

DECREASING DIVERSITY: CORPORATE BOARD CONTAGION

Melinda Roth*

ABSTRACT

*This article argues that the landmark 2023 decision by the Supreme Court in *Students for Fair Admissions v. Harvard (SFFA)* not only eliminated affirmative action and the use of race in college admissions decisions but has also led to a contagion effect on efforts to diversify corporate boards.*

While there has been some progress on corporate board diversity over the past few years, this headway seems to be in jeopardy since the SFFA decision. Courts have invalidated both state regulations and the NASDAQ stock exchange listing requirement that both tried in different ways to mandate board diversity. Large institutional investors, which previously focused on the diversity of the board of their investee companies, have significantly shifted their policies given the current political climate and backed off from carrying the banner of improving board composition.

The trend in corporate board diversity suggests uneven and inconsistent progress. Data indicates that large U.S. companies are reversing the trend to appoint women, people of color, and those who self-identify as LGBTQ+ to their boards.

The benefits of diversity are well known, especially on corporate boards, where divergent experiences and differing backgrounds help boards avoid groupthink and better fulfill their oversight duties. With mandated quotas no longer constitutionally possible, other methods to improve diversity are needed.

* Melinda Roth is currently a Visiting Associate Professor at the Washington and Lee University Law School. Tel: 202 714 8172; Email: melindaroth24@gmail.com. Thank you to Madison Klimchak and Sarah Horowitz for excellent research.

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INTRODUCTION

Popular culture often depicts corporate boards as consisting of old white men. The opening clip of the Coen Brothers movie “The Hudsucker Proxy” shows a typical American boardroom: 15 old white men sitting around a conference table.¹ Most people quickly recognize the recurring and stereotypical image of the company’s board: one demographic and no diversity.²

While there has been some progress on corporate board diversity, this headway is now in jeopardy.³ The 2023 landmark Supreme Court decision disallowing affirmative action, *Students for Fair Admissions v. President and Fellows of Harvard College (SFFA)*, has had a chilling effect on efforts to improve corporate board diversity.⁴ This decision departed from the long-time precedent that had permitted colleges and universities to use race as a factor in admissions to promote educational diversity.⁵

Although the *SFFA* decision was nominally limited to college admissions, its doctrinal reverberations have rapidly spread well beyond the university gates.⁶ Numerous lawsuits, for example, now challenge the validity of corporate hiring practices.⁷ At the same time, the current presidential administration and significant headwinds are now focused on

¹ See THE HUDSUCKER PROXY, Tubi TV, at 08:36 (Ethan Coen 1994) (noting there were 16 old white men until the CEO throws himself out of the window of the skyscraper to start the story).

² In my Business Associations law school classes, I show the opening clip of “The Hudsucker Proxy.” I pause the clip to ask, “What do you notice about this scene?” Without fail, an eager law student calls our attention to the fact that the board is composed of a bunch of old white men.

³ Merel Spierings, *Corporate Boards Are More Diverse Than Ever, But the Pace of Growth Is Slowing*, CONF. BD. (Nov. 20, 2023), <https://www.conference-board.org/publications/pdf/index.cfm?brandingURL=corporate-boards-are-more-diverse-but-pace-of-growth-is-slowing> [<https://perma.cc/3BS2-NVGU>].

⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), *abrogated by*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (holding that narrowly tailored race-conscious admissions policies could survive strict scrutiny); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–15 (1978), *abrogated by*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (plurality opinion).

⁶ Ishan K. Bhabha, Erica Turret & Peggy Xu, *One Year Later: The Implications of SFFA for Corporate America*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 6, 2024), <https://corpgov.law.harvard.edu/2024/08/06/one-year-later-the-implications-of-sffa-for-corporate-america/> [<https://perma.cc/LY93-8444>].

⁷ See, e.g., Complaint at 2, *Do No Harm v. Pfizer Inc.*, 646 F.Supp.3d 490 (S.D.N.Y. Sep. 15, 2022) (No. 1:22-cv-07908); Complaint at 2, *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024) (No. 1:23-cv-03424).

eliminating Diversity, Equity, and Inclusion (DEI) initiatives, including those in the corporate world. These efforts also include private actions against corporations, including major institutional investors, to abolish their DEI programs.⁸ The largest investment funds in the U.S. have morphed from shareholder activists promoting corporate board diversity to more mainstream institutional investors who go along with corporate management and no longer press for change.⁹

Moreover, courts have invalidated mandated board diversity regulations in states like California, and at the National Association of Securities Dealers Automated Quotations Stock Market LLC (NASDAQ).¹⁰ Before the required board diversity law in California was challenged, as an example, the gender balance of California companies rose from 35th to 13th nationally in terms of board diversity.¹¹ Had the mandated gender diversity law been upheld, it is likely Californian companies would have moved further up the national rankings for corporate board diversity to 2nd place.¹²

Board diversity is now holding steady or even decreasing.¹³ Data from the first part of 2025 indicates that large U.S. companies are reversing the

⁸ See, e.g., *Do No Harm v. Pfizer Inc.*, 126 F.4th 109 (2nd Cir. 2025).

⁹ See, e.g., Ross Kerber, *Vanguard Dials Back Diversity Language for U.S. Corporate Boards*, REUTERS (Feb. 5, 2025), <https://www.reuters.com/world/us/vanguard-dials-back-diversity-language-us-corporate-boards-2025-01-31/> [<https://perma.cc/5DXK-5GGH>]; Saijel Kishan, *State Street Shelves Board Diversity Goals Amid DEI Backlash*, BLOOMBERG NEWS (Mar. 3, 2025), <https://www.bloomberg.com/news/articles/2025-03-03/state-street-shelves-board-diversity-goals-amid-dei-backlash> [<https://perma.cc/YHE8-PKQH>]; *BlackRock and Vanguard Release 2025 Proxy Voting Guidelines*, COOLEY (Feb. 5, 2025), <https://www.cooley.com/news/insight/2025/2025-02-05-blackrock-and-vanguard-release-2025-proxy-voting-guidelines> [<https://perma.cc/LD9E-53EG>] (noting removal of prior numerical board-diversity targets).

¹⁰ See *Crest v. Padilla*, No. 20ST-CV-37513, 2022 WL 1073294, at *19 (Cal. Super. Ct. Apr. 1, 2022) (striking down California's board diversity law under state constitution).

¹¹ Raquel Fox, *The Search for Board Diversity: Practical Tips, Statistics on Progress*, SKADDEN (Apr. 13, 2021), <https://www.skadden.com/insights/publications/2021/04/the-informed-board/the-search-for-board-diversity> [<https://perma.cc/DJ2F-7JDX>].

¹² *Id.*

¹³ See DELOITTE CTR. FOR BD. EFFECTIVENESS, MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS (2023); see also Sun Yu, *Women in Business: Trump Administration Pushback Hits US Gender Diversity Efforts*, FIN. TIMES (June 17, 2025), <https://www.ft.com/content/c234079a-f5cb-455e-a3dd-bc44de7235ee> [<https://perma.cc/PSR8-E28L>] (discussing gender diversity); and Carolyn Crist, *DEI Progress on Corporate Boards May Be Slowing*, HR DRIVE (Aug. 30, 2024), <https://www.hrdrive.com/news/dei-progress-on-corporate-boards-may-be-slowing/725769/> [<https://perma.cc/E3YF-SMGK>] (discussing racial diversity); and Merel Spierings, *US Public Company Board Diversity in 2023: How Corporate Director Diversity Can Contribute to Board Effectiveness*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 24, 2024), <https://corpgov.law.harvard.edu/2023/11/24/us-public-company-board-diversity-in-2023/> [<https://perma.cc/5Z4Y-4XT8>] (identifying that the percentage of directors who identify as LGBTQ+ is shrinking).

trend to appoint women to their boards.¹⁴ In fact, the percentage of women being appointed to the boards at S&P 500 firms decreased from 41% for 2024 to 37% for the first five months of 2025.¹⁵ This is the lowest percentage of female appointments in six years.¹⁶ There is also a slowdown in racial diversity as the share of Russell 3000 company non-white directors fell from 48% to 31% from 2022 to 2024.¹⁷ In addition, for new directors who identify as LGBTQ+, the proportion has fallen from 15% of board seats in 2023 to a mere 3% in 2024 for the S&P 500 companies, and from 21% in 2023 to the same paltry 3% in 2024 for the Russell 3000 companies.¹⁸ Some of this may be due to issues of willingness to self-identify, but the decreases regarding sexual orientation diversity are dramatic.¹⁹

This article argues that the *SFFA* decision has served to chill any continued efforts to increase diversity on corporate boards. Even though the *SFFA* decision was focused on college admissions, its ramifications have trickled down to corporate boards. Given the significant literature on the benefit of diversity at the corporate board level, this article will focus more on the current status of board diversity mandates and subsequent challenges.

Part II of the article discusses the *SFFA* decision, its legal framework, and consequences. The benefits of corporate board diversity are briefly discussed in Part III. Part IV details the state level mandates and challenges, as well as the NASDAQ diversity disclosure rules. In Part V, the changing role of institutional investors is examined. Part VI provides data and trend analysis to show a slowdown in new board appointments for women, non-white directors, and those who identify as LGBTQ+. Finally, Part VII offers some policy recommendations given the post-*SFFA* world and the current DEI-challenged environment.

I. THE SFFA DECISION

¹⁴ Yu, *supra* note 13.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Press Release, The Conference Board, Study: Corporate Boards are More Diverse Than Ever (Dec. 3, 2024), <https://www.conference-board.org/press/board-composition-2024> [<https://perma.cc/KJ63-SHXU>].

¹⁸ Matteo Tonello, *Board Practices and Composition: 2024 Edition*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 12, 2024), <https://corpgov.law.harvard.edu/2024/12/12/board-practices-and-composition-2024-edition> [<https://perma.cc/758F-J6WQ>].

¹⁹ *Id.*

A. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*

The Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*) marked a turning point in the legal treatment of race-conscious decision-making.²⁰ The Court held that the admissions policies at both Harvard College and the University of North Carolina violated the Equal Protection Clause by failing to meet the stringent criteria for the permissible use of race in college admissions.²¹ Race may only be considered as a "plus" factor when three conditions are met: (1) the policy must satisfy strict scrutiny by being narrowly tailored to serve a compelling interest; (2) the policy must not stereotype or discriminate negatively against any racial group; and (3) the consideration of race must be temporary, with a clearly defined endpoint.²² The Court found that neither Harvard nor the University of North Carolina's admissions programs met the outlined requirements.²³ While both universities asserted a compelling interest in achieving diversity, the Court concluded that their admissions programs lacked sufficient specificity and measurable endpoints and that they impermissibly relied on race as a consideration for admission.²⁴

Although this decision was several years—and admissions cycles—ago, the White House remains concerned that many universities are still using race as a factor for admission.²⁵ To this extent, President Trump issued an executive order that requires universities to be more transparent about their admissions policies and report data to the Department of Education.²⁶ A statement from the White House announcing this executive order stated, "[T]he persistent lack of available data—paired with the rampant use of 'diversity statements' and other overt and hidden racial proxies—continues to raise concerns about whether race is actually used in practice."²⁷ This

²⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

²¹ *See id.*

²² *Id.* at 213.

²³ *Id.*

²⁴ *Id.* at 214, 218, and 221.

²⁵ *See* Lexi Lonas Cochran, *Trump Signs Memo Requiring Transparency in College Admission Practices*, HILL (Aug. 7, 2025), <https://thehill.com/homenews/education/5440924-executive-order-university-admissions/> [<https://perma.cc/236P-LXLH>].

²⁶ Memorandum on Ensuring Transparency in Higher Education Admissions, 2025 DAILY COMP. PRES. DOC. 837 (Aug. 7, 2025).

²⁷ *Id.*; Juan Perez Jr. & Bianca Quilantan, *Trump Plans to Force New Disclosure of College Admissions Data*, POLITICO (Aug. 7, 2025, at 21:03 ET), <https://www.politico.com/news/2025/08/07/trump-force-disclosure-college-admissions-data-00497737> [<https://perma.cc/XY3A-5RMS>].

executive order corresponds with recent guidance to all federal agencies from the Department of Justice which states that race-based programs and scholarships are likely illegal.²⁸

While *SFFA* was rendered in the context of higher education, the landmark decision has already begun to influence how institutions—including private employers, corporate boards, and government agencies—approach diversity initiatives more broadly. The Court’s emphasis on individualized consideration, race-neutral alternatives, and temporal limits has spurred legal and policy debates about the viability of long-standing affirmative action frameworks outside academia.²⁹ Companies and institutions are increasingly scrutinizing their diversity, equity, and inclusion (DEI) policies to ensure compliance with evolving interpretations of equal protection and anti-discrimination law.³⁰ In this way, the *SFFA* decision represents not just a rebuke of specific university admissions policies, but also a catalyst for a broader reexamination of race-conscious practices in American public and private life.

As one example, Nancy Leong writes in her recent article, *Diversity Messaging After Affirmative Action*, that law school diversity messaging has decreased since the *SFFA* decision.³¹ She utilizes data from three sources to show that: (1) 73% of law schools changed their application materials; (2) 44% of law schools changed hiring announcements; and (3) 54% of law schools changed their DEI websites all to reflect decreased diversity messaging.³² The latter two categories are especially noteworthy, since similarly to corporate board recruiting, the *SFFA* decision did not explicitly address using race as a criteria for hiring faculty, or how a university (or law school) should show diversity statistics on their website.³³

²⁸ See Memorandum from the Att’y Gen. to all Fed. Agencies (July 29, 2025), <https://www.justice.gov/ag/media/1409486/dl?inline> [<https://perma.cc/D7UA-2CPH>].

²⁹ *SFFA in the Courts: Where we are Before the Administration Change*, FOLEY HOAG (Jan. 17, 2025), <https://foleyhoag.com/news-and-insights/publications/alerts-and-updates/2025/january/sffa-in-the-courts-where-we-are-before-the-administration-change/#:~:text=Outside%20of%20higher%20education%2C%20litigants,cases%20did%20reach%20the%20merits> [<https://perma.cc/TYW6-6JFN>].

³⁰ See Merel Spierings, *Diversity, Equity, and Inclusion in the 2024 Proxy Season: A New Era of Scrutiny*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 13, 2024), <https://corpgov.law.harvard.edu/2024/06/13/diversity-equity-and-inclusion-in-the-2024-proxy-season-a-new-era-of-scrutiny/> [<https://perma.cc/3QTP-HHWG>].

³¹ Nancy Leong, *Diversity Messaging After Affirmative Action*, 109 MINN. L. REV. 1059, 1059 (2025).

³² *Id.* at 1070.

³³ *Id.* at 1071.

B. *Subsequent Rise (and Fall) of DEI*

The past decade is marked by a pronounced surge in corporate Diversity, Equity and Inclusion (DEI) initiatives. Corporate DEI initiatives have been driven by a convergence of stakeholder pressure, reputational risk, regulatory nudges, and investor activism.³⁴ Following the murder of George Floyd in 2020 and the ensuing social movements and protests, many companies issued public diversity commitments, adopted Environmental, Social, and Governance (ESG) frameworks inclusive of increased racial equity, and pledged to have greater diversity for both their boards and executives.³⁵

These commitments following Floyd's murder were not simply performative. For example, the CEO of premier investment bank Goldman Sachs, David Solomon, stated that the firm would no longer help any company go public if the company did not have at least one member of the board of directors representing some form of diversity.³⁶ Another concrete example to the focused response is the widespread increase in the appointments specifically of Black directors to corporate boards. Research showed that between 2019 and 2020, appointments of Black directors surged by as much as 185%.³⁷

As described in greater detail in Section IV below, California enacted several diversity mandates for publicly traded companies headquartered in that state.³⁸ NASDAQ also adopted a new rule which required companies listed on that exchange to disclose board diversity statistics and either meet minimum diversity targets for their boards or explain their failure to comply

³⁴ See, e.g., Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361, 363–64 (2024); and Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's \$50 Billion Promise*, WASH. POST (Aug. 24, 2021, 19:03 ET), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/7LRR-4K85>].

³⁵ Fletcher & Lovelace, *supra* note 34; Jan, McGregor & Hoyer, *supra* note 34.

³⁶ Hugh Son, *Goldman CEO Says Firm Won't Take Companies Public that don't Have at Least One Diverse Board Member*, CNBC (Jan. 23, 2020), <https://www.cnbc.com/2020/01/23/goldman-wont-take-companies-public-that-dont-have-at-least-one-diverse-board-candidate-ceo-says.html> [<https://perma.cc/SLB5-6T3N>].

³⁷ Vicki L. Bogan, Ekaterina Potemkina & Scott E. Yonker, *What Drives Racial Diversity on U.S. Corporate Boards? Mandates or Movements* 5 (Oct. 29, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3952897 [<https://perma.cc/6WMW-PU8V>] (unpublished manuscript).

³⁸ A.B. 979, 2019–20 Leg., Reg. Sess. (Cal. 2020) (codified at Cal. Corp. Code §§ 301.3, 301.4, 2115.6).

with the rule.³⁹ These efforts reflect a broader trend of embedding social equity considerations into corporate governance frameworks.

However, the legal and political backlash to these mandated measures was both quick and decisive. The California courts struck down the corporate board diversity mandates as unconstitutional under the state's equal protection clause.⁴⁰ NASDAQ's corporate diversity mandate was also challenged and eliminated.⁴¹

Both legal developments and its costs have catalyzed a broader retreat from DEI across corporate America. In the corporate world, one report estimated that companies spent \$9.3 billion on DEI in 2022.⁴²

In 2024 and 2025, several well-known companies—including McDonald's, Target, and Comcast—faced shareholder or employee litigation alleging that DEI policies constituted unlawful reverse discrimination.⁴³ DEI specialists have seen their ranks shrink or rebranded, with high-profile departures and budget cuts across the tech, finance, and media sectors.⁴⁴ The political prominence of “anti-woke” capitalism, amplified by the current political environment, has made DEI a regulatory

³⁹ Order Approving Proposed Rule Changes, as modified by Amendments No.1, To Adopt Listing Rules Related to Board Diversity and To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44,424, 44.426 (Aug. 12, 2021).

⁴⁰ See *Crest v. Padilla*, No. 20ST-CV-37513, 2022 WL 1073294 (Cal. Super. Ct. Apr. 1, 2022) (relating to Cal. Corp. Code § 301.4); *Crest v. Padilla II*, No. 19ST-CV-27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022) (relating to Cal. Corp. Code § 301.3).

⁴¹ *Alliance for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 164 (5th Cir. 2022).

⁴² Glob. Indus. Analysts, Inc., *As Diversity, Equity & Inclusion Hits \$9.3 Billion in Global Spending, Watch Out for These Key Trends in 2022*, PR NEWSWIRE (Feb. 23, 2022), <https://www.prnewswire.com/news-releases/as-diversity-equity--inclusion-hits-9-3-billion-in-global-spending-watch-out-for-these-key-trends-in-2022--301487159.html> [<https://perma.cc/793G-BTZE>].

⁴³ See Lexi Lonas Cochran, *McDonald's Sued for Latino Scholarships After Ditching Some DEI Practices*, HILL (Jan. 13, 2025), <https://thehill.com/homenews/education/5083087-mcdonalds-latino-scholarships-dei-lawsuit-diversity-trump/> [<https://perma.cc/8MNP-5B5Z>]; Nathaniel Meyersohn, *Target is Getting Hit From All Sides on DEI*, CNN (Feb. 21, 2025), https://www.cnn.com/2025/02/21/business/target-dei-lawsuit?cid=ios_app [<https://perma.cc/QV9C-SZCQ>]; Lillian Rizzo, *Comcast and NBCUniversal Receive FCC Inquiry on DEI Initiatives*, CNBC (Feb. 12, 2025), <https://www.cnbc.com/2025/02/12/comcast-nbcuniversal-fcc-inquiry-dei.html> [<https://perma.cc/5PK5-55CC>].

⁴⁴ See Cara Michelle Smith, *Can Trump Actually Ban DEI? The Confusion is the Point*, SALON (Feb. 25, 2025, at 05:30 ET), <https://www.salon.com/2025/02/25/can-actually-ban-dei-the-confusion-is-the-point/> [<https://perma.cc/62HG-3RUX>]; Jennifer Elias & Annie Palmer, *In Trump Era, Companies are Rebranding DEI Efforts, Not Giving Up*, CNBC (Mar. 30, 2025, at 08:00 ET), <https://www.cnbc.com/2025/03/30/in-trump-era-companies-are-rebranding-dei-efforts-not-giving-up.html> [<https://perma.cc/U3L2-WCSN>].

and reputational flashpoint.⁴⁵ In this environment, many companies have quietly deprioritized DEI programming or shifted to race-neutral “inclusive excellence” models to mitigate legal exposure.⁴⁶

Post-*SFFA*, corporations must ensure their DEI strategies are legally resilient by being grounded in race-neutral policies, and having documented business justifications, and robust compliance protocols.⁴⁷ Overt quotas and affirmative action-style goals are increasingly vulnerable.⁴⁸ The future of corporate DEI (whether labeled as DEI or rebranded) will likely depend on whether diversity can be integrated into fiduciary, strategic, and risk-management frameworks that withstand constitutional scrutiny.

II. THE ROLE OF BOARDS AND THE BENEFITS OF CORPORATE BOARD DIVERSITY

A. *The Role of Boards*

Before discussing the benefits of corporate board diversity, the role and importance of the board of directors must be revisited to understand why this all matters. Most American companies are incorporated in Delaware,⁴⁹ and the Delaware General Corporation Law states that “[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.”⁵⁰ Plainly speaking, members of a corporate board play an integral role in the control and management of any corporation. This is true outside of Delaware as well.

The board members of a public company are chosen by the company’s shareholders.⁵¹ Directors are legally required to not only protect the interests of the shareholders of the company but must also place shareholder interests

⁴⁵ See Elias & Palmer, *supra* note 44; Ginger Christ, *1 in 5 Companies Say They’ve Slashed DEI Since Trump’s Election*, HRDIVE (July 28, 2025), <https://www.hrdiver.com/news/1-in-5-companies-slashed-dei-since-trump-election/754146/> [https://perma.cc/9NF9-LEUH].

⁴⁶ Martin Lipton, John F. Savarese, Adam J. Shapiro, Erica E. Bonnett, Noah B. Yavitz & Carmen X. W. Lu, *Wachtell Lipton Discusses Corporate DEI Initiatives After Harvard Affirmative Action Case*, CLS BLUE SKY BLOG (Aug. 9, 2023) <https://clsbluesky.law.columbia.edu/2023/08/09/wachtell-lipton-discusses-corporate-dei-initiatives-after-harvard-affirmative-action-case/> [https://perma.cc/62L9-URFK].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS: 2023 ANNUAL REPORT A MESSAGE FROM THE SECRETARY OF STATE JEFFREY W. BULLOCK (2023), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2023-Annual-Report.pdf> [https://perma.cc/FUV5-E9DQ].

⁵⁰ DEL. CODE ANN. tit. 8, § 141(a).

⁵¹ *Get on Board: Understanding the Role of Corporate Directors*, FINRA (Feb. 6, 2023), <https://www.finra.org/investors/insights/get-board-understanding-role-corporate-directors> [https://perma.cc/848C-YG9H].

above any interests of their own.⁵² The board's main function is to provide oversight of the company's activities.⁵³ Shareholders vote once a year on at least some, if not all, the members of the board.⁵⁴

Serving on a corporate board can be extremely financially rewarding.⁵⁵ In 2023, the average director of a public company in the U.S. was paid \$325,000 annually, with many large companies paying well in excess of that amount.⁵⁶ The financial attractiveness may factor into why board members have been dominated by members of the proverbial "old boys club," who tend to keep the riches between themselves and in their known networks.

In addition, the structure of how new members are proposed to join the board has a similar "insider" feel. Typically, a board's Nominating Committee, composed of the company's board members, nominates the slate of directors.⁵⁷ It is a vicious circle as board members usually nominate themselves (or their friends).⁵⁸ A study from several years ago illustrates this structural problem. Even though 94% of surveyed companies stated they were looking for diverse board members to nominate, 77% of identified board candidates came from referrals from current board members.⁵⁹ Other research shows that those who attend elite graduate schools are 9 times more likely to be on corporate boards.⁶⁰ It is truly a vicious and usually non-diverse circle.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; see also Will Kenton, *Staggered Board: What it is, How it Works, Pros and Cons*, INVESTOPEDIA (July 31, 2021), <https://www.investopedia.com/terms/s/staggered-board.asp> [<https://perma.cc/JAS8-2YS2>] (providing information on why only some of the directors might be up for election in any given year).

⁵⁵ *Are U.S. Directors Being Paid Too Much?*, BOARDROOM PULSE, <https://boardroompulse.com/are-u-s-directors-being-paid-too-much/> [<https://perma.cc/ZR9N-X6EF>] (last visited Sep. 29, 2025).

⁵⁶ *See id.*

⁵⁷ *See* DEL. CODE. ANN. tit. 8, § 141(c); Model Bus. Corp. Act. § 8.25; NYSE Listed Co. Manual § 303A.04 (Nov. 25, 2009), <https://nyse.wolterskluwer.cloud/listed-company-manual/09013e2c85c00748> [<https://perma.cc/46UB-99GD>]; Nasdaq Stock Mkt. LLC, Nasdaq Rule 5605(e) – *Board Diversity Disclosure* (2025), <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series> [<https://perma.cc/UM8W-376D>].

⁵⁸ *See* James D. Westphal & Edward J. Zajac, *Defections from the Inner Circle: Social Exchange, Reciprocity, and the Diffusion of Board Independence in U.S. Corporations*, 42 ADMIN. SCI. Q. 161, 162 (1997).

⁵⁹ DELOITTE, BOARD PRACTICES REPORT (2018).

⁶⁰ Raj Chetty, David J. Deming & John N. Friedman, *Diversifying Society's Leaders? The Determinants and Causal Effects of Admission to Highly Selective Colleges* 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31492, 2025).

Corporate boards were formerly comprised of mostly corporate officers and insiders.⁶¹ The enactment of Sarbanes-Oxley in 2002 mandated that companies include outside directors, unaffiliated with the company, on the company's audit committee.⁶² Even before the passage of the Sarbanes Oxley Act, the NYSE mandated that companies listed on the NYSE have a majority of independent directors as well.⁶³

B. *The Benefits of Corporate Board Diversity*

The case has been made, numerous times, for corporate board diversity.⁶⁴ Legal and financial literature is filled with those making the case for diversity of corporate boards. Diversity on boards has been associated with greater governance outcomes, better risk oversight, and even higher long-term firm performance.⁶⁵ When boards are diverse, board discussions are enriched, oversight is sharper, and strategic decision-making is improved.⁶⁶ In corporate law, these benefits align with the fiduciary obligations of the board of directors that are classified under the duty of care, which requires directors to make informed, deliberative decisions on behalf of the company.⁶⁷

⁶¹ See, e.g., Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468–78 (2007) (describing mid-20th-century boards as insider-dominated and tracing the shift to majority-independent boards); MYLES L. MACE, *DIRECTORS: MYTH AND REALITY* 3–5, 25–30 (1971) (classic field study reporting boards largely composed of corporate officers and other insiders).

⁶² See Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m).

⁶³ See NYSE Listed Co. Manual § 303A.01.

⁶⁴ See Michal Barzuza & Gideon Parchomovsky, *Economic Analysis of Board Diversity*, 49 J. CORP. L. 1043 (2024).

⁶⁵ See Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 831–32 (2005).

⁶⁶ See, e.g., *Guidance on Board Effectiveness*, FIN. REPORTING COUNCIL 4, (July 2018), <https://www.nedaglobal.com/assets/files/2018-Guidance-on-Board-Effectiveness-FINAL.PDF> [<https://perma.cc/YM4D-YSAU>] (noting that diversity of skills and backgrounds improves board effectiveness and “break[s] down a tendency towards ‘group think’” and that diversity can reduce groupthink and enhance decision-making); Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291 (2009) (finding gender-diverse boards devote more effort to monitoring and have better attendance); David A. Carter, Betty J. Simkins & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, (Mar. 2002), <https://ssrn.com/abstract=304499> or <http://dx.doi.org/10.2139/ssrn.304499> [<https://perma.cc/2UQQ-8Z54>] (Working Paper) (documenting a positive relation between board diversity and firm value).

⁶⁷ See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66–67 (Del. 2006) (describing the duty of care in board decisions).

McKinsey published an extensive report on diversity in 2020, showing that companies with greater gender diversity on their boards were 25% more likely to have higher profits.⁶⁸ Credit Suisse published a series of reports over the years on gender diversity issues, which included findings that showed a “diversity premium,” where companies with at least one woman on their board outperformed all-male boards in share price performance since 2010.⁶⁹ The 2021 Credit Suisse report stated, “While at pains not to claim a causal relationship, our prior research has highlighted how the business model of companies with more gender diverse leadership has displayed higher returns on capital, higher margins and lower volatility through the cycle.”⁷⁰ The report states that both company valuation and the stock price of diverse companies displays a premium. This “diversity premium” is still apparent in 2021 according to Credit Suisse’s research.⁷¹ These findings suggest that board diversity is not just about equality or appearances but also enhances corporate performance and resilience.

There are opposing arguments on the benefits of corporate board diversity. In 2021, Professor Jesse Fried, a Harvard Law professor and corporate governance expert, commented on the diversity mandate instituted by NASDAQ (and detailed below). His focus was to draw attention to the potential harms to shareholders.⁷² Professor Fried claims, “[E]ven if diverse boards cause better corporate governance outcomes, these effects matter to investors if, and only if, they translate into better bottom-line results: higher stock prices.”⁷³ Fried cites studies that show that mandating diversity can negatively impact stock prices and thus hurt investors.⁷⁴

However, Professor Richard Painter, another corporate law professor and corporate governance expert, responded to Fried’s warnings with his own article that concluded “[b]oard diversity is good for shareholders as well as for the economy and society as a whole.”⁷⁵ Professor Painter did not discuss the constitutionality of the NASDAQ diversity mandate, but rather focused only on Professor Fried’s belief that stock price will be negatively

⁶⁸ MCKINSEY & CO., *DIVERSITY WINS: HOW INCLUSION MATTERS* 14 (2020).

⁶⁹ CREDIT SUISSE RESEARCH INSTITUTE, *THE CS GENDER 3000 IN 2021: BROADENING THE DIVERSITY DISCUSSION* (2021).

⁷⁰ *Id.* at 21.

⁷¹ *Id.*

⁷² Jesse M. Fried., *Will Nasdaq’s Diversity Rules Harm Investors?* (Eur. Corp. Governance Inst., Working Paper 597, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642# [<https://perma.cc/DCF9-LT7J>].

⁷³ *Id.* at 4.

⁷⁴ *Id.*

⁷⁵ Richard W. Painter, *Board Diversity: A Response to Professor Fried*, 27 STAN. J.L. BUS. & FIN. 173, 177 (2022).

affected by the NASDAQ rule.⁷⁶ He found no empirical evidence supporting Fried's claims.⁷⁷ Instead, he believed that Fried's arguments against corporate diversity because of their negative impact on stock prices was based on perceived outcomes on inconclusive studies.⁷⁸ For example, the time lag between the initial announcement of either voluntary or mandatory board diversity for a specific company and the time it takes to have those diverse candidates actually on the board can be extensive.⁷⁹ Other factors can influence the company's stock price during all that time. In addition, a company that voluntarily elects a more diverse board may differ from other companies in ways that may influence the company's stock price. Painter claims that the focus on changes in the stock price as an indicator of firm value is premised on two questionable assumptions: the efficient capital markets hypothesis (ECMH) and the shareholder primacy norm, both of which are beyond the scope of this article but do help to provide meaningful explanations as to why Fried's arguments may not be wholly accurate.⁸⁰

In a recent article on "What Directors are Thinking," Lawrence Cunningham, Director of the John L. Weinberg Center for Corporate Governance, provides some background on what types of diversity is needed on corporate boards right now.⁸¹ Professor Cunningham states that "the most relevant forms of diversity, then, are role and perspective diversity."⁸² Role diversity refers to members of the board who represent different business functions, including accounting, marketing, operations, etc.⁸³ Perspective diversity refers to board members having differing experiences in perhaps related sectors or industries to the company.⁸⁴

Professor Cunningham also discusses what he calls demographic diversity, referring to "gender, race, and ethnicity."⁸⁵ He notes the progress made in the past decade.⁸⁶ However, he also says that "intense and at times disproportionate emphasis on demographic criteria has produced backlash and fatigue."⁸⁷ Professor Cunningham discusses that a more balanced

⁷⁶ *Id.* at 176.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 177, 209.

⁸⁰ *Id.* at 204–206.

⁸¹ Lawrence Cunningham, *What Directors are Thinking*, DIRS. AND BDS (June 11, 2025), <https://www.directorsandboards.com/board-composition/board-diversity/what-directors-are-thinking-lawrence-a-cunningham/> [<https://perma.cc/K3M4-KMZJ>].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

approach is required so that demographic diversity is not an end to itself to enrich perspective.⁸⁸ As he writes, “A board's effectiveness lies not in a checklist of traits, but in its collective ability to function.”⁸⁹

III. STATE MANDATED CORPORATE BOARD DIVERSITY AND NASDAQ DIVERSITY DISCLOSURE RULES

In the United States, there have been several concrete actions designed to improve corporate board diversity. These actions can be divided into three different categories: (1) state legislation requiring disclosure of the composition of the boards for companies headquartered in that state; (2) state legislation mandating diversity on boards of companies headquartered in that state; and (3) NASDAQ rules mandating diversity for companies listed on that exchange. These actions are described in greater detail below.

To contrast the actions taken in the United States, it may be useful to compare action taken in the European Union (EU). The EU has moved much faster than the U.S. in improving gender diversity for corporate boards in their countries.⁹⁰ By 2026, EU companies will need to have at least 40% female non-executive directors or 33% for all directors.⁹¹ The EU has not, however, mandated specific racial, ethnic, or sexual orientation representation.⁹²

A. California Mandates

In 2018, California passed legislation (SB 826) which mandated gender diversity on the boards of publicly held corporations headquartered in California.⁹³ This law required companies to have at least one female director by the end of 2019.⁹⁴ By 2021, every California company was required to have either at least two women on boards of companies with five directors, or at least three women on boards with six or more directors.⁹⁵ Financial penalties applied to California corporations that failed to meet these thresholds. The first violation resulted in a \$100,000 fine, and subsequent

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Tamara Lytle, *Board Diversity: Pressure Leads to Action*, HARV. BUS. SCH. (Sep. 3, 2024), <https://www.hbs.edu/race-gender-equity/blog/post/pressure-for-diversity-on-corporate-boards-prompts-discussion-mandates-and-change> [<https://perma.cc/EQ8H-3YSQ>].

⁹¹ *Id.*

⁹² *Id.*

⁹³ S.B. 826 2017-18 Leg., Reg. Sess. § 2(a) (Cal. 2018) (codified at Cal. Corp. Code § 301.3).

⁹⁴ *Id.*

⁹⁵ *Id.* § 2(b).

violations resulted in \$300,000 fines.⁹⁶ Each director seat required to be filled by a female director, which was not filled by a female director, counted as a single violation.⁹⁷ The California Secretary of State was required to publish reports on the status of compliance with the requirements of SB 826.⁹⁸

Professor Jesse Fried found that the penalties for non-compliance were modest and, in most cases, much less than it would have cost the company to add an additional director to their board.⁹⁹ Fried also calculated that the announcement of the California gender mandate decreased the stock prices of those affected California companies by a market-adjusted 2.6%.¹⁰⁰ This was a loss to shareholders of over \$300 million.¹⁰¹

In *Crest v. Padilla II*, the plaintiffs challenged SB 826 on the basis that it violates Article I, Section 7, the Equal Protection clause, of the California Constitution.¹⁰² The plaintiffs sought a judgment declaring the spending of taxpayer funds to enforce SB 826 as illegal and to enjoin the California secretary of state from spending taxpayer funds for the purposes set forth in SB 826.¹⁰³

Under California law, classifications based on gender are considered “suspect” classifications.¹⁰⁴ Therefore, the court applied the strict scrutiny equal protection analysis.¹⁰⁵ The *Crest* court found that the plaintiffs carried their initial burden to show that men and women are similarly situated for the purposes of SB 826’s gender-based quota.¹⁰⁶ Thus, the burden shifted to California to demonstrate that SB 826 satisfied strict scrutiny. To satisfy strict scrutiny, the state was required to show both (1) a compelling state interest and (2) that the law was necessary.¹⁰⁷

In *Crest v. Padilla II*, the court found that the general goal of gender parity on corporate boards is not a compelling state interest.¹⁰⁸ In fact, the court stated that “there is no compelling governmental interest in remedying

⁹⁶ *Id.* § 2(e)(1).

⁹⁷ *Id.* § 2(e)(2).

⁹⁸ *Id.* § 2(c)(d).

⁹⁹ Fried, *supra* note 72, at 6.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Crest v. Padilla II*, No. 19ST-CV-27561, 2022 WL 1565613, at *1 (Cal. Super. Ct. May 13, 2022).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *3.

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *Id.* at *4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

societal discrimination.”¹⁰⁹ The court also found that gender-based classification is not necessary to achieve state interests.¹¹⁰ According to the court, SB 826’s use of gender-based classification is not necessary to boost California’s economy, improve opportunities for women in the workplace, or protect California taxpayers, public employees, pensions, and retirees.¹¹¹ Finally, the court found that SB 826 is not narrowly tailored to serve that compelling state interest.¹¹² The court held that the state presented no evidence that the legislature considered gender-neutral alternatives to achieve the state’s goals, including amending existing anti-discrimination laws or enacting new anti-discrimination laws focusing on the board selection process.¹¹³ Further, the state did not prove that the gender-based classification was limited in scope and duration, or that it was actually remedial.¹¹⁴ Therefore, the court enjoined implementation of SB 826 and its enforcement.¹¹⁵

On September 30, 2020, California passed AB 979, adding California Corporations Code Sections 301.4 and 2115.6.¹¹⁶ This bill required all California-headquartered publicly traded companies to appoint a minimum number of individuals from underrepresented groups onto their boards.¹¹⁷ The legislation defined underrepresented groups to include individuals from “Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native . . . gay, lesbian, bisexual or transgender” communities.¹¹⁸

Depending on the size of the company, the new legislation mandated between one to three new board members from these underrepresented groups.¹¹⁹ According to the law, at least one director from an underrepresented community had to be appointed by the end of 2021, and either two or three diverse directors, depending on board size, by the end of

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *5.

¹¹¹ *Id.*

¹¹² *Id.* at *12.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ A.B. 979, 2019–20 Leg., Reg. Sess. (Cal. 2020) (codified at Cal. Corp. Code §§ 301.4, 2115.6).

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 3(e)(1) (codified at Cal. Corp. Code § 301.4(e)(1)).

¹¹⁹ Cal. Corp. Code § 301.4(b).

2022.¹²⁰ Noncompliance resulted in a \$100,000 fine for an initial violation and a \$300,000 fine for subsequent violations.¹²¹

In *Crest v. Padilla I*, a California superior court ruled the law unconstitutional in 2022, finding that it violated the state constitution's Equal Protection clause.¹²²

The Alliance for Fair Board Recruitment, a Texas non-profit with members “who are seeking employment as corporate directors as well as shareholders of publicly traded companies headquartered in California,” also filed a lawsuit in the U.S. District Court for the Central District of California.¹²³ They challenged the California mandated diversity legislation under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.¹²⁴ It should be noted that the Alliance for Fair Board Recruitment was founded by Edward Blum, the conservative activist behind the *SFFA* decision.¹²⁵ The Alliance for Fair Board Recruitment also contended that the California statute violated the prohibition in 42 U.S.C. § 1981 against discrimination on the basis of race in the making and enforcing of contracts by “hindering those who do not identify as members of California’s favored ‘underrepresented communiti[ies]’ from securing contracts for board of director positions at corporations headquartered in California.”¹²⁶ The federal court granted summary judgment, partly due to the state court rulings in the *Crest v. Padilla* cases, and also because California had stopped enforcing the diversity mandates.¹²⁷

Both California mandated diversity laws faced Equal Protection challenges under the California constitution, which arguably applies a stricter standard than the federal constitution in certain contexts.¹²⁸ The

¹²⁰ Cal. Corp. Code §§ 301.4(a), (b).

¹²¹ *Id.* at (d).

¹²² *Crest v. Padilla*, No. 20ST-CV-37513, 2022 WL 1073294, at *19 (Cal. Super. Ct. Apr. 1, 2022).

¹²³ Complaint at 5, *All. for Fair Bd. Recruitment v. Weber*, No. 21-CV-05644 (C.D. Cal. July 12, 2021).

¹²⁴ *Id.* at 14.

¹²⁵ Jody Godoy, *Activist Behind Harvard Race Case Takes Aim at Calif. Board Laws*, REUTERS (July 13, 2021, at 17:56 ET), <https://www.reuters.com/legal/legalindustry/activist-behind-harvard-race-case-takes-aim-calif-board-laws-2021-07-13/> [<https://perma.cc/S97G-PYEA>].

¹²⁶ Complaint, *supra* note 123, at 15–16.

¹²⁷ *All. for Fair Bd. Recruitment v. Weber*, No. 21-cv-01951, 2023 WL 3481146 (E.D. Cal. May 15, 2023).

¹²⁸ *See Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1 (Cal. 1971) (showing the California Supreme Court held sex is a suspect classification under the California constitution and triggers strict scrutiny (at a time when federal law did not)); *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 36–37 (Cal. Ct. App. 2001) (confirming that all racial classifications get strict

courts ruled that mandating specific demographic representation constitutes discrimination unless it passes strict scrutiny. While the state had argued these laws were justified to remedy historical discrimination and improve corporate governance, the courts found these justifications insufficient under the California Equal Protection clause.¹²⁹

These diversity mandates represent a bold, although constitutionally contested, effort to reshape corporate governance through demographic inclusion in California. By requiring publicly held corporations headquartered in California to include women and members of underrepresented communities on their boards, the state sought to remedy historic exclusion and improve governance outcomes through enhanced diversity.¹³⁰ Although these decisions may curtail state-level experimentation with diversity quotas, they have at a minimum, catalyzed a broader conversation about how corporate law should or could address structural inequities.

B. Other States

Beyond California, other states have passed less impactful legislation, which typically focuses on having companies in their state disclose their board composition, rather than mandating specific diversity quotas.¹³¹ At least 11 other states have enacted or considered diversity laws.¹³² But instead of focusing on mandating minimum numbers of female directors (like in California), these statutes focus on disclosure about the composition of boards of companies headquartered in their state.¹³³ For example, public companies headquartered in New York must disclose the number of female board members biennially.¹³⁴ Maryland and Illinois have also enacted disclosure requirements about board diversity for companies in their respective states.¹³⁵

scrutiny and, under the California constitution); *Crest v. Padilla I*, No. 20ST-CV-37513, 2022 WL 1073294 (Cal. Super. Ct. Apr. 1, 2022); *and Crest v. Padilla II*, No. 19ST-CV-27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022). These cases show that California's equal-protection analysis can be "stricter" than the federal baseline.

¹²⁹ See Cal. Corp. Code §§ 301.4, 2115.6.

¹³⁰ A.B. 979, 2019–20 Leg., Reg. Sess. § 1(q) (Cal. 2020).

¹³¹ See Lytle, *supra* note 90.

¹³² Michael Hatcher & Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/> [<https://perma.cc/H6GY-3TNH>].

¹³³ *Id.*

¹³⁴ See N.Y. Bus. Corp. Law § 408.

¹³⁵ Hatcher & Latham, *supra* note 132.

In Washington, however, public companies headquartered in that state must have at least 25 percent female representation on their boards, or similar to the “comply or explain” rule adopted by NASDAQ and described in more detail below, must disclose to shareholders why it does not comply with the 25% rule.¹³⁶ The remedy for noncompliance is limited: if the company fails to provide required disclosures, a shareholder may apply for a court order requiring the information.¹³⁷ Corporate actions are not invalidated and there is no fine or other penalty for noncompliance.¹³⁸ This limited remedy may account for why the law has not to date been challenged. These types of “comply or explain” type of regulations are a voluntary way to achieve accountability.¹³⁹

C. NASDAQ Mandates

The National Association of Securities Dealers Automated Quotations, commonly referred to as NASDAQ, is a global electronic marketplace.¹⁴⁰ NASDAQ adopted a “comply or explain” board diversity rule for those companies listed on their exchange.¹⁴¹ On August 6, 2021, the Securities and Exchange Commission (SEC) approved these rules for those companies listed on NASDAQ.¹⁴² These rules required companies listed on Nasdaq’s U.S. exchange to: (1) publicly disclose board-level diversity statistics annually using a standardized template; and (2) have in place at least two diverse directors (one woman and one underrepresented minority or LGBTQ+)—or publicly explain why they do not meet this minimum diversity requirement.¹⁴³ This was an attempt not to require specific quotas

¹³⁶ *Is Your Board Gender Diverse Yet? Washington Public Companies Reminded of Upcoming Board Diversity Requirement*, PERKINS COIE (Sep. 17, 2020), <https://perkinscoie.com/insights/update/your-board-gender-diverse-yet-washington-public-companies-reminded-upcoming-board#:~:text=Gender%20Diverse%20Yet?-,Washington%20Public%20Companies%20Reminded%20of%20Upcoming%20Board%20Diversity%20Requirement,be%20compliant%20sooner%20than%20that> [https://perma.cc/BH24-Y3KX].

¹³⁷ See Wash. Rev. Code § 23B.08.120(4) (2024).

¹³⁸ *Id.*

¹³⁹ See Andrew Keay, *Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight*, 34 LEGAL STUD. 279, 279 (2014).

¹⁴⁰ Adam Hayes, *Nasdaq Explained: History, Trading System, and Financial Insights*, INVESTOPEDIA (Aug. 8, 2025), <https://www.investopedia.com/terms/n/nasdaq.asp> [https://perma.cc/S5B9-9AY7].

¹⁴¹ Cydney Posner, *SEC Approves Nasdaq “Comply-or-Explain” Proposal for Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 26, 2021), <https://corpgov.law.harvard.edu/2021/08/26/sec-approves-nasdaq-comply-or-explain-proposal-for-board-diversity/#:~:text=Comply%20or%20explain,those%20terms%20are%20also%20defined> [https://perma.cc/Q67X-PX2X].

¹⁴² *Id.*

¹⁴³ *Id.*

for the boards of listed companies, but instead to move towards public disclosure and greater awareness.¹⁴⁴

NASDAQ's Rule 5605(f)(2) specified the diversity requirement for companies listed on NASDAQ.¹⁴⁵ Each listed company was required to have, or explain why it does not have, at least two members of its board of directors who are diverse, including: (1) at least one Diverse director who self-identifies as Female; and (2) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.¹⁴⁶ These terms were defined in the Rule as follows:

“Female” [was defined as] an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. “LGBTQ+” [was defined as] an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community. “Underrepresented Minority” [was defined as] an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.¹⁴⁷

According to the NASDAQ “comply or explain” rule, a company could clearly choose to not comply with the suggested diversity objectives and simply explain why the company does not comply.¹⁴⁸ Companies could (and did) choose to explain themselves either by communication through its annual proxy statement or even placing this explanation on the company's website.¹⁴⁹ NASDAQ stated that it would not attempt to assess this explanation from any companies that chose to explain rather than comply.¹⁵⁰ In fact, even the following statement would be sufficient: “The Company

¹⁴⁴ Felicia A. Henderson, Zoe Kinias, & Claudia Zeisberger, *How Nasdaq's Board Diversity Rule Creates Potential for Real Change*, INSEAD KNOWLEDGE (Dec. 22, 2021), <https://knowledge.insead.edu/leadership-organisations/how-nasdaqs-board-diversity-rule-creates-potential-real-change> [https://perma.cc/TF6H-ZQZK].

¹⁴⁵ Order Approving Proposed Rule Changes, as modified by Amendments No.1, To Adopt Listing Rules Related to Board Diversity and To Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44,424, 44.424 (Aug. 12, 2021).

¹⁴⁶ *Id.* at 44,424–25.

¹⁴⁷ *Id.* at 44,425.

¹⁴⁸ Posner, *supra* note 141.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

does not meet the diversity objectives of Rule 5605 (f)(2)(C) because it does not believe NASDAQ's listing rule is appropriate."¹⁵¹ Such an explanation as an "out" would potentially inspire explanations rather than the harder route of compliance. More stringent explanations should have been required.¹⁵²

On December 11, 2024, in a 9-8 narrow decision, the U.S. Court of Appeals for the Fifth Circuit vacated the SEC's approval of the NASDAQ "Comply or Explain" Diversity Rule.¹⁵³ The 5th Circuit found that the mandated diversity rules were inconsistent with the goals of the Securities Exchange Act of 1934 and that the SEC's approval was arbitrary and capricious under the Administrative Procedure Act (APA).¹⁵⁴ Moreover, the court emphasized that the diversity mandate did not fall within the SEC's core mandate of preventing fraud, protecting investors, and promoting fair markets.¹⁵⁵

As a result, NASDAQ companies are no longer required to comply with diversity mandates or explain why they do not meet these targets.¹⁵⁶ This decision came after the California mandated diversity court decisions. The Fifth Circuit's ruling marked the death knell of mandated corporate board diversity rules.

Nevertheless, the Fifth Circuit's opinion clearly left open the possibility that the states may enact future legislation in this area. The opinion stated, "Nothing prevents companies from voluntarily disclosing—or even advertising—their directors' social, demographic, political, or any other characteristics."¹⁵⁷ Moreover, investors remain interested in this area and disclosure of such board diversity may be pivotal to investors remaining with the company or their decision to invest in the first place.

D. NYSE Board Diversity Initiative

The competing New York Stock Exchange (NYSE) did not enact specific diversity mandates like the NASDAQ did. Instead, they developed several methods to help increase the representation of women and underrepresented minorities on the boards of NYSE publicly traded

¹⁵¹ *Id.*

¹⁵² Johnson A. Salisbury Jr., *To Have or Have Not: The Limits of Comply-or-Explain Governance in an American Exchange*, 72 EMORY L. J. 1485, 1519–20 (2023).

¹⁵³ *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2024).

¹⁵⁴ *Id.* at 184–85.

¹⁵⁵ *Id.* at 168.

¹⁵⁶ *Id.* at 185.

¹⁵⁷ *Id.* at 176 n.4.

companies.¹⁵⁸ The NYSE organized a Board Advisory Council (now called the CEO Council), which is made up of Chief Executive Officers of NYSE-listed companies from both genders.¹⁵⁹ These CEOs help to identify and recommend candidates to serve on boards.¹⁶⁰

In addition, the NYSE provides curated board searches.¹⁶¹ This is a free service for any NYSE listed company that would like to refresh its board with new, curated candidates.¹⁶² NYSE maintains a list of “1100+ CEO-vetted board-ready candidates” that any NYSE-listed company can request.¹⁶³ Thus far, this service has led to over 50 different board placements.¹⁶⁴

Although these efforts are laudable and clearly meant to help NYSE-listed companies find qualified board candidates, there is no required focus on any elements of diversity for prospective candidates.¹⁶⁵ Moreover, the system remains in a vicious cycle; nominating committees on company boards recommend new board members, who are individuals that tend to be from similar social circles or schools.¹⁶⁶ In fact, social connections to the CEO remain a critical factor in increasing the likelihood for one to be nominated.¹⁶⁷ This continues the perpetual circle of “who you know” and is a contributing factor to a lack of diversity on corporate boards.

E. Shareholder Proposals Focused on Diversity Issues

A shareholder proposal is defined as a formal suggestion that is made by a shareholder or a group of shareholders which tries to change company

¹⁵⁸ *Never Out of Style: Governance Takes Center Stage in the Evolving Landscape of ESG Priorities*, INTELLIGIZE, <https://www.intelligize.com/solution/strategy/executive-board-composition/#:~:text=The%20New%20York%20Stock%20Exchange,a%20plan%20for%20increasing%20diversity> [https://perma.cc/V35K-D9Y4] (last visited Sep. 29, 2025).

¹⁵⁹ *NYSE Board Services*, NYSE, <https://www.nyse.com/board-services> [https://perma.cc/NN2U-DGEK] (last visited Sep. 29, 2025).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See, e.g.*, James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 61 (1995); Marie Lalanne, *Network-based appointments and board diversity*, 90 ECONOMICA 409, 409 (2023); Francis Kramarz & David Thesmar, *Social Networks in the Boardroom*, 11 J. EUR. ECON. ASS'N 780, 782 (2013); Gerald F. Davis, Mina Yoo & Wayne E. Baker, *The Small World of the American Corporate Elite, 1982–2001*, 1 STRATEGIC ORG. 301, 303, 307 (2003).

¹⁶⁷ Westphal & Zajac, *supra* note 166; Lalanne, *supra* note 166; Kramarz & Thesmar, *supra* note 166; Davis, Yoo & Baker, *supra* note 166.

policies or procedures.¹⁶⁸ Shareholders must meet certain minimum holding requirements to submit such a proposal:¹⁶⁹ (1) at least \$2,000 in market value of the company's securities entitled to vote on the proposal for at least three years; or (2) at least \$15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or (3) at least \$25,000 in market value of the company's securities entitled to vote on the proposal for at least one year.¹⁷⁰

This helps to restrict such proposals to those who have a vested interest. Shareholder proposals cannot bind the company to take certain action; they are seen more as a referendum for the company to consider taking action should enough shareholders vote in favor of the proposal.¹⁷¹ Common topics include voting rights, executive and management compensation, and social issues.¹⁷²

Recent reporting shows that despite the retreat from DEI, shareholders of many well-known and large companies have defeated recent anti-DEI shareholder proposals.¹⁷³ Despite many of these same companies removing or rebranding their DEI programs (see Part II B of this article), the same companies are recommending that their shareholders vote down anti-DEI shareholder proposals.¹⁷⁴

For example, investment bank Goldman Sachs removed references to DEI in its most recent annual report, but the firm recommended that

¹⁶⁸ See 17 C.F.R. § 240.14a-8 (2025).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Cam Hoang, Gary Tygesson, & Violet Richardson, *Shareholder Proposals: Strategies and Tactics*, DORSEY & WHITNEY LLP,

<https://www.dorsey.com/newsresources/events/videos/2016/10/~media/0ee87bda7cc84b59824d6c786cf39b5.ashx> [<https://perma.cc/3XP2-ANHX>] (last visited Sep. 29, 2025).

¹⁷² See, e.g., Matteo Tonello, *2025 Proxy Season Review: From Escalation to Recalibration*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 15, 2025),

<https://corpgov.law.harvard.edu/2025/09/15/2025-proxy-season-review-from-escalation-to-recalibration/> [<https://perma.cc/524P-N9WY>] (reporting common governance topics such as special-meeting rights and supermajority-vote elimination); *2025 Proxy Season in Review*, DEBEVOISE & PLIMPTON (Aug. 14, 2025),

<https://www.debevoise.com/insights/publications/2025/08/2025-proxy-season-in-review> [<https://perma.cc/W436-XDNF>] (tracking proposal volume on social issues and executive compensation).

¹⁷³ See Maria Gracia Santillana Linares, *Even as Many Companies Retreat From Diversity Efforts, They Quash Anti-DEI Shareholder Resolutions*, FORBES (May 8, 2025 at 10:27 ET), <https://www.forbes.com/sites/mariagraciasantillanalinares/2025/05/08/even-as-many-companies-retreat-from-diversity-efforts-they-quash-anti-dei-shareholder-resolutions/> [<https://perma.cc/Z6CF-JYEP>] (reporting on rising anti-DEI proposals amidst retreats in corporate diversity).

¹⁷⁴ *Id.*

shareholders vote against two separate shareholder anti-DEI proposals.¹⁷⁵ Shareholders overwhelmingly rejected the anti-DEI proposals with 98% of the vote against a total retreat away from DEI and diversity.¹⁷⁶ Similar votes have occurred at other companies such as Coca-Cola, Pfizer, and Pepsi, just to name a few.¹⁷⁷ Prior to 2025, most of the shareholder proposals which involved diversity issues were pro-diversity (and also typically rejected by shareholders).¹⁷⁸ Clearly, shareholder proposals represent a litmus-like test to understand the appetite for either focused pro-DEI measures or, as more recently shown, anti-DEI measures.

IV. ROLE OF INSTITUTIONAL INVESTORS FOR BOARD DIVERSITY AND WITH DEI

Both institutional investors as well as proxy advisory firms have taken an active role in encouraging board diversity. BlackRock, State Street, and Vanguard, the three largest fund managers (colloquially known as the “Big Three”), all enacted various policies that focus on diversity.¹⁷⁹ Through such policies, the fund managers use their power as significant shareholders to withhold their votes in electing directors, especially directors who served on a nominating committee.¹⁸⁰ Estimates show that the Big Three control about 25% of the votes of most S&P 500 companies.¹⁸¹ This demonstrates exactly how much they could exercise their shareholding power and impact shareholder voting.

Proxy voting is the process by which shareholders vote on important issues, including on the slate of the company’s board of directors.¹⁸² Nominating committees are responsible for the composition of the company’s board as they provide management’s slate of candidates to serve as directors. Studies have shown that directors who are on the company’s nominating committee are therefore held responsible if there is a lack of diversity on the board.¹⁸³ The Big Three would ask the companies in which they had invested to explain why the company lacked corporate board

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Lytle, *supra* note 90.

¹⁸⁰ *Id.*

¹⁸¹ Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why it Matters*, 102 B.U. L. REV. 1547, 1599 (2022).

¹⁸² See Will Kenton, *What is a Proxy Vote, and How Does it Work? With Examples*, INVESTOPEDIA (Aug. 16, 2025), <https://www.investopedia.com/terms/p/proxy-vote.asp> [<https://perma.cc/HEF5-5AE7>].

¹⁸³ Reena Aggarwal, Sandeep Dahiya & Umit Yilmaz, *Why do Investors Vote Against Corporate Directors?* 2 (Eur. Corp. Governance Inst., Working Paper 924, 2023).

diversity, if the investee company's board lacked diversity.¹⁸⁴ These funds would then typically threaten to vote against the incumbent directors if a company did not become more diverse.¹⁸⁵

The largest proxy advisory firms, Institutional Shareholder Services (ISS) and Glass Lewis, also recommended that shareholders vote against nominating committee chairs if the companies' boards were not sufficiently gender diverse.¹⁸⁶ However, on February 11, 2025, ISS announced that the firm would “indefinitely halt consideration of certain diversity factors in making vote recommendations with respect to directors at U.S. companies,” and will “no longer consider the gender and racial and/or ethnic diversity of a company's board when making vote recommendations with respect to the election or re-election of directors at U.S. companies.”¹⁸⁷

Despite this initial focus on improving board diversity, the Big Three fund management companies revised their policies in 2025, based on the wider nationwide movement away from DEI and a dwindling focus on requiring diversity.¹⁸⁸ The following provides a more detailed description of the diversity policies of the Big Three, including the legal challenges they have faced.

A. BlackRock

BlackRock is the world's largest asset manager and was at the forefront of pushing for greater diversity on corporate boards before the *SFFA* decision.¹⁸⁹ The company has undergone a noticeable shift in its approach to

¹⁸⁴ David H. Webber, Michal Barzuza & Quinn Curtis, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Cal. L. Rev. 1243, 1267 (2020).

¹⁸⁵ *See id.*

¹⁸⁶ Lytle, *supra* note 90.

¹⁸⁷ *Statement Regarding Consideration of Diversity Factors in U.S. Director Election Assessments*, ISS INSIGHTS (Feb. 11, 2025), <https://insights.issgovernance.com/posts/statement-regarding-consideration-of-diversity-factors-in-u-s-director-election-assessments/> [<https://perma.cc/NK38-YUM9>].

¹⁸⁸ *See, e.g.*, Eric Juergens, William D. Regner & Amy Pereira, *Proxy Advisors and Institutional Shareholders Revise Voting Guidelines on Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2025), <https://corpgov.law.harvard.edu/2025/03/11/proxy-advisors-and-institutional-shareholders-revise-voting-guidelines-on-board-diversity/> [<https://perma.cc/B5HR-L9F2>] (surveying 2025 changes by BlackRock, Vanguard, and SSGA).

¹⁸⁹ *See, e.g.*, Davide Barbuscia, *BlackRock Assets Hit Record \$11.6 Trillion in Fourth Quarter*, REUTERS (Jan. 15, 2025), <https://www.reuters.com/business/finance/blackrock-assets-hit-record-116-trillion-fourth-quarter-2024-2025-01-15/> [<https://perma.cc/3ZU6-G5MV>] (describing BlackRock as the world's largest money manager); *BlackRock's 2022 Voting Guidelines: Board Diversity, Climate Change, and E&S Disclosures*, PERKINS COIE

DEI issues. Whereas BlackRock initially had a strong public commitment to DEI following the Black Lives Matter and racial justice movements in 2020 and beyond, the company has more recently adopted a more cautious and measured policy framework.¹⁹⁰

Following the murder of George Floyd and the ensuing public reckoning with systemic racism, BlackRock took a highly visible stance on diversity.¹⁹¹ The company announced several aspirational goals, including increasing both Black and Latinx representation in its own U.S. workforce by 30% and doubling the number of Black and Latinx senior leaders by 2024.¹⁹² Furthermore, BlackRock began to require hiring managers to interview diverse candidates for open jobs and incorporate DEI metrics into management evaluations.¹⁹³ These efforts were internal but set the stage for how they would view the companies they invested in by “putting their money where their mouth was” through these concrete internal actions.

BlackRock’s proxy voting guidelines reflected their desired emphasis on improving diversity. Until 2023, BlackRock had the expectation that the boards of companies it invested in would have a minimum of 30% diversity, defined by at least two women and one underrepresented racial or ethnic minority serving on the investee company’s board.¹⁹⁴ Companies that failed to meet these BlackRock aspirational benchmarks without an adequate

(Dec. 15, 2021), <https://perkinscoie.com/insights/blog/blackrocks-2022-voting-guidelines-board-diversity-climate-change-and-es-disclosures> [<https://perma.cc/BL3N-VM2V>] (noting BlackRock’s pre-2023 expectations for ~30% board diversity, at least two women directors, and at least one director from an underrepresented group); Lee Anne Hagel, Hannah Orowitz & Donald Cassidy, *BlackRock Updates 2022 Proxy Voting Guidelines and Stewardship Expectations and Publishes Annual Letter to CEOs*, GEORGESON (2022), <https://www.georgeson.com/us/insights/esg/blackrock-updates-2022> [<https://perma.cc/P97D-DJKN>].

¹⁹⁰ Eric Juergens, William D. Regner & Amy Pereira, *Proxy Advisors and Institutional Shareholders Revise Voting Guidelines on Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2025), <https://corpgov.law.harvard.edu/2025/03/11/proxy-advisors-and-institutional-shareholders-revise-voting-guidelines-on-board-diversity/> [<https://perma.cc/B5HR-L9F2>].

¹⁹¹ See, e.g., *A Review of Diversity and Inclusion Performance at America’s Large Investment Firms Before the Subcomm. on Diversity & Inclusion*, 117th Cong. 5 (2021) (Written Testimony of Michelle Gadsden-Williams, Managing Dir. and Glob. Head of Diversity, Equity and Inclusion, BlackRock) (to support the strong commitments made in 2020: “In the summer of 2020, we committed to increasing our overall workplace representation of Black and Latinx employees by 30 percent, to doubling the number of Black and Latinx senior leaders, and to increasing our senior female representation to 32.5 percent by 2024.”).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Daniel Chang, *BlackRock Updated 2023 U.S. Proxy Voting Guidelines*, GEORGESON (Jan. 11, 2023) <https://www.georgeson.com/us/insights/proxy/blackrock-updated-2023-us-voting-guidelines> [<https://perma.cc/R4BP-UB47>].

explanation risked BlackRock voting against the company's nominating or governance committee members.¹⁹⁵ It should be noted that this is sacrilegious in the world of institutional investors, who almost always go along with management and vote for the company's slate of directors.¹⁹⁶

By late 2024, BlackRock had begun to pull back from these earlier efforts. Internal memoranda revealed that these mandated diversity quotas had been allowed to expire and eliminated the requirement for diverse hiring slates.¹⁹⁷ In addition, BlackRock dissolved its dedicated DEI team and merged it into a new, rebranded organizational Talent and Culture unit.¹⁹⁸

BlackRock conspicuously omitted references to DEI in its 2024 Annual Report and eliminated discussing the demographic breakdowns of its own workforce.¹⁹⁹ This was a noticeable departure from previous years. In 2025, BlackRock also revised their proxy voting guidelines so that these guidelines no longer included the 30% diversity expectation and instead used vague language about "board composition."²⁰⁰ Although BlackRock retained the option to vote against the slate of directors if the investee company is an outlier on diversity, this discretion is limited to situations where investee companies are significantly below market norms.²⁰¹

These policy reversals from BlackRock came against a backdrop of intensified legal and political scrutiny of DEI programs. In 2025, the Trump administration, through several administrative actions, has challenged the

¹⁹⁵ Lytle, *supra* note 90.

¹⁹⁶ See, e.g., Merel Spierings, *2024 Proxy Season Review: Corporate Resilience in a Polarized Landscape*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 12, 2024), <https://corpgov.law.harvard.edu/2024/10/12/2024-proxy-season-review-corporate-resilience-in-a-polarized-landscape/> [https://perma.cc/5V38-SA4N] (reporting average 95% support for director nominees in H1 2024); *Proxy Season Highlights, Part One: Shareholder and Management Proposals*, COOLEY (July 8, 2025), <https://www.cooley.com/news/insight/2025/2025-07-07-proxy-season-highlights-part-one-shareholder-and-management-proposals> [https://perma.cc/F8PQ-B7Z4] (average 95.1% support for Russell 3000 director nominees in 2025); Davidson Heath, Daniele Macciocchi, Roni Michaely & Matthew C. Ringgenberg, *Do Index Funds Monitor?*, 35 REV. FIN. STUD. 91 (2022) (finding index funds are less likely to vote against management on contentious items).

¹⁹⁷ Lamar Johnson, *BlackRock Ends Diversity Goals, Merges DEI Team into 'Talent and Culture'*, ESG DIVE (Mar. 3, 2025), <https://www.esgdive.com/news/blackrock-ends-diversity-goals-merges-dei-team-into-talent-and-culture/741391/> [https://perma.cc/48AG-7FNZ].

¹⁹⁸ *Id.*

¹⁹⁹ Eric Revell, *BlackRock Drops DEI References from Annual Report*, FOX BUSINESS (Feb. 26, 2025), <https://www.foxbusiness.com/politics/blackrock-drops-dei-references-from-annual-report> [https://perma.cc/T7E5-4HH8].

²⁰⁰ BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP 9 (2025).

²⁰¹ *Id.*

legality of corporate affirmative action programs.²⁰² BlackRock explicitly cited changes to the “U.S. legal and policy environment” as the rationale for its internal restructuring.²⁰³

Although aspirational, goals (unlike specific quotas or mandates) are not inherently illegal, but their implementation—especially when tied to hiring outcomes—can raise possible Title VII concerns, which prohibits employment discrimination based on race, color, religion, sex, and national origin.²⁰⁴ BlackRock’s shift away from quantitative diversity targets and its reliance on more general language reflects an attempt to mitigate potential legal exposure.

As a leading institutional investor, BlackRock’s proxy voting policies influence hundreds of publicly traded companies. Its retreat from clear diversity metrics may reduce pressure on corporate boards to pursue demographic diversity. Moreover, as demographic disclosures become less common, shareholders and regulators may find it increasingly difficult to monitor diversity progress. This trend, if it continues, could erode transparency in corporate governance, undermining years of progress toward inclusive practices.

In addition to this pressure and possible legal action against BlackRock at the federal level, BlackRock also faced lawsuits and pressure in several states. The firm became the focal point of a mounting conservative-state pushback on its investment policies, especially regarding board diversity and climate activism.²⁰⁵ Though these legal challenges are not exclusively about racial or gender diversity, they form part of a broad anti-ESG and anti-DEI backlash. BlackRock’s efforts to promote diverse and climate-conscious investee boards are closely tied to its ESG identity. These legal challenges are discussed in more detail below, since some of these lawsuits involve the other institutional investors as well as the two main proxy advisers.

²⁰² See, e.g., Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (revoking Exec. Order No. 11,246 and directing agencies to dismantle affirmative-action obligations for federal contractors).

²⁰³ Johnson, *supra* note 197.

²⁰⁴ 42 U.S.C. § 2000e-2(a).

²⁰⁵ Michelle Abrego & Bradley Saacks, *Republicans Labeled BlackRock as ‘Woke.’ Here’s a Brief History of How the Firm has Tried to Shed That Description*, BUS. INSIDER (Feb. 26, 2025), <https://www.businessinsider.com/blackrock-removes-dei-wording-annual-review-larry-fink-2025-2> [<https://perma.cc/V86M-7XS6>].

B. Vanguard

Vanguard, the world's second-largest asset manager, has historically endorsed corporate board diversity. Although Vanguard never imposed specific quotas or numerical thresholds for diversity on the boards of its investee companies, the firm's pre-2025 proxy policies included language which endorsed such characteristics as part of board composition.²⁰⁶ Specifically, boards of Vanguard's investee companies were expected to disclose personal characteristics to demonstrate diversity of their boards.²⁰⁷ Moreover, should an investee company fail to meet Vanguard's diversity expectations, even absent formal targets, then the firm would potentially use its proxy voting function to vote against management's slate of directors.²⁰⁸

On January 31, 2025, Vanguard removed language from its U.S. proxy voting policy advising boards to "represent diversity of personal characteristics, inclusive of at least diversity in gender, race and ethnicity."²⁰⁹ Vanguard replaced prior demographic guidance with broader considerations: boards should be "fit for purpose" by reflecting a breadth of skills, experience, perspective, and personal characteristics such as age, gender, or race/ethnicity.²¹⁰ The 2025 revised policy removed previous language that provided for negative votes against nominating committee chairs for insufficient action to achieve "appropriately representative" board composition, as well as language stating that boards should, "at a minimum, represent a diversity of personal characteristics, inclusive of at least diversity in gender, race, and ethnicity on the board."²¹¹ Nevertheless, "the 2025 policy continues to emphasize the importance of 'cognitive diversity' to

²⁰⁶ See, e.g., Rajeev Kumar, *Vanguard, 2021 Voting Policy Updates*, GEORGESON (Dec. 2020), <https://content-assets.computershare.com/eh96rkuu9740/ad67e8abd94543b1bf6688fae163b670/576b26608c0e52de4059da88f1a3c771/Vanguard-2021-Voting-Policy-Updates.pdf> [<https://perma.cc/S4MJ-8K4E>] (explaining case-by-case voting and potential votes against directors for "insufficient progress on board diversity or board-diversity-related disclosure," without prescribing quotas); Daniel Chang, *Vanguard's 2023 Voting Policy Updates*, GEORGESON (Jan. 27, 2023), <https://www.georgeson.com/us/insights/proxy-solicitation/vanguard-2023-voting-policy-updates> [<https://perma.cc/BT3L-2DPW>] (summarizing Vanguard's policy emphasizing disclosure of directors' personal characteristics and board-composition rationale, with no numeric thresholds).

²⁰⁷ Chang, *supra* note 206.

²⁰⁸ Kumar, *supra* note 206.

²⁰⁹ Kerber, *supra* note 9.

²¹⁰ *Board Diversity: Policy Updates and Considerations for Proxy Season*, COOLEY (Feb. 28, 2025) <https://www.cooley.com/news/insight/2025/2025-02-28-board-diversity-policy-updates-and-considerations-for-proxy-season#:~:text=BlackRock,with%20at%20least%2030%25%20diversity> [<https://perma.cc/GV73-BFKD>]; and VANGUARD, *GLOBAL VOTING PROXY POLICY 2025* (Feb. 2025).

²¹¹ COOLEY, *supra* note 210.

effective boards, resulting from an appropriate breadth of skills and experience, as well as a diversity of personal characteristics, such as age, gender or race/ethnicity.”²¹² Finally, the 2025 revised policy provides for potential negative votes against nominating committee chairs if the board composition or related disclosure is inconsistent with relevant “market-specific governance frameworks or market norms.”²¹³

C. State Street

State Street Corporation, like BlackRock and Vanguard, also established itself as a leading proponent of board diversity. Most famously, way back in 2017, the firm installed a “Fearless Girl” statue that was intentionally placed opposite the Charging Bull statue on Wall Street.²¹⁴ This statue was largely symbolic and was meant to promote gender diversity on corporate boards.

In 2022, State Street adopted a robust set of diversity-related expectations for companies in its investment portfolio. These policies required public disclosure of demographic diversity data and instituted the following numerical thresholds the firm expected for board diversity for its investee companies: (1) at least one female board member at all investee companies in the S&P 500, FTSE 100, and ASX 100; (2) beginning in 2023, a target of 30% female board representation for companies contained in the major indices; and (3) at least one self-identified racial or ethnic minority director for S&P 500 and FTSE 100 companies.²¹⁵

If an investee company failed to comply with State Street’s diversity expectations, State Street may have opted to vote against the chair of the company’s nominating committee.²¹⁶ State Street publicly committed to holding their investee company’s boards accountable for making progress on

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Richard Chused, *Charging Bull, Fearless Girl, Artistic Composition, and Copyright*, 10 J. INTELL. PROP. & ENT. L. 43, 44(2020).

²¹⁵ John Carroll, *State Street Annual Letter to Directors and Guidance on Diversity Disclosures*, GEORGESON, <https://content-assets.computershare.com/eh96rkuu9740/5txJtaUTXztjz2W1HfX7w3/d54136fe5b7e819a33d2e40032046b69/SSGA-2022-Voting-Policy-Updates.pdf> [<https://perma.cc/XL8Z-XBU3>] (last visited Oct. 12, 2025); Brief Definition of these three indices, see Will Kenton, *S&P 500 Index: What It’s for and Why It’s Important in Investing*, INVESTOPEDIA (Sep. 10, 2025), <https://www.investopedia.com/terms/s/sp500.asp> [<https://perma.cc/S6PG-PXTE>].

²¹⁶ See *BlackRock, Vanguard and State Street Update Corporate Governance and ESG Policies and Priorities for 2022*, GIBSON DUNN (Jan. 25, 2022), <https://www.gibsondunn.com/blackrock-vanguard-and-state-street-update-corporate-governance-and-esg-policies-and-priorities-for-2022/> [<https://perma.cc/UEN9-LQXE>].

board diversity and emphasized that diversity disclosure and composition would be key voting considerations.²¹⁷

However, by March 2025, State Street abandoned its prior numerical thresholds and removed “all of the previous numerical diversity targets from its board composition policy.”²¹⁸ In revised proxy voting guidelines, SSGA eliminated the 30% gender target and no longer required companies to have a minimum number of racially or ethnically diverse board members.²¹⁹ Like other investment funds, State Street redefined diversity under the broader umbrella of “board composition,” with an emphasis on experience, skills, and perspectives—but no mandated demographic traits.²²⁰

The firm also stated that decisions on board composition should be made by the nominating committee, not dictated by investors.²²¹ State Street further clarified that it would no longer automatically vote against directors for failing to meet diversity metrics.²²² The revised State Street policies go “further than BlackRock and Vanguard by not including explicit language indicating that State Street may still take negative voting action against market outliers.”²²³

D. Legal Challenges

The initiatives described above by the Big Three funds as well as by the well-known proxy advisory firms to improve and encourage corporate board diversity have sparked legal and political backlash, particularly from Republican-led states such as Texas and Tennessee. These legal challenges are described in greater detail below.

1. Tennessee v. BlackRock

On December 18, 2023, the Tennessee Attorney General filed a lawsuit against BlackRock under the Tennessee Consumer Protection Act.²²⁴ The complaint alleged that BlackRock made materially misleading statements to Tennessee consumers by misrepresenting the role of ESG considerations in

²¹⁷ *Id.*

²¹⁸ COOLEY, *supra* note 210.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See Civil Enforcement Complaint at 1, State, *ex. rel.* Skrmetti v. BlackRock, Inc., No. 23-CV-618 (Tenn. Cir. Ct. Williamson Cnty. Ct. Dec. 18, 2023).

its investment decision-making.²²⁵ In other words, Tennessee was accusing BlackRock of articulating two inconsistent positions: one focusing solely on money and the other focusing on social issues that mattered to BlackRock, including corporate board diversity.²²⁶

The case settled on January 17, 2025, without admission of wrongdoing.²²⁷ BlackRock agreed to the following: it would (1) enhance disclosures on ESG integration in fund offerings; (2) improve proxy voting transparency; (3) conduct periodic audits of ESG representations; and (4) maintain a firewall between dedicated ESG funds and conventional portfolios.²²⁸

2. Texas Antitrust Litigation

In late 2024, the Texas Attorney General joined a coalition of eventually twelve Republican-led states in filing an antitrust lawsuit against BlackRock, Vanguard, and State Street.²²⁹ The lawsuit alleged that these three investment firms engaged in anticompetitive collusion by coordinating ESG shareholder activism to suppress fossil fuel investment, thereby distorting markets and raising energy prices.²³⁰ In August 2025, a federal court largely denied BlackRock's motion to dismiss, allowing most of the antitrust and unfair trade practice claims to proceed.²³¹ While a few state-law counts were dismissed, the ruling validated the novel theory that coordinated ESG activism may constitute concerted anticompetitive conduct.²³²

3. Blacklists

²²⁵ *Id.* at 8.

²²⁶ *Id.*

²²⁷ Settlement Agreement, State, *ex rel.* Skrmetti v. BlackRock, Inc., No. 23-CV-618 (Tenn. Cir. Ct. Williamson Cnty. Jan. 17, 2025).

²²⁸ Press Release, Tenn. Att'y Gen., *Attorney General Jonathan Skrmetti Announces Landmark Settlement with BlackRock, Inc.* (Jan. 17, 2025).

²²⁹ *Attorney General Ken Paxton Sues BlackRock, State Street, and Vanguard for Illegally Conspiring to Manipulate Energy Markets, Driving up Costs for Consumers*, ATT'Y GEN OF TEX. (Dec (Nov. 27, 2024) <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-blackrock-state-street-and-vanguard-illegally-conspiring-manipulate> [<https://perma.cc/Z358-N89G>]; 15 U.S.C. § 1; Complaint, Texas v. BlackRock, Inc., No. 24-cv-00437 (E.D. Tex. Nov. 27, 2024); and 15 U.S.C. § 18.

²³⁰ ATT'Y GEN OF TEX., *supra* note 229 (the antitrust issues are beyond the scope of this article).

²³¹ Memorandum Opinion & Order on Motions to Dismiss at 3, 5, 61, Texas v. BlackRock, Inc., No. 24-cv-00437 (E.D. Tex. Aug. 1, 2025) (largely denying BlackRock's motion to dismiss and allowing most antitrust and unfair-trade-practice claims to proceed).

²³² *Id.* at 5, 9, 50, 51–52, 61.

In addition to the above antitrust lawsuit, Texas had previously placed BlackRock on a state “divestment list” in 2022, resulting in over \$8.5 billion in state pension funds being withdrawn from BlackRock.²³³ Texas later reinstated BlackRock in 2025, but the financial and reputational impact of the blacklist remains substantial.²³⁴ State blacklists directly restrict their public fiduciaries from awarding new mandates to any blacklisted firms and may even require divestment of existing assets as seen initially in Texas.²³⁵

BlackRock remains on blacklists for Indiana and Oklahoma.²³⁶ In Oklahoma, the state maintains a statutory “Restricted Financial Company List” under their Energy Discrimination Elimination Act, which can bar any state business with blacklisted firms.²³⁷ Indiana utilized both state regulations as well as procurement rules to exclude BlackRock from managing any state assets.²³⁸ In 2023, the state enacted a law that directed the Indiana Public Retirement System (INPRS) to base investment and proxy-voting decisions on pecuniary factors only.²³⁹ State Treasurer Daniel Elliott placed BlackRock on an ESG “watchlist,” and it was not too long before the INPRS board voted to remove BlackRock from handling state assets citing “ESG violations.”²⁴⁰ For context, the INPRS has about \$50

²³³ Leo E. Strine, Jr., *Ignorance is Strength: Climate Change, Corporate Governance, Politics, and the English Language*, 5 J.L. & POL. ECON. 170, 174 (2025).

²³⁴ Jack Pitcher, *BlackRock Is Off Texas’ Blacklist. Where the ESG Battle Stands Now*, WALL ST. J. (June 4, 2025, at 15:15 ET), https://www.wsj.com/finance/blackrock-is-off-texas-blacklist-where-the-esg-battle-stands-now-1cc1f958?gaa_at=eafs&gaa_n=ASWzDAjEEnQu41rzG8xj_U9K_0eKsqnFrJGgPSpjIJgBc2ZVp7g5p0dD5mZ26XyBJCg%3D&gaa_ts=6892bcac&gaa_sig=s0wU9FFz7h4oAdicZep9YkeFz2_yfZJSq5aDKvRpWCfIMGjn5g5l_LXrObdTKv135vdkSEcQgNB8FRW_EqKCKw%3D%3D [https://perma.cc/R7YE-XDF5].

²³⁵ Strine, *supra* note 233 (discussing Comptroller Glenn Hegar invoking Texas law “which could force certain Texas government funds to sell shares and divest from such companies”).

²³⁶ Pitcher, *supra* note 234.

²³⁷ *Financial Institutions Remain on Oklahoma Treasurer’s List of Restricted Companies*, OKLA. STATE TREASURER (Aug. 15, 2023), <https://oklahoma.gov/treasurer/news-releases/financial-institutions-remain-on-oklahoma-treasurers-list-of-restricted-companies.html> [https://perma.cc/4JJN-UEW2].

²³⁸ Leslie Bonilla Muñiz, *Indiana Treasurer Puts BlackRock on ESG Watchlist*, IND. CAP. CHRON. (June 21, 2024, at 13:00 ET), <https://indianacapitalchronicle.com/2024/06/21/indiana-treasurer-puts-blackrock-on-esg-watchlist/> [https://perma.cc/FF99-2CN5].

²³⁹ H.E.A. 1008, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023) (enacted as Pub. L. No. 206-2023).

²⁴⁰ Niki Kelly, *Pension Board Votes to Remove BlackRock Due to ESG Violations*, IND. CAP. CHRON. (Dec. 16, 2024, at 06:30 ET), <https://indianacapitalchronicle.com/2024/12/16/pension-board-votes-to-remove-blackrock-due-to-esg-violations/> [https://perma.cc/4XAE-KAHB].

billion assets under management.²⁴¹ This translates into lost assets under management for BlackRock as well as lost fees and a signaling effect to other states.

Even before Indiana's actions, in December 2022, Florida announced it would pull \$2 billion of assets under management from BlackRock, which was the largest anti-ESG withdrawal by any state at that time.²⁴² Florida also enacted a resolution that investment decisions be made only on pecuniary factors.²⁴³ Over 20 other states have also voiced concern about how BlackRock's fiduciary duties can be reconciled with their social agenda, including increasing corporate board diversity.²⁴⁴

4. Proxy Advisory Laws and First Amendment Challenges

In 2025, Texas enacted legislation (S.B. 2337) that restricted the use of ESG and DEI metrics by proxy advisory firms, such as Institutional Shareholder Services (ISS) and Glass Lewis.²⁴⁵ The law mandates that proxy advice based on non-financial criteria, such as corporate board diversity, must be justified by economic impact analyses and labeled with disclaimers.²⁴⁶ In response, ISS and Glass Lewis filed suit in the United States District Court for the Western District of Texas, arguing the law violates their First Amendment rights by compelling speech and restricting viewpoint expression.²⁴⁷ The case raises critical questions about the constitutional limits of state intervention in proxy voting and advisory communications.

²⁴¹ *About Us*, IND. PUB. RET. SYS., <https://www.in.gov/inprs/about-us/>

[<https://perma.cc/ZS97-R4FQ>] ("approximately \$50 billion in assets under management at fiscal year-end 2024") (last visited Oct. 12, 2025).

²⁴² Ross Kerber, *Florida Pulls \$2 Billion from BlackRock in Largest Anti-ESG Divestment*, REUTERS (Dec. 1, 2022), <https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01/> [<https://perma.cc/9HCG-YE6D>].

²⁴³ *Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments*, EXEC OFF. OF THE GOVERNOR RON DESANTIS (Aug. 23, 2022), <https://www.flgov.com/eog/news/press/2022/governor-ron-desantis-eliminates-esg-considerations-state-pension-investments> [<https://perma.cc/3RL7-DE9K>].

²⁴⁴ See Letter from State Financial Officials to BlackRock Chairman & CEO Larry Fink (July 29, 2025), https://sfof.com/wp-content/uploads/2025/07/Fiduciary-Duty-Letter-to-Asset-Managers_BLACKROCK.pdf [<https://perma.cc/5DNR-QN3M>].

²⁴⁵ See Tex. S.B. 2337, 89th Leg., Reg. Sess. (2025) (enacted).

²⁴⁶ *Id.*

²⁴⁷ Complaint for Declaratory and Injunctive Relief at 3–4, *Institutional Shareholder Servs. Inc. v. Paxton*, No. 24-cv-00477 (W.D. Tex. June 5, 2024); and Complaint at 1, *Glass, Lewis & Co., LLC v. Paxton*, No. 25-cv-01153 (W.D. Tex. July 24, 2025).

In August 2025, Judge Alan D. Albright preliminarily enjoined enforcement of S.B. 2337 against both proxy advisors.²⁴⁸ The case is pending, with trial unlikely to start until February 2026.²⁴⁹ After the injunction was issued in the court case, the Texas Attorney General Ken Paxton opened an investigation of ISS and Glass Lewis over alleged “misleading” ESG/DEI-driven advice.²⁵⁰ Therefore, despite the ongoing litigation, Texas continues to pressure the proxy advisory firms, even while the law is on hold.

5. Legal and Strategic Implications of the Above Actions

The cumulative effect of these lawsuits and regulatory measures has forced the Big Three investment firms, and possibly the proxy advisory firms, to tone down their corporate board diversity focus. This all reflects a growing movement by both the federal and numerous state governments to curtail corporate engagement on diversity (and environmental) issues. The same has been true for institutional investors who have been perceived to be promoting ESG objectives.²⁵¹ Recent research from corporate law professors Zohar Goshen and Assaf Hamdani discusses how the largest institutional investors have not used the power of their shareholding to influence their investee companies to reach those ESG objectives.²⁵² Goshen and Hamdani argue that original hopefulness attached to these investment funds has been misplaced.²⁵³ In the end, they conclude that believing these investors will move the needle is “a very poor substitute for environmental regulation.”²⁵⁴

V. CORPORATE BOARD DIVERSITY DATA AND TRENDS

²⁴⁸ *Texas Court Blocks Enforcement of New Texas Proxy Advisor Law Against ISS and Glass Lewis*, GIBSON DUNN (Aug. 30, 2025), <https://www.gibsondunn.com/texas-court-blocks-enforcement-of-new-texas-proxy-advisor-law-against-iss-and-glass-lewis/> [https://perma.cc/6HND-TXSS].

²⁴⁹ *Id.*

²⁵⁰ *Attorney General Ken Paxton Investigates Proxy Advisors Glass Lewis and ISS for Misleading Public Companies to Push Radical Agenda*, ATT’Y GEN OF TEX. (Sep. 16, 2025), <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-investigates-proxy-advisors-glass-lewis-and-iss> [https://perma.cc/6HND-TXSS].

²⁵¹ See Zohar Goshen & Assaf Hamdani, *Will Systematic Stewardship Save the Planet?*, 70 VILL. L. REV. 467, 478, 514, 518 (2025).

²⁵² *Id.*

²⁵³ *Id.* at 467.

²⁵⁴ *Id.* at 477.

It is important to note that demographic diversity achieved record levels in 2024.²⁵⁵ However, the proportion of new directors who are demographically diverse has decreased.

Data from the first part of 2025 indicates that large U.S. companies are reversing the trend to appoint women to their boards.²⁵⁶ In fact, the percentage of women being appointed to the boards at S&P 500 firms decreased from 41% for 2024 to 37% for the first five months of 2025.²⁵⁷ This is the lowest percentage of female appointments in six years.²⁵⁸ The pushback is likely a reflection of the current “shifting policy environment” under the second Trump administration.²⁵⁹

After George Floyd’s death and the subsequent Black Lives Matter movement, an estimated 185% increase in the appointment of African American directors occurred in 2020 compared to 2019.²⁶⁰ However, there is also a slowdown in racial diversity as the share of Russell 3000 company non-white directors fell from 48% to 31% from 2022 to 2024.²⁶¹ New directors of this same set of companies who are Black fell from 26% to 12% over the same time period.²⁶²

When looking at the proportion of non-White women directors, the data also shows a dramatic decrease. For the S&P 500 companies, new non-White women directors had decreased from a peak of 19% in 2022 to only 12% in 2024.²⁶³ The story is the same for new non-White women directors for Russell 3000 companies, which has fallen from a high of 21% in 2022 to 12% in 2024.²⁶⁴ This trend is concerning given the strides that had been made in both gender and racial corporate board diversity before the *SFFA* decision.²⁶⁵

The Conference Board’s annual study in 2024 shows that racial diversity is increasing, albeit at a slow pace.²⁶⁶ For the S&P 500 companies, the

²⁵⁵ The Conference Board, *supra* note 17.

²⁵⁶ Yu, *supra* note 13.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Bogan, Potemkina, & Yonker, *supra* note 37, at 5.

²⁶¹ The Conference Board, *supra* note 17.

²⁶² *Id.*

²⁶³ ANDREW JONES, MEREL SPIERINGS & PAUL HODGSON, BOARD PRACTICES AND COMPOSITION: 2024 (7th ed. 2024).

²⁶⁴ *Id.*

²⁶⁵ *Id.*; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

²⁶⁶ JONES, SPIERINGS & HODGSON, *supra* note 263, at 8.

proportion of non-White directors has risen from 20% in 2020 to 26% in 2024.²⁶⁷ However, there was zero change from 2023 to 2024, with the proportion holding steady at 26%.²⁶⁸ For the Russell 3000, the proportion of non-White directors has risen more modestly from 21% in 2020 to 23% in 2024.²⁶⁹ Like with the S&P 500 companies, there was no change from 2023 to 2024, with the proportion holding steady at 23%.²⁷⁰

However, the proportion of new directors with certain backgrounds is decreasing significantly and concerningly. For the S&P 500 companies, the number of new directors who identify as African American or Black has dropped dramatically from 26% in 2022 to 10% in 2024.²⁷¹ A similar story is seen with the new directors for the Russell 3000 companies, as those who identify as African American or Black has fallen from 26% in 2022 to 12% in 2024.²⁷²

The share of new Hispanic or Latino directors also decreased from 2022 to 2024 for both the S&P 500 and Russell 3000 companies.²⁷³ In fact, the only observed increase is for new directors who identify as from the Middle East or North Africa; but the numbers of new directors from this background is so negligible that the increase is almost irrelevant.²⁷⁴

Moreover, the proportion of new directors who self-identify as LGBTQ+ has fallen from 15% in 2023 to a paltry 3% in 2024 for the S&P 500 companies, and from 21% in 2023 to the same paltry 3% in 2024 for the Russell 3000 companies.²⁷⁵ Some of this may be due to issues of willingness to self-identify, but the decreases are nonetheless dramatic.

To delve deeper into the data available, the gender and race demographics in companies included in the S&P 1500 is analyzed below.²⁷⁶ This dataset is more expansive and includes not only more companies, but

²⁶⁷ *Id.* at 2.

²⁶⁸ *Id.* at 8.

²⁶⁹ *Id.* at 2.

²⁷⁰ *Id.* at 8.

²⁷¹ *Id.* at 9.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 9–10.

²⁷⁵ *Id.*

²⁷⁶ The following analysis uses ISS ESG's ISS – Directors US dataset to calculate and assess the trends in board diversity and their year-to-year changes. The ISS dataset is on file with the author.

also companies not as “prestigious” as the S&P 500. The S&P shows similar trends as both the S&P 500 and Russell 3000 companies detailed above.

Firstly, women directors in S&P 1500 companies have consistently increased from 24% in 2020 to almost 31% in 2024. However, the percentage increase has slowed each year. From 2023 to 2024, the percentage only increased by 2% whereas from 2020 to 2021 the increase in female directors was 9%. Similar trends in racial diversity were also observed in the S&P 1500 data. New black directors increased 37% from 2020 to 2021 but the rate slowed significantly between 2023 and 2024 as the increase was only 1%.

The chart below shows that the addition of new women directors has slowed significantly and that the year-to-year decrease in male directors is also low. This helps illustrate that often the way that corporate boards increase their diversity is through addition, and not subtraction. In other words, they add a board seat for a woman or a person of color, but for the most part, the non-diverse directors hang on to their seats.

Year	No. of Women Directors	Year to Year Change (in %)	No. of Men Directors	Year to Year Change (in %)
2021	3,182	9.4	8,812	-2.5
2022	3,497	9.9	8,779	-0.4
2023	3,688	5.0	8,761	-0.2
2024	3,761	2.0	8,507	-2.9

A. Diversity by Sector

Another issue not typically discussed is diversity in specific corporate sectors of the economy. Although one often hears about the lack of women in the tech sector,²⁷⁷ the data shows that the tech sector is hardly the worst offender.²⁷⁸ Women on Boards (WOB), the non-profit organization which has been promoting and tracking diversity of corporate boards for 15 years,

²⁷⁷ See, e.g., Jenny Little, *Ten Years On, Why are There Still So Few Women In Tech?*, GUARDIAN (Jan. 2, 2020, at 07:19 ET), <https://www.theguardian.com/careers/2020/jan/02/ten-years-on-why-are-there-still-so-few-women-in-tech> [https://perma.cc/3V3N-BKAF]; and Lynnise E. Pantin, *Race and Equity in the Age of Unicorns*, 72 HASTINGS L.J., 1453, 1464 (2021).

²⁷⁸ See *Gender Diversity Index First Quarter 2025 Key Finds, 50/50 WOMEN ON BDS.*, <https://5050wob.com/quarterly-report-q1-2025> <https://5050wob.com/quarterly-report-q1-2025/> [https://perma.cc/Y2TA-Q6ML] (last visited Oct. 12, 2025).

releases data based on the Russell 3000 companies every quarter.²⁷⁹ For the first quarter of 2025, the WOB data shows both the percentage of women on boards in specific sectors as well as the percentage of companies in that sector that have gender-balance.²⁸⁰ The utilities sector shows the highest percentage of women on boards at 35%, and has 27% of the companies in that sector as gender-balanced.²⁸¹ Technology, perhaps surprisingly to some, sits right in the middle of the sectors for gender diversity.²⁸² The financial services sector and the energy sector, however, sit at the very bottom.²⁸³ Financial services companies have only 28% women representation on boards in that sector, with a mere 8% of the financial services companies achieving gender balance on their boards.²⁸⁴ The energy sector has 27% women representation on boards operating in the energy sector, with an even lower number of gender-balance boards at a shockingly low 6%.²⁸⁵

VI. POLICY RECOMMENDATIONS

Despite recent judicial setbacks to statutory board diversity mandates as described above, there are some possible alternative mechanisms for promoting diversity on corporate boards. A more nuanced approach is necessary to avoid constitutional challenges. Following from the *SFFA* decision, any new efforts will need to avoid using race (or other benchmarks) as criteria for corporate board nominations.

A. Disclosure-based Strategies

Disclosure is an important and a critical aspect of providing information to shareholders and can happen without mandates. Companies can still lead by example by providing comprehensive disclosures in their public disclosure such as annual reports and proxy statements. Such public disclosures could emphasize where their board stands regarding diversity issues (i.e., a statement such as “Our board currently includes 30% women and 20% racial/ethnic minorities”) and include their recruiting strategies to improve that diversity over time. This approach preserves transparency

²⁷⁹ *Quarterly Reports: Gender Diversity Index, 50/50 WOMEN ON BDS.*, <https://5050wob.com/quarterly-reports/> [<https://perma.cc/8NNB-D4ER>] (last visited Oct. 25, 2025).

²⁸⁰ *50/50 WOMEN ON BDS.*, *supra* note 278.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

without triggering potential legal challenges. Moreover, disclosure is a fundamental attribute of the U.S. capital markets.²⁸⁶

In addition, the SEC could expand Regulation S-K Item 407(c)(2)(vi) to require publicly traded companies to provide more granular, standardized disclosures regarding the racial, ethnic, gender, and LGBTQ+ composition of their boards and the processes by which directors are selected.²⁸⁷ Such transparency may enable shareholders, particularly institutional investors, to exert market-based pressure on any companies that may be below aspirational diversity levels. Former SEC Commissioner, Allison Herren Lee, even said that more disclosure is the SEC’s “best toolkit” to increase corporate board diversity for public companies.²⁸⁸ If expanding the requirements in the current regulations are framed as increasing investor protection, then such an expansion might overcome the challenges with previous efforts to mandate board diversity.

B. Listing Standards

Another option would be to leverage listing standards. Unfortunately, NASDAQ tried this with the “Comply or Explain” rule already. Nevertheless, there could be ways to make this optional for listed companies, with perhaps pressure on the companies to be at a minimum transparent for their investors.

The SEC could mandate expanded diversity disclosures in both 10-K and proxy statements—including voluntary self-identification by gender, race/ethnicity, LGBTQ+, veteran, and disability status—and require standard reporting formats.²⁸⁹ These reforms would significantly enhance transparency. A similar bill, Improving Corporate Governance Through Diversity Act of 2021, which mandated the same disclosures for public companies was introduced in Congress, but never progressed.²⁹⁰ Further Congressional action, or SEC rulemaking, is highly unlikely in the current

²⁸⁶ *Id.*

²⁸⁷ 17 C.F.R. § 229.407(c)(2)(vi).

²⁸⁸ Allison Herren Lee, Comm’r, SEC, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference (Sep. 22, 2020) (transcript available at https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922#_ftn23 [<https://perma.cc/4D5C-8FWQ>]).

²⁸⁹ See Alexandra Thornton & Anjunae Chandran, *How to Make Corporate Boards More Diverse*, CAP (Sep. 29, 2021), <https://www.americanprogress.org/article/make-corporate-boards-diverse/#:~:text=It%20is%20necessary%20to%20expand,reflect%20the%20diversity%20of%20America> [<https://perma.cc/G5ES-6ZGL>].

²⁹⁰ *Improving Corporate Governance Through Diversity Act of 2021*, H.R. 1277, 117th Cong. (2021); H.R. Rep. No. 117–230, at 1–2 (2021).

political climate which has been focused on curbing DEI throughout the government as well as both in the educational and corporate world.

C. Shareholder Proposals

As discussed in Section IV E, shareholder proposals have been a tool for both DEI as well as anti-DEI initiatives to be voted on by shareholders. However, most shareholder proposals rarely pass. If passage rates were the sole metric for measuring their success, then one might conclude that SEC Rule 14a-8 is an anemic device at best. Shareholder proposals provide the ability for shareholders—particularly minority investors—to voice concerns and possibly push for changes. Research shows that even non-binding resolutions such as shareholder proposals can result in incremental changes in board composition when combined with continued and sustained engagement in the issue.²⁹¹

Historically, only a small fraction of these proposals receives majority support.²⁹² In other words, the vast majority—as many as 95%—of shareholder proposals fail. Nevertheless, their significance stretches well beyond that binary outcome of passage or defeat. Shareholder proposals catalyze dialogue, provide some pressure for corporate boards to adopt reforms they would otherwise not likely address, and influence public norms around corporate responsibility. Just the submission of a shareholder proposal may provide information to investors, as outlined above. Some might classify this as a “name and shame” type of strategy to call attention to corporate boards that remain far from diverse, but shareholder proposals remain a tool to inform investors and the public. To summarize, shareholder proposals are agenda-setting, disclosure-forcing, and settlement-catalyzing—even when they do not pass.

D. Tax Incentives or State-level Procurement Preferences

Market-driven incentives can also help to encourage corporate diversity without direct (and possibly unconstitutional) regulation. As an example, government agencies or large private-sector buyers could give contracting and procurement preference to companies that have diverse boards, similar

²⁹¹ See Kobi Kastiel & Yaron Nili, *The Corp. Governance Gap*, 131 YALE L.J. 782, 805–06 (2022).

²⁹² See Press Release, The Conference Board, Shareholder Proposals Take a Tumble in the 2025 Proxy Season (Sep. 3, 2025), <https://www.conference-board.org/press/Shareholder-Proposals-Take-a-Tumble-in-the-2025> [<https://perma.cc/T9DP-TXS2>] (reporting passage rates of ~5% in 2023–24 and 7% in 2025).

to existing supplier diversity programs.²⁹³ If such programs are voluntary and non-exclusionary, they may be able to overcome any legal challenges.

E. Improved Diverse Pipeline

Nominating committees may have issues in “finding” diverse candidates. These committees, with incumbent board directors serving on them, tend to utilize their own networks in identifying possible new board members. One suggested response to this issue is to professionalize the pipeline of candidates beyond the normal networks of incumbent board members. Boards can (1) adopt a skills matrix tied to strategy; (2) authorize competitive searches with third-party firms and require that shortlists of potential nominees include multiple candidates from historically underrepresented groups (a “Rooney Rule”-style process²⁹⁴); and/or (3) disclose their efforts and any outcomes in the company’s proxy to create accountability.²⁹⁵

Companies can also create purpose-built channels for identifying diverse candidates. Firstly, they can create “observer” seats for current senior executives or who are otherwise already connected to the company such as those working at major customers or suppliers. Companies can also create advisory boards with specified term limits to evaluate prospective board members. Finally, companies can create portfolio-wide funnels into private equity or venture capital firms that can rotate identified potential candidates on their portfolio-company boards. This helps give those identified candidates experience of sitting on a board until seats open up on their own publicly listed company.²⁹⁶

There is also a need for improving mentorship, training, and sponsorship of underrepresented potential board members. These are all so-called “soft” efforts but can help move the needle for diverse candidates to be identified

²⁹³ See Christopher Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 78 (2010).

²⁹⁴ The Rooney Rule comes from the National Football League (NFL) which adopted the policy in 2003 that required teams to interview at least one minority candidate for any head coach openings. This policy was later expanded to other senior roles. See *Diversity in the NFL: The Rooney Rule*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/inclusion/the-rooney-rule/> [<https://perma.cc/M239-3R8N>] (last visited Sep. 29, 2025) (describing the 2003 adoption, purpose, and subsequent expansions).

²⁹⁵ See NACD, NOMINATING & GOVERNANCE COMMITTEE BLUEPRINT 13–18, 23 (2023); Council of Institutional Investors (CII), *Policies on Corporate Governance* § 2.5 (2024).

²⁹⁶ See Ariel Babcock & Victoria Tellez, *The Missing Element of Private Equity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 8, 2021), <https://corpgov.law.harvard.edu/2021/08/08/the-missing-element-of-private-equity/> [<https://perma.cc/S352-CEEV>].

and board ready. They are not substitutes to the above strategies to increase the possible pool of candidates, but rather complementary actions. While having incumbent board members mentor potential candidates can be a valuable way for those candidates to learn more about the roles of directors, formal sponsoring of potential candidates outperforms mentorship in advancing underrepresented identified board candidates.²⁹⁷ In this manner, corporate boards should pair potential candidates (likely senior executives in the company) with incumbent directors who can advocate for them when board seats open.²⁹⁸

CONCLUSION

After the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, which invalidated the use of race-conscious admissions in colleges and universities, the legal landscape for diversity initiatives—including those in corporate governance—has grown more uncertain.²⁹⁹ This decision negating affirmative action has already influenced debates over the legality of board diversity mandates and corporate affirmative action policies.³⁰⁰ Nevertheless, while *SFFA* highlights the constitutional limits of explicit racial classifications in higher education, it does not negate the well-established empirical and fiduciary rationales for cultivating diverse corporate boards.³⁰¹

Board diversity has long been associated with improved governance quality, risk oversight, and firm value.³⁰² Directors from varied racial, gender, and professional backgrounds tend to bring distinct perspectives, enhance deliberative processes, and challenge cognitive homogeneity, thus mitigating groupthink.³⁰³ The consulting firm McKinsey found that ethnically diverse executive teams are significantly more likely to outperform peers in profitability.³⁰⁴ These market-based pressures create de

²⁹⁷ See 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/ZVT4-56Y9>].

²⁹⁸ *Id.*

²⁹⁹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

³⁰⁰ See *Alliance for Fair Bd. Recruitment v. Weber*, 64 F.4th 1212 (9th Cir. 2023); Joseph McDonald, *Private Affirmative Action*, AM. BAR ASS'N (July 1, 2024), https://www.americanbar.org/groups/labor_law/resources/magazine/2024-summer/private-affirmative-action/ [<https://perma.cc/M542-WYEU>].

³⁰¹ See, e.g., CREDIT SUISSE RESEARCH INSTITUTE, *supra* note 69.

³⁰² Fairfax, *supra* note 65, at 810, 832.

³⁰³ Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 814–15 (2003).

³⁰⁴ MCKINSEY & CO., *supra* note 68, at 13.

facto incentives for board diversity that do not implicate constitutional scrutiny—yet may accomplish similar inclusion outcomes.

Post-*SFFA*, corporate governance actors must also reframe the case for diversity in terms of legally cognizable business goals: enhancing stakeholder engagement, promoting reputational resilience, and strengthening regulatory compliance.³⁰⁵ Efforts to foster diversity through race-neutral structural reforms—such as expanding recruitment pools for new directors, adopting Rooney Rule-style policies such as in the National Football League—may survive judicial scrutiny even as explicit quotas or mandates have been declared illegal.³⁰⁶

Finally, corporations should emphasize that board diversity is not a proxy for racial essentialism but rather a proxy for epistemic pluralism—the idea that diverse lived experiences contribute to more effective corporate oversight.³⁰⁷ This framing situates diversity within the core objectives of corporate law: ensuring responsible governance, managing risk, and maximizing shareholder value over the long term. While *SFFA* may signal the decline of formal affirmative action regimes, it should not deter boards from pursuing inclusive excellence as a matter of fiduciary prudence, investor expectation, and business strategy.

³⁰⁵ See Martin Lipton, *DEI Initiatives Post-SFFA: Considerations for Boards and Management*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 9, 2023), <https://corpgov.law.harvard.edu/2023/08/09/dei-initiatives-post-sffa-considerations-for-boards-and-management/> [<https://perma.cc/G7ZW-UQ96>].

³⁰⁶ See NFL FOOTBALL OPERATIONS, *supra* note 294; Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 420 (2014).

³⁰⁷ Vyacheslav Fos, Wei Jiang & Huasheng Nie, *A Diverse View on Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 8, 2024), <https://corpgov.law.harvard.edu/2024/10/08/a-diverse-view-on-board-diversity/> [<https://perma.cc/RJK4-D334>].