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Improving Board Decisions: The Promise of Diversity

Cindy A. Schipani†

The board of directors plays an important role in United States corporate governance.[1] Corporate law requires board members, particularly independent directors, to both outline corporate strategy and monitor the performance of management.[2] Many boards have failed to meet this important duty. Time after time, we see corporate scandals escape a board's attention. Examples of recent corporate scandals include: the financial crisis of 2008,[3] sales practice abuses at Wells Fargo,[4] sexual harassment at NBC involving *Today* host Matt Lauer,[5] sexual misconduct by Harvey Weinstein of the Weinstein Company,[6] cheating on auto emissions

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1. S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *Do Independent Directors Curb Financial Fraud? The Evidence and Proposals for Further Reform*, 93 IND. L.J. 757, 780 (2018) [hereinafter Avci et al., *Independent Directors*] (noting that "[b]oards of directors have always been a traditional element of American corporate governance"); *see also* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 303 (2004) (noting that board independence has increased in recent years).

2. Kelli A. Alces, *Beyond the Board of Directors*, 46 WAKE FOREST L. REV. 783, 789 (2011); Franklin A. Gevurtz, *The Function of "Dysfunctional" Boards*, 77 U. CIN. L. REV. 391, 396 (2008) (both articles noting the board's traditional function of monitoring management).

3. Shivaram Rajgopal, Suraj Srinivasan & Yu Ting Forester Wong, *Bank Boards: What Has Changed Since the Financial Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 19, 2019), https://corpgov.law.harvard.edu/2019/02/19/bank-boards-what-has-changed-since-the-financial-crisis/ [https://perma.cc/DJ7R-NSEU].

4. *See* Eleanor Bloxham, *Here's How Wells Fargo's Board of Directors Just Failed Customers*, FORTUNE (Apr. 14, 2017), https://fortune.com/2017/04/14/wells-fargo-fake-accounts-2/ [perma.cc/E3KM-3ACY]; Matt Egan, *Wells Fargo Scandal: Where Was the Board?*, CNN BUS. (Apr. 24, 2017), https://money.cnn.com/2017/04/24/investing/wells-fargo-scandal-board-annual-meeting/index.html [perma.cc/L6YZ-YQLR].

5. Caitlin Flanagan, *Matt Lauer's Woman Problem*, THE ATLANTIC (Nov. 5, 2019), https://www.theatlantic.com/ideas/archive/2019/11/lauer-had-a-problem-with-women/601405/ [perma.cc/M2MU-46MC].

6. *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 29, 2020), https://www.bbc.com/news/entertainment-arts-41594672 [perma.cc/

tests at Volkswagen (VW),[7] the ignition switch scandal at General Motors (GM),[8] the explosion in the Massey Energy coal mine,[9] and the Deep Water Horizon oil rig blowup.[10] Presumably, all these scandals were the result of either outright fraud or reckless and wanton disregard for safety.

Some of the warning signs for these scandals appear to have been dismissed by boards. For example, the Weinstein Company's board did not take corrective action when it became aware of Harvey Weinstein's settlements for multiple claims of sexual misconduct.[11] And NBCUniversal allegedly ignored sexual harassment at the company for years before Matt Lauer was fired.[12] The warning signs for other scandals, such as GM's ignition switch scandal[13] or the cheating on emissions tests at VW,[14] may not have risen to the level of the boards. Whether the boards' failures were disregarding facts, or willfully failing to seek them out, all these scandals demonstrate that the board was unable to fulfill its gatekeeping function—a function vital to corporate governance.[15]

A3RK-9VDP].

7. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), https://www.bbc.com/news/business-34324772 [perma.cc/E72P-WR25].

8. Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NPR (Mar. 31, 2014), https://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect [perma.cc/K8DW-AEA2].

9. Sabrina Tavernise, *Report Faults Mine Owner for Explosion that Killed 29*, N.Y. TIMES (May 19, 2011), https://www.nytimes.com/2011/05/20/us/20mine.html [perma.cc/2H3B-AXAX].

10. Jie Jenny Zou, *8 Years After Deepwater Horizon Explosion, Is Another Disaster Waiting to Happen?*, NPR (Apr. 20, 2018), https://www.npr.org/2018/04/20/603669896/8-years-after-deepwater-horizon-explosion-is-another-disaster-waiting-to-happen [perma.cc/XC9W-6557].

11. *See* Dacher Keltner, *Sex, Power, and the Systems that Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein [perma.cc/8ZRK-6EZM].

12. *See* Patrick Ryan, *Ronan Farrow Says NBC's Alleged Cover-up of Sexual Misconduct Is 'Bigger' than Matt Lauer*, USA TODAY (Oct. 14, 2019), https://www.usatoday.com/story/entertainment/books/2019/10/14/ronan-farrow-new-book-catch-and-kill-alleged-cover-up-harvey-weinstein-matt-lauer/3948761002/ [perma.cc/KUQ3-56UN] (citing RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS (2019)) ("NBC brokered nondisclosure agreements and seven-figure payouts with at least seven women who alleged sexual harassment or discrimination at the company.").

13. *See* Basu, *supra* note 8.

14. *See* Hotten, *supra* note 7.

15. *See* S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *The Elusive Monitoring Function of Independent Directors*, 21 U. PA. J. BUS. L. 235, 285 (2018) [hereinafter Avci et al., *Elusive Monitoring Function*] (critiquing the independent directors' role of "gatekeepers" in corporate law); *see also* Coffee, *supra* note 1, at 302 (defining "gatekeepers" as "independent professionals who pledge their reputational capital" and describing their traditional role in securities markets as "protect[ing]

Board diversity may help mitigate this problem. Although progress is being made, corporate gatekeepers are still not diverse. For example, women are struggling to reach business leadership positions in the United States. The U.S. ranks fifty-third in the World Economic Forum's Global Gender Gap Index, with 21.7% female board members.[16] Though this percentage is low relative to the female population, women are increasingly filling open board seats.[17] In 2019, women filled 45% of open board seats at Russell 3000 companies compared to only 12% in 2008.[18] And in July 2019, the last all-male board in the S&P 500 added a female representative.[19] Lawmakers[20] and investors[21] are pressuring companies to increase gender diversity on boards. Women of color, however, only held 4.6% of Fortune 500 board seats in 2018,[22] and ethnic minorities only filled 15% of open board seats in 2019 (and held 10% of total board seats). This disparity indicates there has been less progress with ethnic diversity.[23]

To address these deficiencies in corporate governance and board diversity, this paper is organized as follows. Part I explains three limitations on the effectiveness of independent board

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the interests of dispersed investors who cannot easily take collective action").

16. WORLD ECON. F., GLOBAL GENDER GAP REPORT 2020 11, 32–33 (2020), http://www3.weforum.org/docs/WEF_GGGR_2020.pdf [https://perma.cc/7Y27-WL9A] (noting that the wage gap, rather than workforce participation, was the main reason the U.S. was not ranked higher).

17. *See* Subodh Mishra, *U.S. Board Diversity Trends in 2019*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 18, 2019), https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019/ [https://perma.cc/AMZ5-6RGW] (summarizing the results of Institutional Shareholder Services' diversity profile of Russell 3000 companies from 2008 to 2019).

18. *Id.*

19. Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J. (July 24, 2019), https://www.wsj.com/articles/the-last-all-male-board-on-the-s-p-500-is-no-longer-11564003203 [https://perma.cc/4ZC5-NDPB].

20. CAL. CORP. CODE § 301.3 (requiring public companies headquartered in California to have one or more female directors, depending on the size of their board).

21. *E.g.*, Joann S. Lublin & Sarah Krouse, *State Street to Start Voting Against Companies that Don't Have Women Directors*, WALL ST. J. (Mar. 7, 2017), https://www.wsj.com/articles/state-street-says-it-will-start-voting-against-companies-that-dont-have-women-directors-1488862863 [https://perma.cc/DMV8-CRL5] ("[State Street Global Advisors] says it will vote against board members charged with nominating new directors if they don't soon make strides at adding women.").

22. DELOITTE, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 17 (2018), https://www.catalyst.org/wp-content/uploads/2019/01/missing_pieces_report_01152019_final.pdf [https://perma.cc/ZK2J-PTHE] (analyzing diversity trends of Fortune 500 companies from 2010 to 2018). Women and minorities held 22.5% and 16.1% of total Fortune 500 board seats in 2018, respectively. *Id.*

23. *See* Mishra, *supra* note 17.

members in monitoring management. Part II proposes that board diversity may mitigate these problems with outside directors and uses research on gender diversity to argue this point, while acknowledging cultural barriers. Part III introduces proposals from corporate law lecturer, Professor Akshaya Kamalnath, for improving the board's access to information and diversity. This Part further argues that once women are hired, companies need programs to support their development to maximize the benefits of diversity. Concluding remarks follow.

I. The Difficult Role of Outside Directors

Corporate law relies upon outside directors to monitor management.[24] Relying on outside directors, however, may not be as robust a solution as was once thought.[25] The following sections explain how outside directors are sometimes (A) not fully informed, (B) not fully independent, or (C) potentially complicit in some fraudulent schemes.

A. Outside Directors: Not Fully Informed

Currently, the corporate community expects independent board members to monitor management.[26] But in reality, this expectation may not be fair. Although U.S. corporate law values the independence of outside directors,[27] independence, almost by

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24. James Chen, *Outside Director*, INVESTOPEDIA (Nov. 18, 2020), https://www.investopedia.com/terms/o/outsidedirector.asp [https://perma.cc/N7AK-LSHQ] ("An outside director is a member of a company's board of directors who is not an employee or stakeholder in the company.").

25. James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1078 (2003) ("[I]s the independent director up to the challenges that our expectations have placed before the director?"); *see also* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 130–32 (2010) (arguing that the value of independent directors "has been vastly overstated" and perhaps the solution lies with inside directors, instead).

26. Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1864 (2007) (commenting that a "near consensus" has risen in the global community that increased independence of directors more effectively monitors management); s*ee also* Avci et al., *Illusive Monitoring Function*, *supra* note 15, at 285 (noting corporate law requires independent directors to protect the company from executive fraud); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. L. 921, 921 (1999) (observing the trend toward board independence back in 1999).

27. *See* Lucian Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1280–81 (2017) (observing that "[i]ndependent directors are an important feature of U.S. boardrooms" and have been encouraged by both the judiciary and by federal law); *see also* A.C. Pritchard,

definition, means that board members are not fully informed. Outside directors are not involved in the day-to-day operations of the firm.[28] The best they can do is gather reasonably available information.[29] Yet it is the C-Suite,[30] comprised of the same individuals whom directors are tasked with monitoring, that decides which information to disclose.[31] This conflict complicates independent board members' quests to gather information. If C-Suite executives are planning a get-rich-quick scheme, they can easily hide it from outside directors. Even the most diligent, hard-working board may not receive the information necessary to uncover intentional wrongdoing. Additionally, boards typically meet only a few times per year and outside directors are normally busy running other companies.[32] Therefore, even the most well-intentioned board member may not have the bandwidth to effectively monitor management.

Monitoring of Corporate Groups by Independent Directors, 9 J. KOREAN L. 1, 1–2 (2009) (noting that U.S. corporate law has long-valued director independence).

28. Cox, *supra* note 25, at 1082–83 (arguing that because of their lack of involvement in the company's regular activities, they often have inadequate information); Fairfax, *supra* note 25, at 161 (citing Cox's reasoning that independent directors lack access to adequate information as a reason why outsiders may fail to adequately monitor management).

29. *See* Fairfax, *supra* note 25, at 161–62 (commenting that outsiders often turn to "advisors, attorneys, and accountants" for gathering information, but, even so, these advisors are unlikely to be purely objective).

30. The term "C-Suite" describes the top level of executive corporate managers, often with titles starting with C, such as the CEO (Chief Executive Officer), CFO (Chief Financial Officer), or COO (Chief Operating Officer). *See* Andrew Blumenthal, *C-Suite*, INVESTOPEDIA (Feb. 24, 2021), https://www.investopedia.com/terms/c/c-suite.asp [https://perma.cc/NBF4-ZJU5].

31. *See* Fairfax, *supra* note 25, at 161 (noting that because independent directors rely on insiders for information, it is difficult for them to assess whether the information they receive is accurate); s*ee also* Renée B. Adams, Benjamin E. Hermalin & Michael S. Weisbach, *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey*, 48 J. ECON. LITERATURE 58, 65 (2010) (observing that boards have become reliant on auditors and regulators to discover managerial misconduct).

32. Michal Barzuza & Quinn Curtis, *Board Interlocks and Corporate Governance*, 39 DEL. J. CORP. L. 669, 691 (2015) ("Sitting on many boards could also result in directors who are so busy that they cannot give sufficient attention to any given firm. At a certain point, board members might be too busy to conduct their monitoring role diligently and effectively."); Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 880 (2018) ("America's boardrooms are filled with directors who . . . serve as board members or executives of other firms . . . . [O]ther board seats and outside employment limit a director's availability, contribute to cognitive overload, and thereby diminish the director's effectiveness."); *see also* SPENCER STUART, 2017 SPENCER STUART U.S. BOARD INDEX 18 (2017), https://www.spencerstuart.com/~/media/ssbi2017/ssbi_2017_final.pdf [https://perma.cc/S376-53GC] (finding that on average, S&P 500 independent board members sit on the board of two public companies).

B. Outside Directors: Not Fully Independent

Not only are outside directors likely not fully informed, they may also not be fully independent. That is, even outside board members may be "captured" by the CEO and other executives.[33] This capture may occur when board members and executives inhabit the same social circles, operate in the same professional networks, or are otherwise friends.[34] These relationships suggest a lack of objectivity and may prevent board members from questioning managements' strategies and decisions. For instance, in the options backdating scandal at Comverse Technology, Inc. in 2006, the board unwittingly approved stock options for fictitious employees at management's direction.[35] The board even granted an option to an employee named "I. M. Fanton."[36] That was hardly an inconspicuous moniker for a phantom employee, but not one board member apparently saw any grounds for suspicion.[37]

C. Outside Directors and Complicity

In addition to lacking the full independence necessary for genuine oversight of executive decisions, outside directors may become complicit in wrongdoing. Complicity is especially tempting when there is significant money on the table and no real fear of getting caught. Empirical studies have shown that not only do some

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33. JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 57 (2008) ("The problem with boards is their unique susceptibility to capture by the managers they are supposed to monitor."); Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 19 WIS. L. REV. 19, 27–30 (observing that the reliance of outside directors on management for information and their limited firm-specific knowledge reduces the chance they are independent); Kress, *supra* note 32, at 883–84 (observing that boards form close relationships to management and become emotionally invested in management's success, making them ineffective monitors).

34. *See* Vikramaditya Khanna, E. Han Kim & Yao Lu, *CEO Connectedness and Corporate Fraud*, 70 J. FIN. 1203, 1242–43 (2015) (explaining that board members can be connected to CEOs through "common network ties").

35. Litigation Release No. 21090, SEC, SEC Sues Comverse Technology, Inc. for Fraudulent Options Backdating and Earnings Management Schemes (June 18, 2009), https://www.sec.gov/litigation/litreleases/2009/lr21090.htm [https://perma.cc/BF47-LC9K]; M. P. Narayanan, Cindy A. Schipani & H. Nejat Seyhun, *The Economic Impact of Backdating of Executive Stock Options*, 105 MICH. L. REV. 1597, 1610–11 (2007) ("The executives purportedly went so far as to create a so-called 'slush fund' of backdated options in the names of fictitious employees, hidden from the company's auditors.").

36. *See* Tim Annett, *Ghost Story*, WALL ST. J. (Aug. 9, 2006), https://www.wsj.com/articles/SB115514263305431169 [https://perma.cc/SNB5-4ZST].

37. *See* Litigation Release No. 21090, *supra* note 35; *see also* Annett, *supra* note 36 (explaining that the fake names were gradually intermingled with actual employees to snooker the directors into approving them).

outside directors fail to exercise sufficient checks on the behavior of executives, they may also succumb to the temptation to join in malfeasance. For example, a study examining manipulation of the timing of granting stock options to outside directors analyzed the profits made by outside directors who controlled that timing.[38] The study found that the profits made were strongly suggestive of the directors' complicity in the manipulation of stock options to assure that the options were in the money.[39] Another study similarly found directors were "lucky" in their receipt of stock option grants.[40] Lucky directors are those who receive "lucky grants," which are grants given at the lowest price in a given grant month.[41] The researchers found that lucky grants were not given to executives or independent directors as a result of routine corporate activity.[42] Instead, they found that these lucky grants were likely deliberately given to executives and directors to increase their profits.[43] That is, grants were awarded to directors at the lowest price of the month apparently due to backdating or the knowledge of future stock appreciation.[44] Therefore, so-called "lucky directors" may have profited from illicit behavior rather than luck.[45] Perhaps even worse, there is evidence that boards may have been complicit in manipulating the disclosure of information to the market.[46] This

38. *See* Avci et al., *Independent Directors*, *supra* note 1.

39. *Id.* The term "in the money" means "an option that possesses intrinsic value" where that value is more favorable compared "to the prevailing market price of the underlying asset." Cory Mitchell, *In the Money (ITM)*, INVESTOPEDIA (Nov. 7, 2020), https://www.investopedia.com/terms/i/inthemoney.asp [https://perma.cc/C48B-XRGA].

40. *See* Lucian A. Bebchuk, Yaniv Grinstein & Urs Peyer, *Lucky CEOs and Lucky Directors*, 65 J. FIN. 2363 (2010) (observing the opportunistically timed stock option grants given to executives and outside directors).

41. *Id.* at 2368.

42. *Id.* at 2364–65.

43. *Id.* at 2364.

44. *See id.* at 2382 ("Although we do not know for certain which lucky grants were produced by backdating, we identify a pool of grants—those awarded at the lowest price of the month—in which a large fraction was likely produced by opportunistic timing.").

45. *Id.* at 2399 ("We show that the grants awarded to independent directors, who are charged with overseeing the company's executives, were themselves affected by opportunistic timing. The timing of director grants was not merely a byproduct of the directors being simultaneously awarded grants with executives or of firms routinely timing grants to all recipients.").

46. *See* S. Burcu Avci, Cindy A. Schipani & H. Nejat Seyhun, *Ending Executive Manipulations of Incentive Compensation*, 42 J. CORP. L. 277, 285–88 (2016) [hereinafter Avci et al., *Executive Manipulations*] (citing Robert M. Daines et al., *Right on Schedule: CEO Option Grants and Opportunism* 2 (Stan. U. & BYU, Working Paper No. 3314, 2015)) ("To reduce the risk of this type of distortion, scholars have suggested that boards and analysts stay aware of the incentives

manipulation occurs by either "spring-loading" (delaying disclosure of positive news until after the option grant date, so that the option will be in the money), or "bullet-dodging" (expediting disclosure of negative news before the option grant date, lowering the strike price of the option).[47] Unfortunately, as these and other studies[48] suggest, not all directors are immune from the temptation to make easy money.

Thus, not only may some outside board members fail at the monitoring function, they may be tempted to engage in illegal behavior themselves. At the same time, simply changing the law to strengthen the board's monitoring function is not without its downsides. For example, as board members monitor more, executives may reveal less to them.[49] That is, improving board monitoring may sow distrust between the board and executives.[50] Any solution aimed at improving board monitoring must therefore also improve the trust between the board and company executives. In other words, a solution must focus on the functions of board members as well as the culture of the company they are monitoring.

II. The Potential of Diversity to Improve Board Functioning

Increasing the diversity of board membership may help address the aforementioned problems created by uninformed, not fully independent, or complicit outside directors on boards who fail to properly monitor executives. Akshaya Kamalnath's research and

established by scheduled options and closely monitor disclosures.").

47. Avci et al., *Executive Manipulations*, *supra* note 46, at 286.

48. *See, e.g.*, Daniel W. Collins, Guojin Gong & Haidan Li, *Corporate Governance and Backdating of Executive Stock Options*, 26 CONTEMP. ACCT. RSCH. 403, 404 (2009) ("[I]nterlocking boards are at least partially responsible for spreading the backdating practice across firms."); *see also* Narayanan et al., *supra* note 35 at 1614–15 (noting that directors may violate federal securities law if they recklessly disregard "red flags" in executives' representations regarding stock option grants).

49. *See* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 813 (2001) (noting that CEOs may trust outside directors less and thus reveal less information to them); *see also* Bebchuk, *supra* note 27, at 1312 ("Having [independent directors] . . . would interfere with board cohesiveness and undermine the trust between the board and corporate insiders . . . .").

50. Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1310 (2003) ("[C]orporate governance scholars have cautioned that too many independent directors on a board may weaken the trust needed among the CEO and board members . . . ."); *see also* Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L.J. 173, 174–75 (2007) (commenting on how independent directors may distrust C-Suite executives even if the CEO helped choose them).

the studies on gender diversity discussed below support this proposition.

A. *Kamalnath's Proposal*

Kamalnath suggests improving the monitoring function of the board through diversity. Proposing a way to achieve that diversity,[51] she hypothesizes that improving the diversity of each board's membership will increase the expression of nonconforming opinions, which will improve the board's monitoring of management.[52]

Turning to the example of gender to evaluate Kamalnath's proposal, there are numerous studies supporting the theory that gender diversity improves firm performance.[53] For example, the National Center for Women and Technology found that companies with women on their boards outperformed companies with all-male boards in a variety of industries.[54] This trend was first observed after the 2008 global economic crash, suggesting that gender diversity might matter even more in a struggling economy and that gender diversity on a board may decrease the company's volatility.[55] Research like this has led Christine Lagarde of the International

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51. Akshaya Kamalnath, *Strengthening Boards through Diversity: A Two-Sided Market that Can Be Effectively Serviced by Intermediaries*, 40 LAW & INEQ. (forthcoming 2022) (manuscript at 1) (on file with Minnesota Journal Law & Inequality).

52. *See id.* (manuscript at 11) ("[D]iverse candidates are likely to come from different social circles and hence will not hesitate to question management."); AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY 15 (2015).

53. *E.g.*, LOIS JOY, NANCY M. CARTER, HARVEY M. WAGNER & SRIRAM NARAYANAN, CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007), https://www.catalyst.org/wp-content/uploads/2019/01/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf [perma.cc/EPJ2-WKRT] (finding that Fortune 500 boards with more women enjoy better returns on equity, sales, and invested capital); *see also* FRANCESCA LAGERBERG, GRANT THORNTON, WOMEN IN BUSINESS: THE VALUE OF DIVERSITY 3 (2015), https://www.grantthornton.global/globalassets/wib_value_of_diversity.pdf [perma.cc/M3DM-BP4N] (discovering that in the U.S., boards with both genders represented have an almost 2% greater return on assets than male-only boards); *see also* Tim Smedley, *Diversity at the Top Pays Dividends,* FIN. TIMES (Mar. 7, 2016) (quoting Marcus Noland, Peterson Inst. for Int'l Econ.), https://www.ft.com/content/82a3aee2-d97d-11e5-a72f-1e7744c66818 [perma.cc/JT4Z-QGQW] ("[F]irms with more women can expect a 6 percentage point increase in net profit.").

54. LECIA BARKER, CYNTHIA MANCHA & CATHERINE ASHCRAFT, NAT'L CTR. FOR WOMEN & INFO. TECH., WHAT IS THE IMPACT OF GENDER DIVERSITY ON TECHNOLOGY BUSINESS PERFORMANCE? RESEARCH SUMMARY 3 (2014), https://www.ncwit.org/sites/default/files/resources/impactgenderdiversitytechbusinessperformance_print.pdf [perma.cc/N66C-CYBD] ("Gender-diverse management teams showed superior return on equity, debt/equity ratios, price/equity ratios, and average growth.").

55. *Id.*

Monetary Fund, then the organization's managing director, to comment: "[I]f it had been the Lehman Sisters rather than the Lehman Brothers, the world might well look a lot different today."[56] Additionally, research has suggested that companies with more female board members may be more proactive about corporate social responsibility issues.[57] Indeed, diverse inputs may lead to innovation as more perspectives bring more to the table.[58] Yet increasing board member diversity can be challenging: diverse members may be unsure when to speak up, and they may be less likely to be heard when they do.[59]

B. Difficulties for Women on Boards

The hypothesis that diverse boards may lead to better monitoring is supported by a study conducted by Michael McDonald and James Westphal.[60] This study focused on the diversity of incoming board members and their access to mentoring.[61] The researchers suggest that the board benefits from diversity on the board, but also found that women were not being mentored, which inhibited their advancement.[62] That is, according to the study, newly appointed male board members received informal mentoring

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56. *See* Christine Lagarde, *Ten Years After Lehman – Lessons Learned and Challenges Ahead*, IMFBLOG (Sept. 5, 2018), https://blogs.imf.org/2018/09/05/ten-years-after-lehman-lessons-learned-and-challenges-ahead/ [perma.cc/7VAY-NG4A].

57. Eunjung Hyun, Daegyu Yang, Hojin Jung & Kihoon Hong, *Women on Boards and Corporate Social Responsibility*, SUSTAINABILITY, Apr. 2016, at 1, 2 (2016) (noting that women are more likely to speak up about corporate social responsibility issues for reputational reasons, or because they may be more morally oriented towards social responsibility).

58. *See* Stephen Turban, Dan Wu & Letian Zhang, *Research: When Gender Diversity Makes Firms More Productive*, HARV. BUS. REV. (Feb. 11, 2019), https://hbr.org/2019/02/research-when-gender-diversity-makes-firms-more-productive [perma.cc/2WEJ-K4QC] ("Significant research has shown that diverse teams can develop more innovative ideas.").

59. *See* Michael McDonald & James Westphal, *Access Denied: Low Mentoring of Women and Minority First-Time Directors and Its Negative Effects on Appointments to Additional Boards*, 56 ACAD. MGMT. J. 1169, 1173–74 (2013) (arguing that because women do not receive the mentoring opportunities that men do, they are not as aware of when to speak up or not in the professional setting); *see also* Susan Chira, *The Universal Phenomenon of Men Interrupting Women*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html [perma.cc/QD87-VPSX] (observing that women are often interrupted or decide not to speak when outnumbered by men).

60. *See* McDonald & Westphal, *supra* note 59.

61. *Id.* at 1169.

62. *See id.* (citing Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009)) ("[D]emographic minority directors may be, at least in some respects, more conscientious in executing their director roles and may be more independent from management.").

about board culture, such as raising issues to management before formal board meetings rather than during meetings,[63] whereas newly appointed women did not. This mentorship inequity in turn resulted in women speaking up more often than men in meetings[64] and consequently, not being selected for other board positions because they were perceived as less savvy in navigating their roles, thus hurting women's future career opportunities.[65]

The findings from McDonald and Westphal's study raise several questions: First, why are women not receiving the informal mentoring that men receive? Second, why are women's careers harmed for speaking up and doing their job? And third, why are men, who typically receive more mentoring, not being mentored to ask more questions and to take their monitoring role more seriously? These concerns demonstrate the need to change the prevailing culture of boards. Board members should be applauded, not penalized, for speaking up, asking questions, and seeking information. A board's culture should allow questions to be openly asked and answered, regardless of who is asking the questions.

When corporate culture punishes women for speaking up, it follows that women may be reluctant to speak up in the future. This reluctance not only hurts the company, as potential company improvements are ignored,[66] but also harms the silenced individuals.[67] Employees who feel their voices are not heard may

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63. *Id.* at 1173–76 (finding that mentoring for first-time directors is important for them to win support in the boardroom).

64. *Id.* at 1182 ("[F]irst-time directors who are racial minorities or women receive significantly lower levels of participation process mentoring than first-time directors who are white males.").

65. *See id.* at 1174, 1197 (stating that a first-time director's failure to understand board norms, including the appropriate venues to raise concerns and questions about strategy and policy issues, will ultimately hinder their ability to receive further board appointments).

66. *See* Cindy A. Schipani, Frances J. Milliken & Terry M. Dworkin, *The Impact of Employment Law and Practices on Business and Society: The Significance of Worker Voice*, 19 PA. J. BUS. L. 979, 985 (2017) [hereinafter Schipani et al., *Significance of Worker Voice*] ("An employee is therefore more likely to engage in voice behaviors to the extent that she has a strong desire or sense of obligation to help the organization operate more effectively . . . ."); *see also* Linn Van Dyne & Jeffrey LePine, *Helping and Voice Extra-role Behaviors: Evidence of Construct and Predictive Validity*, 41 ACAD. MGMT. J. 108, 109 (1998) ("[V]oice [is] promotive behavior that emphasizes expression of constructive challenge intended to improve rather than merely criticize.").

67. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 113 (1999) (noting that employees themselves believe their work would improve if they had a greater voice in the company); *see also* Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 1019 (2017) ("Diverse employees often feel pressure to mute some aspect of their identity to fit into their workplace culture."); *see also* Stephen Befort, *A New*

face more stress because they feel less in control of their work environment.[68] Research has shown that workplace stress has many negative effects. For example, higher stress is correlated with employees skipping work more often.[69] Stress can also lead to physical ailments or aggravate pre-existing health conditions.[70]

Put more positively, speaking up may help at both an individual and an organizational level. When able to speak up and feel heard, employees are more likely to have better attitudes toward their duties.[71] They are also likely to think more highly of the company for which they work.[72] On an organizational level, happier employees may be more committed to improving their company.[73] Although these studies demonstrate the positive effects that speaking up has on employees, board members may also experience these same effects.

Voice for the Workplace: A Proposal for an American Works Councils Act, 69 MO. L. REV. 607, 611–12 (2004) (discussing how employees with stronger voices in the company are more likely to be satisfied, loyal, and stay with the company longer).

68. *See* E.W. Morrison & F.J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 ACAD. MGMT. REV. 706, 721 (2000) (stating that employees might use destructive means to establish control if constructive means are unavailable); *see also* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 986 ("[T]he suppression of voice behaviors and the perceived lack of voice opportunities can create feelings of stress . . . .").

69. Thomas W. Colligan & Eileen M. Higgins, *Workplace Stress: Etiology & Consequences*, 21 J. WORKPLACE BEHAV. HEALTH 89, 93 (2006) ("Workplace stress has been shown to . . . increase absenteeism . . . ."); Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 990–91 (observing the psychological and physical health effects of when employees' voices are not heard in their companies).

70. *See* Colligan & Higgins, *supra* note 69, at 91–92 (describing a typical physical response to chronic stress); Schipani et al., *Significance of Worker Voice*, *supra* note 66 ("Stress-induced medical conditions include bodily pains, dizziness, headaches, heart disease, asthma, and hypertension.").

71. *See* Michael Bashshur & Burak Oc, *When Voice Matters: A Multilevel Review of the Impact of Voice in Organizations*, 41 J. MGMT. 1530, 1535–36 (2015) (noting a positive relationship between employee voice and job satisfaction in multiple studies); *see also* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 988 ("[E]mployees who perceive that they have input into procedures and outcomes are likely to view such procedures and outcomes as fairer.").

72. *See* Bashshur & Oc, *supra* note 71, at 1536 (observing a positive relationship between employee voice opportunities and trust in authority); *see also* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 988 ("[Employees] may also feel more like valued members of the organization if they perceive that they are treated fairly at the workplace.").

73. *See* Schipani et al., *Significance of Worker Voice*, *supra* note 66, at 989–90 (observing that when employees have the opportunity to speak, they feel more committed to their companies); *see also* Naz Beheshti, *10 Timely Statistics About the Connection Between Employee Engagement and Wellness*, FORBES (Jan. 16, 2019), https://www.forbes.com/sites/nazbeheshti/2019/01/16/10-timely-statistics-about-the-connection-between-employee-engagement-and-wellness/?sh=5d7bd35a22a0 [perma.cc/EPJ2-WKRT] ("Employees who feel their voice is heard are 4.6 times more likely to feel empowered to perform their best work.").

Not only is it important for board members to raise their voices, but if their voices are diverse (as Kamalnath proposes),[74] boards may be more likely to find innovative solutions to problems. Studies have shown that diversity in multiple characteristics, such as "age, nationality, gender, [and] racial diversity" can all help increase innovation,[75] encouraging the company to consider doing things differently.[76] Therefore, companies with more diverse boards may be less likely to get stuck in practices that do not improve company performance.[77] In addition to making companies more adaptable, board diversity may also increase innovation through widening a company's "knowledge base."[78] Furthermore, a diverse board may help executives understand the market from a more holistic perspective as the board members would represent a broader range of constituents.[79]

III. Potential Solutions to Improve Board Monitoring

This Part discusses Kamalnath's proposal to improve the board's monitoring of management, which includes (1) inviting board members to attend management meetings and (2) empowering third parties to recruit diverse board candidates.[80] It also argues that mentorship and sponsorship programs are important to the advancement of new, diverse employees and board members.

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74. Kamalnath, *supra* note 51 (manuscript at 3) (suggesting that increasing board diversity will improve its monitoring of management).

75. Fabrice Galia & Emmanuel Zenou, Board Composition and Forms of Innovation: Does Diversity Make a Difference? (June 27, 2016) (manuscript at 1, 3) (published in 6 EUR. J. INT'L MGMT. 630 (2012)); *see also* Donald C. Hambrick & Phyllis A. Mason, *Upper Echelons: The Organization as a Reflection of Its Top Managers*, 9 ACAD. MGMT. REV. 193, 202 (1984) ("[N]ovel problem solving is best handled by a heterogenous group in which diversity of opinion, knowledge, and background allows a thorough airing of alternatives.").

76. *See* Christian R. Østergaard, Bram Timmermans & Kari Kristinsson, *Does a Different View Create Something New? The Effect of Employee Diversity on Innovation*, 40 RSCH. POL'Y 500, 500 (2011) ("Employee diversity . . . make[s] the firm more open towards new ideas and more creative.").

77. *See id.*

78. *Id.* (noting that more diversity increases a firm's knowledge base, which in turn creates more opportunities for innovation).

79. *See* Galia & Zenou, *supra* note 75 (manuscript at 2) ("According to many studies . . . diversity provides the firm with several advantages such as greater creativity, better understanding of the market, effective problem solving and enhanced capability.").

80. *See* Kamalnath, *supra* note 51 (manuscript at 6, 15).

A. *Kamalnath's Proposals*

Kamalnath suggests there are several ways to create more diverse boards that can effectively monitor management.

i. Include Board Members in Executive Meetings

In addition to diversity increasing a board's access to information at a company, Kamalnath discusses other potential solutions to ensure information is readily available to the board.[81] One such example is the so-called "Netflix model."[82] At Netflix, the executives ensure information is accessible to the board by asking directors to regularly listen in on management meetings.[83] Netflix also requires executives to provide the board with detailed memos on the corporation's activities and allows the board to question the executives about these memos.[84] A board with information on the company's activities readily available—and the ability to question it—can create a culture of openness and free thinking between the board and management.

ii. Empower Third Party Intermediaries

Kamalnath also proposes that third party intermediaries may be able to assist in recruiting diverse members to the firm, as well as mediate a shift in culture.[85] She suggests the market for intermediaries is two-sided.[86] On one side, third parties can help companies find diverse board candidates.[87] On the other side, third parties can help potential board members assess a company's

81. *See id.* (manuscript at 6–10) (discussing proposals to outsource the board's functions, empower well informed board members, and follow the "Netflix model").

82. *Id.* (manuscript at 6–7) (describing the "Netflix model" as requiring directors to "regularly attend monthly and quarterly senior management meetings" as observers and to adopt a "memo-based culture[,]" as opposed to a presentation culture).

83. *See id.* (manuscript at 6).

84. *See id.* ("[B]oard communications are 'structured as approximately 30-page online memos in narrative form that not only include links to supporting analysis but also allow open access to all data and information on the company's internal shared systems, including the ability to ask clarifying questions of the subject authors.'" (quoting David F. Larcker & Brian Tayan, *Netflix Approach to Governance: Genuine Transparency with the Board*, (Rock Ctr. for Corp. Governance, Stanford Closer Look Ser. No. CGRP71, 2018)).

85. *See id.* (manuscript at 15–17).

86. *See id.* (manuscript at 14) ("[E]xecutive search firms . . . facilitate transactions between companies and potential executives." (internal citations omitted)).

87. *See id.* (manuscript at 14–15) (suggesting that third parties find and vet diverse candidates for companies to improve their boards or to minimally signal they are socially responsible).

culture.[88] Because they see both sides of the market, Kamalnath notes that third parties can "fill information gaps" between boards and potential candidates.[89] In turn, she observes that the work of third parties shapes "corporate culture generally" through advising how to create a more inclusive corporate culture and attracting a more diverse pool of individuals for board seats.[90]

To further the work of third-party intermediaries, it is necessary for executives and board members to fully invest in the approach. Otherwise, they could easily shop for an outside opinion that blindly praises the board's functioning. This approach could lead to "tick-the-box compliance" instead of critically evaluating the board to improve its effectiveness.[91] Yet when properly utilized, these third parties can help improve a board's diversity and performance.

B. Mentoring, Sponsoring, and Networking

Once more diverse candidates are hired into companies—which, in turn, feed the pipeline for corporate boards—they need proper mentoring to succeed. Gender discrimination has been illegal for some time,[92] so presumably, overt discrimination is not the reason why boards have few women members.[93] Instead,

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88. *See id.* (manuscript at 14) ("[D]iverse candidates want to be able to accurately assess boards before joining them.").

89. *Id.* (manuscript at 14–15) (noting that the benefits of using executive search firms outweigh the costs).

90. *Id.* (manuscript at 15–16) ("[Executive search firms] work to manage unconscious bias . . . ." (internal citations omitted)).

91. *Id.* (manuscript at 17) (citing Luca Enriques & Dirk Zerzsche, *Quack Corporate Governance, Round III: Bank Board Regulation Under the New European Capital Requirement Directive*, 16 THEORETICAL INQUIRIES L. 211 (2015)) (observing that the European Union's board evaluation requirements do not lead to meaningful board engagement).

92. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Cindy A. Schipani & Terry M. Dworkin, *The Need for Mentors in Promoting Gender Diverse Leadership in the #MeToo Era*, 87 GEO. WASH. L. REV. 1272, 1275–80 (2019) [hereinafter Schipani & Dworkin, *Mentors in the #MeToo Era*] (detailing Title VII's protections and other laws that prohibit sexual harassment in the workplace).

93. *See* Cindy A. Schipani, Terry M. Dworkin, Angel Kwolek-Folland & Virginia G. Maurer, *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89, 97–98 (2009) (internal citations omitted) ("The more usual forms of discrimination, however, are the subtle but clear cultural biases and gender stereotypes in corporate decision-making, behavior, and job assignment."); *see also* Karen S. Lyness & Donna E. Thompson, *Above the Glass Ceiling? A Comparison of Matched Samples of Female and Male Executives*, 82 J. APPLIED PSYCHOL. 359, 372 (1997) ("[W]omen are more likely to be found in jobs that are not comparable to men's jobs in status, power, or advancement potential."). Subtle discrimination has persisted for decades. *See* O.C. Brenner, Joseph Tomkiewicz & Virginia Ellen Schein, *The Relationship Between Sex*

unconscious biases may be at play as humans tend to value people who are similar to them.[94] Because men are more often the leaders of a company, this norm may result in women often being considered outsiders by company leadership.[95] Mentoring programs may help counter these unconscious biases.[96]

Furthermore, mentoring provides many benefits that can turn women into insiders. Mentoring, for instance, exposes "both parties to the values, beliefs, and assumptions of the other."[97] Mentoring may also further the careers of those mentored.[98] It helps mentees adapt more quickly to the corporate culture and introduces them to influential figures within the corporation who could help advance their careers.[99] Furthermore, employees with informal mentors are

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Role Stereotypes and Requisite Management Characteristics Revisited, 32 ACAD. MGMT. J. 662, 668 (1989) (noting that although there is an increase in women in lower and middle management positions, the attitudes of male managers have not changed and impede women from obtaining positions in upper management); *see also* Belle Rose Ragins & Eric Sundstrom, *Gender and Power in Organizations: A Longitudinal Perspective*, 105 PSYCH. BULL. 51, 63 (1989) (noting gender stereotyping is one obstacle to female success in the corporate world).

94. *See* Georgia T. Chao & Henry Moon, *The Cultural Mosaic: A Metatheory for Understanding the Complexity of Culture*, 90 J. APPLIED PSYCHOL. 1128, 1135 (2005) (describing research on why people prefer to interact with those who are similar to them); *see also* DONN BYRNE, THE ATTRACTION PARADIGM 211 (1971) (discussing the similarity-attraction theory, which claims humans gravitate to those with whom we are similar); Terry M. Dworkin, Cindy A. Schipani, Frances J. Milliken & Madeline K. Kneeland, *Assessing the Progress of Women in Corporate America: The More Things Change, the More They Stay the Same*, 55 AM. BUS. L.J. 721, 725 (2018) [hereinafter Dworkin et al., *Progress of Women in Corporate America*] ("Social-identity theory . . . posits that individuals attach differing value to various social categories and assign more value to those categories with which they personally identify.").

95. *See* Dworkin et al., *Progress of Women in Corporate America*, *supra* note 94, at 755 (discussing how the perception of women as outsiders makes mentoring programs important in elevating women up the corporate ladder).

96. *See* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1288 (arguing that mentoring women may help connect them to career opportunities they may not otherwise have if male management subconsciously "views them as less capable"); *see also* Terry M. Dworkin, Aarti Ramaswami & Cindy A. Schipani, *The Role of Networks, Mentors, and the Law in Overcoming Barriers to Organizational Leadership for Women with Children*, 20 MICH. J. GENDER & L. 83, 115–16 (2013) (observing that mentoring may improve the networks of women with dependents).

97. Dworkin et al., *Progress of Women in Corporate America*, *supra* note 94, at 755 (continuing on to suggest mentoring will help women "be seen as part of the same club as men").

98. *See* Tammy D. Allen, Lillian T. Eby, Mark L. Poteet & Elizabeth Lentz, *Career Benefits Associated with Mentoring for Protégés: A Meta-analysis*, 89 J. APPLIED PSYCHOL. 127 (2004); *see also* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 (stating that mentors support the career development of their mentees).

99. *See* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 (citing Allen et al., *supra* note 98, at 128) (noting how mentoring teaches mentees about how an organization functions and helps communicate mentees' value to

more likely to be noticed within a company, as mentors can draw the attention of decision makers to their mentees.[100]

Not only does mentoring help boost a mentee's career, it can also improve their mental health.[101] A mentor can provide their mentee with emotional support during stressful moments at work.[102] Mentees may also turn to their mentors for advice when feeling stuck on a project.[103] These professional relationships may become personal friendships as well.[104] On a macro-level, mentorship helps the mentee feel connected to and accepted by the corporation and that the company believes the mentee is worth its investment.[105] Mentors also receive positive psychological benefits from mentorship, such as feeling appreciated by their coworkers.[106]

Sponsorship programs (whether formal or informal) are another tool that may help increase the diversity of the workforce—and thus future diversity on boards. Sponsorship differs from mentorship because a mentor shares their institutional knowledge with the mentee, while a sponsor uses their influence to help the protege rise within a corporation.[107] The corporate community often prefers mentoring over sponsoring.[108] Some companies have stopped their formal sponsorship programs because executives felt uncomfortable advocating for junior colleagues whom they felt were unprepared for promotion.[109] Indeed, sponsorship creates higher risks for executives as it asks them to put their reputation on the

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decision-makers).

100. *See id.*

101. *See id.* at 1289 ("Studies have indicated that informal relationships tend to be more beneficial both psychosocially and for career development . . . .").

102. *See id.* at 1287 (quoting Allen et al., *supra* note 98, at 128) (stating that a mentor's psychosocial function includes "counseling[] and friendship").

103. *See id.*

104. *Id.* at 1287 (quoting Allen et al., *supra* note 98, at 128).

105. *See id.* at 1288 (stating that mentoring will help women feel less like outsiders in organizations); *see also* Allen et al., *supra* note 98, at 128 (stating that mentoring includes "psychosocial functions," one of which is "acceptance").

106. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 (quoting Kathy E. Kram, *Phases of the Mentor Relationship*, 26 ACAD. MGMT. J. 608, 613–14 (1983)) ("[M]entors, in turn, are benefitted through 'recognition and respect from peers and superiors' for developing the talent.").

107. Herminia Ibarra, *A Lack of Sponsorship is Keeping Women from Advancing into Leadership*, HARV. BUS. REV. (Aug. 19, 2019), https://hbr.org/2019/08/a-lack-of-sponsorship-is-keeping-women-from-advancing-into-leadership [https://perma.cc/T6YG-MRQB] (describing the difference between a sponsor and a mentor).

108. *See id.* ("Typically, [organizations] abandon sponsorship because . . . you cannot mandate that [senior executives] spend their personal capital advocating for people they don't know well . . . .").

109. *Id.*

line for junior colleagues.[110] On the other hand, sponsorship provides higher rewards for junior colleagues than mentorship does.[111] Thus, companies should provide opportunities that facilitate informal sponsorship as well as mentorship programs.

In addition to mentorship and sponsorship, professional networking also helps women feel more accepted at work.[112] Women are often not given control over the most valuable client projects.[113] This exclusion could be because management sees women as less competent than their male counterparts or holds women to a higher standard when proving their competence.[114] Networking may help women bring valuable clients to the firm and thus gain ownership of important projects.[115] Networking may also help debunk stereotypes of women being too burdened by marital or familial life to fully participate in the organization.[116] Furthermore, studies have shown that networking can result in a better salary, improved career development, and even better job performance evaluations.[117]

In their above-mentioned study, McDonald and Westphal concluded that women were not receiving the same mentoring opportunities that men were, and thus, women were offered fewer

110. *Id.*

111. *See id.* ("[H]aving a mentor increased the likelihood of promotion two years later for men, but had no effect on promotion for women.").

112. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1292–94 (observing the ways networking can benefit women in the workplace); *see also* Kristen Hicks, *Why Professional Networking Groups for Women Remain Valuable*, FAST COMPANY (Jan. 7, 2020), https://www.fastcompany.com/90448654/the-benefits-of-womens-networking-groups [https://perma.cc/8ACP-WUVN] ("[I]nner [female] networks help not just with finding opportunities, but also by exchanging advice specific to the unique challenges women face.").

113. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287–88 (citing Paula Santonocito, *Women Pipeline*, 27 EMP. ALERT 3, 3 (2010)).

114. DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 6 (2001) (stating that female attorneys are not presumed to be competent, as men are, and citing studies where a majority of women feel they are held to a higher standard); *see* Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1288 (stating that gender stereotypes can lead to women not being assigned to the company's most valuable clients).

115. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287–88 (citing Santonocito, *supra* note 113, at 3) (commenting that not getting more "valuable clients" is one obstacle women face in climbing the corporate ladder).

116. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1288; *see also* Dworkin et al., *Progress of Women in Corporate America*, *supra* note 94.

117. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1289 (citing Hans-Georg Wolff & Klaus Moser, *Effects of Networking on Career Success: A Longitudinal Study*, 94 J. APPLIED PSYCHOL. 196, 196–97, 202 (2009)) (observing the benefits networking can have on one's professional life).

opportunities to serve on additional boards.[118] Mentoring opportunities may help more women attain board positions, with the direct effect of creating more gender-diverse boards.[119] And, as Kamalnath argues, greater board diversity may, in turn, help improve the board's monitoring of management.[120]

C. Integrity

It is also critically important to look for individuals of high integrity when appointing C-Suite executives as well as board members, and to have internal controls in place so that good people are not tempted to do bad things. As previously mentioned, we have seen executives perpetrate elaborate and not-so-elaborate schemes to hide fraud.[121] And in some cases, we have even seen likely complicity between management and the directors.[122] Integrity in both the C-Suite and the boardroom is thus critical.

D. Applying Equal Standards Across the Board

Finally, in addition to increasing board diversity, it is also important to hold all board members to the same standards. This application of equal standards is not necessarily the case today. For example, during the ongoing Black Lives Matter movement, reporters have observed that, following allegations of gaslighting, emotional abuse, or underpaying or ignoring the opinions of people of color, female business founders were stepping down from their leadership positions more quickly than their male counterparts.[123]

118. McDonald & Westphal, *supra* note 59, at 1174.

119. *See id.* at 1190 ("[D]isadvantages in mentoring might contribute to the difficulties that women and minorities have in attaining other kinds of high-influence positions in the corporate world.").

120. Kamalnath, *supra* note 51.

121. *See, e.g.*, Annett, *supra* note 36 (describing how Comverse Technology, Inc.'s executives tricked the board into approving stock grants for fictitious employees and how "[t]he Enron scandal had accounting vehicles named after 'Star Wars' characters").

122. *See, e.g.*, Avci et al., *Executive Manipulations*, *supra* note 46, at 285–88 (citing Robert M. Daines, Grant R. McQueen & Robert J. Schonlau, *Right on Schedule: CEO Option Grants and Opportunism*, 53 J. FIN. & QUANTITATIVE ANALYSIS 1025, 1055 (2018)).

123. Leah Chernikoff, *Are All These Female-Founder Takedowns Fair?*, THE HELM (May 14, 2020), https://thehelm.co/female-founder-takedowns-outdoor-voices-away-the-wing/ [perma.cc/JH9J-KWYV] (observing that three female business founders stepped down after allegations of mismanagement, while the press was slow to report more incriminating behavior by male founders); *see also* Katie Robertson, *Refinery29 Editor Resigns After Former Employees Describe 'Toxic Culture'*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/business/media/refinery-29-christene-barberich.html [perma.cc/4TT6-N6VT] (stating that Refinery29 co-founder Christene Barberich resigned after allegations of racial

After employees called out companies for creating toxic environments for people of color, the female founders of The Wing,[124] Man Repeller,[125] and Refinery29[126] (to name a few) all stepped down. These quick departures starkly contrast with how long it took the male founders of Uber (Travis Kalanick) and WeWork (Adam Neumann) to step down.[127] Kalanick allegedly created a sexist work culture at Uber, which involved "sexual harassment, discrimination and retaliation."[128] Similarly, Neumann allegedly smoked marijuana around a pregnant WeWork employee, who was demoted after both her pregnancies.[129] It took years for Kalanick and Neumann's alleged discriminatory behaviors to catch the public's eye.[130] Top management, whether male or female, should be held accountable by their board of directors. They should not exist in responsibility-free vacuums. Instead, the business community should ensure that both male and female founders are held to the same standards.

Conclusion

We rely on outside directors to play an important monitoring role in corporate law.[131] Yet their presence on the board is not a

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discrimination).

124. Amanda Hess, *The Wing Is a Woman's Utopia, Unless You Work There*, N.Y. TIMES (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/magazine/the-wing.html [perma.cc/MU8Z-NV5T] ("Members and their guests could be casually racist.").

125. Frida Garza, *With Its Founder Gone, Can Man Repeller Ever Be Relevant Again?*, THE GUARDIAN (June 13, 2020), https://www.theguardian.com/lifeandstyle/2020/jun/13/man-repeller-leandra-medine-cohen-fashion-relevance [perma.cc/HPL6-CRJM] ("[Founder Leandra Medine Cohen] was responding to claims that the fashion blog . . . had failed its former staffers of color.").

126. Robertson, *supra* note 123.

127. *See* Chernikoff, *supra* note 123 ("[E]gregious stories of [their] misbehavior . . . were so slow to come out in the press, and far more incriminating.").

128. Randall Stross, *Why Companies Like Uber Get Away with Bad Behavior*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/opinion/travis-kalanick-uber-bad-behavior.html [perma.cc/CH68-TJQH]; *see also* Chernikoff, *supra* note 121.

129. Chernikoff, *supra* note 123; Taylor Telford, *WeWork and Ex-CEO Neumann Accused of Pregnancy Discrimination by Former Employee*, WASH. POST (Nov. 1, 2019), https://www.washingtonpost.com/business/2019/11/01/wework-ex-ceo-neumann-accused-pregnancy-discrimination-by-former-employee/ [perma.cc/9PNH-FPCH].

130. Chernikoff, *supra* note 123.

131. Prentice & Spence, *supra* note 26, at 1864 (noting the board's role in monitoring management and that director independence is a best practice for corporate governance); *see* Avci et al., *Independent Directors*, *supra* note 1 (noting that "[b]oards of directors have always been a traditional element of American corporate governance").

panacea.[132] Due to their status as outsiders, independent board members lack the information necessary to fully understand the company's operations.[133] Furthermore, outside directors often are not completely independent from management: they move in similar social and professional networks, sometimes developing personal friendships.[134] Without complete information and full independence, it is not surprising that the monitoring function of the board sometimes fails.[135] Kamalnath proposes two solutions to this dilemma. First, she suggests that increasing the diversity of board members will help improve the board's monitoring of management.[136] Second, she recommends both companies and potential board candidates interact with third party intermediaries to help reduce information gaps between these two sides of the labor market.[137]

Kamalnath's proposals are insightful and important steps in the right direction. In addition, to maximize the benefits of board diversity, corporations must ensure diverse voices are heard and valued. Corporations can do this through investing in mentorship and sponsorship programs that promote diversity, as well as increasing networking opportunities.[138] Finally, the board should appoint members of high integrity and hold all executives to the same standards of behavior. With these changes, future boards may be better able to prevent—or at least better positioned to take corrective action against—another major corporate scandal.

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132. *See* Cox, *supra* note 25, at 1082–83 (arguing that because of their lack of involvement in the company's regular activities, independent directors often rely on management for information); *see also* Khanna et al., *supra* note 34, at 1242 (noting that directors may run in the same social circles as the CEO and thus not be fully independent).

133. *See* Cox, *supra* note 25, at 1082–83.

134. *See* Khanna et al., *supra* note 34, at 1242–43 (explaining that board members can be connected to CEOs through "common network ties").

135. Annett, *supra* note 36 (recalling the board approval of stock options granted to fictitious employees at Comverse Technology); *see* Avci et al., *Elusive Monitoring Function*, *supra* note 15, at 285 ("[N]ot only may independent directors be ill-equipped to engage in serious oversight of the activities of management, they may also be easily co-opted when they have the opportunity to personally participate in self-interested transactions to the detriment of shareholders.").

136. Kamalnath, *supra* note 51 (manuscript at 1).

137. *Id.* (manuscript at 15).

138. Schipani & Dworkin, *Mentors in the #MeToo Era*, *supra* note 92, at 1287 ("One tool that is crucial for women in dealing with the issues of voice and climbing the corporate ladder is access to networks and mentors."); *see also* Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52 (observing that mentoring programs increase the diversity of a company's management).