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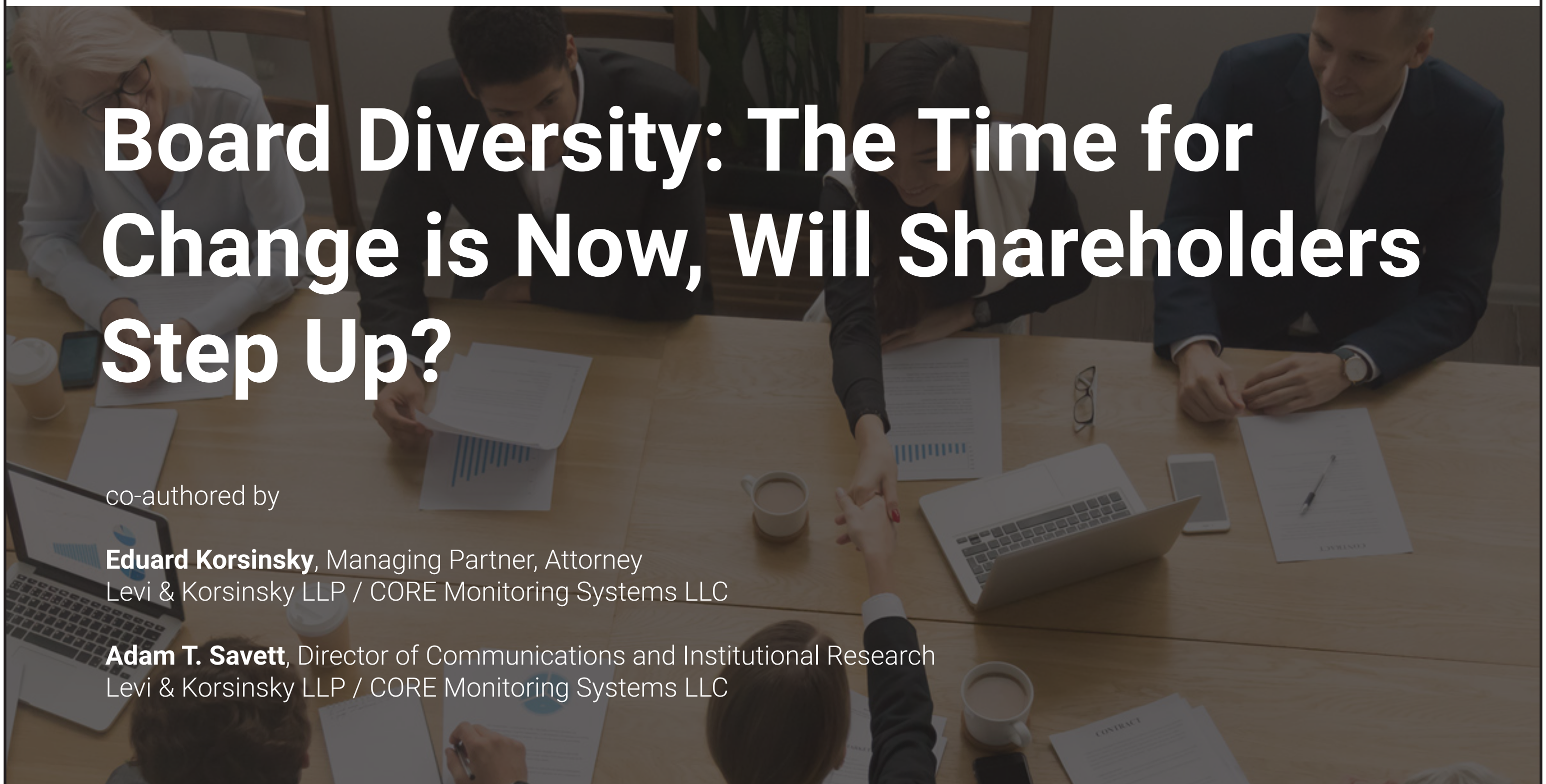

Board Diversity: The Time for Change is Now, Will Shareholders Step Up?

co-authored by

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Much ink has been spilled, much breath expended, and many hands have been wrung over the last decade on the lack of diversity in corporate boardrooms. That chorus only intensified over the last year as protests over racial inequity poured out into the streets of cities across the country.

While companies continue to make progress, hundreds of US publicly traded companies still have an all-male board of directors. Board gender diversity has been accelerating, but female directors continue to represent just 18.5 percent of the total population of board members across the companies comprising the Russell 3000 Index, an increase of only 4.2 percent since 2016. According to a recent report from The Conference Board, 13.4 percent of Russell 3000 companies do not yet have a single woman on their board. Board leadership roles are also not equally open to women – less than 5 percent of companies in each of the Russell 3000 and S&P 500 indexes have a female board chair, and less than 20 percent of board committees in the Russell 3000 are led by women.

The Conference Board's report also revealed that for companies that explicitly disclose the race or ethnicity of their boards of directors, a staggering 80 percent of those board members are white. The data is somewhat limited, as only about 10 percent of S&P 500 companies explicitly disclose the race of individual directors. Anecdotal data suggests that the companies that do disclose the racial composition of their boards may, in fact, be more diverse on average, strongly suggesting that the true diversity numbers are even lower than the sample suggests.

The issue matters. Research published by **Vontobel Asset Management** reveals that public companies with the most ethnically diverse boards performed better than their peers. Specifically, Vontobel found that the most diverse boards generated a higher five-year EPS growth than public companies with the least diverse boards.

In response to the frustrating pace of change in Corporate America, institutional investors have become even more active in calling for increased boardroom diversity in their portfolio companies. Laudable as those efforts may be, they have often been measured steps, which may not yet represent transformational changes, but may result in long term movement.

Before the start of the 2020 proxy season, the **Office of the New York City Comptroller** launched the third phase of its Boardroom Accountability Project, expressly calling out companies that do not have a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees, similar to the so-called "Rooney Rule" pioneered by the National Football League. In response, 20 companies actually enacted a broader version – requiring consideration of women and racially/ethnically diverse candidates for both director seats as well as the CEO role.

In releasing their "Investment Stewardship Engagement Priorities for 2021," **BlackRock** noted that they "expect boards to include directors with diverse personal and professional experiences" and where they "consider a board to be insufficiently diverse, we may vote against directors on the nominating and governance committee or equivalent for an apparent lack of commitment to board effectiveness."

CalPERS has identified "Board Quality: Diversity, Independence and Competence" as one of the five core issues that they believe have a long-term impact on risk and return in their "Governance & Sustainability Principles." While those principles do not yet include a "Rooney Rule," CalPERS asks portfolio companies to annually disclose the "demographic information including race, ethnicity and gender" of the board.

In their 2021 US Proxy Voting guidelines, **Glass Lewis** announced that they will generally recommend against the nominating committee chair of a board that has no female members, and will note as a concern boards that have fewer than two female directors. Beginning in 2022, Glass Lewis will up the stakes, and generally recommend voting against the nominating committee chair of a board that has fewer than two female directors. Glass Lewis will also look at whether a company has a "Rooney Rule" in place. While they will not make voting recommendations solely on that basis in 2021, it will "help inform our assessment of a company's overall governance and may be a contributing factor in our recommendations when additional board-related concerns have been identified."

Change is brewing at the legislative level as well. Following on the heels of California's Senate Bill 826 and Assembly Bill 979, which mandated companies headquartered in that state to have specified levels of representation of women and people from an "underrepresented community" on their boards, New Jersey, Massachusetts, and Washington have all introduced their own legislative proposals setting a female quota for public company boardrooms. While that is a step towards ensuring board diversity, such efforts focusing exclusively on gender are well off the bar that California has already set.

Scrutiny of board diversity practices will only continue to intensify, driven by both the lead of prominentasset managers and the increasing demands put on public companies by state and federal legislators.

One of the historical hurdles to achieving greater board diversity has been a supposed lack of qualified candidates. That narrative is false, but is rooted in a historical preference for board members to come from the C-suite. Women and diverse candidates have, of course, been underrepresented in the C-suite for decades. While progress continues to be made there as well, for the overall composition of boards and the pool of board candidates to better represent the diversity of the country, boards and companies will need to look for talented directors outside their traditional fishing holes.

Empirical data strongly suggests that corporations, and their investors, will be better off in the long term as these trends continue. A recent academic study cited by BlackRock found that an increase of just 10 percentage points in the representation of female directors on a company board was associated with a statistically significant increase in the number of patents that issued and the level of subsequent research citations for a given R&D expenditure.

With increasingly insistent prodding from asset managers, who have placed diversity front and center in their corporate stewardship initiatives, the proof will very likely be in the pudding. The key remains, as always, for institutions to continue to work together to press for change, as there is strength in numbers.

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Eduard Korsinsky is the Managing Partner and Co-Founder of Levi & Korsinsky LLP, a national securities firm that has recovered billions of dollars for investors since its formation in 2003. For more than 24 years Mr. Korsinsky has represented investors and institutional shareholders in complex securities matters. He has achieved significant recoveries for stockholders, including a $79 million recovery for investors of E-Trade Financial Corporation and a payment ladder indemnifying investors of Google, Inc. up to $8 billion in losses on a ground-breaking corporate governance case. His firm serves as lead counsel in some of the largest securities matters involving Tesla, US Steel, Kraft Heinz and others. He has been named a New York "Super Lawyer" by Thomson Reuters and is recognized as one of the country's leading practitioners in class action and derivative matters.

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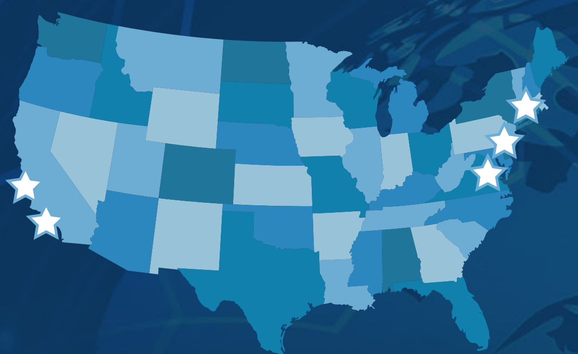

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Adam is a nationally recognized expert on complex litigation, class actions, and settlement claims filing. He is a frequent speaker, author, and commentator on class actions and securities litigation, and his comments have appeared in a wide variety of publications, such as The New York Times, Wall Street Journal, CFO Magazine, and Pensions & Investments.

Adam was previously named one of the 100 Lawyers You Need to Know in Securities Litigation by Lawdragon Magazine and has been an invited speaker before numerous industry groups, including the Federal Judicial Center (FJC), Bank Depository Users Group (BDUG), Association of Global Custodians (AGC), and SIFMA's Global Corporate Actions Forum.

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