The Corporate Boardroom: Still a Male Club

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I. INTRODUCTION

In No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom, Douglas M. Branson,1 the W. Edward Sell Chair in Business Law at the University of Pittsburgh School of Law, documents the dearth of women board directors at Fortune 500 companies through an analysis of data from the 2001 and 2005 proxy

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Professor Broome also heads the Director Diversity Initiative (DDI) at the University of North Carolina (UNC) School of Law. The DDI is the joint project of the school’s Center for Civil Rights and the Center for Banking and Finance. The goal of this Initiative is to increase the number of women and minorities serving on public company boards. The DDI is supported by grants from The Z. Smith Reynolds Foundation and the Fulfilling the Dream Fund: North Carolina Consortium. The DDI maintains a web-based database for potential diverse directors, provides a web-based clearinghouse about organizations and programs devoted to director diversity, and sponsors several of its own programs to train potential directors. Program participants who have assumed public company board positions, major government commissions, or significant nonprofit board positions after attending a DDI program are highlighted at http://www.law.unc.edu/centers/banking/diversity/successes.aspx. The DDI is supporting a qualitative interview study of corporate actors by Professors Broome and Kimberly Krawiec that is exploring whether and how board diversity impacts board processes and corporate performance. See infra note 74.

statements of these companies. Branson’s book is an important addition to a growing body of legal and other literature on the lack of diversity in corporate boardrooms. Branson contends that greater gender diversity would improve corporate decision making by helping to ensure a variety of perspectives at the boardroom table, reducing negative stereotypes, and encouraging women and minority employees.

Part II of this Review details Professor Branson’s numerical analysis of women board directors of Fortune 500 companies and provides some further numerical insights. Part III reviews the benefits Branson ascribes to increased board diversity, which are unfortunately not as well-articulated as diversity advocates might hope. Part IV explores Branson’s explanations for the lack of greater gender diversity on corporate boards. Part V examines Branson’s general prescriptions for improvement, supplemented by my own more specific suggestions for enhancing board diversity. Finally, Part VI proposes that lack of racial and ethnic diversity on corporate boards is as significant an issue as the lack of gender diversity discussed in Branson’s book.

II. THE NUMBERS

The two years of proxy data selected by Branson for examination—2001 and 2005—provide a pre-Sarbanes-Oxley Act and a post-Sarbanes-Oxley view of corporate board diversity. Sarbanes-Oxley and the stock exchange listing requirements increased the emphasis on corporate governance and the independence of directors on audit and nominating committees. Board member nomination has shifted from the almost

2. Professor Branson’s research assistants found the proxies of the Fortune 500 companies for 2001 and 2005 on the EDGAR database, and compiled for each company listed in each year the size of the board, the number of female directors, the name of each female director, information on each female director’s background and current and former employment positions, and all other boards on which the female director served. SEC Filings & Forms (EDGAR), http://www.sec.gov/edgar.shtml (last visited Jan. 30, 2008).
4. See infra notes 63–64.
5. BRANSON, supra note 1, at 178; see infra Part II.
7. Sarbanes-Oxley required disclosure of whether the audit committee has a “financial expert” as a member, or disclosure of why the company was unable to find such an expert. BRANSON, supra note 1, at 101. The New York Stock Exchange (NYSE) requires that listed companies have a majority of independent directors, that non-management directors meet at regularly scheduled executive sessions without management, and that the nominating/corporate governance, compensation, and audit committees be composed entirely of independent directors. NYSE, Inc., Listed Company Manual § 303A.01–.06 (2007), available at http://www.nysse.com (search under “Listed Company Manual”); see also NASDAQ, Inc., Marketplace Rule
exclusive province of the CEO prior to Sarbanes-Oxley, to the domain of the board’s nominating committee after Sarbanes-Oxley. Thus, Branson’s selection of these time periods provides insight into whether and how this change in procedure has affected board gender composition, although it is possible that the effects of Sarbanes-Oxley and the revisions to the stock exchange listing requirements may not have been fully manifested by 2005.

A. Percentage of Women Directors and Multiple Board Seats Held by the Same Woman

Although the percentage of Fortune 500 board seats and the absolute number of women serving on boards of Fortune 500 companies increased slightly between 2001 and 2005, the numbers and percentages are still low compared to the percentage of women in the population. Catalyst, a research and advisory group devoted to advancing women in the workplace, conducts a regular census of the gender composition of Fortune 500 boards. Catalyst reported that 12.4% of Fortune 500 board seats were held by women in 2001 and 14.7% in 2005. As Branson notes, even these percentages may be misleading, as the increasing percentage of women directors was skewed somewhat by the overall decline in board size, and by the fact that the absolute number of individual women serving on corporate boards is less than indicated since some women serve on multiple boards. Because of multiple board memberships, Branson proclaims that the actual number of women on Fortune 500 boards is comparable “to the size of a senior class at a middle-size high school.” In 2001, for instance, although women held 678 board seats, these seats were occupied by only 480 different women. By 2005, 568

4350(c), (d) (2006) (requiring that the majority of the board be composed of independent directors, that the audit committee be composed of independent directors, that the independent directors have executive sessions without management, and that compensation and nominations either be handled by committees composed only of independent directors or be determined by a majority of the independent directors), available at http://complinet.com/nasdaq.


9. CATALYST, 2001 CATALYST CENSUS OF WOMEN BOARD DIRECTORS 1 (2001) [hereinafter 2001 CATALYST CENSUS], available at http://www.catalyst.org/knowledge/files/U.S.%20Census/2001%20Catalyst%20WBD.pdf. The 2001 Catalyst Census was also expanded to survey the companies in the bottom half of the Fortune 500. In the Fortune 501 to 1000, women held 8.9% of all board seats. Id. The aggregate percentage of board seats held by women in the Fortune 1000 was 10.9%. Id.


12. Branson, supra note 1, at 97. The numbers reported by Catalyst for the two time periods show 5915 Fortune 500 board seats in 2001, declining to 5629 board seats in 2005. 2005 CATALYST CENSUS, supra note 10, at 6. This decline, however, only reduced the average board size from 11.83 members in 2001 to 11.26 members in 2005. See id.

13. Id.
different women were represented on Fortune 500 boards. Branson criticizes Catalyst for reporting the percentage of board seats held by women rather than the percentage of all directors who are female. Catalyst’s census data, however, for every year until 2006, include a detailed breakdown of the number of individual women holding Fortune 500 board seats. According to Branson’s calculations, when the number of individual women is factored in (instead of the number of board seats held by women) the percentage of Fortune 500 board seats held by women in 2001 declines further to 8.3% in 2001 and 11% in 2005. This critique may be misguided, at least in the absence of any evidence that multiple board seats are more common among women than men. There is no indication that Branson counted the number of individual men who served on Fortune 500 boards, rather than just the number of board seats held by men. Undoubtedly, some men serve on more than one Fortune 500 board.

Branson chastises Catalyst, noting that even with evidence of little progress in board diversity, “Catalyst has only praise for corporations and their efforts, perhaps because corporations fund many of the organization’s programs.” Branson notes that the funding is sufficient to support offices for the organization in New York, Toronto, and San Jose. Diane Brady has reported that the specificity of the data supplied from Catalyst as a result of its board diversity surveys declined for the 2006 report, suggesting that the organization has become concerned about embarrassing its corporate supporters. Indeed, the Catalyst website has multiple-page reports online for each year Catalyst conducted a director diversity survey, which are sponsored by various corporations. Catalyst posted only seven pages for its 2006 and 2007 surveys, although one of the pages lists the Fortune 500 companies with no women directors, providing some public shaming for those corporations with absolutely no board gender diversity.

14. Id. at 97.
15. Id. at 97, 181.
16. According to the Catalyst reports, the number of individual women serving on Fortune 500 boards increased from 527 in 2001 (Branson reported 480) to 619 in 2005 (Branson reported 568), slightly reducing the number of board seats held by each woman, from 1.4 in 2001 to 1.3 in 2005. 2005 CATALYST CENSUS, supra note 10, at 10; BRANSON, supra note 1, at 97. The disparities between Branson’s data and the Catalyst data highlight the fluctuating nature of this data. Branson’s research assistants compiled data from publicly available information, primarily found in proxies. BRANSON, supra note 1, at 88. Catalyst compiled data by surveying Fortune 500 companies with several letters, follow-up phone calls, and an examination of the public records. 2001 CATALYST CENSUS, supra note 9, at 13; 2005 CATALYST CENSUS, supra note 10, at 32-33.
17. Id. at 181.
18. Id.
B. Trophy Director Analysis

According to the Catalyst data, in 1999, almost 76% (371 total) of the women serving on Fortune 500 boards served on only one Fortune 500 board, but 3.5% (17 total) served on four or more boards, with an additional 6.5% (32 total) serving on three boards. Thus, 10% (49 total) of women board directors served on three or more Fortune 500 boards. Branson and others have labeled such directors “trophy” directors. By 2005, the Catalyst data show that the percentage of individual women serving on three or more boards declined to 7.6%. By Branson’s count, however, the number of trophy directors increased between 2001 and 2005 from 30 to 79. The discrepancy may be because Branson appears to count all boards on which individual women serve, while the Catalyst numbers include only other Fortune 500 boards. The term “trophy” director is sometimes used to label a director selected because of his or her high visibility and whose contribution to the board is generally limited to lending his or her name to the board list, rather than a serious dedication of the individual’s time and expertise. Branson describes these directors as having “celebrity status.” In this category, he places Susan Bayh, whose celebrity status derives from her husband, a U.S. Senator from Indiana, Evan (“Birch”) Bayh. Mrs. Bayh sat on eight boards in 2005. She also falls into a new category identified by Branson—“academic trophy director”—since she lists her occupation as Former Distinguished Visiting Professor, Butler University. By Branson’s count, the “academic trophy director” category was populated in 2005 by 17 women with ties to colleges or universities who held collectively 97 board seats.

The “trophy director” category, however, might be better segmented into the following subcategories: “celebrity director” (someone who is lending her name rather than substantial time or expertise to a board; this person may be on one or multiple boards); the “retired director” (someone who has retired from a significant position and is remaining active and engaged by serving on one or more boards, but who reserves sufficient time free of board commitments to be considered retired); and the “professional director” (someone who is retired from a day-to-day position, self-employed, or support the organization with membership fees that range from $10,000 to $100,000) appear on the list: AmGen, Dell, FedEx, and Whirlpool. Brady, supra note 20, at 34. The 1999 data are reported because the information on the number of women holding multiple board seats was not reported in the 2001 Census and there was no Census conducted in 2000.


26. BRANSON, supra note 1, at 97.

27. 2005 CATEALYST CENSUS, supra note 10, at 10-11. Sixteen women served on 4 or more boards and 31 women served on 3 boards, for a total of 47 trophy directors out of 619 individual females holding Fortune 500 board seats. Id.

28. Id. at 97.

29. See id. at 99 (listing board memberships of several female trophy directors, including boards of companies not listed in the Fortune 500).

30. Id. at 104.

31. Id.

32. According to Wellpoint’s most recent proxy, Mrs. Bayh, who is only 47, currently serves on the boards of six companies. Wellpoint Inc., Official Notification to Shareholders of Matters to Be Brought to a Vote (Form 14A), at 20 (Apr. 4, 2007), available at http://www.wellpoint.com (follow “Investor Info”; to “Financial Information”; to “SEC Filings”; then select “Proxy Filings” under the “Grouping Filter” drop-down menu).

33. BRANSON, supra note 1, at 98.
employed in a context that provides a great deal of flexibility and free time, and who spends a majority of her working week on board-related activities. It is important to distinguish between the categories. There may be a negative connotation to the trophy director, but the retired and professional directors may add valuable insights to board deliberations based on their former employment experience as well as their knowledge and expertise from service on other public company boards.

C. The Wall of Shame

Another point for examination is the number of boards with no women or only one woman board member. Catalyst reports approximately 13% of Fortune 500 boards (66 companies) had no female members in 2001, while less than 10% (48 companies) had three or more women board members. In 2005, the percentage of companies with no female board members declined to just over 10% (53 companies), and there was a substantial improvement in the percentage of companies with three or more women board members to over 15% of Fortune 500 boards (76 companies). Branson’s figures for 2005 reveal what he labels a “startling fact: a clear majority, 51.2%, of U.S. major corporations have no women directors or engage only in apparent tokenism, with one director who is female.” Among the companies with no female board members in 2005 were Apple Computer, Dillard’s department store, and Levi Strauss.

D. The Path to a Board Seat and Changes in the Composition of Female Board Members

One of Branson’s most significant contributions comes from his detailed analysis of the backgrounds of the women who have ascended to Fortune 500 board seats and his documentation of the changes in their characteristics between 2001 and 2005. The gold standard for a potential board member has long been service as a CEO, or recently retired CEO, of a public corporation, although there is some evidence that CEOs, at least active CEOs, are increasingly reluctant to serve on outside boards. Over one-half of male Fortune 500 board members in 2001 were CEOs or former CEOs. There were only five women who were Fortune 500 CEOs at that time and serving on their own boards. Another very small percentage of women board members (5.7%) were serving as CEOs of smaller companies. By 2005, there were 8 women serving as CEOs of Fortune 500 companies, and 15 as CEOs of Fortune 1000 corporations. The percentage of board

34. 2001 CATALYST CENSUS, supra note 9, at 1.
35. Id. at 3.
37. BRANSON, supra note 1, at 102. Catalyst reports a slightly lower percent, 47% (235 companies), with no women or only one woman on the board of directors. 2005 CATALYST CENSUS, supra note 10, at 9.
38. Id. at 106.
39. Id. at 107.
40. Id. at 108. The 2006 Catalyst Census still reports Apple Computer, Inc. and Dillard’s, Inc. as having no women directors. Companies with Zero Woman Board Directors, supra note 24.
41. See Joann S. Lublin, More Boards Seek Directors Who Aren’t CEOs, WALL ST. J., Dec. 17, 2007, at B1 (noting more executives below the level of CEO are serving on boards of other companies).
42. BRANSON, supra note 1, at 91.
43. Id.
44. Id.
45. Id. at 77.
members who were employed as CEOs of smaller companies increased from 5.7% in 2001 to 10.6% in 2005. In general, post-Sarbanes-Oxley, Fortune 500 CEOs have reduced their own board service from an average of 2 boards to less than 0.9 boards during this period.

Women executives who are Vice Presidents, Chief Operating Officers, Chief Financial Officers, or Chief Executive Officers of a corporate subsidiary have increased their share of the female board seats from 18.3% in 2001 to 32.7% in 2005. In each of the two years studied, this category of female senior executives has been the largest source of female directors. The increase in percentage may signal the greater importance of public company experience to becoming a member of a public company’s board. Accompanying this increase was a decline in women directors coming from academia, nonprofits, and former government service from 37.2% of directors in 2001 to 29% of directors in 2005. Indeed, Branson found that in 2001 the most successful route to a board seat for a woman was not patiently ascending the corporate ladder to a CEO position, but rather being a “tenured professor at Harvard University—in law, economics, business, or even medicine.” The Harvard professors lost some ground in 2005, however, as the number of female Harvard academics on Fortune 500 boards declined from 13 in 2001 to 6 in 2005, with a corresponding decrease in board seats from 21 to 11. On the other hand, Branson noted the ascendancy in 2005 of the academic trophy director, holding four or more board seats. The academic trophy directors increased from just a few in 2001 to at least 17 in 2005.

Another change in board composition was the decline in consultants from 17% in 2001 to 7% in 2005, and the increase in independent businesswomen from 10.4% to 15.1% over the same period. Branson suggests that women may be marketing themselves in a more strategic manner by highlighting their business positions, noting that a woman who listed her role as “Consultant, Little Consulting” in 2001, was likely to rename her role in 2005 to “Partner, Little Consulting.”

III. THE BENEFITS OF INCREASED NUMBERS OF FEMALE DIRECTORS

Corporate governance would be improved, Branson asserts, with greater board diversity. Not only would “groupthink” be less likely with a diverse board, but the

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46. Id. at 103.
47. BRANSON, supra note 1, at 101. Forty-eight percent of CEOs sit on another board in addition to their own; more than one-quarter serve only on their own company’s board. Lublin, supra note 41, at B1.
48. BRANSON, supra note 1, at 98.
49. Id. at 91.
50. Id. at 103.
51. Id. at 91.
52. Id. at 103.
53. BRANSON, supra note 1, at 87.
54. Id. at 104. The principal cause for this decline was corporations falling out of the Fortune 500 between 2001 and 2005. Id. at 100.
55. Id.
56. Id. at 91.
57. BRANSON, supra note 1, at 103.
58. Id. at 91, 103.
59. Id. at 103.
60. Id. at 178.
presence of women and other minorities would likely reduce debilitating stereotypes about the performance of women and minorities, encourage women and minority employees, and increase cooperation among employees from different backgrounds.61

Branson says the best available evidence shows no correlation between board diversity and corporate performance.62 While there is some evidence that supports the theory of no correlation,63 Branson fails to note the several studies that support the link between board diversity and corporate performance.64 Branson’s argument, however, is that enhancing corporate performance is not the relevant measure of success because the role of directors is not to enhance profitability, but rather to monitor senior management and help prevent catastrophe.65

IV. THE EXPLANATION FOR THE LACK OF GENDER DIVERSITY ON CORPORATE BOARDS

Branson explores multiple explanations for the lack of progress in the representation of women on corporate boards. While Branson does not characterize these explanations as such, all are essentially variations on the “pipeline” theme—women have failed, for whatever reason, to ascend to the upper rungs of the corporate ladder from which most

61. Id. (citing Devon W. Carbado & Mitu Gulati, Race to the Top of the Corporate Ladder: What Minorities Do When They Get There, 61 WASH. & LEE L. REV. 1645, 1659-60 (2004)).

62. BRANSON, supra note 1, at 176.


64. Some of the studies supporting a link between board diversity and corporate performance cited in this footnote were published after Branson’s book went to press. See, e.g., David Carter et al., The Diversity of Corporate Board Committees and Firm Financial Performance (Mar. 15, 2007) (unpublished manuscript, on file with the Journal of Economic Literature) (reporting the results of a cross-section fixed-effects procedure with lagged variables and a three-stage least-squares estimation that support the hypothesis that board diversity positively affects financial performance as measured by Tobin’s Q), available at http://ssrn.com/abstract=972763; LOUIS JOY ET AL., CATALYST, INC., THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN’S REPRESENTATION ON BOARDS 2007, available at http://www.catalyst.org/knowledge/bottomline2.shtml (finding that companies with the highest representation of women board members outperformed companies with the least representation of women board members by 53% on ROE, 42% on return on sales, and 66% on return on invested capital); Renée B. Adams & Daniel Ferreira, Diversity and Incentives in Teams: Evidence From Corporate Boards 11 (October 2003) (unpublished manuscript) (finding that Tobin’s Q is positively related to the percentage of female directors on the board), available at http://ssrn.com/abstract=321095; David A. Carter et al., Corporate Governance, Board Diversity, and Firm Value, 38 FIN. REV. 33, 38, 51 (2003) (finding that Tobin’s Q is positively related to both the percentage of female directors and the percentage of minority directors); Niclas L. Erhardt et al., Board of Director Diversity and Firm Financial Performance, 11 CORP. GOVERNANCE: AN INT’L REV. 102, 107 (2003) (finding that the percentage of Caucasian females plus ethnic minority directors on the board is positively related to both ROE and ROA).

65. BRANSON, supra note 1, at 176.
board members are selected. His explanations for lack of board gender diversity include legal explanations derived from his analysis of over 2000 Title VII cases that reached the federal appellate courts from 1995 through 2005.\textsuperscript{66} as well as his examination of theoretical literature from social psychology, linguistics, sociology, and other fields.\textsuperscript{67} Branson concludes that for a woman, the recipe for success in business shifts as she rises in the ranks, and that women are ill-served by following paths that have proved successful for men. He recounts four paradigm shifts for a woman advancing up the corporate ladder, beginning with behavior that is aggressive enough to allow the woman to excel while “walking a tightrope” and not being considered too pushy or aggressive.\textsuperscript{68} At higher levels of management, however, the behavior paradigm shifts as women must demonstrate their strategic skills and ability to cooperate with others.\textsuperscript{69} Advancing even further, women must again come on strong, without assuming too much imperial authority that may doom them. As a possible example of this, Branson cites Carly Fiorina, the now-deposed CEO of Hewlett Packard, who may have been doomed by her aggressive style.\textsuperscript{70} The conflict for women managers is also exemplified by other studies of the success of women. For instance, a recent study showed that additional board appointments were more likely for directors who gave the company’s CEO information and advice, and who engaged in ingratiating behavior, but that women and ethnic minorities were rewarded less for this behavior.\textsuperscript{71} A second article reports that women do not face a glass ceiling in corporate America, but instead face many obstacles that together constitute a “labyrinth.”\textsuperscript{72} A third article reports that women are more reluctant to negotiate their own salaries than are men (helping to account for the continuing gender gap in salaries), but notes that “women’s reluctance was based on an entirely reasonable and accurate view of how they were likely to be treated if they did [negotiate]. Both men and women were more likely to subtly penalize women who asked for more—the perception was that women who asked for more were ‘less nice.’”\textsuperscript{73}

Branson does not observe or discuss what may be the most powerful explanation for the lack of greater board gender diversity. In the presence of conflicting empirical evidence about the effect of board diversity on corporate performance and the absence of a compelling case outlining how such diversity might enhance board performance, there is no momentum for change from the status quo. In a separate project, my colleague Kimberly Krawiec and I are interviewing board members and corporate executives about the impact of board diversity on board processes in an attempt to help fill in this gap in the literature and to explore more thoroughly how board diversity affects corporate

\textsuperscript{66} Id. at 23-24.
\textsuperscript{67} Id. at 55-64.
\textsuperscript{68} Id. at 69.
\textsuperscript{69} Id. at 166.
\textsuperscript{70} BRANSON, supra note 1, at 173.
\textsuperscript{72} Alice H. Eagly & Linda L. Carli, Women and the Labyrinth of Leadership, HARV. BUS. REV., Sept. 2007, at 63.
V. PRESCRIPTIONS FOR IMPROVEMENT

Professor Branson concludes by offering suggestions for how to improve the representation of women on corporate boards. His prescriptions, discussed below, may not be adequate if the real issue facing the advancement of women is—as he suggests—child-bearing and pervasive institutional discrimination. These prescriptions may be necessary, but not sufficient, to solve the problem. Branson suggests that board nominating or governance committees include at least one woman board member. Although this is a sound suggestion, it may be one doomed to fail for a reason Branson notes himself—the effects of tokenism. A lone woman may feel reluctant to advance the consideration of women for new board seats. Although our interview study is still in its early stages, an observation made by several of the women respondents is that female board members may carefully select the issues on which they speak. They make a conscious decision not to “rock the boat” so their own contributions are taken seriously by the male board members. Even where the women are chairing or serving on the nominating committee, they have been reluctant to emphasize the need to consider additional women or other diverse candidates.

A second prescription offered by Branson is that boards eliminate trophy directors, male and female, who have high profiles and sit on multiple boards, freeing up seats for more women candidates. This is another laudable suggestion, which could be improved with more specificity. In Part II.C, I suggested that there appeared to be three distinct sub-categories included in the “trophy director” term: the celebrity director (who lends her name to the board, rather than significant time or expertise), the retired director (who is retired from full-time employment, sits on one or more boards, but still is sufficiently free of board service commitments to be considered retired), and the professional director (who is retired or flexibly self-employed and who spends a majority of her workweek on board-related activities). With these sub-categories in mind, I agree with Professor Branson that boards should be encouraged to eliminate celebrity directors. Retired and professional directors, however, often add significant value to the board as a result of their prior professional experience or their exposure to multiple companies and boards. Therefore, I am reluctant to endorse a limit on the number of board seats a director should hold. There is no magic number of board seats that is reasonable for any particular board member. The reasonableness of the number depends on whether the board member is employed full-time, and on the amount of time she has to devote to board service given her other commitments, including service on non-profit boards. Some proxy advisory firms do recommend withhold votes for directors with numerous board commitments.

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74. See Lissa Lamkin Broome & Kimberly D. Krawiec, Signaling Through Board Diversity: Is Anyone Listening? (forthcoming 76 U. CINN. L. REV. 2008) (discussing preliminary results from the early stages of our study). When our interviews are completed later this year, we will prepare a paper discussing all of our results, tentatively titled, Board Diversity and Corporate Performance: Filling in the Gaps.

75. Branson, supra note 1, at 181.

76. Id. at 181-82.

77. See INST. S’HOLDER SERVS., ISS 2007 U.S. PROXY VOTING GUIDELINES: CONCISE SUMMARY 2 (recommending a withhold vote for an individual director who sits on more than six public company boards and also recommending a withhold vote from outside board seats for a CEO of a public corporation who sits on the boards of more than two public companies besides his or her own company), available at
but rigid rules may inadvertently exclude qualified directors. Whether investors really act based on information provided by proxy advisory firms is uncertain, but it appears that many directors pay close attention to the guidelines set forth by such groups.

In addition, I would suggest that women directors should also be encouraged to have a list of other women they know through their own professional circles to suggest for board service when they are approached for a board position that they do not wish to pursue. Chances are, if a woman is asked about potential board service, one of the factors involved in the search may be gender. In addition, the woman asked to consider additional board service should find out as much as she can about the qualities that the company is seeking in the new board member so that any suggestions she makes of additional female candidates are targeted to fit multiple characteristics rather than just gender.

There were eight women Fortune 500 CEOs at the time Branson wrote his book. Companies that narrow their board searches to include only a CEO or retired CEO of a public company not only unnecessarily narrow the candidate pool, but substitute this conventional board member requirement for a more deliberate and thoughtful search for a contributing and effective board member. Most importantly, those boards requiring CEO level experience in potential board members will not likely consider a woman candidate. The 2005 proxy data examined by Branson indicates that women are advancing onto boards from other executive positions at corporations. Although this is a promising development, it is unlikely to significantly increase the number of women serving on public company boards, for women are not now adequately represented in the uppermost echelons of the corporate hierarchy. Measuring or benchmarking a company’s progress in advancing women into and through the managerial ranks is also likely to have positive effects. As Branson notes, if it is not measured, it will not be managed. The relative lack of success of women in advancing to the most senior rungs of the corporate ladder will increasingly impede the appointment or election of women to corporate boards. Public company experience is viewed as more of a necessity in the post-Sarbanes-Oxley environment, reducing the opportunities for women academics, nonprofit leaders, and former government officials to fill board positions.

Ensuring greater success for women in the corporate world so that more women advance to the highest executive levels would likely lead to a greater number and percentage of women directors. Branson suggests that corporations appoint diversity directors and charge them with eliminating what has been called “second generation


78. Broome & Krawiec, supra note 74 (suggesting that many of the female directors interviewed believed their gender to be a relevant criteria for their board selection).

79. Cf. RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR 108-09 (2002) (arguing that CEO searches that begin with the premise that the desired candidate must be a sitting CEO are an example of a social matching process that substitutes convention for “deliberative thinking and decision-making”).

80. According to a 2005 Catalyst Survey of women executives, only 16.4% of the Fortune 500 corporate officers were female (as compared to 14.7% of the board members). 2005 CATALYST CENSUS, supra note 10. Moreover, 71% of the Fortune 500 women corporate officers are in staff positions, while only 29% are in the line positions that are preferred for corporate board members. Id. Forty-eight percent of men holding corporate officer positions, however, were in line positions. Id.

81. BRANSON, supra note 1, at 183.

82. Id. at 182.
employment discrimination." Branson describes such discrimination as facially neutral acts and practices that impact women adversely, such as requiring managers to attend late day or Saturday morning meetings. As long as women embrace or shoulder a significant portion of a family’s child rearing responsibilities, such subtle acts may force women off of the managerial track to a position with hours that are more conducive to the child rearing role. Branson also recounts more overt discriminatory employment practices against women managers in his exhaustive review of Title VII cases from 1995 to 2005.

Branson suggests, however, a more fundamental issue that appointing a diversity officer is not likely to solve, even when focusing on equal treatment of male and female employees. That fundamental issue is the effect of child-bearing and child-rearing on a woman’s career. Indeed, “[e]quality gives way when there exists a universal and defined biological trait that requires equality to assume a secondary role. And there is only one such trait—child-bearing, which by definition is exclusively the females’ role.” Branson strongly urges that women who go on the “mommy track” (which might include a longer maternity leave or a reduced work schedule while their children are young) up to a specific period of time determined by the corporation should not be subject to any adverse inference or evaluation. This practice, he argues, should become “part of the organization’s very fabric.” As Branson persuasively concludes, “[t]o relegate a woman to a secondary role, or to 60 percent of the pay a comparable male earns, because, overall, she took two years out to help rear a family, when that woman may have a 35-year career with the organization is irrational.” Absent such enlightened employment practices, however, many women leave the workforce altogether when their efforts to accommodate family and work are not successful or are not embraced or valued by the employer.

I would add some more concrete suggestions to Branson’s more general change prescriptions. To the extent that women do rise to the highest executive levels in a corporation, the corporation’s CEO and board of directors should work with women executives and champion them for board service on other companies. This additional experience on another company’s board would enrich the woman executive’s own management skills and help prepare her for eventual service as a CEO. In many companies, there is either no formal policy regarding board service by company executives or external board service is prohibited because of the time commitment and potential liability. The professional development opportunity afforded by board service for senior executives, however, should not be underestimated and boards should be encouraged to discuss the value of such service for their own executives.

One possible approach to increase the number of women directors championed by the American Bar Association’s (ABA) Business Law Section is the advancement of women corporate attorneys to board positions. Branson’s data recorded an uptick in female attorneys on Fortune 500 boards between 2001 and 2005. Corporate attorneys in

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83. Id.
84. Id.
85. Id. at 21-34.
86. BRANSON, supra note 1, at 183.
87. Id. at 184.
88. Id.
89. Id.
90. Id. at 91, 103 (stating that the percentage of female attorneys on Fortune 500 boards increased from
private practice have represented a number of public companies, and often have been privy to board discussions as legal advisers to their corporations. In-house counsels of public corporations also have extensive knowledge of their corporations and significant board interaction, often serving as the corporate secretaries and hence attending all board and board committee meetings.

Lawyers, by nature risk-averse, will need to be prodded to seek board service given their knowledge of director liability for misstatements in registration statements, and other securities law claims for material misstatements or omissions and corporate law claims for breach of fiduciary duty. In addition, many companies may need to be convinced of the value of adding a lawyer to the board, since all public companies are advised by outside counsel and often also by an in-house attorney. The ABA DirectWomen project advances the potential attractiveness of board service as a second act for a law firm partner or in-house counsel who is contemplating retirement or who has recently retired. I argue that this encouragement should also extend to senior women attorneys still actively employed. For one thing, this would expand the pool of potential women attorney board members considerably. Second, retired women attorneys may experience the “short runway” problem. Many corporations have adopted a mandatory retirement age for directors. A typical age is 72, but the age picked varies from company to company. It is unlikely that a company would nominate a director for board service at the age of 67, knowing that after five years the director would be forced to step down from the board. Moreover, achieving the first board appointment is the hardest hurdle. Many directors find that additional board appointments come to them as a direct or indirect result of their first board service and the experience and contacts evolving therefrom. The time period for an older woman director to advance onto the boards of increasingly larger corporations would be very limited if her first board seat did not come until she was in her mid-sixties.

Encouraging active women attorneys to seek board positions may require changing firm policies that either prohibit outright, or strongly discourage, public company board service. Liability concerns loom large, especially for risk-averse attorneys. An attorney’s liability exposure “increases exponentially when he or she accepts a board position,” primarily because directors are far more likely to be sued than attorneys. The more
The practical reason that many firms may discourage board service is the fear that the firm will not be able to accept legal employment from the corporation, either to avoid the lawyer-director losing the necessary independence or to avoid the appearance of a conflict of interest. This motivation, however, seems to be shortsighted as the lawyer-director’s business development opportunities should increase by the number of other directors she interacts with who may control legal business for their own companies.

“Financial experts” are in demand post-Sarbanes-Oxley, and women CFOs or even CPAs should be increasingly attractive candidates when board searches are focused on financial expertise. To the extent large accounting firms, like large law firms, prohibit outright or strongly discourage board service by partners, a source of female board members with financial expertise is being limited.

Finally, those involved in board searches should take advantage of the numerous databases and directories of women interested in board service. The University of North Carolina (UNC) School of Law Director Diversity website points to some of these resources. Many databases and registries are proprietary. Those registries maintained by executive search firms are accessed only for searches in which the firm is retained. Some registries are available only for members of the organizations that maintain them, or for those individuals who have completed a training program offered by the organization. Some, such as the NASDAQ registry, are open to anyone. Other registries have more of a regional focus, and may be of more use to smaller companies willing to consider a candidate for a board position who has not previously served on a public company board. Executive search firms, CEOs, and board nominating committee chairs should become familiar with and take advantage of these resources in addition to polling current board members and the CEO for the names of their associates and acquaintances who might be qualified for board service.

Boards also need to understand that gender diversity is not achieved with a single woman director or necessarily even with two women directors. Branson addresses tokenism, describing the same phenomenon reported in a study on “critical mass” published after his book went to press.

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97. Peter Lattman, Dual Role of Topps Director Revives Old Conflict Debate, WALL ST. J., June 13, 2007, at B2 (attorney-director was accused of favoring a merger of the company, a transaction which would presumably bring a substantial fee to his firm).


100. Board Recruiting, A NASDAQ Product, supra note 99.


is a token, two may be a skewed group, but the tipping point or “critical mass” may come with three or more from the same group. With three or more women on a board, every comment by a woman director ceases to be marginalized or scrutinized as the woman’s view and is instead valued for its own merit. With three women, each holding three different opinions, none of them can represent the woman’s point of view. For corporations with one or two women board members, the women may still feel marginalized, and may not champion women’s concerns or advance the candidacy of other women board members for fear of being further marginalized.

VI. OTHER GROUNDS FOR DIVERSITY

Diversity, other than gender diversity, is also of critical importance in the board room as we head toward a society where whites will be in the minority later this century. Branson elected to confine his project to the gender disparity on boards, but many of his observations also apply to the lack of racial and ethnic diversity on boards.

When measuring racial diversity, the “counting problems” are exacerbated. It is difficult to determine race from looking at a name or even a picture. Gender cannot always be determined by name, but almost always is confirmed by a picture, and is conclusively determined by proxy references to the directors as “Mr.” or “Ms.” But, surely, a board with racial diversity is also important for the same reasons cited for greater board gender diversity. Many organizations that have surveyed for racial diversity, including the UNC School of Law Director Diversity Initiative, have spent countless hours and resources trying to make an accurate and fair racial determination. Perhaps the SEC proxy disclosure and proxy access rules could provide an avenue to elicit information on race of director candidates. My colleague, Thomas Lee Hazen, and I hope to explore that issue in a subsequent article. If the counting problem is eliminated, organizations interested in board racial diversity would have accurate

104. See id.
105. Contrary to this line of argument, however, some female respondents in our director interview study report that throughout their careers and do not find this to be an impediment to making a contribution to the group. See supra note 74.
106. Fairfax, Bottom Line, supra note 3, at 801-02 (“[O]ne researcher estimates that by 2050, people of color will constitute almost half of the nation’s population.”).
107. See Phred Dvorak, Some Things Don’t Change (A Special Report); Sarbanes-Oxley Was Expected to Increase the Number of Minority Directors; What Happened?, WALL ST. J., Jan. 14, 2008, at R4 (describing the business case for racial diversity and explanations for the continuing lack of significant representation of minorities on public company boards).
110. See SEC Rule 14a-8(i), 17 C.F.R. § 240.14a-8(i) (2007) (setting forth the scope of shareholder access to publish shareholder proposals in management’s proxy statement).
information and could redirect their time and resources from surveys on board racial diversity to finding, training, and promoting qualified racially diverse candidates for board service. Some of these candidates would also provide gender diversity.111

Any benefits boards realize from diversity may also extend to dimensions of diversity not captured merely by gender or race. Thus, in our increasingly global economy, international heritage or experience is becoming increasingly important. Perhaps the overall message is that there may be a competitive advantage from constructing a high performance board of qualified professionals with a broad array of backgrounds and experiences. Too often, directors follow the path of least resistance and nominate their acquaintances with whom they feel comfortable and these candidates necessarily often resemble the incumbent directors in terms of gender, race, social status, background, and experience.

VII. CONCLUSION

Branson’s book highlights the lack of women on public company boards and identifies the wasted resource of female talent that either leaves the workforce or is relegated to reduced pay and responsibility because of overt discrimination, second order discrimination, or a failure to accommodate the singular role that women play in child-bearing and child-rearing. The challenge Branson identifies is how to retain women in the work force and how to advance them to the corporate boardroom. With more women in the boardroom, perhaps these issues would be highlighted and attended to as a serious strategic imperative for corporations wishing to broaden and deepen their managerial talent pool.

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111. Minority females are especially scarce on Fortune 500 boards. For the 222 companies for which Catalyst was able to verify director race in 2005, only 2.4% of the directors were African-American women, 0.3% Latinas, and 0.4% Asian-American. 2005 CATALYST CENSUS, supra note 10, at 16.