Corporate Reporting under the U.S. Securities and Exchange Commission's Diversity Disclosure Rule: A Mixed-Methods Content Analysis

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Abstract:
This is chapter 6 of Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity (Cambridge University Press, forthcoming in 2015). In this chapter I investigate the disclosure-based approach to addressing diversity in corporate governance. In 2009, the United States Securities and Exchange Commission adopted a rule requiring publicly traded firms to report on whether they consider diversity in identifying director nominees and, if so, how. The rule also requires firms that have adopted a diversity policy to describe how they implement the policy and assess its effectiveness. The rule does not define “diversity,” however, leaving it to corporations to give this term meaning.

I present findings from my mixed-methods content analysis of corporate disclosures during the first four years of the rule in order to provide empirical elucidation of how the rule operates in practice. The research sample consists of a hand-collected dataset of the 2010–2013 definitive proxy statements of S&P 100 firms. I am interested in learning how these firms, in responding to the rule, construct the concept of diversity through their public discourse. What does diversity, viewed through the prism of legal regulation, mean to market participants? How do they interpret and understand this socio-political idea in the absence of a regulatory definition? How is diversity constituted and discursively performed?

The SEC’s disclosure rule has caused US corporations to establish a vocabulary of diversity. My study shows that “diversity” carries multiple connotations for these firms. My most salient finding, however, is that when interpreting this concept in the absence of regulatory guidance, the dominant corporate discourse is experiential rather than identity-based. Firms most frequently define diversity with reference to a director’s prior experience or other nonidentity-based factors rather than his or her socio-demographic characteristics. The data provide a unique window into the potential meanings of “diversity” in the corporate governance setting, as well as the limits of a strategy that permits corporations to give the term their own definition.
Keywords:
Corporate governance, securities law, diversity, disclosure, United States Securities and Exchange Commission, socio-legal research, mixed-methods content analysis

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CHAPTER 6
CORPORATE REPORTING UNDER THE U.S. SECURITIES AND EXCHANGE COMMISSION’S DIVERSITY DISCLOSURE RULE: A MIXED-METHODS CONTENT ANALYSIS

Introduction

In 2009, the United States Securities and Exchange Commission (“SEC”) adopted a rule requiring publicly traded firms to report on whether they consider diversity in identifying director nominees and, if so, how. The rule also requires firms that have adopted a diversity policy to describe how they implement the policy and assess its effectiveness. The rule does not define “diversity,” however, leaving it to corporations to give this term meaning.

Calls for disclosure-based efforts to address diversity in the corporate governance arena are not new. Almost twenty years ago, the Federal Glass Ceiling Commission, a bipartisan body formed under the Civil Rights Act of 1991, argued that public reporting of diversity-related information “motivates organizations to begin a process of positive social change,” and that disclosing “data on the most senior positions . . . is an effective incentive to develop and maintain innovative, effective programs to break glass ceiling barriers.” Accordingly, the commission “urge[d] the Federal government and its agencies to look for ways to increase public access to diversity data,” specifically suggesting disclosure requirements under US securities law as a viable avenue.

In chapter 3, I introduced the SEC diversity disclosure rule, highlighted its conceptual underpinnings, and engaged with critical reactions to the new measure. I presented the rule as form of new governance, reflexive-style regulation that seeks to influence corporate behavior without resort to coercive sanction. In this chapter, I offer preliminary insights into how firms have responded to the rule. These early data offer a beginning point for analysis of how a reflexive law mechanism (disclosure) that contemplates a particular policy objective (board diversity) translates into practice. Will the SEC disclosure rule eventually catalyze a process of critical self-reflection that, coupled with the potential for shaming, transforms corporate thinking on governance and representation?

This question engages a long-standing, core preoccupation of socio-legal research: the potential divide between law as codified and law in operation. While a wide body of reflexive and new

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3 Ibid at 15.
4 Ibid at 42.
5 Ibid at 43 (with respect to corporate officer positions, in particular).
6 I recognize that my characterization of the rule’s intent is contestable, given the SEC’s position that the rule is not attempting to direct behavior. However, as I discuss below, I believe the SEC’s claim should be viewed with skepticism.
governance literature makes “ambitious claims” about the capacity of reflexive models to transcend the rigidity and “intrusive prescription” of command-and-control regulation, the application of these models to concrete situations is still in an early stage of development. As Schneiberg and Bartley note, “[S]cholarship on new regulatory forms has produced far more empirical research on their rise and character than on their translation into practice.”

Because the SEC’s diversity rule is still in its infancy, it remains too early to reach any definitive conclusions concerning its impact on board composition or corporate governance more generally. My goals in exploring “regulation in action,” therefore, are two-fold. First, I hope to inform future analyses of the disclosure rule’s results, to be conducted when more abundant data exist. Eventually, the available data will enable comprehensive study of the causal or correlative relationship between the diversity disclosure rule and diversity levels on corporate boards. Second, I hope to shape current SEC practice by explaining how corporations have interpreted its disclosure rule to date.

In conducting this preliminary study, I strove to understand the different meanings that US corporations attribute to “diversity” in their disclosures. To that end, I compiled and analyzed the information reported under the SEC rule by firms included in the Standard & Poor’s (“S&P”) 100 Index for four full proxy seasons, from 2010 to 2013. This entailed culling the diversity-related content from firms’ proxy statements, which, for a number of companies, exceeded one hundred pages. Proxy statements are documents that contain information relevant to investors in exercising their voting rights. Listed companies must file their proxy statement with the SEC and distribute the statement to shareholders in advance of a shareholders’ meeting.

I elaborate on my findings in considerable detail below, but some of the important insights my study reveals are the following:

- During the notice and comment period on the rule, which included various reforms related to compensation and corporate governance disclosure, nearly 40 percent of commenters discussed diversity. Of those commenters, the overwhelming majority supported the diversity component of the rule and defined diversity with reference to gender and race or ethnicity.

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9 Ibid at 474.
10 Ibid at 476-477.
11 Marc Schneiberg & Tim Bartley, “Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century” (2008) 4 Ann Rev L & Soc Sci 31 at 49. See also Anna Gelpen, “Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing” in Carlos Espósito, Yuefen Li & Juan Pablo Bohoslavsky, eds, Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing (Oxford, UK: Oxford University Press, 2013) 347 at 362 (“Empirical studies of the effectiveness of new governance are still sparse and inconclusive.”); David M Trubek & Louise G Trubek, “New Governance and Legal Regulation: Complementarity, Rivalry or Transformation” (2007) 13:3 Colum J Eur L 539 at 543, 560 (“We . . . recognize that substantial further work needs to be done to clarify terminology, secure empirical information, and develop a more sophisticated typology”; “This process will require careful delineation of variables and substantial empirical work. . . . [T]here is very little hard data available on most of the cases we have identified.”).
• Overall levels of compliance with the rule after its promulgation were high; in all years, most proxy statements reflected the consideration of diversity.

• While corporations gave the term “diversity” multiple meanings, only approximately half reported on the socio-demographic characteristics of gender, race, or ethnicity. Firms most frequently defined diversity with reference to experiential and related factors.

• Many firms discussed why they considered diversity in identifying director nominees. Most frequently, they indicated that a diverse board provides a plurality of perspectives and experiences, results in more informed decision-making processes, expands knowledge available to the corporation, and enhances judgment.

• Few firms disclosed the existence of a formal diversity policy. Many more disclosed the absence of a policy or were silent. A number of firms that did not explicitly acknowledge having a policy appeared nonetheless to have adopted something similar, which I treated as a “functional equivalent” in my analysis.

The finding regarding firms’ definition of diversity is particularly revealing. The SEC’s decision not to define diversity left room for corporations to give the term content. That social identity categories were not more prominent in the disclosures serves as a preliminary caution that the SEC rule, in the future, may not produce diversity-enhancing results along socio-demographic lines. Officially, the SEC disavows any desire to affect firms’ conduct or encourage any particular type of diversity.\(^\text{13}\) As I explain in more detail in chapter 7, however, I believe this claim should be viewed with skepticism. The agency previously has made statements accepting disclosure as a conduct-influencing tool,\(^\text{14}\) and SEC commissioners’ unofficial public statements on the rule reflect a desired goal of increasing socio-demographic representation.

As a result, I ultimately agree with the rule’s detractors who, in analyzing the SEC’s representations on the rule when it was promulgated, argued that “[i]t strains credulity that this testimonial in favor of diversity policies . . . does not express a policy preference.”\(^\text{15}\) Unlike detractors, however, I believe the SEC should adopt a rule specifically designed to elicit information related to identity-based diversity with the end objective of promoting this type of diversity on boards. I explore the reasons for this belief in chapter 7 and discuss how the SEC might reform its rule to better serve these objectives. In this chapter, I begin by reporting the results of my study.

**Methodology and research questions**

In my study, I used content analysis as the primary research method. Content analysis is a “form of textual analysis used to identify, enumerate, and analyze occurrences of specific messages and message characteristics embedded in relevant texts.”\(^\text{16}\) In undertaking this technique, the researcher aims to “mak[e] replicable and valid inferences from texts (or other meaningful matter) to the contexts

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\(^{14}\) See my discussion of this point in chapter 3.


of their use.”\textsuperscript{17} In furtherance of this goal, the researcher constructs analytical categories used to place and classify written text (or “content units”).\textsuperscript{18} Although conventional content analysis is quantitative and involves counting the instances and forms of different features arising from the text,\textsuperscript{19} qualitative uses of this research method are now well established. This qualitative analysis, derived from the social sciences and critical and literary theory,\textsuperscript{20} strives to accomplish one of the key goals of qualitative research generally: the description and explanation of complex social phenomena.\textsuperscript{21} Holsti dismisses the inflexible division between the two quantitative and qualitative approaches, recommending that “the content analyst should use qualitative and quantitative methods to supplement each other” and that “[i]t is by moving back and forth between these approaches that the investigator is most likely to gain insight into the meaning of his data.”\textsuperscript{22} Researchers, in merging approaches, have referred to their mode of inquiry as qualitative–quantitative content analysis,\textsuperscript{23} hermeneutic content analysis, and content analysis within a mixed-methods framework.\textsuperscript{24}

Adopting Hsieh and Shannon’s definition of qualitative content analysis as “a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns,”\textsuperscript{25} I am chiefly concerned with understanding how firms conceptualize and articulate their understanding of diversity. What meanings, principles, values, intentions, and modes of discourse emerge from the textual data? How do firms discursively perform “diversity”? For this aspect of the study, I used a “conventional” analysis, considered appropriate when a researcher seeks to characterize a particular phenomenon. This approach involves “inductive category

\begin{itemize}
\item \textsuperscript{17} Klaus Krippendorff, \textit{Content Analysis: An Introduction to its Methodology}, 3d ed (Los Angeles: SAGE, 2013) at 24.
\item \textsuperscript{19} Colin Robson, \textit{Real World Research}, 3d ed (Padstow, Great Britain: John Wiley, 2011) at 350.
\item \textsuperscript{20} Krippendorff, supra note 17 at 23.
\item \textsuperscript{22} Ole R Holsti, \textit{Content Analysis for the Social Sciences and Humanities} (Reading, Mass: Addison-Wesley, 1969) at 11. See also Yan Zhang & Barbara M Wildemuth, “Qualitative Analysis of Content” in Barbara M Wildemuth, ed, \textit{Applications of Social Research Methods to Questions in Information and Library Science} (Westport, Conn: Libraries Unlimited, 2009) 308 at 309 (“In real research work, the two approaches are not mutually exclusive and can be used in combination.”). For Mayring, qualitative content analysis should seek “to preserve the advantages of quantitative content analysis for a more qualitative text interpretation.” Philipp Mayring, “Qualitative Content Analysis”, online: (2000) 1:2 Forum: Qualitative Social Research 20 at s 3: <http://www.qualitative-research.net/index.php/fqs/article/view/1089/2385>.
\item \textsuperscript{23} See e.g. Sara Zamir & Sara Hauphtman, “The Portrayal of the Jewish Figure in Literary Texts Included in the Present Matriculation Curriculum in Hebrew for Students of the Arab Sector in Israel” (2009) 7:1 Critical Edu Pol’y Stud 216; Amelie Cserer & Alexandra Seiringer, “Pictures of Synthetic Biology: A Reflective Discussion of the Representation of Synthetic Biology (SB) in the German-Language Media and by SB Experts” (2009) 3 Systems & Synthetic Biology 27.
\item \textsuperscript{25} Hsiu-Fang Hsieh & Sarah E Shannon, “Three Approaches to Qualitative Content Analysis” (2005) 15:9 Qualitative Health Res 1277 at 1278.
\end{itemize}
development,” where the researcher develops categories through his or her engagement with the data; they are not predetermined.\textsuperscript{26}

But I also quantify the frequency of occurrences in the nonnumerical data. For example, were stakeholders who provided feedback on the SEC rule before it was adopted generally in favor of or opposed to the rule? What percentage of firms demonstrated a basic level of compliance with the rule? In discussing the concept of diversity in their disclosures, how many corporations chose to do so with reference to socio-demographic characteristics such as gender, race, and ethnicity, and how many chose other characteristics? And what number of disclosures revealed the adoption of corporate governance–related diversity policies? I thus examine both the content and level of information reported through the processes of thematic and frequency coding. My analysis is both qualitative and quantitative.\textsuperscript{27} My view is that this fusion facilitates an expansive analysis that, in turn, permits a more nuanced understanding of the phenomena under study.\textsuperscript{28} I detail the specific methodological steps I took as I explore each phase of the regulation below, as well as in the appendix.\textsuperscript{29}

A broad body of literature employing content analysis as a means of analyzing corporate reporting on environmental and social responsibility–related issues in corporate annual reports has emerged,\textsuperscript{30} and some studies include workplace gender issues voluntarily presented in corporate reports prior to the SEC requirement.\textsuperscript{31} Few academic studies, however, have given in-depth, multi-year consideration to the proxy disclosures of firms under the SEC’s mandatory diversity disclosure rule.\textsuperscript{32} To

\textsuperscript{26} Ibid at 1279. \\
\textsuperscript{27} Robert Philip Weber, Basic Content Analysis, 2d ed (Newbury Park, Cal: SAGE, 1990) at 41 (“Researchers must, of course, tailor their methods to the requirements of their research by selecting specific techniques and integrating them with other methods, substantive considerations, and theories.”). While the quantitative aspect of my analysis is similar to the “summative analysis” identified by Hsieh and Shannon, it is more traditionally quantitative than qualitative. Ibid at 1283-85. \\
\textsuperscript{29} As I discuss in the appendix, I employed four JD students from 2010–2014 to assist with data collection and coding. \\
\textsuperscript{31} For a review of this scholarship, and a further empirical contribution based on a sample of UK, Australian and US companies, see Kate Grosser, Corporate Social Responsibility, Gender Equality and Organizational Change: A Feminist Perspective (D Phil Thesis, University of Nottingham, 2011) [unpublished]. Of particular note is the following conclusion, presented after reviewing voluntarily produced firm disclosures found in annual and corporate social responsibility reports and on corporate websites: “Many aspects of gender inequality in the workplace . . . remain invisible. . . . [T]he most glaring omissions include lack of systematic, comparable reporting on women in management.” (Ibid at 156). \\
\textsuperscript{32} The extant empirical literature, both academic and nonacademic, includes: Hazen & Broome, supra note 12 (reviewing one hundred 2010 proxy statements and comparing same to each firm’s 2009 statement); Kimberly Gladman, “Beyond the Boilerplate: The Performance Impacts of Board Diversity” (29 July 2010), online: The Corporate Library <http://www.thecorporatelibrary.com/reports.php?reportid=327> (reviewing 388 2010 proxy statements); Calvert Investments, “Examining the Cracks in the Ceiling: A Survey of Corporate Diversity Practices of the S&P 100” (October 2010) at 15, online: <www.calvert.com/nrc/literature/documents/CorporateDiversity2010.pdf> (reviewing ninety 2010 proxy statements and ten governance charters; see also Calvert’s similar analysis of 2012 proxy statements: Calvert Investments, “Examining the Cracks in the Ceiling: A Survey of Corporate Diversity Practices of the S&P 100”
remedy that gap, I studied the SEC rule as it existed in three stages, using three data sets. Table 6.1 sets out these stages and the questions I pursued with respect to each one. I discuss each stage in turn.

Table 6.1 – Stages, data sets, and research questions

<table>
<thead>
<tr>
<th>Stage</th>
<th>Data set</th>
<th>Research questions</th>
</tr>
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<tbody>
<tr>
<td>1. Prerule adoption</td>
<td>Letters submitted to the SEC in response to its feedback request</td>
<td>1. How did stakeholders respond to the proposed rule?</td>
</tr>
<tr>
<td>2. Corporate reporting under the rule</td>
<td>2010–2013 proxy statements of S&amp;P 100 firms</td>
<td>1. Did firms achieve minimal compliance with the rule?</td>
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<td></td>
<td></td>
<td>2. How did firms consider the concept of diversity?</td>
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<tr>
<td></td>
<td></td>
<td>3. What, if any, rationales did firms provide for their consideration of diversity?</td>
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<td></td>
<td></td>
<td>4. Did firms disclose the existence of diversity policies? If so, did they comply with the rule’s additional reporting requirements regarding implementation and effectiveness?</td>
</tr>
<tr>
<td>3. Regulatory response subsequent to corporate reporting</td>
<td>Comment letters sent by the SEC to issuers, and response letters</td>
<td>1. How many firms received a diversity-related comment letter?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. How did the SEC react to the diversity-related disclosures? What was the nature of the agency’s observations and what do they reveal about its approach to the rule?</td>
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<tr>
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<td></td>
<td>3. How did issuers receive the SEC’s guidance?</td>
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</table>

Stage 1: Prerule adoption

A. Data collection and results

Reflexive and related approaches to regulatory design are intended to be transparent and cooperative, and to emphasize the role of multiple societal groups. The theory is that compliance rates

will be higher when regulated subjects and other entities participate in standard development, and that a participatory process leads to each segment assuming shared responsibility for regulatory results.\footnote{Gelpern, supra note 11 at 360.}

In what I have labelled stage 1, the SEC sought feedback on various proposed reforms related to compensation and corporate governance disclosure. Before ultimately implementing the diversity component of its final rule, the agency posed the following questions:

We are interested in understanding whether investors and other market participants believe that diversity in the boardroom is a significant issue. . . Should we amend Item 407(c)(2)(v) to require disclosure of any additional factors that a nominating committee considers when selecting someone for a position on the board, such as diversity? Should we amend our rules to require additional or different disclosure related to board diversity?\footnote{SEC, Proxy Disclosure and Solicitation Enhancements, Securities Act Release No 33-9052 (10 July 2009) at 30-31.}

In my study, I asked how stakeholders responded to the proposed rule. The regulator received 145 response letters from a range of market participants and other interested parties, including institutional investors, retail investors, law and accounting firms, companies, and academics.\footnote{SEC, Final Rule, supra note 13 at 5. This figure excludes two duplicate letters and twelve memoranda documenting meetings that were held with individuals or groups that submitted comments.} I analyzed all of them, coding each letter for whether it mentioned diversity and supported or opposed the SEC rule. I also assessed whether a commentator proposed a definition for the term diversity and whether that definition included gender, race, or ethnicity.

Of the letters in the population, 37.9 percent (n=55) explicitly mentioned diversity while 62.1 percent (n=90) did not, commenting instead on other aspects of the proposed rule. In the former group, 90.9 percent (n=50) supported diversity-related governance disclosure while 9.1 percent (n=5) did not. These figures are presented in Figure 6.1, below.

Of the fifty letters that supported diversity disclosure, 88 percent (n=44) provided a definition of diversity, while 12 percent (n=6) did not. Seventy-six percent of the letters in support (n=38) defined diversity with reference to gender, 62 percent (n=31) with reference to race or ethnicity, and 16 percent
(n = 8) with reference to age. Twenty-six percent (n=13) defined diversity in terms of other demographic characteristics, such as culture and geography, 32 percent (n=16) in terms of experiential characteristics such as “background,” “skills,” “experience,” and “expertise,” and 34 percent (n=17) in terms of generic factors such as “viewpoint,” “background,” “thought,” “perspective,” and “personal attributes.”

The letters supporting diversity disclosure cited a range of justifications for the rule, including the potential of diversity to enhance financial performance; the benefits that a plurality of perspectives may bring to decision making; heightened responsiveness to diverse nonshareholder stakeholders such as suppliers, customers, and employees; and the promotion of inclusivity and prevention of workplace discrimination. Interestingly, one letter, which supported diversity disclosure only if shareholders considered it relevant, recommended that the ethnicity of each director or nominee be disclosed and that a color photo be included in order to facilitate truthfulness: “The photo will serve to keep self-described ethnicity ‘honest.’ If a director describes himself as ‘Hispanic’ but his photo looks ‘White Anglo-Saxon Protestant,’ shareowners will draw appropriate conclusions.”

The letters opposing diversity disclosure expressed the view that existing rules implicitly included diversity such that explicit provisions were unnecessary, that firms already provided sufficient disclosure, and that such disclosure would serve no helpful purpose vis-à-vis shareholder voting. One commentator registered vehement objection to the consideration of ethnicity or race in the selection of

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36 More information on these categories follows in stage 2, below.
37 Various letters, of course, cited multiple rationales.
38 See e.g. Letter from Anne Simpson, Senior Portfolio Manager, Global Equity, CalPERS Investment Office, to Elizabeth M Murphy, Secretary, SEC (16 September 2009) at 3; Letter from Ilene H Lang, President & CEO, Catalyst, to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 2; Letter from David H Zellner, Chief Investment Officer, General Board of Pension and Health Benefits of the United Methodist Church, to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 2; Letter from Ernst & Young LLP to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 4; Letter from Justin Levis, Senior Research Associate, Council of Institutional Investors, to Elizabeth M Murphy, Secretary, SEC (8 September 2009) at 3.
39 See e.g. Letter from Calvert Group, Ltd to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 2; Letter from Mary Kay Craig, Associate, Sisters of Charity, BVM, to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 1; Letter from Dawn Wolfe, Associate Director of ESG Research, Boston Common Asset Management, et al to Elizabeth M Murphy, Secretary, SEC (14 September 2009) at 2.
40 See e.g. Letter from Cheryl Smith, President, Trillium Asset Management Corp, to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 1-2; Letter from Julie Fox Gorte, Senior VP for Sustainable Investing, Pax World Management Corp, & Tracey C Rembert, Sustainability Analyst and Governance Advocate, Pax World Management Corp, to Elizabeth M Murphy, Secretary, SEC (12 September 2009) at 8.
41 See e.g. Letter from Timothy Smith, Senior VP, Walden Asset Management, to Elizabeth M Murphy, Secretary, SEC (14 September 2009) at 1; Letter from Lisa Woll, CEO, Social Investment Forum, to Elizabeth M Murphy, Secretary, SEC (14 September 2009) at 1.
42 Letter from Glyn A Holton, Executive Director, United States Proxy Exchange, et al to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 15.
43 Letter from Jeffrey W Rubin, Chair, Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association, to Elizabeth M Murphy, Secretary, SEC (16 October 2009) at 26.
44 Letter from Alexander M Cutler, Chair, Corporate Leadership Initiative, Business Roundtable, to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 6.
45 Letter from Cleary Gottlieb Steen & Hamilton LLP to Elizabeth M Murphy, Secretary, SEC (15 September 2009) at 7.
board candidates. Another opined that requiring diversity disclosure may lead to diversity being misunderstood as a “qualification,” which would result in the degradation of minority and female candidates.

Stage 2: Corporate reporting under the SEC diversity disclosure rule

The level of stakeholder support for the rule during the comment phase prompted the SEC to move forward with its diversity disclosure initiative. In stage 2 of my study, I engaged in a detailed exploration of the nature of the corporate disclosures submitted under the rule.

A. Data collection and coding

(i) Sample

The research sample for stage 2 of my analysis consisted of a hand-collected dataset of the 2010–2013 definitive proxy statements of S&P 100 firms. I chose the S&P 100 to achieve both data homogeneity and heterogeneity. The index consists of one hundred “major, blue-chip companies” with a market capitalization “of USD 4.6 billion or greater,” all of which are subject to the diversity disclosure rule. The similarity of the firms in this defined population permitted “meaningful comparisons of the processes and actors involved.” At the same time, the index’s membership is diverse, representing a cross-section of industries, and amounts to almost 45 percent of overall US market capitalization. While smaller than the S&P 500, the S&P 100 represents approximately 60 percent of the larger index’s market capitalization and demonstrates less turnover.

The sample was populated from the index as of December 16, 2010. While the index’s

46 Letter from Roger Clegg, President & General Counsel, Center for Equal Opportunity, to Elizabeth M Murphy, Secretary, SEC (1 September 2009).
47 Letter from John C Guerra, Jr, CEO, New America Alliance, to Elizabeth M Murphy, Secretary, SEC (2 September 2009) at 2.
48 In discussing the results of my study below, I frequently use firms’ 2011 proxy statements as representative examples.
50 Standard & Poor’s Dow Jones Indices, “Equity: S&P 100” (30 June 2014) at 1, online: <http://ca.spindices.com/idsenhancedfactsheet/file.pdf?calcFrequency=M&force_download=true&hostIdentifier=48190c8c-42c4-46af-8d1a-0cd5db894797&indexId=2431> [Standard & Poor’s].
51 Sally Maitlis & Thomas B Lawrence, “Triggers and Enablers of Sensegiving in Organizations” (2007) 50:1 Academy Mgmt J 57 at 59.
52 Standard & Poor’s, supra note 50 at 1.
components change periodically, I selected companies from a fixed date in order to compare the disclosures of a specific set of firms over the study’s four-year period. The only discrepancy in the data arose in 2013, when two firms did not file proxy statements; accordingly, the sample size for that year is ninety-eight. Table 6.2 presents a list of the companies studied. I also categorized the sample according to the ten sector codes used in the Global Industry Classification Standard, as reported in Bloomberg Law. Figure 6.2 presents the results of this industry categorization.

Table 6.2 – Research sample

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<thead>
<tr>
<th>1</th>
<th>3M Co</th>
<th>26</th>
<th>Coca-Cola Co</th>
<th>48</th>
<th>H.J. Co</th>
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<td>Colgate-Palmolive Co</td>
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<td>Hewlett-Packard Co</td>
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<td>Comcast Corp</td>
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<td>Alcoa Inc</td>
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<td>ConocoPhillips</td>
<td>51</td>
<td>Honeywell Intl Inc</td>
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<td>Allstate Corp</td>
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<td>Costco Wholesale Corp</td>
<td>52</td>
<td>Intel Corp</td>
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<td>Intel Business Machines</td>
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<td>JP Morgan Chase &amp; Co</td>
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56 See infra notes 59 and 61 regarding Sprint Nextel Corporation and the H.J. Heinz Company, respectively.

57 In 2012, Kraft Foods Inc. was renamed Mondelez International, Inc.

58 In 2012, Sara Lee Corporation was split into two companies; North American operations were renamed Hillshire Brands Company.

59 In 2013, Sprint Nextel Corporation discontinued the Nextel Network and reverted to its prior name, Sprint Corporation; it also merged with SoftBank Corp. The firm did not file a separate proxy statement that year.

60 In 2013, News Corporation was split into two companies, focusing on media and publishing, respectively. Twenty-First Century Fox, Inc. represents the latter and is News Corporation’s legal successor.

61 The H.J. Heinz Company was acquired by Berkshire Hathaway in 2013 and did not file a separate proxy statement that year.
The diversity and breadth of the index make it a sample sufficient to provide an indication of overall disclosure patterns. While I do not seek to establish statistical representation, and drawing conclusions as to how all issuers that file with the SEC consider diversity is not my goal, my study can help to elucidate possible generalizable conclusions. Williams acknowledges that the data qualitative researchers study typically cannot lead to statistical generalizations, but argues these data can produce “moderatum generalisations,” or moderate generalizations “where aspects of [the data] can be seen to be instances of a broader recognizable set of features.” While the patterns that emerge from this documentary analysis may not be determinative, they are suggestive of how firms consider diversity, are “likely to replicate themselves,” and will provide “working hypotheses” that inform subsequent studies.

(ii) Categorizing and coding “diversity”

In qualitative content analysis, the unit of analysis is generally a specific theme or expressed idea, as opposed to an actual linguistic unit (such as a word or sentence). “A theme captures something important about the data in relation to the research question, and represents some level of
patterned response or meaning within the data set. The unit on which I focused in my study was the theme of diversity as expressed in the corporate disclosures. Determining whether “diversity” was present in a disclosure entailed an interpretative process of locating both explicit and implicit content through inductive reasoning. While I approached the data with some categories based on the secondary literature in mind, I gradually culled my analytical categories and themes from the data after careful, iterative study and after having considered all data holistically. This technique was particularly appropriate given the scarcity of prior academic studies.

I pursued four questions in stage 2 of my study. First, did firms achieve minimal compliance with the rule? Did they report on whether, and if so how, they considered diversity in identifying director nominees? Second, in what ways did firms consider diversity? Third, what rationales, if any, did firms provide for the ways in which they considered diversity? And finally, did firms disclose the existence of diversity policies and then comply with the rule’s additional reporting requirements regarding implementation and effectiveness? I consider the results of each inquiry in turn.

B. Did firms achieve minimal compliance with the rule?

The first research question I pursued in stage 2 of my study was whether firms achieved minimal compliance with the rule. Did firms report on whether, and if so how, their boards or nominating committees considered diversity in identifying director nominees?

I separated the proxy statements into one of two groups. I coded those that gave specific consideration to diversity as “yes,” while those that were silent I coded as “no.” I considered statements that simply described the personal characteristics of existing directors (such as in the director biographies), rather than commenting on how diversity is considered in identifying director nominees, as not having met the requirements of the rule. Hewlett-Packard’s 2011 disclosure provides an example:

Ms. Baldauf’s knowledge of global business from both a consumer and an enterprise market perspective and her experience in large, emerging markets such as China and India have provided her with insight regarding building operations in diverse cultural environments as well as the importance of innovation. Ms. Baldauf also has a high level of understanding of the board’s role and responsibilities based on her service on other public company boards. In addition, because of her service on the boards of several other international companies, Ms. Baldauf is able to provide insight regarding operating and governing a business in a diverse range of geographies.

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66 Bryman, supra note 49 at 282. See also ibid at 84 (“[A] thematic analysis at the latent level goes beyond the semantic content of the data, and starts to identify or examine the underlying ideas, assumptions, and conceptualizations – and ideologies – that are theorized as shaping or informing the semantic content of the data.”).
67 Zhang & Wildemuth, supra note 22 at 309.
68 Satu Elo & Helvi Kyngäs, “The Qualitative Content Analysis Process” (2008) 62:1 J Advanced Nursing 107 at 109 (“If there is not enough former knowledge about the phenomenon or if this knowledge is fragmented, the inductive approach is recommended.”).
69 Hewlett-Packard Co, Definitive Proxy Statement (Form DEF 14A) (1 February 2011) at 27.
I made two exceptions to this rule. In 2012 and 2013, Honeywell International specifically linked its directors’ biographies to its approach to diversity.\textsuperscript{70} Likewise, in its 2011 disclosure, Bank of America described the diversity-related characteristics of its directors\textsuperscript{71} immediately following its consideration of diversity,\textsuperscript{72} implying a connection between the two.

In cases where the statement did not make specific reference to the term “diversity” but used a functional equivalent (such as “variety”), I considered the company to have met the requirements of the rule, and coded the proxy statement “yes.” Qualcomm’s 2011 disclosure provides an example: “The Governance Committee’s goal is to assemble a board of directors that brings to us a variety of perspectives and skills derived from high quality business and professional experience. In doing so, the Governance Committee also considers candidates with appropriate non-business backgrounds.”\textsuperscript{73} In cases where neither the term “diversity” nor any functional equivalent was used, I considered companies to not be in compliance with the rule and coded their proxy statements “no”, even if the disclosures made reference to factors such as “prior experience” and “personal attributes,” given that they did not connect these factors to diversity or a functional equivalent.

I found high levels of compliance, as depicted in Figure 6.3, below. In all four years, 98 percent of proxy statements reflected the consideration of diversity.\textsuperscript{74} It might be argued that a firm’s failure to provide any disclosure of diversity consideration is a form of compliance, because it signals that firms do not undertake any diversity-related consideration when appointing directors.\textsuperscript{75} But my view is that these firms are not in compliance, because the rule requires an active description of whether the firm took diversity into account. In all years, Hewlett-Packard and MetLife fell into this noncompliance category. Of course, compliance does not necessarily correspond with active consideration of diversity. Berkshire Hathaway, for example, fulfilled its reporting obligation in all years by expressly rejecting the incorporation of diversity into its board nomination process: “Berkshire does not have a policy regarding the consideration of diversity in identifying nominees for director. In identifying director nominees, the Governance, Compensation and Nominating Committee does not seek diversity, however defined.”\textsuperscript{76}

\textsuperscript{70} “Our current Board composition reflects this approach and the Board’s commitment to diversity.” See Honeywell International Inc, Definitive Proxy Statement (Form DEF 14A) (8 March 2012) at 13; Honeywell International Inc, Definitive Proxy Statement (Form DEF 14A) (7 March 2013) at 16.

\textsuperscript{71} “Of our 14 current directors, one is a citizen of India, one is African-American and two are women, one of whom is Hispanic.” Bank of America, Definitive Proxy Statement (Form DEF 14A) (30 March 2011) at 1.

\textsuperscript{72} “Although we do not have a formal policy regarding diversity, our Board views its diversity as a priority and seeks diverse representation among its members.” \textit{Ibid.}

\textsuperscript{73} Qualcomm Inc, Definitive Proxy Statement (Form DEF 14A) (13 January 2010) at 8; Qualcomm Inc, Definitive Proxy Statement (Form DEF 14A) (20 January 2011) at 6 [emphasis added].

\textsuperscript{74} As previously noted, the H.J. Heinz Company and Sprint Nextel Corporation did not file proxy statements in 2013. As such, the sample size for that year is ninety-eight, rather than one hundred.

\textsuperscript{75} Hazen and Broome note this potential argument. \textit{Supra} note 12 at 61.

\textsuperscript{76} Berkshire Hathaway Inc, Definitive Proxy Statement (Form DEF 14A) (12 March 2010) at 5; Berkshire Hathaway Inc, Definitive Proxy Statement (Form DEF 14A) (11 March 2011) at 6; Berkshire Hathaway Inc, Definitive Proxy Statement (Form DEF 14A) (16 March 2012) at 6; Berkshire Hathaway Inc, Definitive Proxy Statement (Form DEF 14A) (15 March 2013) at 6. Non-sample firms that have taken a similar approach include Lennar Corporation. See e.g. Lennar Corp, Definitive Proxy Statement (Form DEF 14A) (3 March 2011) at 11 (“The . . . Committee has not considered racial or ethnic diversity in evaluating possible directors. It does not believe race or ethnic background is relevant to a person’s qualifications to serve on the Board. While it recognizes the benefits of diversity of training and experience, it does not believe that race or ethnic background significantly affects a person’s ability to contribute to our Board.”). Branson refers to the possibility of such disclosures as the “Achilles Heel” of the SEC
C. How do firms consider diversity?

Because the rule does not define diversity, understanding firms’ compliance requires further inquiry. I next explored how firms actually consider diversity in their director nomination processes. In the absence of guidance from the SEC, how is diversity understood and articulated? How do corporations make sense of diversity? What range of indicators is used to give life to this concept? To what extent do social identity–based factors, such as gender and race, emerge from the data as opposed to other forms of diversity representation?

I considered six categorical variables when determining how firms defined diversity. The first three involved conventional descriptive characteristics: (1) gender; (2) race and ethnicity; and/or (3) age. I coded a proxy statement “yes” if, in its consideration of diversity, the firm made explicit reference to one or more of the above characteristics, and “no” if it did not. I constructed the remaining three variables to adequately reflect the narrative data.77 I also coded a proxy statement “yes” if, in its consideration of diversity, the firm made explicit reference to: (4) “other demographic” factors; (5) “other experiential” factors; and/or (6) “generic” factors, and “no” if it did not.78 I explain these latter three indicators in more detail below.

Firms defined diversity in numerous ways, as depicted in Figure 6.4, below. In all years studied, no more than roughly half of firms referenced socio-demographic indicators of diversity. Approximately half of the proxy statements referenced gender in the firm’s consideration of diversity (47, 52, 50, and 52 percent for years 2010–2013, respectively). For race and ethnicity, the figures were slightly lower, but similarly close to 50 percent in all years (45, 50, 48, and 49 percent, respectively). Far fewer firms referenced age (24, 23, 23, and 23 percent, respectively). Citigroup’s 2011 proxy statement illustrates how those firms that considered socio-demographic factors disclosed that fact:

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78 Many firms, of course, disclosed the presence of multiple diversity elements, such as gender, race, age, and other experiential.
Diversity is among the critical factors that the nomination and governance committee considers when evaluating the composition of the board. For a company like Citi, which operates in over 100 countries around the globe, diversity includes race, ethnicity and gender. . . . The board believes that the current nominees reflect an appropriate diversity of gender, age, race . . . but is committed to continuing to consider diversity issues in evaluating the composition of the board.⁷⁹

Figure 6.4 – Definition of diversity (n=100, 2010–2012; n=98, 2013)

Firms also referred to “other demographic” factors, beyond gender, race and ethnicity, and age, though these other factors appeared in the data with less frequency (40, 41, 39, and 40 percent, respectively). Most commonly, these other factors related to national origin or nationality, geographic representation or background, and citizenship. Over the four years of the study, 29, 31, 29, and 31 percent of proxy statements referenced these variables. A small number of firms referenced cultural background or experience (6, 7, 7, and 6 percent, respectively), and an even smaller number used the terms “minority groups” (2 percent in all years) or “other demographics” (3 percent in all years). For example, in 2011, Goldman Sachs reported: “Our Board believes that diversity is an important attribute of a well-functioning board. In selecting qualified candidates to serve as directors, the Committee considers a range of types of diversity, including race, gender, ethnicity, culture, nationality and geography, seeking to develop a board that, as a whole, reflects diverse viewpoints, backgrounds, skills, experiences and expertise.”⁸⁰ Figure 6.5 presents this data. As of 2013, only two firms—Goldman Sachs and Bank of New York Mellon—included sexual orientation or preference in their respective definitions of diversity.⁸¹ Outside of nondiscrimination provisions (discussed in the appendix), no firms included other social identity categories such as disability or class.⁸²

⁷⁹ Citigroup Inc, Definitive Proxy Statement (Form DEF 14A) (10 March 2011) at 8 [emphasis added] [Citigroup 2011].
⁸⁰ The Goldman Sachs Group, Inc, Definitive Proxy Statement (Form DEF 14A) (1 April 2011) at 12 [emphasis added] [Goldman 2011].
⁸¹ The Goldman Sachs Group, Inc, Definitive Proxy Statement (Form DEF 14A) (12 April 2013) at 7; Bank of New York Mellon Corp, Definitive Proxy Statement (Form DEF 14A) (8 March 2013) at 2.
⁸² This finding resonates with the findings of Gladman’s study. See Gladman, supra note 32 at 2.
By far the most frequent manner in which firms elected to define the concept of diversity did not involve identity-based indicators, but rather focused on “other experiential” factors, or companies’ expressed preference for directors who brought a diversity of experience to their positions. In 2010, 83 percent of disclosures, and in 2011–2013, 87, 87, and 88 percent of disclosures, respectively, described diversity in this way. The firms that defined diversity in terms of “other experiential” factors reported a wide range of desirable experience and I further disaggregated the data to reflect this breadth, as shown in the twenty-one subcategories represented in Table 6.3, below. Perhaps not surprisingly, experiential backgrounds expressed with a high degree of generality appeared most frequently in the data: relevant knowledge, skills, experience (58, 61, 60, and 60 percent, respectively); general professional experience (28 percent in 2010–2012 and 29 percent in 2013); and business/industry experience (25, 28, 28, and 27 percent, respectively). Of the more specific types of experiential backgrounds that firms articulated as desired, the following were most prevalent: scientific, engineering, technology, R&D (14 percent in 2010 and 15 percent in 2011–2013); finance, accounting (13 percent in 2010 and 15 percent in 2011–2013); government, public affairs, policy (13 percent in 2010, 16 percent in 2011–2012, and 15 percent in 2013); and educational background (12 percent in 2010–2011 and 11 percent in 2012–2013).

Table 6.3 – “Other experiential” codes (n=100, 2010–2012; n=98, 2013)

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<td>Govt, public affairs, policy</td>
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Determining whether disclosures fit into this category required some particularly tricky coding decisions. In general, I coded proxy statements throughout the study “yes” if the firm made explicit reference to the particular variable(s) in the portion of the disclosure that involved its consideration of diversity. More specifically, I determined that any “other experiential” factors that a firm reported had to be sufficiently linked to the concept of diversity in order to be coded as responsive, because experiential factors could appear in a disclosure for reasons other than to respond to the diversity disclosure request. For instance, in its description of its director nomination process, the Campbell Soup Company discussed diversity, which it defined as including a suite of experiential factors—a formulation that led me to code the disclosure “yes” for “other experiential.” The disclosure notes:

In addition, the Committee believes that, collectively, the Board should reflect appropriate diversity of thought, background and experience, and include directors who are:

- reasonably sophisticated about the duties and responsibilities of directors of a public company;
- knowledgeable about the consumer products industry, business operations, marketing, finance and accounting;
- respected in the business community;
- knowledgeable about general economic trends; and
- knowledgeable about the standards and practices of good corporate governance.
All candidates considered by the Governance Committee for potential recommendation to the Board as director nominees are evaluated in light of the minimum qualifications listed above.\textsuperscript{83}

In establishing the connection between experience and diversity disclosure, I considered those disclosures that used euphemistic phrases for diversity, such as “range of”\textsuperscript{84} or “variety of,”\textsuperscript{85} followed by experiential factors, to have met the requirements of the rule and coded them “yes”.

Finally, 72 percent of proxy statements in 2010–2012 and 71 percent in 2013 mentioned what I have called “generic” diversity factors. I used the descriptor “generic” to refer to disclosures that construed diversity in a somewhat amorphous manner. Text assigned to this group did not describe a specific characteristic and could not be captured under the headings of “other demographic” or “other experiential.” In these cases, the proxy statement may have used terms such as “viewpoint,” “background,” “perspective,” “personal attributes,” or “thought.” These terms may have been used in conjunction with more specific indicators assigned to other classifications. Home Depot, for example, reported: “The Nominating and Corporate Governance Committee recognizes the importance of selecting directors from various backgrounds and professions in order to ensure that the Board as a group has a wealth of experiences to inform its decisions. Consistent with this philosophy . . . the . . . Committee considers the personal attributes of individual nominees, including ethnic, racial and gender diversity.”\textsuperscript{86} In this case, I coded the proxy statement “yes” for “gender,” “race/ethnicity,” and “other experiential,” as well as for “generic,” given the presence of the words “various backgrounds.” Figure 6.6 presents data concerning generic reporting.

\begin{figure}
\centering
\includegraphics[width=0.6\textwidth]{chart.png}
\caption{Use of generic descriptors in firms’ consideration of diversity (n=100, 2010–2012; n=98, 2013)}
\end{figure}

\begin{flushleft}
\textsuperscript{83} Campbell Soup Co, Definitive Proxy Statement (Form DEF 14A) (7 October 2011) at 1 [emphasis added].
\textsuperscript{84} General Electric Co, Definitive Proxy Statement (Form DEF 14A) (14 March 2011) at 20 (“We endeavor to have a Board representing a range of experience at policy-making levels in business, government, education and technology, and in areas that are relevant to the company’s global activities.”).
\textsuperscript{85} Lowe’s Companies, Inc, Definitive Proxy Statement (Form DEF 14A) (11 April 2011) at 15 (“In identifying nominees for election and reelection to the Board, the Governance Committee considers persons with a variety of perspectives, professional experience, education and skills that possess the following qualifications . . . : broad training and experience in policy-making decisions in business, government, education or technology.”).
\textsuperscript{86} The Home Depot, Inc, Definitive Proxy Statement (Form DEF 14A) (2 April 2012) at 10.
\end{flushleft}
D. What, if any, rationales did firms provide for their consideration of diversity?

Having analyzed how firms consider the idea of diversity in their director nomination processes, I also sought to determine whether firms explained why they did so. Why does diversity matter to these corporations? While the SEC rule does not require disclosure of such information, more than half of the firms in my research sample voluntarily offered at least some rationale for their consideration of diversity.

Again, I placed the proxy statements into one of two groups. I coded those in which the firm provided a rationale as “yes” and those that were silent as “no.” In the four years of the study, 53, 54, 60, and 61 percent of proxy statements offered a justification for the firm’s consideration of diversity. Figure 6.7 presents these figures. I documented eight different rationales. The corresponding codes, with reporting percentages, are shown in Figure 6.8.87

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87 Gladman’s three explanation categories informed the generation of these eight codes. See supra note 32 at 2.
Firms that provided a rationale most frequently rooted their consideration of diversity in the concept of “perspectives” (42, 44, 43, and 42 percent of companies providing an explanation, in each of the study’s four years). These firms indicated that a diverse board brings a plurality of perspectives and experiences to governance, results in more informed decision-making processes, and enhances the board’s knowledge and judgment. Coca-Cola, for example, reported that “[t]he Board . . . considers diversity of race, ethnicity, gender, age, cultural background and professional experiences in evaluating candidates for Board membership. Diversity is important because a variety of points of view contribute to a more effective decision-making process.”

Similarly, Baxter International disclosed that “[d]iversity of background, including diversity of gender, race, ethnic or national origin, age, and experience . . . is a relevant factor in the selection process. This factor is relevant as a diverse Board of Directors is likely to be a well-balanced Board with varying perspectives and a breadth of experience that will positively contribute to robust discussion at Board meetings.”

A noteworthy number of firms articulated an interest in “geographic and/or stakeholder representation” (28 percent in 2010–2011, 25 percent in 2012, and 23 percent in 2013). These firms indicated that diversity in governance complemented the company’s global business operations and could facilitate the representation of geographically diffuse stakeholders in the corporation. Citigroup’s proxy statement provides a case in point: “Diversity is among the critical factors that the nomination and governance committee considers when evaluating the composition of the board. For a company like Citi, which operates in over 100 countries around the globe, diversity includes race, ethnicity and gender as well as the diversity of the communities and geographies in which Citi operates.”

According to Heinz’s disclosure:

The Board believes that a diversity of background, perspectives, and experience is beneficial . . . and has identified certain key attributes to be represented on the Board. The Company’s business is global in scope and, as a result, the Board believes that international experience in global publicly-traded businesses and specific knowledge of certain geographical areas is important for effective and growth-driven leadership and should be represented.

I classified roughly 20 percent of the proxy statements that included rationales for their diversity consideration as “inherent” (21, 19, 18, and 18 percent), because they presented board diversity as important or recognized it as valuable in and of itself, but did not elaborate why. Firms expressed this sentiment in different ways. For example, in 2010 Boeing reported that “diversity with respect to factors such as background, experience, skills, race, gender and national origin is an important consideration in board composition.” In 2011, the firm added that it “recognizes the value of diversity and [that] the Board seeks diversity . . . among its members.”

Beyond these acknowledgements, however, these disclosures do not explain why diversity “is an important consideration,” or a value worth recognizing.

In general, while the number of firms I classified as having reported one or more rationales for their consideration of diversity was fairly high (again, more than half of all disclosures in each year), the

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88 The Coca-Cola Co, Definitive Proxy Statement (Form DEF 14A) (10 March 2011) at 17 [emphasis added].
89 Baxter International Inc, Definitive Proxy Statement (Form DEF 14A) (18 March 2011) at 13 [emphasis added].
90 Citigroup 2011, supra note 79 at 8.
91 HJ Heinz Co, Definitive Proxy Statement (Form DEF 14A) (1 July 2011) at 23.
92 The Boeing Co, Definitive Proxy Statement (Form DEF 14A) (15 March 2010) at 3 [emphasis added].
93 The Boeing Co, Definitive Proxy Statement (Form DEF 14A) (18 March 2011) at A-1 [emphasis added] [Boeing 2011].

21
explanations themselves were often vague. Goldman Sachs, as noted above, disclosed its belief that “diversity is an important attribute of a well-functioning board” and that the firm “considers a range of types of diversity, including race, gender, ethnicity, culture, nationality and geography, seeking to develop a board that . . . reflects diverse viewpoints, backgrounds, skills, experiences and expertise.” So we learn that the firm considers diversity for two reasons: (1) it believes diversity contributes to a well-functioning board; and (2) it believes that the types of diversity listed will bring a range of perspectives and abilities to the board. But the disclosure does not precisely tell us why the firm holds these beliefs, or why it feels a diverse board is a better functioning board and why gender, racial, or cultural diversity, for example, necessarily serve as a proxy for varying views, experiences, and so on. The biographical information of existing directors included in the proxy statements sometimes reveals this pattern as well. Alcoa, for instance, reports that a particular director’s “Asian perspective adds valuable diversity to the deliberations of the Board” without any further unpacking of what this “Asian perspective” specifically entails. Similarly, Colgate-Palmolive’s explanatory statement fits clearly into the geographic/stakeholder category, but additional facets of the statement, such as its discussion of the value of “diversity in the traditional sense,” were too ambiguous and ill defined to parse.

Other rationales firms less frequently expressed included linking board diversity to: expanding oversight capabilities, or monitoring of management (8, 11, 12, and 12 percent, respectively); providing leadership or guidance to the company (8, 7, 7, and 5 percent, respectively); enhancing effectiveness (6, 7, 10, and 12 percent, respectively); promoting business success (8 percent in 2010 and 7 percent in 2011–2013); and helping the board fulfill its responsibilities (4 percent in 2010–2011 and 3 percent in 2012–2013).

E. Did firms disclose the existence of diversity policies? If so, did they comply with the rule’s reporting requirements regarding implementation and effectiveness?

The SEC rule does not obligate corporations to adopt a governance-related diversity policy. Nor does it require firms to disclose the absence of a policy. That said, if a firm has a policy, it must report on two elements: (1) how it implements the policy; and (2) how it assesses the policy’s effectiveness. I therefore considered whether the companies in my sample disclosed the existence of diversity policies and, if so, whether they complied with the rule’s reporting requirements.

(i) The existence of diversity policies

I divided the data into one of four groups. I coded proxy statements “yes” if the firm disclosed the existence of a diversity policy; “no” if the firm disclosed the absence of a policy; and “not disclosed” if the firm was silent (the statement contained no explicit reference to a policy). I coded a fourth group of statements that suggested an informal policy as “functional equivalent,” which is a concept I define in more detail below.

94 Goldman 2011, supra note 80 at 12.
95 See also Gladman, supra note 32 at 1, 3 (“Companies almost uniformly claim to value a diverse board, but they’re typically pretty vague about what difference it could make to the functioning of a firm”; “[A] skeptic reading these might easily think that these disclosures are nothing more than politically correct (and somewhat incoherent) clichés.”).
96 Alcoa Inc, Definitive Proxy Statement (Form DEF 14A) (5 March 2010) at 10; Alcoa Inc, Definitive Proxy Statement (Form DEF 14A) (1 March 2011) at 8 [emphasis added] [Alcoa 2011].
97 The firm used identical language in each year’s filing. See e.g. Colgate-Palmolive, Definitive Proxy Statement (Form DEF 14A) (23 March 2011) at 15 [emphasis added] [Colgate-Palmolive 2011].
In all years of the study, 8 percent of firms in the sample disclosed the existence of a diversity policy. A substantial number of firms disclosed the absence of a policy (33, 36, 36, and 39 percent, respectively), while almost as many (28, 25, 25, and 21 percent, respectively) were silent. I categorized 31 percent in 2010–2012 and 32 percent in 2013 as having functional equivalents of diversity policies. Figure 6.9 presents these figures.

Figure 6.9 – Firm disclosures regarding diversity policies

The firms that affirmatively reported the presence of a policy did so in one of two ways. In 2011, for example, five out of the eight firms referred to a dedicated board diversity policy, or to a general board membership policy or statement of qualifications and criteria for appointment, that included diversity as a component.\textsuperscript{98} The remaining three firms included diversity in a corporate document, such as a set of corporate governance guidelines or principles, and explicitly referred to this document as a policy or as a diversity policy.\textsuperscript{99}

While eight firms in all years expressly disclosed the existence of a policy, a group of proxy statements were slightly more ambiguous. These disclosures did not use the specific language of “policy”; however, the arrangements and practices that the disclosures indicated were in place arguably played the same role as a formal diversity policy. In classifying these statements, it may seem prudent to strictly construe the actual language each firm employed and to adhere to its literal characterization. That said, while the rule provides no guidance on what constitutes a “policy,” SEC Commissioner Luis

\textsuperscript{98} Alcoa 2011, \textit{supra} note 96 at 64; American Electric Power Co, Inc, Definitive Proxy Statement (Form DEF 14A) (14 March 2011) at 13; Baker Hughes Inc, Definitive Proxy Statement (Form DEF 14A) (28 April 2011) at 12; \textit{Ibid}; Entergy Corp, Definitive Proxy Statement (Form DEF 14A) (24 March 2011) at 12 [Entergy 2011].

\textsuperscript{99} Occidental Petroleum Corp, Definitive Proxy Statement (Form DEF 14A) (24 March 2011) at 51; Procter & Gamble Co, Definitive Proxy Statement (Form DEF 14A) (26 August 2011) at 6 [Procter & Gamble 2011]; Regions Financial Corp, Definitive Proxy Statement (Form DEF 14A) (29 March 2011) at 21 [Regions Financial 2011].
Aguilar has warned against imposing a “false distinction” between formal and informal policies and has opined that the rule requires the disclosure of both.100

I coded these more nebulous statements as “functional equivalent” to capture the existence of informal diversity policies. In many of these disclosures, the firm relied on an underlying document, such as a guideline, code, or matrix, in reporting on its diversity-related practices. Devon Energy, for example, reported that under its Governance Committee’s Charter, the governance committee must periodically assess the board’s composition against a range of factors, including “diversity of skills, background and experience.” The committee relies on the same factors when assessing candidates for the board.101 UnitedHealth Group reported the integration of diversity into a skills matrix.102 The firm’s nominating committee “evaluates potential Board candidates against the skills matrix when determining whether to recommend that the Board appoint the candidate to be a director.”103 While the firm states that it “has not adopted a formal definition of diversity,” I classified its 2011 disclosure (for example) as including the “other experiential” diversity definition in light of the following statement: “We encourage diversity and inclusion in all our business operations. Our Board’s consideration of nominees for director reflects its consideration of diversity and the broad range of experience, skills and attributes that should be represented on the Board.”104 Following from this, the firm reported that its yearly evaluation process includes “an assessment of the overall composition of the Board, including the diversity of its members.”105

The disclosures of Boeing and Costco provide additional examples of the “functional equivalent” coding. In the case of Boeing, its Governance, Organization, and Nominating Committee considers diversity as one of many factors in the assessment of a potential director’s qualifications. The committee and the board also administer annual self-evaluations that involve an examination of whether both have given sufficient consideration to diversity, among other things, in identifying and deliberating on director candidates.106 As set out in its Corporate Governance Principles, the company considers diversity holistically, with reference to “background, experience, skills, race, gender and national origin.”107 Costco’s Corporate Governance Guidelines set out the characteristics it seeks for directors, which include diversity. The guidelines further provide for a triennial self-assessment of board performance that the company’s Nominating and Governance Committee oversees. This process identifies any areas for improvement in governance, including board diversity “in terms of viewpoints, backgrounds and experiences.”108

I distinguished the above proxy statements coded as “functional equivalent” and statements in which the corporation indicated that it “instructed its executive search firm to include diversity as part of the candidate search criteria”109 from disclosures that merely listed diversity as a desired factor. I

101 Devon Energy Corp, Definitive Proxy Statement (Form DEF 14A) (27 April 2011) at 10.
102 UnitedHealth Group Inc, Definitive Proxy Statement (Form DEF 14A) (13 April 2011) at 19-20.
103 Ibid at 21.
104 Ibid at 2.
105 Ibid at 21.
106 Boeing 2011, supra note 93 at 3.
107 Ibid at A-1.
108 Costco Wholesale Corp, Definitive Proxy Statement (Form DEF 14A) (13 December 2011) at 7.
109 Exxon Mobil Corp, Definitive Proxy Statement (Form DEF 14A) (13 April 2011) at 11.
coded the latter as “no” in determining whether the firm had a diversity policy. I coded disclosures as “functional equivalent” when they articulated an actual process for the inclusion of diversity in composing the board, because these disclosures reflect a higher level of commitment to diversity, however defined, and therefore suggested the existence of a policy, however informal. If a firm specifically disclaimed the existence of a diversity policy, I did not code the disclosure as “functional equivalent,” even if it otherwise mentioned elements of diversity.

(ii) Reporting on policy implementation and effectiveness

I scrutinized the eight proxy statements that expressly disclosed the existence of a diversity policy for their compliance with the rule’s requirements that firms describe how they implement the policy and how they assess the policy’s effectiveness.

With respect to implementation, I coded the disclosures “yes” if the firm described in some manner how it operationalized its policy (if at all) and “no” if it did not. With respect to effectiveness, I coded the disclosures “yes” if the firm described either: (i) a process for assessing the efficacy of the policy; or (ii) the results of such a process. Concerning (ii), I considered firms that communicated the number of “diverse” directors on the board in a given year (for example, the number of female and racialized directors)\textsuperscript{110} compliant with the effectiveness requirement, because a description of effectiveness is implicit in the reporting of results. In other words, in these cases, the board assesses the efficacy of its policy with reference to the end result—the level of diversity achieved. I coded the disclosures “no” if the firm communicated neither (i) nor (ii).

In all years of the study, each of the eight firms coded “yes” for the existence of a diversity policy met the implementation reporting requirement, and all but one met the effectiveness reporting requirement as well. Table 6.4 presents a breakdown of the eight firms’ specific and overall compliance. By way of illustration, Procter & Gamble reported that, in furtherance of its Corporate Governance Guidelines, it “seeks to achieve a mix of Board members that represents a diversity of background and experience, including with respect to age, gender, international background, race and specialized experience.”\textsuperscript{111} Further, it disclosed that:

> the Board assesses the effectiveness of its diversity policy every year as part of the nomination process for the annual election of Directors by the Company’s shareholders. The Board’s Governance & Public Responsibility Committee, responsible for making recommendations for Director nominations to the full Board, reviews the Director nominees (including shareholder nominees) and ascertains whether, as a whole, the group meets the Board’s policy in this regard.\textsuperscript{112}

While not required by the rule, the firm took the additional step of providing the results of its self-assessment: “Having reviewed the collective background and experience of the 11 nominees, the Board has concluded that they provide sufficient diversity to meet the Board’s policy.”\textsuperscript{113}

\textsuperscript{110} See e.g. Alcoa 2011, supra note 96.
\textsuperscript{111} Procter & Gamble 2011, supra note 99.
\textsuperscript{112} \textit{ibid}.
\textsuperscript{113} \textit{ibid}.
Exhibiting less detail, but similarly compliant, Regions Financial disclosed that it has “no formal process for implementing [its] policy” but that “the Board performs an annual self-evaluation and board diversity is part of the evaluation about which each Director is asked to make an assessment.”\textsuperscript{114} Similarly, Colgate-Palmolive revealed that its Governance Committee implements its diversity policy “through its director recruitment efforts” and that the policy’s effectiveness is assessed “regularly through Board and committee self-evaluations.”\textsuperscript{115} By contrast, Entergy Corporation disclosed that it assessed its policy’s effectiveness but did not explain how it did so; it disclosed only that the firm’s Corporate Governance Committee “annually evaluates the effectiveness of its policy and procedures for the evaluation of director candidates.”\textsuperscript{116} I concluded that this statement did not meet the effectiveness reporting requirement.

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**Stage 3: Regulatory response subsequent to corporate reporting**

The SEC monitors corporate disclosure in different ways. The Sarbanes-Oxley Act of 2002, for example, requires the agency to administer filing reviews of each reporting issuer’s periodic disclosures “on a regular and systematic basis” and at least once every three years.\textsuperscript{117} More generally, the agency’s Division of Corporation Finance conducts selective examinations of various registrant filings, focusing on “critical disclosures that appear to conflict with Commission rules . . . and on disclosure that appears to be materially deficient in explanation or clarity.”\textsuperscript{118} In the case of a selective review, the Division’s evaluation may include a company’s complete filings, the financial statements and related documents only, or various filings to ascertain compliance with requirements pertaining to a specified issue.\textsuperscript{119}

The division provides feedback, if any, to companies via a comment letter. This letter begins a dialogical process during which the regulator may seek further information from the corporation, revisions to existing filings, or enhanced disclosure in future documents. Firms typically respond in writing to each issue set out in an SEC comment letter, providing a reaction or explanation. These responses, in turn, may trigger additional correspondence from the regulator. The exchange continues until the parties reach a resolution.\textsuperscript{120} This process is the agency’s principal way of monitoring firms’

\textsuperscript{114} Regions Financial 2011, supra note 99.
\textsuperscript{115} Colgate-Palmolive 2011, supra note 97.
\textsuperscript{116} Entergy 2011, supra note 98.
\textsuperscript{117} Pub L No 107-204, §§408(a), (c), 116 Stat 745 at 790-91.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
compliance with disclosure obligations. While the SEC’s comment letters are tied to the particular facts of the disclosure to which the agency is responding and do not create binding precedent, they provide market actors and their counsel with valuable normative guidance for subsequent filings and reflect the SEC’s interpretation of its rules.

With this process in mind, in stage 3 of my analysis, I assessed how the regulator responded to firms’ diversity disclosures. How many firms in the sample received a diversity-related comment letter? What was the nature of the SEC’s observations and what do its observations reveal about its approach to the rule? How did issuers receive or interpret the agency’s guidance?

As set out in Figure 6.10, below, 6 percent of firms in the sample received a diversity-related comment letter in 2010, while no firms received a letter in 2011–2013. In all cases but one, the SEC reviewed the firm’s definitive proxy statement and subsequently sent a comment letter with board diversity-related content. Each firm submitted a response letter and the SEC eventually ended the dialogues by sending a concluding letter confirming the completion of its review. In all instances, only the initial letter and reply addressed board diversity, and I analyzed these first two letters sent between the regulator and the firms.

Figure 6.10 – Firms that received diversity-related comment letters from the SEC (n=100, 2010–2012; n=98, 2013)

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123 The six firms that received a comment letter in 2010 were: American Electric Power Company, Inc.; American Express Company; Baker Hughes Incorporated; Baxter International Inc.; Exxon Mobil Corporation; and Target Corporation.

124 The one exception involved Exxon Mobil Corporation. The SEC requested that Exxon comply with the regulation S-K amendments, which it noted includes diversity disclosure. See Letter from H Roger Schwall, Assistant Director, Division of Corporation Finance, SEC, to Rex W Tillerson, President & Chairman of the Board, Exxon Mobil Corp (1 April 2010) at 2. In its reply, Exxon correctly indicated that it provided the required disclosure in its definitive proxy statement, filed twelve days after the SEC’s comment letter. See Letter from Patrick T Mulva, VP & Controller, Exxon Mobil Corp, to H Roger Schwall, Assistant Director, Division of Corporation Finance, SEC (22 April 2010) at 3-4. So in this case, there appears to have been a simple misunderstanding where the SEC reviewed the firm’s Form 10-K (a form used for annual reports) for the required disclosure, when it was actually contained in the subsequently filed proxy statement.
In four of the six cases, the exchanges between the SEC and firms highlight the confusion that has arisen in the diversity reporting process. The agency asked American Electric Power (“AEP”) for specific detail as to “whether, and if so how, the board considers diversity in identifying nominees for director,” specifically referring to Item 407(c)(2)(vi), the provision that contains the disclosure rule. But the firm had already provided robust disclosure in its filing:

Two central objectives in selecting board members and continued board service are that the skills, experiences and perspectives of the Board as a whole should be broad and diverse. In particular, the Board should be balanced by having complementary knowledge, expertise and skill in areas such as business, finance, accounting, marketing, public policy, manufacturing and operations, government, technology, environmental and other areas that the Board has decided are desirable and helpful to fulfilling its role. Diversity in gender, race, age, tenure of board service, geography and background of directors, consistent with the Board’s requirements for knowledge, standards, and experience, are desirable in the mix of the Board. Our Directors and Corporate Governance Committee considers these criteria each year as it determines the slate of directors to recommend to the Board for election at our annual meeting. It also considers these criteria each time a new director is recommended for election to the Board. The Board believes that its implementation of this policy is effective in considering the diversity of the members of the Board.

Though the SEC in its letter did not request information about a formal diversity policy, AEP responded to the letter by telling the commission that it “does not have a policy with regard to the consideration of diversity in identifying nominees for directors” and indicated that it would disclose that fact in future proxy statements. If AEP did not consider itself to have a policy, committing itself to disclose that fact in the future exceeds the requirements of the rule, which does not require firms to disclose the absence of a policy. Further, given that the original disclosure did in fact refer to a “policy,” it is unclear why AEP responded in this fashion. Perhaps the firm’s apparent disavowal of a policy represents an effort to backpedal after having attracted scrutiny from the regulator to avoid future scrutiny.

The SEC requested that American Express and Baker Hughes provide, respectively, “a proposed disclosure that covers all of the information required by [Item] 407(c)(2)(vi) . . . and [confirmation] that you will include such information in future filings” and “complete disclosure regarding your director nomination process pursuant to Regulation S-K, Item 407(c)(2)(vi).” American Express responded by...
advising that it had considered its disclosures through the lens of the rule’s requirements. It then concluded, before referring the SEC to the relevant sections and page numbers of its proxy statement: “With respect to Item 407(c)(2)(vi), the Company believes that its disclosures contain all information required by such item.” The firm’s response appears sound; in this study, I classified its 2010 proxy statement as “generic” in its consideration of diversity, given the firm’s linkage of diversity with “perspectives, sound advice and critical viewpoints.” While the statement did not exhibit a particularly high level of diversity-related content, it is clear that it met the requirements of the rule. Like AEP, the company additionally disclosed that it does not have a policy, though again, this disclosure was not required by the rule, thus putting American Express in a state of overcompliance as well.

Baker Hughes also responded by arguing that it had “already provided complete disclosure regarding its director nomination process pursuant to Regulation S-K, Item 407(c)(2)(vi)” and pointed the SEC to the germane portions of its proxy statement. It is also apparent that this firm met the diversity consideration requirements of the rule; my study shows that its 2010 proxy statement addressed gender, race/ethnicity, experiential, demographic, and generic diversity under my classification scheme.

The SEC initiated dialogue with Baxter International by making the following request: “We note [from] your disclosure . . . that [d]iversity of background’ is a relevant factor in the selection of directors process. In future filings please describe how this policy is implemented, as well as how the corporate governance committee assesses the effectiveness of its policy as requested by Item 407(c)(2)(vi) of Regulation S-K.” From this passage, we see that the SEC interpreted the company’s disclosure as referencing a policy and sought information on how that policy is implemented and how its efficacy is assessed. In its proxy statement, however, while Baxter clearly set out how diversity is considered in its board nomination process, it did not use the term “policy” to describe its diversity-related practices. Indeed, this is in contrast with other aspects of its proxy statement where it discussed, for example, its “policy” regarding related person transactions and the preapproval “policy” of its audit committee vis-à-vis the receipt of services from its independent accounting firm.

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*evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder.” See SEC, Final Rule, supra note 13 at 115. The comments that follow relate only to the diversity requirement.*

132 American Express Co, Definitive Proxy Statement (Form DEF 14A) (15 March 2010) at 16.
133 Letter from Daniel T Henry, supra note 131.
134 Letter from Peter A Ragauss, Senior VP & CFO, Baker Hughes Inc, to H Roger Schwall, Assistant Director, Division of Corporation Finance, SEC (9 June 2010) at 7.
136 Letter from Kate Tillan, Assistant Chief Accountant, Division of Corporation Finance, SEC, to Robert M Davis, CFO, Baxter International Inc (7 April 2010) at 3.
138 In this study, Baxter International’s 2010 proxy statement was coded “functional equivalent.”
139 Baxter International 2010, supra note 137 at 40.
140 Ibid at 42.
Correspondingly, Baxter’s response to the SEC clarified that the disclosure it provided “was intended to address the requirement . . . that companies indicate whether, and if so how, diversity is considered in identifying directors” but that the firm “has not adopted a policy requiring the consideration of diversity.”\textsuperscript{141} Baxter further advised that “[i]f such a policy is adopted, we will provide disclosure on the existence of the policy as well as how such policy is implemented and assessed for effectiveness in future filings.”\textsuperscript{142} In other words, since Baxter does not view itself as having a policy, it was not required to fulfill the rule’s implementation and effectiveness requirements. While Baxter ends its response on a note of compromise, stating that it will dispel any confusion surrounding its treatment of the term diversity in subsequent filings,\textsuperscript{143} it is clear that the firm—contrary to the SEC’s interpretation—was in compliance. I should note that this study classified Baxter’s 2010 proxy statement as “functional equivalent” with respect to the existence of a policy since its corporate governance guidelines outline the factors it considers in selecting directors, including various diversity-related indicators.\textsuperscript{144} As such, some degree of ambiguity as to whether a policy exists is understandable. However, rather than seeking clarification on whether the firm has a policy,\textsuperscript{145} the SEC simply assumed that a policy was in place.

**Concluding remarks: firms’ consideration of diversity pre- and post-SEC rule**

The disclosures issuers have submitted thus far under the SEC diversity rule give rise to questions such as whether the rule will be effective in promoting diversity on corporate boards and whether any such focus it has produced emphasizes the “right” forms of diversity. I discuss these questions in chapter 7, where I contextualize the discursive data I presented in this chapter within academic literature on social norms and expressive law, and then provide recommendations for reform.

To fully contextualize and evaluate the rule, one piece of description visible in my sample will be helpful. In addition to collecting proxy statements for the four years since the SEC rule came into effect, I collected the 2009 definitive proxy statements of the S&P 100 sample, which were the statements filed in the year before the diversity disclosure rule came into effect. Comparing the 2009 prereule data to the 2010–2013 postrule data, I found that firms considered diversity to a notably greater extent subsequent to the rule’s implementation. Whereas 98 percent of proxy statements reflected diversity consideration in 2010–2013, in 2009, 76 percent of proxies reflected consideration of diversity.\textsuperscript{146} Figure 6.11 presents a comparison of these figures.

\textsuperscript{141} Letter from Robert M Davis, Corporate VP & CFO, Baxter International Inc, to Kate Tillan, Assistant Chief Accountant, Division of Corporation Finance, SEC (30 April 2010) at 6.
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid.
\textsuperscript{144} Baxter International 2010, supra note 137 at 13.
\textsuperscript{145} As the SEC did in the case of Target Corporation. See Letter from H Christopher Owings, Assistant Director, Division of Corporation Finance, SEC, to Gregg W Steinhafel, Chairman, President & CEO, Target Corp (12 July 2010) at 2.
\textsuperscript{146} For a similar finding, see Hazen & Broome, supra note 12 at 68-69 (using the Fortune 100 as a sample; comparing 2009 data with 2010 data).
A 76 percent consideration rate may appear high, but I found a marked difference in the content of the prerule disclosures. Many firms in 2009 (25 percent) simply included the term “diversity” in a list of factors they considered in the director nomination process without further explication. Firms that discussed diversity in their 2010–2013 proxies, by contrast, provided much more detailed information. In each of the years 2010–2013, for example, roughly half of proxy statements indicated that the firms considered gender, and similar (albeit lower) percentages referred to race or ethnicity. In 2009, only 14 percent and 13 percent of firms mentioned gender and race or ethnicity, respectively. Not surprisingly, this same pattern appeared in relation to all six of the variables I studied. Figure 6.12 presents a statistical comparison of how firms considered diversity pre- and postrule with reference to these six variables.
Of course, even though the SEC rule has undoubtedly catalyzed more frequent discussion of diversity in the board nomination process, much remains to be assessed about the rule’s effectiveness and desirability. I turn to this analysis in the chapter that follows.