THE FIDUCIARY DUTY TO GENDER DIVERSITY WITHIN CORPORATE BOARDS: THE NECESSARY LINK AMONG SHAREHOLDER PRIMACY, THE DIRECTOR NOMINATION PROCESS, AND HIGHER FINANCIAL RETURN

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No country can ever truly flourish if it stifles the potential of its women and deprives itself of the contributions of half of its citizens.
— Michelle Obama, First Lady of the United States

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THE STATISTICS AND THE DISPARITY

The reported positive correlation between the rise of women within corporate boards and the increase of a corporation's financial performance and corporate social responsibility has supported global business debates regarding the need for more diversity within executive boards. Although both international governments and the United States' own Securities and Exchange Commission have attempted to instill regulations to combat the lack of diversity within corporate boards and executive positions, this tactic has proven to be ineffective to and taken lightly by United States' corporations.[2] The lackluster diversity, particularly gender diversity, within executive and other high-level positions is not a fleeting issue. At the 10th Circuit Bench & Bar Conference in October of 2012, Supreme Court Justice Ruth Bader Ginsburg commented, "[W]omen are here to stay. And I'm sometimes asked when will there be enough [women on

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2. Sonja S. Carlson, Comment, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 369 (2012).

the Supreme Court]? And [when] I say, 'When there are nine,' people are shocked. But there'd been nine men, and nobody's ever raised a question about that."[3] The Supreme Court is just one example of insufficient female representation. The most apparent and expansive lack of representation has been in the general United States workforce. By 2014, women made up 46.8% of the United States' labor force.[4] Earning almost 60% of all undergraduate and 60% of all master's degrees,[5] women hold almost 52% of all professional-level positions.[6] While these general statistics favor gender diversity, the statistics reflecting women's presence among higher-level, executive positions within American corporations are bleak.

Ethical arguments aside, the lack of women within corporate boardrooms is a poor financial strategy and directly conflicts with the board of directors' fiduciary duty to shareholders. Part I of this article discusses the dangers of homogenous boards and the United States' and international governments' initiatives for boardroom diversity. Part II of this article discusses the Shareholder Primacy theory, board members' common law fiduciary duties, and the business rationale. Part III dissects the importance of the nomination and voting process within Delaware-incorporated corporations. This section also discusses Delaware law initiatives for strict compliance with Shareholder Primacy, the boundaries surrounding the business judgment rule, and a potential derivative cause of action that shareholders may bring against directors for violating their duty of care to the shareholders in terms of intentional board homogeneity or avoidance of their duty to nominate the most qualified people for the position. Of the corporations that make up the Fortune 500 companies, more than one-half are incorporated in Delaware.[7] Due to Delaware's overwhelming authority within corporate law and publicly held companies, this article will focus on Delaware General Corporate Law and Delaware's common law.

Although women hold over half of all professional-level positions, there is an incredible deficiency in the number of women who hold executive or high-level positions within the American market.[8] Thus, there is a marginal number of women representatives within corporate boardrooms. Recently, there have

3. Melanie Arter, *Justice Ginsburg: We Need An All-Female Supreme Court*, CNS NEWS (Nov. 26, 2012), http://www.cnsnews.com/news/article/justice-ginsburg-we-need-all-female-supreme-court.

4. UNITED STATES DEPARTMENT OF LABOR, LATEST ANNUAL DATA: WOMEN OF WORKING AGE (2015).

5. Joseph Chamie, *Women More Educated Than Men But Still Paid Less*, YALEGLOBAL ONLINE (Mar. 6, 2015), http://yaleglobal.yale.edu/content/women-more-educated-men-still-paid-less-men.

6. Judith Warner, *Fact Sheet: The Women's Leadership Gap*, CENTER FOR AMERICAN PROGRESS (Mar. 7, 2015, 8:56 AM), https://www.americanprogress.org/issues/women/report/2014/03/07/85457/fact-sheet-the-womens-leadership-gap.

7. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, n.8 (2013).

8. Warner, *supra* note 7.

been national and international initiatives to diversify boards within major corporations, particularly publicly held corporations. In 2013, Catalyst researchers reported that fifty Fortune 500 companies had all male, or homogenous, boards of directors.[9] By 2015, this statistic decreased by 54% to twenty-three Fortune 500 companies with all-male boards of directors.[10] While this 54% decrease may seem like a great feat for women, it is notable that adding a single woman to the company's board is enough to remove a board's homogenous label. In fact, adding a single woman to a board of directors in an effort to remove the homogenous label is not uncommon.[11] Yet, a single woman in a group of, usually, twelve or more members is seen as a "token" diverse director rather than a contributing member of the board.[12] Although many Fortune 500 companies have worked toward more diversity among positions within their companies, the Fortune 500 board seats are left almost untouched; as of 2015, 28% of Fortune 500 firms list only one female director.[13]

Boardroom homogeneity or near-homogeneity with a "token" female board member is a poor economic strategy for corporate boards in terms of financial return and company performance. The presence of women on the boards has been correlated with the improvement in a corporation's financial performance,[14] corporate social responsibility,[15] and an increased number of women[16] in other high-level positions.[17] Specifically, "[there is] on average, [a] notably stronger-than average performance at companies with three or more women board directors."[18] These reports are based on the top three critical factors in financial measurements: return on equity, return on sales, and return on invested capital.[19]

9. CATALYST, *Catalyst Census: Fortune 500 Appendix 4—Companies With Zero Women Directors,* (2013), http://www.catalyst.org/knowledge/2013-catalyst-census-fortune-500-appendix-4-companies-zero-women-directors (last visited Nov 1, 2015).

10. *Id.*

11. Caroline Fairchild, *The 23 Fortune 500 companies with all-male boards*, FORTUNE (Jan. 16, 2015), http://fortune.com/2015/01/16/fortune-500-companies-with-all-male-boards.

12. *Id.*

13. Fairchild, *supra* at 12.

14. Nancy Carter, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)*, CATALYST (2011), http://www.catalyst.org/system/files/the_bottom_line_corporate_performance_and_women%27s_representation_on_boards_%282004-2008%29.pdf.

15. Rachel Soares et al., *Gender and Corporate Social Responsibility: It's a Matter of Sustainability* CATALYST (2011), http://www.catalyst.org/system/files/gender_and_corporate_social_responsibility.pdf.

16. EMILY TROIANO, WHY DIVERSITY MATTERS, CATALYST (2013), http://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf.

17. Kimberly Weisul, *Globally, women gain corporate board seats — but not in the US,* FORTUNE (2015), http://fortune.com/2015/01/13/catalyst-women-boards-countries-us/ (last visited Oct 18, 2015).

18. CATALYST, COMPANIES WITH MORE WOMEN BOARD DIRECTORS EXPERIENCE HIGHER FINANCIAL PERFORMANCE, ACCORDING TO LATEST CATALYST BOTTOM LINE REPORT, (2007), http://www.catalyst.org/media/companies-more-women-board-directors-experience-higher-financial-performance-according-latest (last visited Oct 18, 2015).

19. *Id.*

Return on equity is the amount of net income returned as a percentage of shareholders' equity.[20] This measures a corporation's profitability by revealing how much profit a company generates with the money shareholders have invested.[21] On average, companies with the highest percentage of women board directors outperformed those with the least by 53% in terms of the return on equity.[22] Return on sales is the net income before interest and taxes, which is divided by the net sales.[23] This expresses the profit left over for each dollar of sales revenue, making it a useful measure of a company's income-generating efficiency.[24] On average, the companies with the highest percentages of women board directors outperformed those with the least by 42% in terms of the return on sales.[25] Return on invested capital is used to assess a company's efficiency by allocating the capital under its control to profitable investments.[26] This gives a sense of how well a company is using its money to generate returns.[27] On average, companies with the highest percentages of women board of directors outperformed those with the least by 66% in terms of the return on invested capital.[28] While these statistics are corollary and not conclusory, these numbers are not to be ignored.

The positive correlation between a corporation's financial performance and the presence of women on the board suggests that men are not always the most able candidates for director nomination and election. Indeed, many successful companies thrive with the strong presence of women representation on the board. While "firms which fail to select the most able candidates for the board of directors damage their financial performance,"[29] this damage directly conflicts with corporate law's landmark Shareholder Primacy Theory which assigns shareholder interests as the board's first priority.[30] More directly, the board of directors holds an integral position in the nomination process of incoming board members, as it is their duty to nominate potential board members during elections. Thus, the board plays a key role in diversifying their nominees in time for shareholder voting. In short, the directors' honest efforts to make diverse and

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20. *Return On Equity (ROE) Definition*, INVESTOPEDIA (2003), http://www.investopedia.com/terms/r/returnonequity.asp.

21. *Id.*

22. CATALYST, *supra* note 19.

23. *Return On Sales (ROS) Definition*, INVESTOPEDIA (2003), http://www.investopedia.com/terms/r/ros.asp.

24. *Is return on sales (ROS) the same as profit margin?*, INVESTOPEDIA (2015), http://www.investopedia.com/ask/answers/030315/return-sales-ros-same-profit-margin.asp.

25. CATALYST, s*upra* note 19.

26. *Return On Invested Capital (ROIC) Definition*, INVESTOPEDIA (2003), http://www.investopedia.com/terms/r/ros.asp.

27. *Id.*

28. CATALYST, s*upra* note 19.

29. Sonja S. Carlson, Comment, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 369 (2012).

30. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013), http://scholarship.law.berkeley.edu/bblj/vol10/iss2/1.

well-deserved nominations are the first step to creating the most business-savvy board for the shareholders' financial interest.

Despite the national and international governments' regulations and initiatives for board diversification, the consistently low number of women representatives among executive and board positions suggests that corporate America has not taken these efforts seriously. The question lies in what state-level initiatives can be taken to more directly push for board members to act as true fiduciaries to shareholders in all aspects of business decisions, including board member nominations.

I. THE WORLD-WIDE THREAT AND RESPONSE TO HOMOGENEOUS BOARDS

Both the United States' national government and other international governments have debated boardroom homogeneity, which has opened a dialogue for more targeted resolutions in the form of governmental policies and initiatives.[31] The debate on the lack of diversity within executive and high-level positions has become an area of focus because this poor representation not only posits ineffective business practices for corporations, but it presents economic-crushing results as well.[32] The 2008 financial crisis, which has been considered the worst recession in eighty years, shook worldwide economies as stock markets dropped, governments were unable to bail out banks, and a five-year global recession followed.[33] Richard A. Bennett, the Executive Chairman of GovernanceMetrics International, a global leader in corporate governance research and risk rating, suggests that the 2008 financial crisis showcased the dangers of homogenous boards to the financial health of corporations.[34] Bennet suggests, "[D]uring the financial crisis, we saw examples of boards that were composed of members who were too similar in background and that too often may breed 'groupthink.' Those boards would have benefited from having a more dynamic and broad-ranging composition."[35] Groupthink is social psychologist Irving Janis' theory that the "mode of thinking that persons engage in when consensus-seeking becomes so dominant in a cohesive in-group that it tends to override realistic appraisal of alternative courses of action."[36] Instead of finding the best solutions to a problem, the group uses a variety of techniques to encourage conformity.[37] Homogenous boards, or boards with a low level of diversity, undoubtedly make the same assumptions, ask the same questions, and

31. Carlson, *supra* note 30.

32. *Id.*

33. *Crash Course*, THE ECONOMIST, (Sept. 14 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article.

34. Carlson, *supra* note 30.

35. *Id.*

36. ON DIRECTORSHIP, SHAREHOLDER PRIMACY: PARADIGM OR GROUPTHINK (2013), http://ondirectorship.com/ondirectorship/2013/10/29/corporate-governance-paradigm-or-groupthink (last visited Oct 18, 2015).

37. *Id.*

employ the same strategies.[38] There are underlying eight techniques, whether known or not, within these homogenous boards that encourage conformity.[39] These techniques include an illusion of invulnerability, illusions of morality, collective rationalization, out-group stereotyping, pressure to conform, self-censorship, illusion of unanimity, and appearance of mind guards.[40] Janis states that when more symptoms of groupthink are present, "the probability is higher that any resulting decisions will be unsuccessful, possibly even catastrophic."[41]

Although groupthink is a threat to corporate boards' fiduciary duties and performances, "critical mass" works to combat groupthink's presence within these boards, and it acts as an entry for diversity within dominantly homogenous boards. The theory of "critical mass" is a key way to combat groupthink, as it suggests that when "the size of the subgroup reaches a certain threshold, or critical mass, the subgroup's degree of influence increases."[42] Bennett suggests, "Gender diversity in the boardroom can aid in the fulfillment of directors' fiduciary duties because considering a diversity of perspectives during the decision-making process can help a corporation achieve optimal long-term and risk-adjusted returns." Furthermore, critical mass reaches beyond executive positions, as board diversity may also assist non-executive directors in relieving their oversight duty, which requires them to scrutinize the executive directors' performances and "the company's system of financial controls and risk management."[43] Critical mass not only combats against groupthink but also against tokenism. Pax World Management President and CEO, Joe Keefe, broke down how many companies view gender diversity. He reveals, "We have one woman on our board now, so we can check that box off; we have quote unquote

38. Carlson, *supra* note 30.

39. Tunjic, s*upra* note 37.

40. The illusion of invulnerability is seen when members ignore obvious danger, take extreme risks, and are overly optimistic about their board's performance. Board members are clouded by the illusion of morality when members believe that their decisions are "morally correct, ignoring the ethical consequences of their decisions." Collective rationalization occurs when members "discredit and explain away warning contrary to group thinking." Out-group stereotyping occurs when members create negative stereotypes of outcasts or "others." The pressure to conform exists when members pressure others who express contrary arguments, views, or commitments to the majority group, and this adversity is seen as disloyalty. Self-censorship occurs when members withhold their contrary views or counter-arguments. The illusion of unanimity is present when members falsely perceive that everyone agrees. Finally, the appearance of mindguards occurs when members appoint themselves as the protectors of the group from adverse, thus threatening, information. Peter Tunjic, *Shareholder Primacy: Paradigm or Groupthink*, ON DIRECTORSHIP (October 29,2013), http://ondirectorship.com/ondirectorship/2013/10/29/corporate-governance-paradigm-or-groupthink

41. Tunjic, s*upra* note 37.

42. Carlson, *supra* note 30. (quoting Mariateresa Torchia, Andrew Calabrò, & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 302 (2011)).

43. UK CORPORATE GOVERNANCE CODE, PRINCIPLE A.4 (2016), https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf.

gender diversity."[44] In short, "a fresh perspective [resulting from board diversity] may not necessarily result in more effective monitoring if female board members are marginalized. . ."[45] Tokenism hinders the token director's contributions to the board. Tokenism has negative consequences like visibility, polarization, and assimilation.[46] In terms of visibility, the token individual finds herself being watched and pressured to perform.[47] In terms of polarization, the token individual may experience isolation from members of the dominant group. Finally, in terms of assimilation, the dominant group may force the token into a stereotypically defined minority group.[48] A popular study conducted by Sumru Ekrut, Vicki W. Kramer, and Alison M. Konrad explored the dimensions of numerical representation and its relation to critical mass.[49] "This study found that three or more women directors are able to establish a critical mass, creating "normalization" where gender is no longer a barrier to communication, and where women directors are more likely to feel comfortable, supported, and freer to raise issues and actively participate."[50] This study into critical mass provides helpful guidelines in terms of the numbers that regulators ought to expect from complying companies in terms of diversifying their boards.

A. The International Response

Many countries have practiced transparency in an effort to "[exchange] information, [identify] potential regulatory problems upstream, and [seek] mutually acceptable solutions."[51]Transatlantic dialogue has become extremely important within financial regulation,[52] and policies on diversity initiatives have drawn quite a bit of attention from international countries.[53] International countries have tested both soft and hard regulations, ranging from quotas to reports to suggestions for boards to act more proactively in their board nomination and election processes.

Within recent years, Norway, France, Italy, the Netherlands, and Spain have enacted hard regulations in the form of various quotas in order to promote gender

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44. Carlson, *supra* note 30. (quoting Joel Stonington, *Boys-Only Boards: Where the Women Aren't at the Top*, BLOOMBERG BUSINESSWEEK (June 27, 2011)).

45. *Id.* at 345 (quoting David Carter, Betty J. Simkins & Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003)).

46. *Id.* at 351.

47. *Id.*

48. *Id.*

49. *Id.*

50. Carlson, *supra* note 30. (quoting David Carter, Betty J. Simkins & Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003)).

51. Alexander Kern, Eilís Ferran, Howell E. Jackson, & Niamh Moloney. *A Report on the Transatlantic Financial Services Regulatory Dialogue*, JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS DISCUSSION PAPERS at 6 (2007).

52. *Id.* at 31.

53. EY: Ernst & Young, *Women on boards: global approaches to advancing diversity*, POINT OF VIEW (July 2014). http://www.ey.com/Publication/vwLUAssets/ey-women-on-boards-pov-july2014/$FILE/ey-women-on-boards-pov-july2014.pdf.

diversity.[54] Ansgar Gabrielsen, the Norwegian trade minister, was motivated by the "business case" to institute mandatory quotas in the Norwegian gender diversity legislation.[55] His theory is that diversity is a value that creates wealth, which, as discussed, is the fiduciary duty of the director to insure for the shareholder.[56] Furthermore, Gabrielsen did not understand the scarcity of gender diversity due to the equal numbers of qualified and educated women. He noted that qualified women represent "a valuable, underutilized resource in terms of human capital."[57] The Norwegian law's argument for gender diversity lies more so along the ethical grounds that each gender shall have significant representation in the boardroom.[58] The 2004 Norwegian Public Limited Liabilities Companies Act has been amended to explicitly state these hardline rules: "If the board of directors has two or three members, both sexes shall be represented; If the board of directors has four or five members, each sex shall be represented by at least two directors. . ."[59] Public companies were given until January 1, 2008 to comply with the requirements, and if failed, the companies were forced to dissolve. Every company complied with this regulation. Another hardline example is France who amended its constitution in 2008 to permit the use of quotas with respect to gender diversity on corporate boards.[60] Similar to the Norwegian law, the French law requires at least 40% of each gender on corporate boards.[61] The French law targets both public and non-listed companies that have revenues or total assets over 50 million Euros or that have employed five hundred or more persons for three consecutive years.[62] While the Norwegian law requires companies to dissolve upon noncompliance, the French law would require companies to explain its noncompliance in the annual report.[63] Although France's requirement for explanation rather than dissolution is softer than Norway's requirement, it is arguable that making these companies conscious of their board makeups could make the executives ask the hard questions and be more cognizant of their nomination and election procedures.

When determining how the United States can target our own corporations, it is necessary to determine which policies have worked for other countries and which policies have been ignored. International countries with hard regulations, particularly in forms of quotas, have a generally higher proportion of female directors than those in markets with no quotas.[64] In Belgium, a 2011 law requires

54. Carlson, *supra* note 30.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. Carlson, *supra* note 30.
61. *Id.*
62. *Id.*
63. *Id.* at 360-61.
64. Kamonjoh, Edward. *Gender Diversity On Boards: A Review of Global Trends*, Institutional Shareholder Services, Inc. (September 25, 2014), 5, https://www.issgovernance.com/file/publications/2014-iss-global-board-diversity-report.pdf.

33 percent gender diversity by the end of 2016.[65] In India, a 2013 law required firms to have at least one female on the board by the end of the 2014 year.[66] In Spain, boards were required to constitute 40 percent representation by the "less represented gender" by 2015.[67] In the Netherlands, a July 2013 law required boards to attain 30 percent gender diversity, with a comply-or-explain basis.[68] Lastly, a 2005 Norwegian law required 40 percent of gender diversity on all public boards by the end of 2010.[69] While these initiatives are still a work in progress and a number of markets do not appear to be on track for the quota requirements in India, France, and other countries, female representation in Belgium, the Netherlands, Norway, and Spain have complied very well to the quotas.[70]

Australia, Germany, and the United Kingdom are countries that have initiated soft regulatory approaches in an effort to diversify corporate boardrooms. These "soft" countries have instituted primarily disclosure-oriented diversity regulations and requiring companies to "comply or explain."[71] In 2010, Australia reissued its corporate governance code to a "comply or explain" regulation, encouraging companies to set their own targets (in the number of female participation on corporate boards).[72] Public companies, as defined on the Australian Securities Exchange, are required to do the following: adopt and publicly disclose a diversity policy; establish measurable objectives for achieving gender diversity and assess annually both the objectives and progress towards achieving them; disclose in each annual report the measurable objectives for achieving gender diversity, the progress towards achieving them, the proportion of women employees in the whole organization (in senior executive positions, on the board); and disclose the mix of skills and diversity for which the board is looking to achieve in membership of the board.[73] Similar to France, compliance is not mandatory and those who choose not to comply must explain their noncompliance in each annual report.[74] In 2010, the UK's Financial Reporting Council ("FRC") reissued the UK Corporate Governance Code.[75] This code included a new provision requiring that "[t]he search for board candidates

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65. *Id.* at 6.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Kamonjoh, Edward. *Gender Diversity On Boards: A Review of Global Trends*, Institutional Shareholder Services, Inc. (September 25, 2014), 5, https://www.issgovernance.com/file/publications/2014-iss-global-board-diversity-report.pdf.

71. Alice Klettner, Thomas Clarke, & Martjin Boersma, *The Impact of Soft Law on Social Change: Measurable Objectives for Achieving Gender Diversity on Boards of Directors*, AUSTL. J. OF CORP. L. 3, 148-176 (2013).

72. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337-391, 362-63 (2012).

73. *Id.*

74. *Id.*

75. *Id.*

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."[76] Companies must either comply with the provisions or provide an explanation for their noncompliance.[77] Unlike the French, the UK's FRC is opposed to setting a minimum gender diversity target.[78] The UK Corporate Governance Code explains that "No matter how it [is] qualified, embedding a specific figure would inevitably [be] viewed as a quota."[79] While it is too early to judge the efficacy of the UK's 2010 recommendation, there is notable momentum following the target set by the Davies report and the European Parliament's 2011 resolution endorsing the European Commission's proposal for a gender quota if the voluntary suggestions fail to make progress.[80] Falling in line with other countries who initially began with voluntary codes but then moved to mandatory quotas, the momentum for increasing gender diversity within boards did not pick up until a gender quota became a real political threat.[81]

B. The National Response

The United States' Congress created the Securities and Exchange Commission ("SEC") to regulate the securities market, to require disclosures from public companies, and to protect investors.[82] The SEC's attempt to diversify corporate boards through its 2009 diversity disclosure statement has followed in suit with the "soft" regulatory measures found in Australia, the UK, and Germany. SEC Chairman Mary L. Schapiro argues that "Accountability is impossible without transparency. By adopting these rules, [the SEC] will improve the disclosure around risk, compensation, and corporate governance, thereby increasing accountability and directly benefiting investors."[83] The SEC's 2009 diversity disclosure requirement:

Describe the nominating committee's process for identifying and evaluating nominees for director, including nominee recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating

76. *Id.*

77. *Id.*

78. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337-391, 362-63 (2012).

79. *Id.*

80. Colette Fagan, *Women on Corporate Boards in Europe*, 9 (2013), http://www.europarl.europa.eu/document/activities/cont/201303/20130321ATT63598/20130321ATT63598EN.pdf (last visited Jan 24, 2016).

81. *Id.*

82. *Securities and Exchange Commission (SEC) Definition,* INVESTOPEDIA (2003), http://www.investopedia.com/terms/r/ros.asp.

83. SECURITIES AND EXCHANGE COMMISSION, SEC APPROVES ENHANCED DISCLOSURE ABOUT RISK, COMPENSATION AND CORPORATE GOVERNANCE (2009).

committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy. . .[84]

The SEC designed this diversity disclosure requirement "to assess a company's commitment to developing and maintaining a diverse board."[85] Public companies are required to disclose in their proxy statements[86] whether diversity is a factor in the nomination process, how diversity is considered in the process, and how the company assesses the effectiveness of its diversity policy.[87]

The SEC's rationale for adopting the diversity disclosure requirement was to aid investors in understanding how the board considers, addresses, and assesses diversity and their diversity policies, if any.[88] Commentators agreed that diversity disclosure would allow investors to be better suited to make more informed decisions in terms of voting and investing.[89] Furthermore, commentators agreed that there is "a meaningful relationship between diverse boards and improved corporate financial performance."[90] This supports the business rationale which Lisa Fairfax, George Washington University Law School professor and potential SEC seat holder, describes as having two key components: enhanced board quality and decision-making.[91] While these disclosure requirements are likely to encourage boards to conduct a more extensive and broader search for their board selection, this could be a simple entry into embracing diversity procedures.[92]

While the SEC has pushed for more diversity in its 2009 disclosure requirement, the Commission lost some ground by permitting companies to develop and to disclose their own standards for diversity.[93] As such, the SEC left "diversity" undefined within the requirement. [94] While it is noble to have good faith in our American corporations to have a unified grasp on "diversity" and to make a genuine effort to remedy the deficiency of equal representation, this

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84. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 364-365.

85. *Id.*

86. Proxy statements are documents sent to shareholders that contain information about matters that will be brought at the annual stockholder meeting. The SEC requires this disclosure so that shareholders are able to make informed decisions during voting. INVESTOPEDIA, *Proxy Statement Definition*, INVESTOPEDIA (2004), http://www.investopedia.com/terms/p/proxystatement.asp.

87. Carlson, *supra* note 85, at 365.

88. *Id.* at 366.

89. *Id.*

90. *Id.*

91. *Id.* at 366-67.

92. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 367 (2012).

93. *Id.* at 365.

94. *Id.*

undefined requirement allows for too much flexibility and leaves threat for the "token" director and groupthink in terms of defining diversity. The impact of the undefined "diversity" requirement has been less than impactful. SEC Commissioner Luis Aguilar has stated that since the SEC requirement has gone into effect, a substantial number of companies had provided only abstract disclosure. These statements had only included that "diversity was something considered as part of an informal policy," rather than "a discussion of any concrete steps taken to give real meaning to its efforts to create a diverse board."[95] Aguilar noted that by leaving out these concrete steps and how the diversity requirement is evaluated, these companies end up depriving the investors of the information they require to make informed decisions.[96] The SEC's trouble with genuine compliance is similar to the lackluster or non-compliance that the international countries who used soft regulatory measures experienced. This trend in the poor return of soft regulatory measures is critical information to take into consideration when taking more serious steps toward gender diversity within executive boards. For example, when looking to the state-level, it is important to understand that soft regulations will not produce the desired feedback and so it is necessary to put more "teeth" or consequences into the regulatory measures so that corporations will have more incentive to respond with genuine policies and feedback.

II. SHAREHOLDER PRIMACY THEORY, DELAWARE COMMON LAW FIDUCIARY DUTIES, THE BUSINESS RATIONALE

Understanding corporate governance is integral to understanding the implicit and explicit duties that directors owe to the shareholder's best interest: particularly their financial interest. Corporate governance also dictates the nomination and election process of incoming directors, which is very closely related to the opportunity for diversity within boards. Corporate governance is the system of rules, practices, and processes by which a company is directed and controlled.[97] The corporate governance structure follows either Delaware General Corporate Law (DGCL), the Model Business Corporation Act (MBCA), or less commonly, specific state laws.[98] The Securities and Exchange Commission gives further federal instruction into reporting requirements and shareholder proxy rules of publicly traded companies, as seen in the 2009 Diversity Disclosure Requirement.[99] This corporate governance system has grown from the evolution of public ownership, which has created a separation

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95. *Id.* at 367.

96. *Id.*

97. *Corporate Governance Definition*, INVESTOPEDIA (2003), http://www.investopedia.com/terms/c/corporategovernance.asp (last visited Feb. 28, 2017).

98. *See* Jeffrey M. Gorris et. al., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 L. & CONTEMP. PROBS. 107-120 (2011).

99. *See* U.S. Sec. and Exch. Comm'n, *SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance*, SEC (Dec. 16, 2009), https://www.sec.gov/news/press/2009/2009-268.htm; *See* 17 C.F.R. Parts 229, 239, 240, 249, and 274 (2009).

between the ownership and management of a corporation.[100] Before the 20th century, most companies were small and family-run.[101] Today, there are many publicly owned and traded conglomerates that are on one or more global exchanges.[102] By 2014, there were 5,008 companies traded on major U.S. stock exchanges.[103] Within these are the Fortune 500 listings, the United States' five hundred most profitable industrial corporations.[104] Structure within governance essentially involves balancing the interests of many stakeholders in a company.[105] The stakeholders include the shareholders, management, customers, suppliers, financiers, government, and the community.[106] Corporate governance encompasses practically every sphere of management, from action plans and internal controls to performance measurement and corporate disclosure.[107] Looking simplistically at corporate governance, it is focused on three groups: shareholders, board of directors, and officers.[108] The shareholders own the company; the board of directors oversees the officers who do the day-to-day business.[109] The ultimate goal of corporate governance is to determine the distribution of power among the three.[110]

The Delaware General Corporate Law is by far the most popular corporate governance structure[111] with over 50% of publicly traded corporations in the United States and 60% of the Fortune 500 companies incorporated in Delaware.[112] Once a corporation is formed, the DGCL requires that "the business and affairs of every corporation organized under [DGCL Title 8 Chapter 1] *shall be* managed by or under the direction of a *board of directors*, except as may be otherwise provided in this chapter or in its certificate of incorporation."[113] Besides incorporation guidelines, there is not much more statutory clarity on the

100. Investopedia Staff, *The Basics of Corporate Structure*, INVESTOPEDIA, http://www.investopedia.com/articles/basics/03/022803.asp?rp=i (last updated Oct. 8, 2015).

101. *Id.*

102. *Id.*

103. Dan Strumpf, *U.S. Public Companies Rise Again: Stock-Market Listings Grow for First Time Since Internet Boom*, WALL ST. J. (Feb. 5, 2014, 3:43 PM), http://www.wsj.com/.

104. *Fortune 500*, INVESTOPEDIA, http://www.investopedia.com/terms/f/fortune500.asp (last visited Mar. 1, 2017).

105. *Investopedia*, *supra* note 98.

106. *Id.*

107. *Id.*

108. *Corporate Structure: Directors to Shareholders*, FINDLAW, http://www.findlaw.com/ (search "Corporate Structure: Directors to Shareholders"; then click on the "Corporate Structure: Directors To Shareholders – FindLaw" hyperlink) (last visited Mar. 1, 2017).

109. *Shareholder*, INVESTOPEDIA, http://www.investopedia.com/terms/s/shareholder.asp (last visited Mar. 1, 2017); *See* Investopedia Staff, *supra* note 101.

110. *Id.*

111. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181, 184 (2013).

112. *About Agency*, STATE OF DELAWARE (2015), https://corp.delaware.gov/aboutagency.shtml (last visited Nov 7, 2015).

113. Del. Code Ann. tit. 8 § 141(a) (2017) (emphasis added).

subjects of the board's duties to the other levels of governance within the corporation. David G. Yosifon, a business law and legal theory professor at Santa Clara Law, identifies Delaware corporate law's passivity and obscurity in the director's fiduciary duties to the corporation:

> Indirectly, the Delaware code makes clear that by default directors owe fiduciary duties to the corporation and its stockholders. I say indirectly because the first and only mention of this obligation comes in a part of the statute specifying that corporations may, if they so desire, choose to excuse directors from liability for breaches of that obligation. It states: "the certificate of incorporation may also contain . . . a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty.[114]

Although the DGCL leaves specific answers to directors' fiduciary duties to shareholders mostly untouched, Delaware courts have clarified exactly what duties the directors owe and the safe harbor protections that directors can expect, all in compliance with the Shareholder Primacy theory.

A. Shareholder Primacy and Delaware's Common Law Fiduciary Duties

Corporate governance hosts the Shareholder Primacy theory which is the basis for many duties that directors owe to shareholders to maximize their investments within the company. The Shareholder Primacy theory is relevant to the argument that directors have the responsibility to nominate diverse, potential board members when these nominees hold the capabilities typically sought for within the nomination process due to the positive correlation between diversified boards and high financial return. This is a dominant theory within corporate law and is normally assumed to be "a major factor considered by boards of directors of publicly traded corporations in making ordinary business decisions."[115] The shareholder primacy background begins at the infamous Adolf A. Berle and E. Merrick Dodd debate in the 1930s.[116] Berle's argument was based on the premise that shareholders were owners of the company and directors were agents or trustees of these owners.[117] Thus, corporations should be run for the shareholder's interest.[118] The American Law Institute (ALI), which was

114. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 186 (2013).

115. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 341 (2012) (quoting D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998)).

116. Lynn A. Stout, *Bad and Not-So-Bad Arguments For Shareholder Primacy*, CORNELL FACULTY PUBLICATIONS (2002) http://scholarship.law.cornell.edu/facpub/448. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL 637, 647 (2006) http://scholarship.law.upenn.edu/faculty_scholarship/1043.

117. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL 637, 647 (2006) http://scholarship.law.upenn.edu/faculty_scholarship/1043.

118. *Id.* at 646.

established to promote the clarification and simplification of the United States' common law and adaption,[119] gives further stamina to the common law stance of shareholder primacy. The ALI's Principles of Corporate Governance states, "a corporation. . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[120] Although the ALI delivers restatements which in themselves are not binding authority, these restatements are highly persuasive to the American legal community due to the extensive input from law professors, practicing attorneys, and judges.[121]

Although the Delaware General Corporate Law statutes do not explicitly point to Shareholder Primacy, Delaware's common law follows the ALI interpretation that Shareholder Primacy is inherent within the corporate governance structure and can be seen through the directors' fiduciary duties. Delaware courts have articulated several duties of directors to their corporation and its stockholders as part of the overall fiduciary duty that the directors owe to Delaware corporations: the duty of care, the duty of loyalty, and the duty of good faith.[122] The duty of loyalty, for example, requires that the best interests of the corporation and its stockholders take precedence over any interest possessed by a director, officer or controlling stockholder and not shared by stockholders generally. Directors may not act inconsistently with the corporation's best interests to further some interest of their own, such as a relationship with a large stockholder or another company or a personal interest in remaining a director or officer.[123] A key common law ruling on the duty of loyalty was in *Dodge v. Ford Motor Company* in which the court struck down CEO Ford's plan to use surplus earnings to reduce car prices rather than distribute those earnings to shareholders. The court explained: "A business corporation is organized and carried on primarily for the profit of the shareholders."[124] A more recent common law decision came out of Delaware in 1986 from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, in which the court held that "concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."[125] Rather, the directors were required, in that context, to maximize shareholder value.[126]

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119. *American Law Institute*, WIKIPEDIA (2015), https://en.wikipedia.org/wiki/American_Law_Institute (last visited Nov 8, 2015).

120. Fisch, *Supra* note 118, at 646-47 citing AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a)(1994).

121. *Supra* note 120.

122. Carl Kaplan & Beth Mazzagetti, *Private Capital Markets - Data & Insights - VC Experts* Vcexperts.com (2015), https://vcexperts.com/buzz_articles/208 (last visited Oct 18, 2015).

123. *Id.*

124. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL 637, 650 (2006) http://scholarship.law.upenn.edu/faculty_scholarship/1043.

125. *Id.* at 651.

126. *Id.*

As seen in *Dodge* and *Revlon*, shareholders can bring derivative cases against directors based on the claim that directors are not maximizing the shareholders' investments, and this exact claim of the directors' breach of their duty of care is the basis for *In re Walt Disney Corporation Derivative Litigation*, a key case within Delaware common law. The *Walt Disney* court found that corporate fiduciaries who act faithfully and honestly on behalf of those whose interest they represent are granted wide latitude in their efforts to maximize shareholders' investments.[127] The court found that the duty of care require that directors of a Delaware corporate use that amount of care which ordinary prudent men would use in similar circumstances, considering all material information is available in making the business decision.[128] The duty of loyalty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer, or controlling shareholder and not shared by stockholders generally.[129] *Walt Disney* holds that corporate fiduciaries are held to a high standard to fulfill their stewardship over the assets of others.[130]

The high standard that the *Walt Disney* court set for corporate boards reflects the standard that current boards should use while diversifying their board nominees during each corporation's nomination season. Because more gender diversified corporate boards are linked to a stronger financial performance,[131] it falls in line with the Shareholder Primacy theory that directors should be working toward solid business strategies[132] In fact, gender diversification on corporate boards has already advanced from an initiative to a "solid business strategy" that results in return on equity, sales, and invested capital.[133] Based on the empirical studies, there is a strong business rationale for encouraging directors to diversify their boards: better decision making, improved performance of monitoring functions, and a stronger market penetration.[134] Assuming that increased gender diversity can be equated with an increased variety of perspectives, a broader range of ideas implies that boards will be able to make more informed decisions and, subsequently, act on those informed decisions.[135] In the least, questions and ideas that have previously gone unconsidered would likely now be addressed.[136] Furthermore, having a more diverse board would allow for more efficient and a more vigorous monitoring board. Some scholars link women directors and overall board independence, suggesting that diverse boards may result in more effective monitoring because "women are more inclined to ask questions that

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127. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697-98 (Del. Ch. 2005).

128. *Id.* at 749.

129. *Id.*

130. *Id.* at 697

131. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 341 (2012).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

would not be asked by male directors."[137] Lastly, board diversification allows for a broader perspective and a better understanding of the marketplace results from a similar male-to-female proportion on the board as it is in the marketplace.[138] There is no reason why diversifying corporate boards should fall away from the implicit list of duties that a board of directors must work toward satisfying.

III. THE IMPORTANCE OF THE NOMINATION & ELECTION PROCESS

The nomination and election process is the foremost procedure by which corporations diversify their boards, thus this is a very important process to target when making policies to promote diversity within managerial positions, like the board of directors, in a corporation. The shareholder election of directors is widely accepted as an important tool in corporate governance,[139] but coupled with the election is the directors' default[140] power of nomination.[141] Before shareholder election occurs, there is a long-standing, widespread system by which the board of directors or its nominating committee, as such, nominates candidates for election at the annual shareholder meeting.[142] That the board of directors itself has the power to nominate candidates is consistent with the overall legal framework of the U.S. corporate governance system: given the dominant managerial position of the board of directors in U.S. corporation law, it would be peculiar to find that the board of directors lacked the power to place candidates of its choice before the stockholder meeting for election as directors.[143] The power to nominate the candidates for potential board election by the shareholders, at minimum, brings the desired nominee's candidacy to the attention of the shareholders, which can be powerful, especially if the group of electors is disaggregated and large.[144]

The nomination time is the point at which the board of directors ought to practice their due diligence to nominate a diverse selection of qualified potential

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137. Sonja S. Carlson, *"Women Directors": A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 341 (2012).

138. *Id* at 337-391.

139. Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. OF CORP. LAW 117-159 (2014).

140. *See*, e.g., Del. Code Ann. tit. 8 § 141(a) (2013) ("The business and affairs of every corporation . .. shall be managed by or under the direction of a board of directors . . . "); Model Business Corporation. Act § 8.01(b) ("[T]he business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . .. ").

141. On April 10, 2009, Delaware amended provisions within the DGCL, one of which was Section 112 which expressly allowed corporations to adopt bylaws that would require the corporation to include stockholder nominated directors in its proxy solicitation materials. Ron Berenblat, et. al., *CLIENT ALERT: Delaware Amends Its General Corporation Law*, Olshan Law (2009), http://www.olshanlaw.com/resources-alerts-Delwaware-Gerneral-Corporation-Law.html (last visited Jan. 21, 2016).

142. Hamermesh, *supra* note 140.

143. *Id.*

144. *Id.* at 127.

directors among whom the shareholders themselves can vote to elect. It is in this process that the SEC suggested in the 2009 Diversity Disclosure that the corporations disclose their processes taken in consideration of diversity by which candidates for directors are considered for nomination by the board of directors or the board-appointed nominating committee. As discussed, "diversity" was left undefined and the SEC has received less-than-satisfactory disclosure of diversity policies in return. This minimal compliance has also been noted in the international attempts to suggest diversity initiatives. It is for this reason that the state-level statutes, in this case the Delaware Code or common law ought to have more teeth to ensure that the directors are acting in the shareholders' best financial interests.

The fiduciary duties, particularly the duty of care, that are found in Delaware's common law and supported by the Delaware General Corporate Law are the "teeth" needed for a stricter compliance with diversity initiatives and, thus, the Shareholder Primacy rule that is embedded so deeply within Delaware corporate law. Duty of care is the requirement that directors of a Delaware corporate use that amount of care which ordinary prudent men would use in similar circumstances, considering all material information is available in making the business decision.[145]In terms of director *inaction*, the *Walt Disney* court held that in order for the inaction to be so great as to constitute a breach of the director's duty of care, a plaintiff must show a "lack of good faith as evidenced by sustained or systemic failure of a director to exercise reasonable oversight." In the duty of care to corporate fiduciaries, the court holds that gross negligence is "reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are without the bounds of reason."[146]

Although fiduciaries are held to a high standard to maximize their shareholders' investments to the highest degree, the Delaware law does permit some flexibility for these fiduciaries with the exculpatory clause[147] defense found in Delaware Code Annotated title 8, section 102(b)(7) and the business judgment

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145. *In re Walt Disney Co. Derivative Litig.,* 907 A.2d 693, 749 (Del. Ch. 2005).

146. *Id*. at 750.

147. "[T]he certificate of incorporation may also contain any or all of the following matters: (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title." Eric J. Pan, *The Duty to Monitor Under Delaware Law: From Caremark to Citigroup*, The Conference Board, 5 (2010), https://www.conference-board.org/retrievefile.cfm?filename=DN-004-10.pdf&type=subsite.

rule.[148] First, the section 102(b)(7) exculpatory clause permits corporations to include provisions eliminating monetary damages for director for any breach of fiduciary duty, with some limits in terms of the director's breach of her duty of loyalty to the corporation, bad faith, and improper personal benefit.[149] This safe harbor was enacted to encourage directors to undertake risky but potentially value-maximizing business strategies in good faith.[150] Delaware common law also follows the business judgment rule, which serves to protect and promote the role of the board as the ultimate manager of the corporation. Courts accept that they are ill equipped to deliver a fully informed substantive review of business decisions, so the business judgment rule precludes the court from imposing itself unreasonably on business decisions.[151] The business judgment rule applies when there is no evidence of fraud, bad faith, or self-dealing.[152] The business judgment rule will be upheld unless no rational basis can be found for the litigated business decision.[153] Furthermore, the business judgment rule does not apply to inaction or unintelligent or unadvised business judgment.[154]

Both safe harbor 102(b)(7) and the business judgment rule will not stand up in court if the plaintiff proves that the directors acted in bad faith. Delaware common law defines good faith as an "honesty of purpose" and a genuine care for the shareholders.[155] On the other side, Delaware common law had defined bad faith as authorizing a transaction "for some purpose *other than* a genuine attempt to advance corporate welfare or [when the transaction] is *known to constitute* a violation of applicable positive law."[156] Chancellor Allen from the Delaware Supreme Court clarified that "bad faith (or lack of good faith) is when a director acts in a manner 'unrelated to a pursuit of the corporation's best interests.'"[157] Bad faith can result from any emotion which places a director's own interests before the welfare of the corporation, including greed, hatred, lust, envy, revenge, shame, pride, or even sloth, if it constitutes a systematic avoidance of duty.[158] It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation."[159]The *Walt Disney* court held that to act in good faith, a director must always act with an honesty of purpose and with the best interests of the corporation.[160] The business

148. Eric J. Pan, *The Duty to Monitor Under Delaware Law: From Caremark to Citigroup*, THE CONFERENCE BOARD, 5 (2010), https://www.conference-board.org/retrievefile.cfm?filename=DN-004-10.pdf&type=subsite.

149. *Id.*

150. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 753 (Del. Ch. 2005).

151. *Id.* at 746

152. *Id.* at 752

153. *Id.*

154. *Id.* at 753.

155. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 753 (Del. Ch. 2005).

156. *Id.*

157. *Id.* at 754.

158. *Id.*

159. *Id.*

160. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005).

judgment rule creates a presumption that a director acts in good faith.[161] In order to overcome that presumption, a plaintiff must prove an act of bad faith by the preponderance of the evidence.[162]

Considering the facts that the SEC has made diversity requirements known to all corporations who are in the securities market, that there is an incredible amount of research on the strong correlation between diverse boards of directors and higher financial return, and that the Shareholder Primacy theory is rooted so deeply within Delaware statutory and common law, it is reasonable to argue that boards of directors should be held to a higher level duty of care when acting as fiduciaries for the shareholders, particularly during the potential-director nomination time period. While it may be helpful toward the shareholders' cause to amend the Articles of Incorporation, or the Charter, to include diversity provisions and strategies that directors ought to employ to be considered acting within the proper scope of the corporation's best interests, it is safe to argue that if directors intentionally avoid diverse, potential nominees or did not practice due diligence in searching for the most capable candidates to maximize financial return for the shareholders, then it is reasonable for shareholders to bring a cause of action against the directors for failing to act as fiduciaries.

While this derivative cause of action for the violation of the duty of care in terms of directors failing to nominate more capable and diverse candidates will likely need to go through years of court deliberation and requires further siphoning as to where to draw the line between electing incapable candidates for the sake of avoiding litigation versus electing more diverse, capable candidates for the sake of financial return, a hard regulation may be just what corporate America needs to expand the boards and reflect more representation. Furthermore, there is an issue with shareholders stepping on the business activity of the directors, yet the Shareholder Primacy argument pulls the need for diversity and more thoughtful director nominations back into the direction of a director's duty to his shareholder.

CONCLUSION

The lack of women representatives as directors in corporate boardrooms is a pressing issue not only for the financial health of corporations but for the disregard to the corporate structure for Shareholder Primacy which is rooted in Delaware law, the United States' corporate law expertise state. There is clear research data pointing to the strong correlation of a higher percentage of women within corporate boards and higher financial return. Both the United States' and international governments have instilled regulations to increase gender diversity within corporate boardrooms, but based on the responses that corporations have given to hard versus soft rules, it is clear that the United States ought to instill hardline rules within our corporate common law.

Delaware common law is the United States' expertise forum for corporate law litigation, and so it is appropriate to instill hard rules to hold existing directors' accountable by allowing derivative litigation for the negligence to

161. *Id.*
162. *Id.*

directors' fiduciary duties to shareholders. Directors fiduciary duties to shareholders being: the duty of care, the duty of loyalty, and the duty of good faith. The duty of care is the fiduciary duty that requires directors to use that amount of care which ordinary prudent men would use in similar circumstances, considering all material information available in making business decisions. Coupled with the duty of care, directors have the duty to nominate potential directors for shareholders to vote into boards. While it is not always certain that the most equipped nominees will be a diverse group, it is in line with directors' duty of care to make a good faith effort to find the most capable candidates so that shareholders have the best candidates to consider for their votes. This stricter compliance with duty of care in nominee diversification ought to be an allowable derivative cause of action for shareholders to bring against directors should there be a display of negligence for an informed nomination procedure. While this stricter compliance with the duty of care leaves plenty of room for interpretation by Delaware courts, it is appropriate to open forums for this cause of action solely based on the Shareholder Primacy theory that directors ought to be acting in the best financial interest of shareholders.