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Women and M&A

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Corporations, law firms, and investment banks all state that diversity matters. This Article shows that there is a chasm between discourse and action. For the most important decisions undertaken by companies—large merger and acquisition (M&A) transactions—a gender gap persists. This Article provides a holistic examination of the network of lead actors involved in M&A, revealing that women’s leadership opportunities continue to be vastly unequal. Using hand-collected data from 700 transactions, this Article reveals that thirty years after women began to account for almost half of all law students, gender parity in M&A leadership lags far behind. To illustrate, over a seven-year period, women make up on average 10.5% of lead legal advisors for buyers in large M&A deals. Moreover, this Article documents the lack of transparency on leadership data for other players in M&A. This Article argues that understanding, documenting, and disclosing the gender gap in M&A leadership is critical for increasing accountability and for determining the solutions that may work to reduce such disparities.

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Introduction	360
I. The Dearth of Women in M&A: Boards and the C-Suite.....	367
A. Women as Executives in Corporate America	367
B. Women on Boards	371
II. Women as M&A Advisors	378
A. Women as Legal Advisors.....	378
B. Gender Diversity of Leading M&A Advisors: Empirical	
Findings.....	381
Overall Picture.....	382
Law Firms	383
Unique Women as Lead Counsel.....	385
Deal Teams.....	386
C. Barriers to the Advancement of Women as Lead M&A	
Advisors	387
1. Explicit and Implicit Biases	388
2. Structural Biases in the Practice of M&A	392
3. Promotion, Credit, and Pay Disparities	393
D. Women as M&A Financial Advisors	394
III. Diversity and M&A: Why Does Diversity Matter?	397
A. The Value of Values: Equity, Inclusion, and Access.....	397
B. Improving the M&A Decision-Making Process	399
1. Improving Decision-Making	401
2. Diversity and M&A: Implications from Empirical Studies	403
IV. Towards Women's Inclusion in M&A.....	405
A. Disclosure and Transparency	406
B. Attacking Bias.....	408
C. Stakeholder Pressure	410
1. Stakeholder Pressure for Board Diversity.....	410
2. Stakeholder Pressure for C-Suite Diversity	411
3. Advisors and Client Pressure to Diversify.....	413
D. Quotas and Mandates	415
E. Improving the Pipeline in Professional Schools	417
Conclusion.....	418
Appendix A—Methodology.....	419
Appendix B—Additional Data Charts	421

INTRODUCTION

Merger and acquisition (M&A) transactions are often the most significant undertaking by a company and a recurring feature of the business world. In 2020 alone, worldwide M&A deals totaled \$3.6 trillion, with 2021 dealmaking reaching

even higher record levels.¹ Large M&A deals are often transformational events for companies, determining whether a celebrated brand survives, whether a company expands its business to new heights, or whether a company dies. M&A deals are watched closely by the financial press, which regularly profiles deals and dealmakers.² Law firms and investment banks routinely tout their M&A prowess and expertise, seeking to grow this lucrative practice area. Given its significance, M&A activity is an intense focus of academics with hundreds of articles and books on M&A from scholars across disciplines.

Undertaking a large M&A deal involves many different actors—a corporation's board of directors, its senior management, and legal and financial advisors.³ Each of these actors plays a significant role in the decision to move forward on an M&A deal and is deeply involved in the decision-making and planning for a deal. With all these central players, there is a glaring absence of women as leaders.⁴ Whether as executives, as board members, as financial advisors, or as legal advisors, women, and particularly women of color, are vastly underrepresented.⁵ And women's progress as leaders in M&A practice has been sluggish, at best.

Despite the importance of M&A and the central role that the actors involved in M&A play in corporate governance, the legal literature on M&A has largely overlooked gender disparities.⁶ M&A casebooks do not address gender diversity

1. REFINITIV, GLOBAL MERGERS & ACQUISITIONS REVIEW (2020); *The Deals of the Year*, N.Y. TIMES: DEALBOOK (Dec. 18, 2021), <https://www.nytimes.com/2021/12/18/business/dealbook/deals-of-the-year.html> [<https://perma.cc/Y6XL-7QQ7>].

2. See, e.g., Erin Griffith & Lauren Hirsch, *Salesforce to Acquire Slack for \$27.7 Billion*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2020/12/01/technology/salesforce-slack-deal.html> [<https://perma.cc/NPE2-VCZ5>].

3. A myriad of other actors, such as accountants, public relations experts, integration consultants, and the like, are also typically involved.

4. While this Article focuses on the lack of sex diversity in M&A, there is also a glaring lack of racial diversity in the boardroom, C-Suite, and among leading advisors in M&A. Some scholars have long urged strategies to address racial justice using the tools of corporate governance. See, e.g., Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 968–74 (2005). Nonetheless, as the racial reckoning of 2020 highlighted, again, there are few Black directors or executives in leadership roles at the largest companies in the United States. See David Gelles, *Corporate America Has Failed Black America*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html> [<https://perma.cc/6SB3-495M>]. To begin to address this problem, there is a critical need for greater disclosure of racial and gender metrics at companies and their myriad of advisors. See generally Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. F. 869 (2021). Furthermore, I hope to explore the lack of racial diversity in M&A more fully in future scholarly work.

5. It is not surprising that women of color are underrepresented as M&A advisors. The 2020 National Association for Law Placement Report on Diversity in U.S. Law Firms found that only ten percent of all partners at law firms are people of color, and less than four percent of partners are women of color. NAT'L ASS'N FOR L. PLACEMENT, 2020 REPORT ON DIVERSITY IN U.S. LAW FIRMS 25, chart 7 (2021).

6. For an excellent examination of how gender politics have shaped the foundations of corporate law and corporate governance, see Sarah C. Haan, *Corporate*

issues; few law review articles focus on gender disparities in M&A;⁷ the celebrated M&A cases rarely feature women executives, board members, or lawyers; and elite M&A legal practice remains dominated by men.⁸

This Article addresses the gap in the literature. Corporations, law firms, and investment banks all state that diversity matters. This Article provides a holistic analysis of the lead actors involved in M&A transactions, revealing gender disparities in leadership among each of these actors. After decades of pronouncements about the commitment to diversity, there remains a significant underrepresentation of women in leadership among all the institutions involved in M&A. This Article contends that gender diversity matters for both equity reasons and to improve M&A decision-making. Yet, organizations aiming to achieve greater diversity in M&A leadership face a difficult task that requires tackling persistent and pervasive inequalities from many angles. This Article argues that understanding, documenting, and disclosing the gender disparity in leadership in M&A is critical for increasing accountability and for determining the solutions that may work to reduce gender disparities in the leading institutions involved in M&A practice.⁹ The Article contributes to those efforts by enhancing the focus on diversity in the M&A literature through a robust, quantitative study.

Much of the literature on women's participation in corporate governance has focused on the board of directors. Numerous articles and books have examined board diversity.¹⁰ But while boards are important players in M&A deals, boards do

Governance and the Feminization of Capital, 74 STAN. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740608 [<https://perma.cc/PHV7-GGAR>].

7. Recent scholarship has addressed how feminist movements, such as the #MeToo movement, have impacted M&A dealmaking. See generally Anna Windemuth, *The #MeToo Movement Migrates to M&A Boilerplate*, 129 YALE L. J. 488 (2019); see also Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 UC DAVIS L. REV. 1913, 1980–81 (2021).

8. Even in corporate law cases that involve women or women's interests, considerations of gender are ignored. See Afra Afsharipour, *Commentary on Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, in FEMINIST JUDGMENTS IN CORPORATE LAW (Anne Choike, Usha Rodrigues & Kelli Alces Williams eds., forthcoming 2022); Ann Lipton, *Capital Discrimination*, — HOUS. L. REV. (forthcoming 2022) (manuscript at 26–28) (on file with author).

9. As Professor Jamillah Bowman Williams has argued, “[w]ithout information and data on workplace representation, pay equity, and best practices for promoting inclusion, it is difficult to know what problems exist and how to create effective strategies moving forward.” Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1724 (2019).

10. See, e.g., AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2016); Lisa M. Fairfax, *Fall 2018 Symposium: All on Board? Board Diversity Trends Reflect Signs of Promise and Concern*, 87 GEO. WASH. L. REV. 1031, 1032 (2019) [hereinafter Fairfax, *All on Board?*]; Darren Rosenblum, *California Dreaming?* 99 B.U. L. REV. 1435, 1437 (2019) [hereinafter Rosenblum, *California Dreaming?*]; Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 431–32 (2017) [hereinafter Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*]; Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 147–48 (2019); Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 889–90 (2015); Joan MacLeod Heminway, *Women in the Crowd of Corporate Directors: Following, Walking Alone, and Meaningfully Contributing*, 21 WM. & MARY J. WOMEN & L. 59, 60–61 (2014); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does*

not act in a vacuum and frequently play an acquiescent role in M&A.¹¹ For most large M&A deals, board decisions only arise after significant involvement by a company's management.¹² Management largely controls the flow of information to the board.¹³ C-Suite executives determine whether an M&A transaction is initiated and how it is valued, negotiated, and completed. In other words, when it comes to M&A, senior executives run the show and are often the proponents of these transactions.

The C-Suite's gender disparities are well-documented. Few women lead companies in corporate America, and even fewer women of color are represented in the C-Suite.¹⁴ By late 2020, the number of women chief executive officers (CEOs) of Fortune 500 companies hit an unprecedented high of forty-one, about eight percent, although women still make up less than a quarter of C-level executives.¹⁵ The absence of women of color in the C-Suite is particularly notable. Women of color account for about twenty percent of the U.S. population and make up almost eighteen percent of entry level workers at firms.¹⁶ Yet in 2020, few women of color held leadership positions at large corporations, with only three percent holding C-Suite positions.¹⁷ Not only are women underrepresented as

Difference Make?, 38 DEL. J. CORP. L. 377, 378 (2014); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 859 (2011) [hereinafter Fairfax, *Board Diversity Revisited*]; Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 580 (2006); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 797.

11. See Afra Afsharipour, *Bias, Identity and M&A*, 2020 WISC. L. REV. 471, 474–75.

12. See Afra Afsharipour & J. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443, 480–81 (2019); Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679, 683 (2015).

13. See Nicola F. Sharpe, *The Cosmetic Independence of Corporate Boards*, 34 SEATTLE U. L. REV. 1435, 1453–55 (2011).

14. See *infra* Section I.A. Over the past decade, women have made up more than one-third of MBA graduates, rising to close to forty percent at leading business schools. Kathryn Dill, *More Women Pursue M.B.A. as Elite Schools Step Up Recruiting*, WALL ST. J. (Nov. 6, 2019, 5:30 AM), <https://www.wsj.com/articles/more-women-pursue-m-b-a-as-elite-schools-step-up-recruiting-11573036204> [<https://perma.cc/5HP7-F9CJ>].

15. See Vanessa Fuhrmans, *There Are More Female CEOs Than Ever, and Many of Them Are in Retail*, WALL ST. J. (Nov. 25, 2020, 1:17 PM), <https://www.wsj.com/articles/there-are-more-female-ceos-than-ever-and-many-of-them-are-in-retail-11606328235> [<https://perma.cc/S2Z9-LVE5>]. The numbers in 2020 were a significant increase from just two years prior, when the number of women CEOs in the Fortune 500, small to begin with, fell by twenty-five percent. See Claire Cain Miller, *The Number of Female Chief Executives Is Falling*, N.Y. TIMES: THEUPSHOT (May 23, 2018), <https://www.nytimes.com/2018/05/23/upshot/why-the-number-of-female-chief-executives-is-falling.html> [<https://perma.cc/JT6G-4F5H>].

16. *Women of Color in the United States (Quick Take)*, CATALYST (Feb. 1, 2021), <https://www.catalyst.org/research/women-of-color-in-the-united-states/> [<https://perma.cc/YNB5-GHE7>].

17. RACHEL THOMAS, MARIANNE COOPER, GINA CARDAZONE, KATE URBAN, ALI BOHRER, LAREINA YEE, ALEXIS KRIVKOVICH, JESS HUANG, SARA PRINCE, ANKUR KUMAR & SARAH COURY, *WOMEN IN THE WORKPLACE 2020*, at 8 (2020),

CEOs, but few leaders in the corporate development teams responsible for executing M&A transactions are women.¹⁸ In short, “corporations have been faster to embrace diverse directors (who monitor management at a distance)” than diverse executives.¹⁹

Women also continue to be underrepresented on boards, although due to the focus on gender diversity on the board, the numbers here are less skewed than in the C-Suite. In 2018, approximately twenty-three percent of board members of Fortune 500 board seats were held by women.²⁰ By 2020, that number had moved up to twenty-eight percent, with the recruitment of women board members gaining steam.²¹ Nevertheless, progress on racial diversity on boards has lagged. Few board seats are filled by women of color, with women of color making up only ten percent of new board appointments in 2020.²² Data shows that in 2018, Black/African American, Asian/Pacific Islander, and Latinx women together held less than five percent of board seats in the Fortune 500, a small uptick from 2010 when fewer than three percent of board seats were held by minority women.²³

In M&A deals, senior executives and boards rarely act on their own, and many deal teams are populated by highly compensated financial and legal advisors. Advisors play a key role in the valuation, negotiation, and completion of deals, as well as in the diligence and complex documentation process involved in M&A transactions.²⁴ Among advisors, there has been little transparency or data on women’s involvement in M&A, although anecdotal reports suggest that as among corporate executives, there is a significant lack of women as M&A advisors.²⁵ This

https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf [https://perma.cc/TKF2-ULBC]. As of February 2021, only three Fortune 500 companies were led by women of color. See Alisha Ebrahimji, *Female Fortune 500 CEOs Reach an All-time High, but It’s Still a Small Percentage*, CNN BUS. (May 20, 2020, 10:46 AM ET), <https://www.cnn.com/2020/05/20/us/fortune-500-women-ceos-trnd/index.html> [https://perma.cc/DW3W-BZTY].

18. See Janet Burns, *The Results Are in: Women Are Great for Business, but Still Getting Pushed out*, FORBES (Sept. 22, 2017, 1:41PM) <https://www.forbes.com/sites/janetwburns/2017/09/22/2016-proved-women-are-great-for-business-yet-still-being-pushed-out/?sh=21c8e8c9188b> [https://perma.cc/S8LT-L8KS].

19. Susan E. Reed, *Corporate Boards Are Diversifying. The C-suite Isn’t.*, WASH. POST (Jan. 4, 2019), https://www.washingtonpost.com/outlook/corporate-boards-are-diversifying-the-c-suite-isnt/2019/01/04/c45c3328-0f02-11e9-8938-5898adc28fa2_story.html [https://perma.cc/9ZZ7-ZC5M].

20. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 9 fig. 7 (2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf> [https://perma.cc/7B5S-B7F7].

21. SPENCER STUART, 2020 U.S. SPENCER STUART BOARD INDEX HIGHLIGHTS 3 (2020).

22. *Id.* at 6. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20, at 6, 31–34.

23. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20, at 17–18.

24. For more on complexity in M&A, see Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403 (2016).

25. Diane Frankle, Jennifer Muller & Eric Talley, *Fixing the Dearth of Women in M&A*, DAILY J. (Sept. 22, 2014), https://www.law.berkeley.edu/files/belbe/Women_in_M_and_A%281%29.pdf [https://perma.cc/2UWE-57NV]; Simon Mortlock, J.P. Morgan M&A Head: Female Bankers Must Network Better, Be More Mobile, and Have “Initiative” to Reach the Top, EFINANCIALCAREERS (May 30, 2018), <https://www.efinancialcareers.com/news/2018/05/ee-ching-tay-jpmorgan> [https://

trend is especially prevalent in leadership and management roles in both the legal and investment banking industries.²⁶

Focusing on one set of the advisors—legal advisors—this Article presents hand-collected data from the largest 100 public company transactions in each year from 2014 to 2020. Women have accounted for almost half of all law students for almost thirty years, and one would expect some progress toward gender parity in leadership roles in M&A practice.²⁷ The study in this Article, however, reveals a persistent gender gap in lead legal advisors in M&A transactions. Rather than being leaders on deals, women are “often in secondary roles in practice areas supporting the deal, reflecting the wide gender disparity in the most senior levels of M&A.”²⁸ For example, Davis Polk, one of the leading law firms in the United States and the leading firm for worldwide M&A in 2020, has received awards for its “commitment to integrating women into leadership positions.”²⁹ The study in this Article finds, however, that until 2020, not a single woman served as lead corporate attorney on the dozens of large M&A matters led by Davis Polk during the period covered by this study.³⁰

The data on financial advisors is more opaque than it is for legal advisors. There is little industry, firm, or deal-specific disclosure on women’s leadership in

perma.cc/S336-T6KU]. The gender gap in law firms generally is well-documented. *See, e.g.*, ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE (2019), https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf [<https://perma.cc/QFR9-2S48>]; Ghazala Azmat & Rosa Ferrer, *Gender Gaps in Performance: Evidence from Young Lawyers*, 125 J. POL. ECON. 1306 (2017).

26. *See* Lizzy McLellan, *M&A’s Missing Women*, LAW.COM (Mar. 27, 2017, 12:08 AM), <https://www.law.com/sites/almstaff/2017/03/27/mas-missing-women/> [<https://perma.cc/8YMV-ZG98>].

27. *See generally* Legal Education & Admissions to the Bar, *Statistics*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_education/resources/statistics/ [<https://perma.cc/Y2P3-LGLH>].

28. Patrick Smith, *When It Comes to Leading Big M&A Deals, Women are an Illusion*, LAW.COM: THE AM. LAW., (Jan. 13, 2021, 10:00 AM), <https://www.law.com/americanlawyer/2021/01/13/when-it-comes-to-leading-big-ma-deals-women-are-an-illusion/> [<https://perma.cc/A7RB-HT4P>].

29. Press Release, Davis Polk, Davis Polk Named a 2020 “Gold Standard Firm” by Women in Law Empowerment Forum (Feb. 17, 2021), <https://www.davispolk.com/news/davis-polk-named-2020-gold-standard-firm-women-law-empowerment-forum-0> [<https://perma.cc/RLS5-7RUK>]. *See* Roy Strom, *Here’s the Secret to Davis Polk’s Banner 2020—and 2021 So Far*, BLOOMBERG L. (Apr. 22, 2021, 1:55AM), <https://news.bloomberglaw.com/business-and-practice/heres-the-secret-to-davis-polks-banner-2020-and-2021-so-far> [<https://perma.cc/9DV9-571Y>].

30. According to Davis Polk’s website, as of September 2021, women account for four out of forty-seven partners identified as having M&A expertise. *Lawyers*, DAVIS POLK, <https://bit.ly/3l8iXa> [<https://perma.cc/3VWY-BZBZ>] (last visited Nov. 14, 2021). Wachtell Lipton, the law firm with the most lead counsel roles in the deals included in this Article’s study, lists thirty-nine corporate partners out of which four are women. *See Attorneys*, WACHTELL, LIPTON, ROSEN & KATZ, <https://bit.ly/3D8EVdz> [<https://perma.cc/3AYY-F549>] (last visited Nov. 14, 2021).

M&A investment banking. Nevertheless, the limited information available and press reports highlight the male-dominated banking and finance industry.³¹

Not only are women underrepresented as legal and financial advisors in M&A transactions, but even the training of women as future lawyers and bankers indicates underrepresentation. This Article's survey of M&A courses taught in 2018–2019 and 2019–2020 at top-fifty-ranked law schools in the United States shows that fewer than fifteen percent of faculty teaching M&A-related courses are women, with women adjunct faculty making up approximately ten percent of all adjunct faculty in such courses.³² The enrollment of students in M&A courses also reflect gender disparities. An ABA survey of students at leading law schools found that enrollment of women in M&A-related courses was thirty-seven percent, despite women making up more than half of all law students.³³

Why do the gender disparities in M&A matter? The paucity of women as decision makers in M&A transactions is alarming for several reasons.³⁴ First, from an equity standpoint, a significant portion of the population does not hold key decision-making roles in fundamental deals that greatly impact companies and billions of dollars trading hands.³⁵ Second, research on group decision-making suggests that greater diversity could improve M&A transactions significantly. M&A transactions are often the most impactful decisions that a corporation can undertake.³⁶ Research suggests, however, that M&A deals are also plagued with

31. See Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 456 (2018); see also Mortlock, *supra* note 25; Megan Davies & Paritosh Bansal, *M&A Still Overwhelmingly a Man's Game*, REUTERS (Apr. 12, 2011, 10:41AM), <https://www.reuters.com/article/us-mergers-summit-women/ma-still-overwhelmingly-a-mans-game-idUSTRE73A7NT20110412> [<https://perma.cc/8CB7-LU3M>]; Shama Hyder, *Why Investing in Women Investment Bankers Pays Off*, FORBES (July 8, 2014, 9:00AM), <https://www.forbes.com/sites/yec/2014/07/08/why-investing-in-women-investment-bankers-pays-off/#1b4809ff0b9> [<https://perma.cc/X6A7-EVQ2>]. As recounted in Claire Hill and Richard Painter's book, "a distorted vision of masculinity in banking" where excessive risk taking is seen as a "sign" of masculinity has contributed to problematic practices in the banking profession generally. CLAIRE A. HILL & RICHARD W. PAINTER, *BETTER BANKERS, BETTER BANKS* 10, 99 (2015).

32. For an investigation into the intersection of gender and race in legal academia, see MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

33. Frankle et al., *supra* note 25.

34. While other forms of diversity are likely also relevant to M&A decision-making, the overwhelming majority of empirical and psychological diversity literature focuses exclusively on the effects of women in the boardroom. For a survey of extant literature addressing various facets of demographic diversity, see generally Muneza Kagzi & Mahua Guha, *Board Demographic Diversity: A Review of Literature*, 11 J. STRATEGY & MGMT. 33 (2018).

35. Lisa Fairfax, for example, has emphasized the importance of acknowledging social and moral justifications for board diversity. Fairfax, *Board Diversity Revisited*, *supra* note 10, at 859.

36. See Ken Smith, *The M&A Buck Stops at the Board: Directors Are Learning Fast How to Screen out No-Win Deals*, MERGERS & ACQUISITIONS: DEALMAKER'S J., Apr. 1, 2006, at 48, 49; see also Andrew Balls, *Big Firms Lose Value in Acquisitions*, NBER DIGEST, Aug. 2003, at 3; Scott A. Christofferson, Robert S. McNish & Diane L. Sias, *Where Mergers Go Wrong*, MCKINSEY Q. (May 1, 2004), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong> [<https://perma.cc/3W4K-QNM4>].

shortcomings in decision-making.³⁷ As this Article discusses, a new body of finance literature has begun to explore the connection between M&A transactions and lack of diversity in M&A, suggesting that greater diversity may improve M&A outcomes.

This Article seeks to enhance the focus on diversity in the M&A literature. Part I provides a textured examination of the roles of executives and the contemporary board of directors, chronicling the paucity of women as leaders in the C-Suite and the boardroom. Part II focuses on the advisors typically involved in M&A transactions. Academic studies have to date ignored the lack of women advisors in M&A. This Article is the first academic article to examine the lack of women as M&A advisors with a focus on legal advisors. Using hand-collected data from the top 100 public company transactions in each year from 2014 to 2020, this Article's study uncovers the persistent gender gap among legal advisors in M&A transactions.

Part III addresses the implications of empirical findings regarding the gender gap among executives, directors, and advisors in M&A transactions. Part III argues that the lack of gender diversity in M&A is important from an equity and access perspective. Part III also examines the literature on the effects of diversity for group culture and decision-making and ties this literature to existing literature that suggests that M&A deals and dealmakers are particularly susceptible to agency problems and behavioral biases. Reducing gender disparities in M&A more broadly will present significantly greater challenges than achieving board diversity. Part IV addresses the policy implications of this Article's findings and examines various tools that may be useful for advancing diversity in leadership ranks in M&A.

I. THE DEARTH OF WOMEN IN M&A: BOARDS AND THE C-SUITE

M&A transactions are primarily driven by senior executives, directors, financial advisors, and legal advisors. Each of these players has a central role in the decision-making for a transaction. This Section examines the roles of executives and the contemporary board of directors in M&A transactions and chronicles the underrepresentation of women in both the C-Suite and the boardroom.

A. Women as Executives in Corporate America

While corporate law and scholarship largely focus on the board and the interplay between the board and shareholders, for today's large public companies, senior executives—especially CEOs—dominate decision-making.³⁸ CEOs “wield

37. See generally Afsharipour & Laster, *supra* note 12, at 453–54 (surveying literature on agency costs in M&A); Afra Afsharipour, *Reevaluating Shareholder Voting Rights in M&A Transactions*, 70 OKLA. L. REV. 127, 133–35 (2017).

38. See, e.g., Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 357, 367 (2016) (describing an “officer-dominated model of corporate governance, with officers exerting immense power and influence over the corporation”); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 1 (2009) (describing officers as the “true corporate decision makers”).

tremendous power and influence in running corporate America[.]” and “decisions made by these individuals can result in the success or collapse of their companies—and in some cases may even impact the broader economy.”³⁹

The domination of C-level executives in corporate decision-making and in allocating the resources of a company is particularly acute in M&A deals where executives are really the first among equals. Senior managers run the show and are often the proponents of M&A transactions. They typically control the initial conversations about a potential deal, and if deal negotiations move forward, senior managers control much of the flow of information to the board.⁴⁰ A CEO plays a multifaceted role in M&A deals: a visionary who frames “the strategic vision for the [deal]”; a cheerleader who must “generate enthusiasm” for the deal and “confront fear and uncertainty” about the success of the deal; a deal closer; a captain who manages the integration of the two companies; and a crusader for the merged entity.⁴¹ Not only do CEOs dominate M&A decision-making but they also play an outsize societal role. *The Economist* magazine described CEOs as the “new aristocrats of power.”⁴² Like the aristocrats of old, most CEOs are “white and male.”⁴³

Large companies have long touted their commitment to diversity.⁴⁴ Yet few of the C-Suite leaders of corporate America are women, and even fewer are women of color.⁴⁵ Studies find that women are less likely to become CEOs, even when they did not differ from men on interpersonal, analytical, and managerial skills and general ability.⁴⁶ By early 2020, less than six percent of CEOs of Fortune 500

39. Shaner, *supra* note 38, at 357–59.

40. See Orit Gadiesh, Robin Buchanan, Mark Daniell & Charles Ormiston, *A CEO's Guide to the New Challenges of M&A Leadership*, 30 STRATEGY & LEADERSHIP, no. 3, 2002, at 13, 13–14.

41. *Id.*

42. *The New Aristocrats of Power*, ECONOMIST, Feb. 23, 2019, at 71.

43. *Meet the New Boss: What it Takes to Be a CEO in the 2020s*, ECONOMIST, Feb. 6, 2020, at 9.

44. Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1017–18 (2011).

45. See DEBORAH L. RHODE, WOMEN AND LEADERSHIP 56–57 (2017). In general, few people of color hold leadership positions at large companies. See Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (forthcoming 2022) (manuscript at 14–18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788159 [<https://perma.cc/Z66A-E5TB>]. A 2020 study found that non-white executives held only nine percent of CEO roles among Fortune 500 companies. David F. Larcker & Brian Tayan, *Diversity in the C-Suite: The Dismal State of Diversity Among Fortune 100 Senior Executives* 1, 7 (Rock Ctr. for Corp. Governance, Stan. Closer Look Series – CGRP82, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587498 [<https://perma.cc/53CC-9DE6>]. The one role with a significant growth in the C-Suite is that of the chief diversity officer (CDO), with many companies appointing CDOs in 2020. See Mita Mallick, *Do You Know Why Your Company Needs a Chief Diversity Officer*, HARV. BUS. REV. (Sept. 11, 2020), <https://hbr.org/2020/09/do-you-know-why-your-company-needs-a-chief-diversity-officer> [<https://perma.cc/Z4MP-HVRV>]. Reports indicate, however, that the CDO role is “marked by high turnover” with many CDOs feeling disillusioned by “a lack of resources, unrealistic expectations and inadequate support from senior executives.” Chip Cutter & Lauren Weber, *Demand for Chief Diversity Officers Is High. So Is Turnover.*, WALL ST. J. (July 13, 2020, 7:00 AM).

46. Miller, *supra* note 15; see Steven Neil Kaplan & Morten Sorensen, *Are CEOs Different?* 76 J. FIN. 1773, 1805 (2021).

companies were women, and women made up about a quarter of C-level executives.⁴⁷ In May 2020, CNN reported thirty-seven women were CEOs of Fortune 500 companies, hitting an all-time record.⁴⁸ While this was a significant achievement for gender diversity, only three women CEOs in 2020 were women of color.⁴⁹ Looking at a broader array of companies, as of 2018, only nine percent of top executive roles in the Russell 3000 were held by women.⁵⁰

Women are often underrepresented in decision-making centers of corporations responsible for M&A deals. Few of the executives that are responsible for executing M&A transactions, that is, the corporate development teams of companies, are women.⁵¹ And in 2018, half of Fortune 50 companies had no women of color on leadership teams.⁵²

Studies indicate that meaningful progress to diverse corporate leadership has been slow “even as public pressure to move from the status quo has continued to grow (most notably through the global #MeToo movement against sexual harassment and assault) from institutional investors, regulators, and lawmakers.”⁵³ A 2018 study by McKinsey & Company and LeanIn.Org noted that although firms claim a high commitment to gender diversity, this “has not translated into meaningful progress. The proportion of women at every level in corporate America has hardly changed. Progress isn’t just slow. It’s stalled.”⁵⁴ A 2019 study by the same

47. *Pyramid: Women in S&P 500 Companies (Infographic)*, CATALYST (Jan. 15, 2020), <http://www.saichefulicai01.com/index-272.html> [<https://perma.cc/DD7L-6K97>]; Vanessa Fuhrmans, *Where Are All the Women CEOs?*, WALL ST. J. (Feb. 6, 2020, 10:34 AM), <https://www.wsj.com/articles/why-so-few-ceos-are-women-you-can-have-a-seat-at-the-table-and-not-be-a-player-11581003276> [<https://perma.cc/ZBV3-8QU8>]; Miller, *supra* note 15; DAVID A. BELL & DAWN BELT, FENWICK & WEST, *GENDER DIVERSITY IN SILICON VALLEY* 52 (2018). *See generally* AMANDA KIMBALL, UC DAVIS GRADUATE SCH. OF MGMT., UC DAVIS STUDY OF CALIFORNIA WOMEN BUSINESS LEADERS: A CENSUS OF WOMEN DIRECTORS AND HIGHEST-PAID EXECUTIVES 2015–2016 (2015), https://www.usu.edu/uwlp/files/ucclaviswomenstudy2015_web.pdf [<https://perma.cc/4CB7-VZ6G>].

48. Ebrahimji, *supra* note 17; Emma Hinchliffe, *The Number of Female CEOs in the Fortune 500 Hits an All-time Record*, FORTUNE (May 18, 2020, 4:15 AM), <https://fortune.com/2020/05/18/women-ceos-fortune-500-2020/> [<https://perma.cc/39V7-7LQN>].

49. Ebrahimji, *supra* note 17. Black people are particularly underrepresented as executives among large companies in the United States, holding only one percent of CEO positions in the S&P 500 companies, even though they constitute approximately thirteen percent of the population in the United States. *See* Te-Ping Chen, *Why Are There Still So Few Black CEOs?*, WALL ST. J. (Sept. 28, 2020, 10:16 AM), <https://www.wsj.com/articles/why-are-there-still-so-few-black-ceos-11601302601> [<https://perma.cc/RL6N-R2JJ>].

50. Subodh Mishra, *Women in the C-Suite: The Next Frontier in Gender Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 13, 2018), <https://corpgov.law.harvard.edu/2018/08/13/women-in-the-c-suite-the-next-frontier-in-gender-diversity/> [<https://perma.cc/BR36-2QA8>].

51. *See* FENWICK & WEST, *supra* note 47, at 61.

52. Georgene Huang, *Women of Color Left Behind as Women Are Added to Boards, Management*, FORBES (Nov. 27, 2018, 8:53 AM), <https://www.forbes.com/sites/georgenehuang/2018/11/27/women-of-color-left-behind-as-women-are-added-to-boards-management/?sh=2941eb9b5d9c> [<https://perma.cc/UG2R-QZAT>].

53. FENWICK & WEST, *supra* note 47, at 1.

54. RACHEL THOMAS, MARIANNE COOPER, ELLEN KONAR, MEGAN ROONEY, MARY NOBLE-TOLLA, ALI BOHRER, LAREINA YEE, ALEXIS KRIVKOVICH, IRINA STARIKOVA, KELSEY ROBINSON, MARIE-CLAUDE NADEAU & NICOLE ROBINSON, *WOMEN IN THE WORKPLACE* 2018,

organizations found that companies are slowly adding more women to the C-Suite, although the overall representation is “far from parity” given that only one in five C-Suite executives is a woman and only one in twenty-five C-Suite executives is a woman of color.⁵⁵ Furthermore, a 2020 study conducted by the *Wall Street Journal* shows that men overwhelmingly get the management positions, such as those that include profit-and-loss (P&L) responsibilities, that set executives on the CEO track.⁵⁶

Women of color, in particular, face disproportionate barriers to advancing to the C-Suite.⁵⁷ While women of color make up around twenty percent of the U.S. population and about eighteen percent of entry-level positions in firms, they hold few leadership positions in companies.⁵⁸ For example, in 2020, few women of color advanced to leadership positions, with only three percent of C-Suite positions held by women of color.⁵⁹ Another study found that among the Fortune 100, Asian/Pacific Islander women had the most representation among women of color in any C-Suite positions as seven out of 349 P&L leaders.⁶⁰ The second most representation of women of color in C-Suite positions is a tie between three Black women as P&L leaders and another three Black women as general counsel.⁶¹

Research indicates that women of color have a double hurdle derived from their race and gender identities that impedes their ascent to the upper ranks of corporate America.⁶² In many elite professions, women of color are devalued by “the compound effects often caused by holding multiple devalued identity

at 4 (2018), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2018.pdf [<https://perma.cc/D9NL-T7FE>].

55. RACHEL THOMAS, MARIANNE COOPER, ELLEN KONAR, MEGAN ROONEY, MARY NOBLE-TOLLA, ALI BOHRER, LAREINA YEE, ALEXIS KRIVKOVICH, IRINA STARIKOVA, KELSEY ROBINSON, MARIE-CLAUDE NADEAU & NICOLE ROBINSON, *WOMEN IN THE WORKPLACE 2019*, at 9 (2019), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2019.pdf [<https://perma.cc/M897-Y9UJ>].

56. Fuhrmans, *supra* note 47.

57. *WOMEN IN THE WORKPLACE 2019*, *supra* note 55, at 28–31. People of color are generally underrepresented in C-Suite positions. A 2020 study by Larcker and Tayan of the Fortune 100 found that “racially diverse executives hold only 16 percent of total C-Suite positions” and that twenty-six companies in the Fortune 100 had *zero* racially diverse executives in the C-Suite. Larcker & Tayan, *supra* note 45, at 2.

58. See Larcker & Tayan, *supra* note 45, at 17–23.

59. *WOMEN IN THE WORKPLACE 2020*, *supra* note 17, at 8; *Women of Color in the United States*, *supra* note 16.

60. Larcker & Tayan, *supra* note 45, at 18.

61. *Id.* at 20.

62. See Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This Is Not Just Women’s Work*, 65 MD. L. REV. 346, 350–54 (2006); Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN’S L. REV. 1105, 1105 (2006); Nina Bahadur, *How C-Suite Women of Color Have Powerfully Redefined Executive Presence*, WORKING MOTHER (May 13, 2020), <https://www.workingmother.com/new-executive-presence> [<https://perma.cc/EV8U-EMD2>]; Ruchika Tulshyan, *Speaking Up as a Woman of Color at Work*, FORBES (Feb. 10, 2015, 12:38 PM), <https://www.forbes.com/sites/ruchikatulshyan/2015/02/10/speaking-up-as-a-woman-of-color-at-work/#15305d772ea3> [<https://perma.cc/5ZG5-5X4T>].

characteristics, namely the intersection of race and gender.”⁶³ The 2017 *Women in the Workplace* report observed that companies often “overlook the realities of women of color, who face the greatest obstacles and receive the least support.”⁶⁴ One explanation is that companies “prioritize” gender diversity more than racial diversity.⁶⁵ The danger of not equally prioritizing both is the risk of overlooking complex and varied experiences women undergo, particularly those of women of color.

The 2019 *Women in the Workplace* report maintained that the greatest obstacle to women, including women of color, is the “broken rung.”⁶⁶ The broken rung refers to the lack of support for a woman’s initial promotion to a manager position, that could theoretically kickstart a woman’s promotion.⁶⁷ Thus, while white women may come up against a “glass ceiling,” women of color hit a “concrete ceiling” since they are usually supported less and receive fewer opportunities or projects that would help accelerate a promotion.⁶⁸ Black women in particular are more likely to report they never have senior-level contact.⁶⁹

The COVID-19 pandemic may further hamper women’s climb to the C-Suite. Studies show that the challenges wrought by the pandemic have disproportionately affected women and that many women, especially mothers and caregivers in leadership positions, are considering “downshifting” their careers or exiting the workforce.⁷⁰ And the pandemic has disproportionately harmed Black and Latinx women, who are already underrepresented in senior leadership positions.⁷¹ There is significant concern that the loss of women as leaders in the workforce may have negative downstream effects on diversity at all levels of the workforce.⁷²

B. *Women on Boards*

Corporate law places the board at the center of decision-making for M&A transactions. Under state corporate law, the board is charged with managing the

63. DEO, *supra* note 32, at 8.

64. RACHEL THOMAS, MARIANNE COOPER, ELLEN KONAR, MEGAN ROONEY, ASHLEY FINCH, LAREINA YEE, ALEXIS KRIVKOVICH, IRINA STARIKOVA, KELSEY ROBINSON & RACHEL VALENTINO, *WOMEN IN THE WORKPLACE 2017*, at 2 (2017), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2017_print.pdf [<https://perma.cc/KK9U-BB3H>].

65. *Id.* at 23.

66. *WOMEN IN THE WORKPLACE 2019*, *supra* note 55, at 5, 8.

67. *Id.* at 11.

68. Julia Carpenter, *Forget the ‘Glass Ceiling.’ Women Of Color Face A ‘Concrete Ceiling’*, CNN MONEY (Aug. 8, 2018, 7:05 AM), <https://money.cnn.com/2018/08/06/pf/women-of-color-ceos/index.html> [<https://perma.cc/5VVY-3RBS>]; see also *WOMEN IN THE WORKPLACE 2019*, *supra* note 55, at 8, 11, 28; Fuhrmans, *supra* note 47.

69. See *WOMEN IN THE WORKPLACE 2020*, *supra* note 17, at 28.

70. *Id.* at 6.

71. *Id.* at 28–29.

72. *Id.* at 25. Studies find that gender diverse leadership teams are associated with stronger equity practices at firms. See generally Christy Glass & Alison Cook, *Do Women Leaders Promote Positive Change? Analyzing the Effect of Gender on Business Practices and Diversity Initiatives*, 57 HUMAN RESOURCES MANAGEMENT 823 (2017).

business and affairs of the corporation and acting in the best interest of the corporation and its shareholders in fulfilling its fiduciary obligations.⁷³ Boards serve two important functions which address the agency costs inherent in the corporate governance structure: monitoring and advising. As monitors, boards supervise manager conduct to ensure that the incentives of management align with the interests of shareholders. As advisors, directors use their experience and expertise to guide management in designing corporate strategies and policies.

In line with the board's fiduciary role, state corporate law generally requires that the board of directors of a company involved in a merger transaction must approve the transaction.⁷⁴ Even if there is no statutorily defined role, in significant acquisitions by public companies, some level of board involvement, including seeking the board's approval for the deal, is the norm.⁷⁵ As part of their role as fiduciaries, directors must undertake sufficient investigation and obtain all reasonably available information regarding an M&A transaction. Due to their statutory role as well as the threat of fiduciary duty litigation against target directors in M&A deals, directors of the target often are heavily involved in the decision to sell the company.⁷⁶ For many boards, their primary involvement in the acquisition process is an advisory and oversight role to ensure "a reality check on management's plans."⁷⁷

73. The board is charged with managing the affairs of the corporation and acting in the best interest of the corporation and its shareholders in fulfilling its fiduciary obligations. *See* DEL. CODE ANN. tit. 8, § 141 (2020). Directors' fiduciary duty to the corporation encompasses two specific duties: the duty of loyalty and the duty of care. The duty of loyalty requires directors to consider the best interest of the corporation and its shareholders in making business decisions. If the director has a chance to benefit personally (and apart from benefits to the company) from a transaction, the director should remove himself from the transaction so as to avoid violation of his duty of loyalty to the company. The directors' duty of care requires them to inform themselves of all critical information available to them prior to approving an acquisition. This includes evaluating, investigating, and understanding expert opinions and terms for a transaction. Once the board is "informed" on a decision, directors must act with the requisite care in performing their duties. *See* JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS §§ 10.2–10.4, 10.11 (3d ed. 2010) (discussing the duties of care and loyalty).

74. *See* CAL. CORP. CODE § 1200 (West 2019); DEL. CODE ANN. tit. 8, § 251(b) (2020); MODEL BUS. CORP. ACT § 11.04(a) (AM. BAR. ASS'N 2016); STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 217–20 (3d ed. 2012).

75. *See* THERESE H. MAYNARD, MERGERS AND ACQUISITIONS CASES, MATERIALS, AND PROBLEMS 29–30 (4th ed. 2017). The board of the bidder is not necessarily deeply involved in all acquisitions "[i]f a very large company regularly buys smaller companies in its industry and has already developed a process for finding, acquiring, and integrating these firms, boards need not focus on the details of any particular transaction." Alexandra R. Lajoux, *Role of the Board in M&A*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 7, 2015), <https://corpgov.law.harvard.edu/2015/09/07/role-of-the-board-in-ma/> [<https://perma.cc/UX66-6W6L>].

76. *See* BAINBRIDGE, *supra* note 74, at 57–60, 63–64; *see also* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 475–77 (2015) (documenting the increase in merger litigation overall and the number of suits filed in connection with each individual transaction).

77. Lajoux, *supra* note 75; *see also* TRACY BENARD, ROB COBLE & PHIL ISOM, KPMG, THE BOARD'S PERSPECTIVES ON M&A: FROM DUE DILIGENCE TO DAY 1 AND BEYOND (2013),

The central role that boards play in corporate governance has made the board as an institution a target for gender diversity efforts.⁷⁸ Advocates argue that gender diversity on boards must be a priority for moral and social reasons as well as for instrumental reasons—often referred to as the business case for board diversity.⁷⁹ The business case for board diversity is a complex one that goes beyond financial performance to also consider diversity as important for decision-making, effective risk management, and establishment of egalitarian corporate cultures.⁸⁰ Moreover, scholars argue that the business case for diversity also considers the impact of diversity “on the corporation’s reputation with regulators and all its key stakeholders, and thus and by extension, on its cost of capital, access to talent and business partners, and its attractiveness to customers.”⁸¹

The drive for board diversity has come from a variety of stakeholders.⁸² Not only have reporting guidelines in corporate governance regulations focused on diversity,⁸³ but board gender diversity also has been vigorously pursued by investors, particularly institutional investors,⁸⁴ and even endorsed by board members and corporate business leaders.⁸⁵ For example, in early 2021, the Carlyle Group, a leading private equity firm, announced that it would tie the price of debt to the diversity of the board of its portfolio company.⁸⁶ The Carlyle Group based its

<http://www.kpmginfo.com/role-of-the-board/pdf/The%20Boards%20Perspective%20on%20MA.pdf> [<https://perma.cc/52M2-R2LV>].

78. See Nili, *supra* note 10, at 155–57.

79. For an overview of these arguments, see Nili, *supra* note 10, at 159–63. Some scholars have defined the instrumental value for diversity as one that values diversity in the service of further ends, but not as something valuable in itself. See Shin & Gulati, *supra* note 44, at 1020. Other scholars have argued that an instrumental case can “exist alongside the moral and business case.” See Naomi Cahn, June Carbone & Nancy Levit, *The Instrumental Case for Corporate Diversity* (on file with author).

80. See Brummer & Strine, *supra* note 45 (manuscript at 31–38); Miazad, *supra* note 7, at 1938–41.

81. Brummer and Strine, *supra* note 45 (manuscript at 25).

82. See Fairfax, *All on Board?*, *supra* note 10, at 1040–43.

83. In some jurisdictions, mandatory disclosure requirements now call for companies to outline their diversity policies and goals, and also to describe the steps taken to achieve these goals. See EDWARD KAMONJOH, INSTITUTIONAL S’HOLDER SERVICES, GENDER DIVERSITY ON BOARDS: A REVIEW OF GLOBAL TRENDS 3–4 (2014), <https://www.issgovernance.com/file/publications/2014-iss-global-board-diversity-report.pdf> [<https://perma.cc/Q6W7-XP7>].

84. See Fairfax, *All on Board?*, *supra* note 10, at 1040–45; see also Todd A. Gormley, Vishal K. Gupta, David A. Matsa, Sandra C. Mortal & Lukai Yang, *The Big Three and Board Gender Diversity: The Effectiveness of Shareholder Voice* (European Corp. Governance Inst. in Fin., Working Paper No. 714/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724653 [<https://perma.cc/UNU5-JP4L>].

85. See Fairfax, *All on Board?*, *supra* note 10, at 1044–45. A variety of business groups have advocated for board diversity. *Id.* For example, launched in the U.K. in 2010, the “30% Club” is an organization committed to achieving a gender balance at all levels of organizations, including corporate boards and C-suites. See *Our Global Mission*, 30% CLUB, <https://www.30percentclub.org/about/who-we-are> [<https://perma.cc/6ECV-ZKRR>] (last visited Jan. 7, 2022). Currently, the 30% Club has eighteen chapters throughout the world. See *id.*

86. See Lauren Hirsch, *The Carlyle Group Ties a \$4.1 Billion Credit Line to Board Diversity*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/business/the-carlyle-group-ties-a-4-1-billion-credit-line-to-board-diversity.html> [<https://perma.cc/4KPS-F2PA>].

decision on internal research that showed that “the average earnings growth of Carlyle portfolio companies with two or more diverse board members has been approximately 12% greater per year than companies that lack diversity.”⁸⁷

In addition to pressure from stakeholders, in some jurisdictions, mandatory board diversity quotas have been introduced, modeled after the initial quotas in leading countries such as Norway.⁸⁸ For example, in 2018, California passed legislation requiring that publicly traded firms with a principal office in California must include women on their boards.⁸⁹ Data suggests that the California statute has significantly increased the number of women on corporate boards.⁹⁰ Moreover, other states have either passed or are considering legislation on board

87. Press Release, The Carlyle Group, Carlyle Announces Largest ESG-Linked Credit Facility in the US at \$4.1 Billion and First-Ever Exclusively Tied to Board Diversity (Feb. 17, 2021), <https://www.carlyle.com/media-room/news-release-archive/carlyle-largest-esg-linked-credit-facility-us-4-billion-board-diversity> [<https://perma.cc/5VT3-2KZ7>]. Carlyle defined “diversity” as referring to female, Black, Hispanic, or Asian. JASON M. THOMAS & MEGAN STARR, THE CARLYLE GRP., GLOBAL INSIGHTS: FROM IMPACT INVESTING TO INVESTING FOR IMPACT 5 (2020), https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf [<https://perma.cc/VG5G-V53F>].

88. See Rosenblum & Roithmayr, *supra* note 10. For example, in 2003, Norway became the first country to impose a gender quota, mandating that corporate be composed of at least forty percent of each gender, effectively mandating the addition of a significant number of female directors. Øyvind Böhren & Siv Staubo, *Does Mandatory Gender Balance Work? Changing Organizational Form to Avoid Board Upheaval*, 28 J. CORP. FIN. 152, 152 (2014). The penalty of noncompliance is liquidation. *Id.*

89. See S. 826, Chapter 954 (Cal. 2018) (requiring publicly traded companies headquartered in California to have at least one female director by the end of 2019 and at least two (three) female directors on five (six or more) member boards by the end of 2021). For an analysis of the new California quota, see generally Rosenblum, *California Dreaming?*, *supra* note 10, at 1435.

90. See Julie Hembrook Daum & Spencer Stuart, *Fresh Perspectives: Increasing the Diversity of Experience, Expertise, and Ideas in the Boardroom*, in 2020 GOVERNANCE OUTLOOK: PROJECTIONS ON EMERGING BOARD MATTERS 62, 62–63 (2019), https://www.spencerstuart.com/-/media/2019/december/2020_nacd_governance_outlook_report.pdf [<https://perma.cc/6YPE-BUFE>]. Some also argue that California’s efforts may prompt companies not directly impacted by the California law to increase gender diversity on their boards and further prompt federal action on diversity on boards. See Fairfax, *All on Board?*, *supra* note 10, at 1037–38.

diversity disclosure or quotas.⁹¹ For example, Illinois,⁹² Maryland,⁹³ and New York⁹⁴ all mandate disclosure on gender diversity on boards, while Colorado⁹⁵ and Pennsylvania⁹⁶ have passed resolutions to encourage board diversity. Washington requires public companies incorporated in Washington to have gender-diverse boards or “deliver to its shareholders a board diversity discussion and analysis.”⁹⁷

The significant advocacy on board gender diversity has meant that board gender diversity has outpaced the sluggish pace of gender diversity in the C-Suite.⁹⁸ While women directors continue to remain underrepresented on corporate boards, boards have seen a moderate increase in the proportion of women’s representation.⁹⁹ In 2008, approximately sixteen percent of board members of S&P

91. See Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/> [<https://perma.cc/B4LH-T5ZL>]. States considering legislation on board diversity include Hawaii, Massachusetts, Michigan, New Jersey, and Ohio. See *id.*; Joan Helwig, *State Gender Diversity Legislation: Status Updates*, COGENCY GLOB. (Nov. 6, 2020), <https://www.cogencyglobal.com/blog/state-gender-diversity-legislation-status-updates> [<https://perma.cc/G8BL-SVJL>].

92. On August 27, 2019, Governor J.B. Pritzker signed into law a bill, H.B. 3394, which requires publicly traded businesses with principle executive offices in Illinois to file an annual report of the number of women and minority board members with the Secretary of State. See H.R. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

93. Maryland law (H.B. 1116/S.B. 911), effective October 1, 2019, requires business entities with corporate headquarters in Maryland with operating budgets over \$5 million and domestic stock corporations with sales over \$5 million to report the number of female board members and the total number of board members, as part of their annual personal property tax filing. See S. 911, 2019 Leg., Reg. Sess. (Md. 2019); see also Hatcher & Latham, *supra* note 91.

94. New York law also requires corporations to disclose the number of their board directors and how many of their directors are women. Assemb. 6330, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); S. 4278, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); see also Helwig, *supra* note 91.

95. In 2017, the Colorado legislature adopted a Joint Resolution encouraging “equitable and diverse gender representation on corporate boards” with specific guidelines depending on board size. H.R.J. Res. 17-1017, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). The resolution is non-binding and does not impose disclosure requirements. *Id.*; see also Hatcher & Latham, *supra* note 91.

96. Pennsylvania’s house resolution, H. Res. 114, encourages—but does not require—equitable and diverse gender representation on boards of publicly held corporations in Pennsylvania by 2021. H. Res. 114, 2019–2020 Gen. Assemb., Reg. Sess. (Pa. 2019).

97. S. 6037, 66th Leg., 2020 Reg. Sess. (Wash. 2020); see also Natalie Guevara, *What to Know About Washington’s New Rules for Boardroom Diversity*, PUGET SOUND BUS. J. (Mar. 1, 2021, 2:31 AM), <https://www.bizjournals.com/seattle/news/2021/02/28/washington-state-aims-to-make-boards-more-diverse.html> [<https://perma.cc/CLN2-7RRK>].

98. See Fairfax, *All on Board?*, *supra* note 10, at 1051–53. While there has been significant progress on women’s representation on public company boards in the largest companies, small companies still lag far behind. *Id.* at 1055–56. For private high-technology venture-backed companies, women represent less than ten percent of board members. See Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 374 (2019).

99. See Debbie McCormack & Robert Lamm, *The 2020 Boardroom Agenda*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 20, 2020), <https://corpgov.law.harvard.edu/2020/01/20/the-2020-boardroom-agenda/> [<https://perma.cc/CA4J-KSTM>]. Women’s representation in the boardrooms of the largest companies has outpaced that of non-white directors. See Larcker & Tayan, *supra* note 45, at 5–7. The percentage of non-white directors among the Russell 3000 companies crept up from eight percent in 2008 to ten percent in 2019. See *id.* at 6. These numbers

500 board seats were held by women.¹⁰⁰ By 2020, that number had moved up to twenty-eight percent, with the recruitment of women board members gaining steam.¹⁰¹ There remain concerns, however, that outside of the Fortune 500, achievement of board gender diversity has been tougher, and public company boards remain “a long way from gender parity.”¹⁰² For example, in 2019, women constituted just nineteen percent of board members in the Russell 3000 companies.¹⁰³ Furthermore, even in 2020, thirteen percent of boards in the Russell 3000 companies had *zero* women directors.¹⁰⁴

Not only does gender parity appear to be out of reach, but also board diversity efforts have yet to result in significant inclusion of women of color on boards.¹⁰⁵ Annual studies conducted by Deloitte and the Alliance for Board Diversity on women and minorities holding board seats for Fortune 500 companies show “African American/Black women and Asian/Pacific Islander women made the largest percentage increase in board seats gained in both the Fortune 100 and Fortune 500.”¹⁰⁶ Yet, the actual numbers remain very small. In 2018, Fortune 100 directors were comprised of 3.4% Black/African American women, and only 1.4% and 0.9% of Fortune 100 directors were Asian/Pacific Islander and Latinx women,

are somewhat higher for the largest 200 companies in the United States, where minorities made up twenty percent of all directors in 2020. See SPENCER STUART, *supra* note 21, at 17.

100. Larecker & Tayan, *supra* note 45, at 5; see also Elizabeth Olson, *Slow Gains for Women and Minorities on Boards of Big U.S. Firms, Study Says*, N.Y. TIMES, (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/business/women-minorities-corporate-boards.html> [<https://perma.cc/XS69-6K44>] (documenting the slow progress of women and people of color on boards of publicly traded companies).

101. See SPENCER STUART, *supra* note 21, at 3; Julie Daum, Laurel McCarthy & Ann Yerger, *Key Takeaways—2020 Board Index*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 26, 2021), <https://corpgov.law.harvard.edu/2021/01/26/key-takeaways-2020-board-index> [<https://perma.cc/3HX7-DGF2>].

102. Fairfax, *All on Board?*, *supra* note 10, at 1055–56; see also Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L. J. (forthcoming 2022) (manuscript at 11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3824857 [<https://perma.cc/6RH8-VYQV>] (stating that “small-cap companies are approximately ten years behind large-cap companies in terms of board gender diversity”); Fan, *supra* note 98, at 345, 368–75 (documenting gender disparities on board of venture capital-backed private companies).

103. Larecker & Tayan, *supra* note 45, at 5.

104. The Conference Board, *Report: Women on Russell 3000 Boards Increased by Just 4 Percent Over 3 Years; Only 10 Percent of S&P 500 Companies Explicitly Identify Directors’ Race and Ethnicity*, CISION PR NEWSWIRE (Oct. 1, 2020, 9:00 AM), <https://www.prnewswire.com/news-releases/report-women-on-russell-3000-boards-increased-by-just-4-percent-over-3-years-only-10-percent-of-sp-500-companies-explicitly-identify-directors-race-and-ethnicity-301143701.html> [<https://perma.cc/LT9K-PH3B>].

105. In general, people of color remain underrepresented on boards. See Brummer & Strine, *supra* note 45 (manuscript at 10–12); Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR 219, 241 (2015).

106. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20, at 6 (“African American/Black women saw an increase in seats of 26.2 percent in 2018, while Asian/Pacific Islander women saw an increase of 38.6%.”).

respectively.¹⁰⁷ In fact, between 2016 and 2018, the percentage of Latinx women on Fortune 100 boards decreased.¹⁰⁸

There were similar trends of slow progress for women of color as Fortune 500 directors from 2016 to 2018, with the exception of Latinx women remaining stagnant at 0.8%.¹⁰⁹ Black women filled an additional thirty-two board seats in 2018 (a 26.2% increase from 2016), while Asian/Pacific Islander women saw an impressive 38.6% increase with seventeen additional seats in 2018.¹¹⁰ A separate 2019 report on board diversity of S&P 500 companies found that ten percent of the incoming 2019 S&P 500 directors were minority women, up slightly from nine percent in 2018.¹¹¹ Despite this upward trajectory, the figures are still negligible.¹¹²

Studies suggest that the pipeline of women, particularly women of color, into director roles remains a significant challenge. Diverse executives hold fewer of the positions that are most likely to be on the path of advancement towards corporate board service.¹¹³ Recruitment practices for board membership, which often rely on social and business networks of existing board members and executives, also perpetuate the status quo of boards.¹¹⁴ Moreover, while companies face greater incentives to prioritize the recruitment of diverse directors, slow-moving board turnover rates may mean that few board seats will be available to be filled by women and other diverse candidates.¹¹⁵

Even with an increase in gender diversity on boards, women remain underrepresented in board leadership roles. Research shows that “substantive gender diversity,” that is women holding leadership roles with clout in the boardroom, remains elusive.¹¹⁶ Data from 2018 shows that only 4.3% of the Fortune 500 board chair positions were held by Caucasian/White women, with only

107. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20 (showing an increase in the representation of women of color in Fortune 100 board seats from 3.4% in 2010 to 5.8% in 2018).

108. Deb DeHaas et al., *supra* note 20, at 24 appendix 1 (displaying that board seats for Black/African American women saw an increase from 2.4% in 2016 to 3.4% in 2018, and board seats for Asian/Pacific Islander women saw an increase from 1.1% in 2016 to 1.4% in 2018).

109. *See* DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20, at 32.

110. *Id.* at 22.

111. SPENCER STUART, 2019 U.S. SPENCER STUART BOARD INDEX HIGHLIGHTS (2019), https://www.spencerstuart.com/-/media/2019/ssbi-2019/ssbi2019_highlights.pdf [<https://perma.cc/QA8V-RYSL>].

112. *See* Daum, *supra* note 90, at 63. In addition to low numbers, there is concern about the “recycle rate,” or the rate at which individuals serve on multiple boards, when examining representation of women and people of color on boards.” DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20, at 24. Research indicates that recycle rates are “higher for women and minorities than for Caucasian/white men, showing that while the diversity of boards may be increasing, there is not necessarily an equivalent rate of increase in the number of new women and minorities on boards.” *Id.*

113. *See* Larcker & Tayan, *supra* note 45, at 3.

114. *See* Cydney S. Posner, *Addressing the Challenge of Board Racial Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 8, 2020), <https://corpgov.law.harvard.edu/2020/09/08/addressing-the-challenge-of-board-racial-diversity/> [<https://perma.cc/73MU-RFGK>].

115. *See* Daum & Stuart, *supra* note 101.

116. *See* Nili, *supra* note 10, at 152.

two minority women serving as board chair in the Fortune 500.¹¹⁷ For M&A transactions, substantive gender diversity may be particularly important as positions such as board chair play a critical role in setting a board's agenda, and board members often view the chair as influential on board decisions.¹¹⁸

II. WOMEN AS M&A ADVISORS

As among corporate executives, there is a significant lack of female M&A advisors. This trend is especially prevalent in leadership and management roles in the legal and banking industries. Section A addresses the incremental changes in gender diversity among legal advisors and efforts to add greater diversity to M&A law practice. Section B then presents hand-collected data from the 100 largest public company transactions in each year from 2014 to 2020. The study reveals the lack of women as lead legal advisors in M&A transactions. Section C provides insight into the factors contributing to gender disparities in M&A leadership at law firms. Section D then examines women as leaders in the M&A investment banking industry where there has been little systematic disclosure on leadership information. While there have been few formalized studies focusing on gender diversity among financial advisors in M&A, there is little doubt that M&A investment banking has been and continues to be a “boys club.”¹¹⁹

A. Women as Legal Advisors

Legal advisors play an important role in M&A transactions and have a strong effect on M&A outcomes.¹²⁰ Inspired by Ronald Gilson's seminal work on transactional lawyering, scholars often characterize partners advising on M&A deals as “transaction cost engineers” who help their clients create and claim value, thus allowing deals to move forward.¹²¹ M&A legal advisors in large complex deals can serve as reputational intermediaries between the parties and with important third

117. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 20, at 26.

118. See Juliet Andrews & Sarah Ogilvie, *The Omnipotent Chair: How Will History Judge You?*, EY (Sep. 4, 2020), https://www.ey.com/en_fi/workforce/the-omnipotent-chair-how-will-history-judge-you [<https://perma.cc/6Z6A-R32W>].

119. Tom Terrarosa & Anders Keitz, *Cracking the M&A Glass Ceiling: Why Corporate Dealmaking Needs More Diversity and What It Will Take to Get It*, DEALMAKER Q., 4, 7 (Q4 2018). Senior leadership roles at large banks are dominated by white men. See STAFF OF H.R. COMM. ON FIN. SERVS., 116TH CONG., DIVERSITY AND INCLUSION: HOLDING AMERICA'S LARGE BANKS ACCOUNTABLE 16, 19 (Comm. Print 2020), <https://docs.house.gov/meetings/BA/BA13/20200212/110498/HHRG-116-BA13-20200212-SD003-U1.pdf> [<https://perma.cc/2TAR-BPKV>]. For a historical account of women's advancement on Wall Street, see generally MELISSA S. FISHER, WALL STREET WOMEN (2012).

120. See C. N. V. Krishnan & Ronald W. Masulis, *Law Firm Expertise and Merger and Acquisition Outcomes*, 56 J.L. & ECON. 189, 189 (2013).

121. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 254–55 (1984); see also Krishnan & Masulis, *supra* note 120, at 189, 192 (finding that top-tier bidder law firms have strong incentives to facilitate successful completions of their clients' M&A bids).

parties, such as regulators.¹²² They are frequently regulatory experts or arbitrageurs who understand how to use the law to structure deals so as to navigate, minimize, and “avoid taxes, accounting rules, securities disclosure, and other regulatory costs.”¹²³ Furthermore, as Elisabeth de Fontenay has argued, transactional lawyers draw on their expertise and experience to provide their clients private information about “market” deal terms that give the client “a valuable bargaining advantage in deal negotiations.”¹²⁴ M&A lawyers are the epitome of the deal “quarterback” who run a variety of complex plays to bring a deal to completion.¹²⁵ Like quarterbacks of major football teams, leading M&A partners are typically men “at the top of the law firm pyramid”¹²⁶ often “commanding premium billing rates.”¹²⁷ In other words, leading M&A partners often receive higher compensation and regularly have more prestige and power at large law firms. Frequently the most highly compensated attorneys at large law firms, leading M&A lawyers are high in demand and the target of poaching by other large firms.¹²⁸

M&A legal practice, especially at the top law firms, has long been viewed as unwelcoming to women.¹²⁹ As the data discussed below reveals, the gender disparity in M&A practice groups is more significant than among law firms more generally.¹³⁰ Surveys conducted over the last several years have shown slightly improved numbers in overall diversity at law firms. Decades after women began to regularly comprise a significant number of students attending law schools,¹³¹ approximately

122. See Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 493, 500 (2007); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 285–87 (2010). *But see* Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J. CORP. L. 393, 404 (2015).

123. Fleischer, *supra* note 122, at 227, 229.

124. de Fontenay, *supra* note 122, at 393, 396.

125. Victor Fleischer has aptly described transactional lawyers as “quarterbacks” to the deal. Fleischer, *supra* note 122, at 227, 240–42.

126. Cathy Hwang, *Value Creation by Transactional Associates*, 88 FORDHAM L. REV. 1649, 1650 (2020).

127. Adam B. Badawi & Elisabeth de Fontenay, *Is There a First-Drafter Advantage in M&A?*, 107 CALIF. L. REV. 1119, 1120 (2019).

128. See James B. Stewart, *\$11 Million a Year for a Law Partner? Bidding War Grows at Top-Tier Firms*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/business/cravath-kirkland-ellis-partner-poaching.html> [<https://perma.cc/6VSG-DKKG>].

129. Research shows that the legal profession is particularly unwelcoming to women of color. See DESTINY PEERY, PAULETTE BROWN & EILEEN LETTS, *LEFT OUT AND LEFT BEHIND: THE HURDLES, HASSLES, AND HEARTACHES OF ACHIEVING LONG-TERM LEGAL CAREERS FOR WOMEN OF COLOR* (2020).

130. Professor Deborah Rhode’s comprehensive account of persistent gender inequalities in the law shows that gender inequities in law firms are not unique to M&A practice alone. See RHODE, *supra* note 45, at 77. Nevertheless, women have made significant progress in leadership in law firms. At the largest law firms, women account for twenty-five percent of managing partner positions. See COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, *A CURRENT GLANCE AT WOMEN IN THE LAW* 3 (2018), <https://www.nyipla.org/images/nyipla/Programs/2018December6/acurrentglanceatwomeninthelawjan2018.pdf> [<https://perma.cc/4WKP-FM9G>].

131. See Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, Mar. 26, 2001, at A1. By 2002, women constituted forty-nine percent of U.S. law students. AM. BAR

twenty percent of equity partners at large law firms are women.¹³² Once refusing to hire women,¹³³ leading law firms now frequently tout their commitment to diversity, including their commitment to developing communities with diversity in “gender identity, . . . ethnicity, . . . LGBTQ+ status, ability, place of origin, language, educational background, socioeconomic status, non-legal expertise and interests, experience outside law and more.”¹³⁴ But as the hand-collected data below demonstrates, the reality in M&A presents a less rosy picture than these statements of commitment.¹³⁵

To address and understand gender disparities in M&A, one group of researchers, including Jennifer Muller, the Chair of the American Bar Association’s (ABA’s) Women in M&A Task Force, conducted a survey of more than 17,500 attorneys at twenty-five different law firms.¹³⁶ The study first considered attorneys across all practice groups. They found that gender discrepancy begins at the associate level but becomes more pervasive as attorneys progress through their career.¹³⁷ Women made up forty-eight percent of first- and second-year associate classes but only eighteen percent of senior equity partners, which they define as those who have been partners for more than five years.¹³⁸ M&A practice groups saw this trend even more exaggerated. Women made up only forty percent of

ASS’N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947–2011, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf [http://web.archive.org/web/20220103113720/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf].

132. See Vivia Chen, *Am Law 100 Firms that Are Failing Women*, LAW.COM: THE AM. LAW. (June 25, 2020, 5:57 PM), <https://www.law.com/americanlawyer/2020/06/25/am-law-100-firms-that-are-failing-women/> [https://perma.cc/983C-ZDFB]. Data on partners at law firms overall indicates that by 2020, women make up about twenty-five percent of all partners at law firms. See NAT’L ASS’N FOR L. PLACEMENT, *supra* note 5, at 5. Nevertheless, there remains “a severe underrepresentation of women and women of color in partnership ranks and a significant gender gap in partner compensation.” Katrina Lee, *Discrimination as Anti-Ethical: Achieving Systemic Change in Large Law Firms*, 98 DENV. L. REV. 581, 583 (2021).

133. See Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2252 (2010); see also Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience about Law and Social Change?*, 61 ME. L. REV. 1, 9–16 (2009).

134. *Careers: Diversity, Equity, Inclusion*, DAVIS POLK, <https://www.davispolk.com/careers/summer-programs/diversity-equity-and-inclusion> [https://perma.cc/2QVV-72U4] (last visited Nov. 14, 2021).

135. See Smith, *supra* note 28. There is also significant concern that the challenges wrought by the COVID-19 pandemic will disproportionately impact women and attorneys of color, especially those who are parents. Whitney Beard & Malini Nangia, *‘My Career Is Basically Over’: Working Parents Offer Pleas for Empathy from Law Firms*, LAW.COM: THE AM. LAW. (Jan. 19, 2021, 11:33 AM), <https://www.law.com/americanlawyer/2021/01/19/my-career-is-basically-over-working-parents-offer-pleas-for-empathy-from-law-firms/> [https://perma.cc/F9EU-58EL].

136. Frankle et al., *supra* note 25.

137. See *id.*; Arlene Arin Hahn, *Women in M&A: How to Get More Women to Stay in BIGLAW M&A*, WHITE & CASE (Mar. 28, 2019), <https://www.whitecase.com/publications/article/women-ma-how-get-more-women-stay-biglaw-ma> [https://perma.cc/3US2-DDV3].

138. See Hahn, *supra* note 137.

first- and second-year M&A associate classes and only fifteen percent of M&A senior equity partners.¹³⁹ The authors conclude that this trend shows that the issue begins from the outset: there are not enough women entering M&A practice.¹⁴⁰

A second study conducted by the Women in M&A Task Force was completed in 2016.¹⁴¹ This survey also found that forty percent of first- and second-year M&A associates were female. The percentage of women as senior equity partners had dropped to sixteen percent from the previous study's finding of eighteen percent.¹⁴² This survey also noted that women made up thirty-six percent of all lawyers surveyed but only thirty percent of M&A lawyers.¹⁴³ A previous study conducted by the Task Force had found that only twenty-seven percent of M&A attorneys were women, compared to thirty-five percent of all attorneys.¹⁴⁴

Moreover, neither the ABA's Women in M&A Task Force nor law firm initiatives address access to M&A practice for women of color. Nevertheless, the reported numbers on women of color as leaders in law practice are bleak, as are the experiences of many women of color at large firms.¹⁴⁵ According to the 2020 National Association for Law Placement *Report on Diversity in U.S. Law Firms*, less than four percent of law firm partners are women of color, a small increase from about 1.5% in 2006.¹⁴⁶ Women and associates of color exit the profession earlier and report a variety of barriers to advancement.¹⁴⁷

B. Gender Diversity of Leading M&A Advisors: Empirical Findings

While the percentage of women as lawyers and law firm partners in general has increased, to better understand the leadership role women play in the M&A profession, this Article surveys the number of women named as lead corporate counsel for the top 100 (by dollar value) public company M&A transactions announced in each year from 2014 to 2020—700 deals in total. These are all large “bet the company” type transactions that are predominantly led by lawyers who have the most significant clout and power in a large law firm. Appendix A provides details of the methodology used to identify the deals and the lead lawyers advising these deals.

139. *Id.*

140. *Id.*

141. Am. Bar Ass'n Women in M&A Taskforce, *Strategies for Increasing the Level of Participation and Retention of Women in M&A* (Apr. 13, 2018); *see also* McLellan, *supra* note 26.

142. Am. Bar Ass'n Women in M&A Task Force, *supra* note 141.

143. *Id.*

144. *Id.*

145. *See, e.g.*, TSEDALE M. MELAKU, *YOU DON'T LOOK LIKE A LAWYER: BLACK WOMEN AND SYSTEMIC GENDERED RACISM* (2019).

146. NAT'L ASS'N FOR L. PLACEMENT, *supra* note 5, at 5. In 2020, Black women and Latinx women accounted for less than one percent each of partners at law firms. *Id.*

147. *See* Joni Hersch & Erin E. Meyers, *Why Are Seemingly Satisfied Female Lawyers Running for the Exits? Resolving the Paradox Using National Data*, 102 MARQ. L. REV. 915 (2019).

Overall Picture

Figure 1 shows that women’s representation as lead corporate lawyer varies from year to year but in general remains low.¹⁴⁸ As lead counsel for the buyer, there does not seem to be a linear pattern of increased or decreased representation of women in lead counsel positions during the time period studied, hovering at an average of 10.5% over the time period. On the seller/target side, the data shows an increase in the share of women as lead lawyers from 2014 to 2020. This increase is particularly pronounced since 2017.

The percentage of women as lead counsel in this dataset of large transactions is lower than that reported for women partners generally. According to studies by the National Association for Law Placement, by 2014, women constituted about twenty-one percent of all partners at law firms, and by 2020, women made up about twenty-five percent of all partners at law firms.¹⁴⁹ With respect to law firms more generally, scholars have emphasized that inequality “reigns within law partner ranks” with men holding the power, prestige, and pay in large firms.¹⁵⁰ The dataset in this Article reveals that for large M&A transactions, inequality between men and women is even more acute than in law firm leadership more generally.

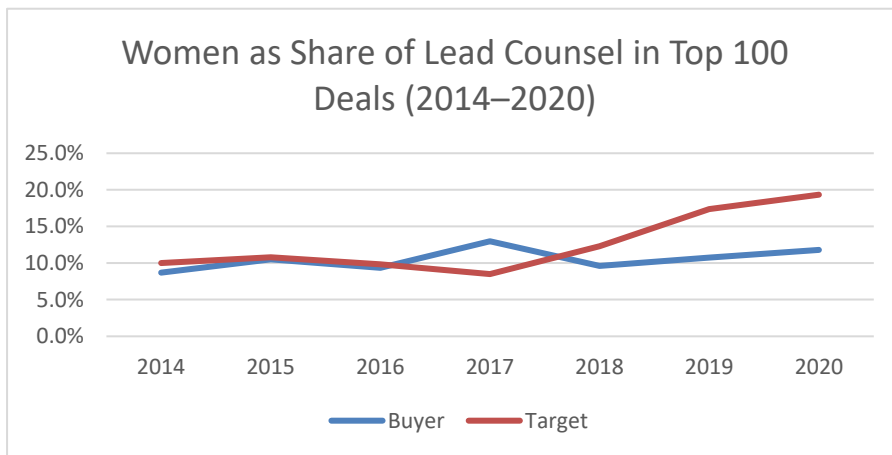


Figure 1: Women as Share of Lead Counsel in Top 100 Deals by Year (2014–2020)

For the 100 largest deals in terms of dollar value upon announcement over the seven years between 2014 and 2020, Figure 2 shows that twenty-four women were named as lead counsel on the buyer side out of 243 lead counsel, comprising, on average, 10.1% of lead counsel roles. On the target side, thirty-three women were

148. Appendix B provides this data in greater detail on a year-by-year basis.

149. See NAT’L ASS’N FOR L. PLACEMENT, *supra* note 5, at 12.

150. Miranda McGowan, *The Parent Trap: Equality, Sex, and Partnership in the Modern Law Firm*, 102 MARQ. L. REV. 1195, 1198–99 (2019). For a detailed account of inequality in law firm partnership compensation, see Lee, *supra* note 132, at 589.

named as lead counsel out of 263 lead counsel, comprising, on average, 12.43% of lead counsel positions in the top 100.

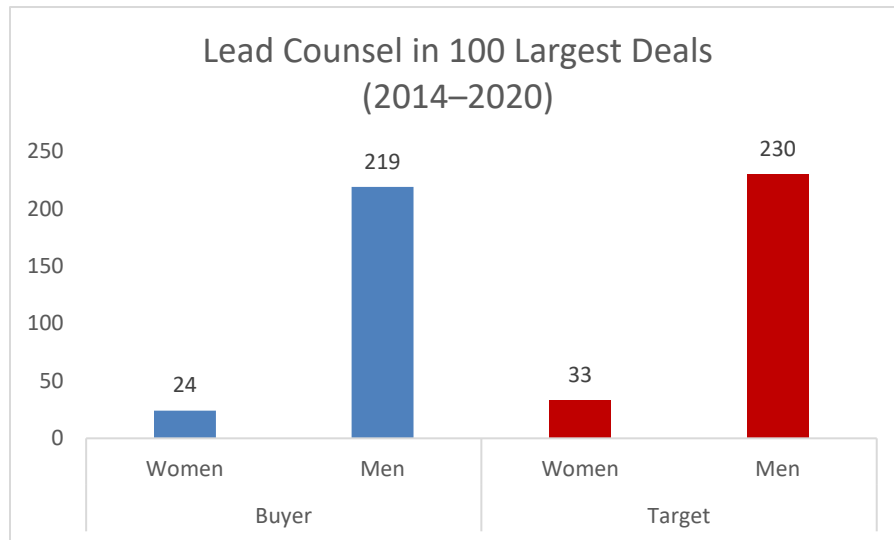


Figure 2: Lead Counsel in Top 100 Deals (2014–2020)

Law Firms

One hundred and forty-six law firms were involved in the deals studied from 2014 to 2020 on both the target and buyer side. The majority of these firms appeared in fewer than ten transactions. The top twenty law firms in terms of number of transactions over the seven-year period account for almost half of all lead counsel named from 2014 to 2020, and these transactions were in general the largest. Figures 3A and 3B show the data for the top twenty law firms involved in deals over the seven-year period. The data indicates that the predominance of men as lead counsel is not driven by one firm alone. Other than at one firm in the data set (Cooley LLP), men appear as lead counsel in much higher numbers than women.¹⁵¹ Furthermore, the discrepancy in number of women versus men as lead lawyers is particularly pronounced in the ten firms advising the greatest number of transactions from 2014 to 2020.

151. Overall, Cooley only appears as lead counsel in forty-three of the transactions in the study, while Wachtell Lipton, which has women named as lead counsel thirteen times over the seven-year period, has advised on 266 of the transactions in the study.

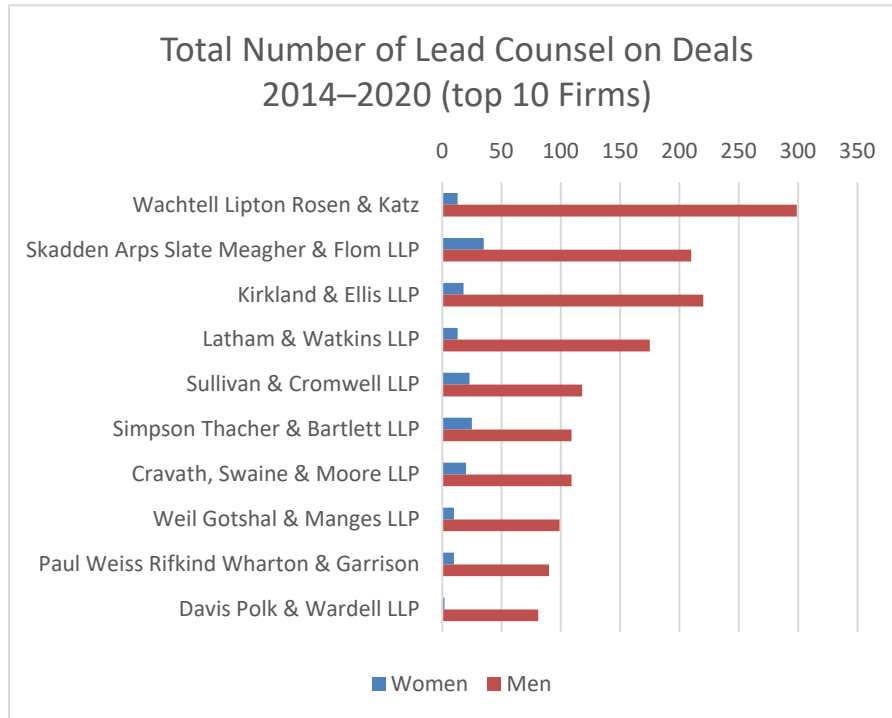


Figure 3A: Total Number of Lead Counsel on Deals 2014–2020 (top 10 firms)

The most dominant law firm over the seven-year period of the data, Wachtell Lipton Rosen & Katz, had a low proportion of women named as lead counsel. Six women from Wachtell held thirteen named lead counsel roles on deals from 2014 to 2020, compared to forty men holding 299 roles. Of the top ten most active law firms during the period studied, Skadden Arps Slate Meagher & Flom and Kirkland & Ellis named the most unique women to their deal teams, but even then, men vastly outnumbered women in total lead advisor roles. Women were severely underrepresented at two leading firms, Davis Polk and Cleary Gottlieb Steen & Hamilton, which named only two women to lead counsel positions from 2014 to 2020, compared to eighty-one and sixty men respectively. Only one firm, Cooley, had the same number of women and men named as lead counsel.

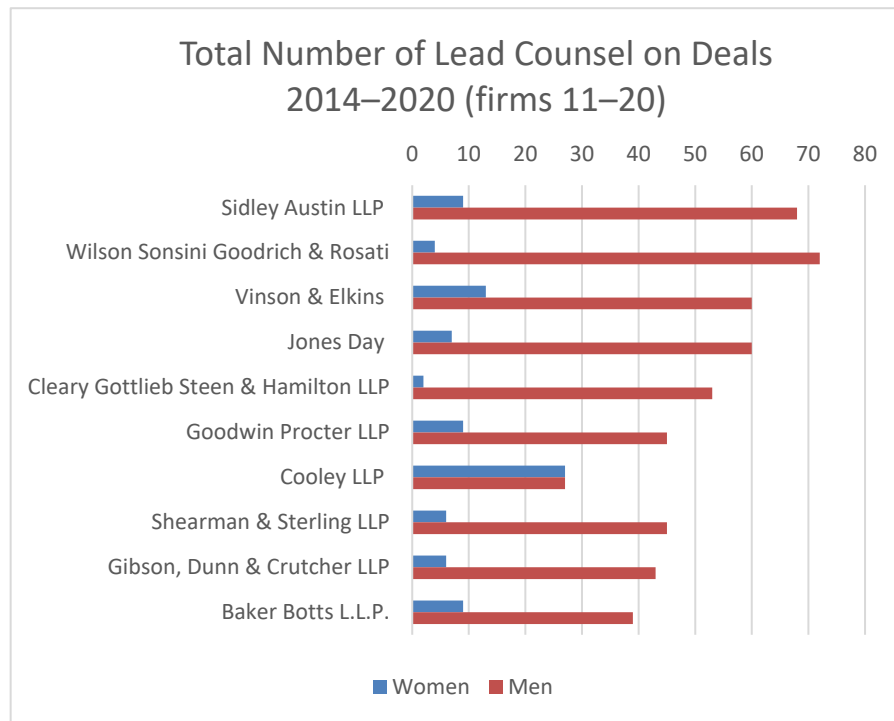


Figure 3B: Total Number of Lead Counsel on Deals 2014–2020 (firms 11–20)

Unique Women as Lead Counsel

An analysis of the data showed that there was a greater likelihood for the same men to be staffed on deals repeatedly throughout the years. This was true beyond those lawyers representing clients who tended to be involved in multiple M&A deals, such as Comcast. With respect to men named as lead counsel, 1,176 unique men were named out of 2,757 men named as lead counsel. Of the 351 women named as lead counsel from 2014 to 2020, there were 186 unique women involved. While some of M&A's leading women lawyers, such as Faiza Saeed (Cravath), Elizabeth Cooper (Simpson Thacher), and Barbara Borden (Cooley), were involved in multiple transactions throughout the years studied, 122 of the 186 unique women (65.6%) were named as lead counsel in only one transaction. Fifteen women appeared in the lead counsel list more than five times, together accounting for ninety-nine out of 351 women (28%) named as lead counsel over the seven-year period:

Names	Number of Transactions 2014–2020
Faiza J. Saeed (Cravath Swaine & Moore)	14
Elizabeth A. Cooper (Simpson, Thacher & Bartlett)	12
Barbara L. Borden (Cooley)	9
Debbie P. Yee (Latham & Watkins)	9
Jamie K. Leigh (Cooley)	9
Lande A. Spottswood (Vinson & Elkins)	9
Taurie M. Zeitzer (Paul Weiss) (Kirkland & Ellis)	9
Melissa Sawyer (Sullivan & Cromwell)	7
Audra D. Cohen (Sullivan & Cromwell)	6
Karessa L. Cain (Wachtell Lipton)	5
Lisa R. Haddad (Goodwin Procter)	5
Lizanne Thomas (Jones Day)	5
Marie L. Gibson (Skadden Arps)	5
Marni J. Lerner (Simpson Thacher)	5
Renee Wilm (Baker Botts)	5

Deal Teams

From 2014 to 2020, the percentage of deal teams that included at least one woman as a named partner tended to increase. In 2014, around nineteen percent of deal teams included a woman as at least one named partner. This number rose to thirty percent in 2020. While it was fairly uncommon to have only one lead counsel for these large transactions, if there was only one person named, it was usually a man. For example, twenty-eight deal teams named only one lead counsel in 2014, and only two of those teams were led by women. The number of deal teams where only women were named as lead counsel, with either one or multiple lead counsel positions, stayed roughly the same throughout the time studied, with a slight increase in 2020.

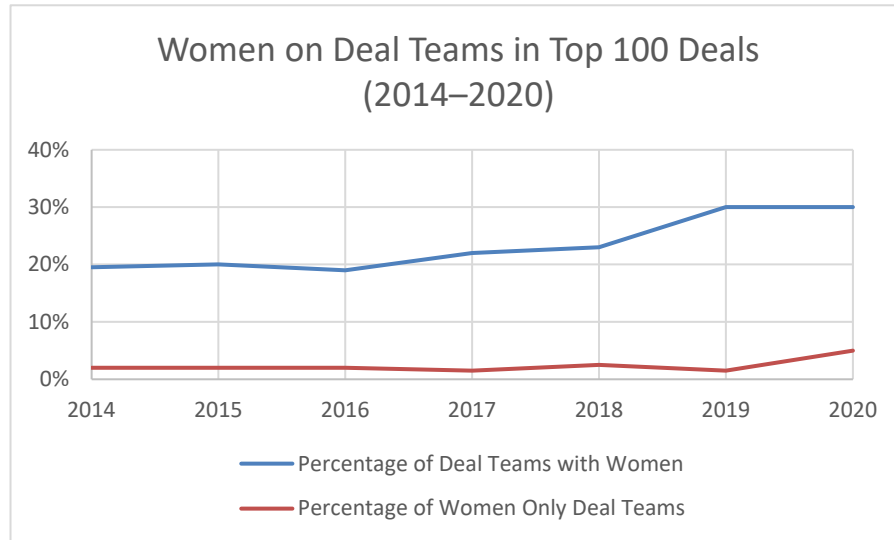


Figure 4: Percentage of Deal Teams with Women as Named Lead Counsel 2014–2020

In sum, this study presents several trends regarding women’s representation in the top 700 public M&A deals from 2014 to 2020. Women, on average, were more likely to be named as lead counsel when representing a target rather than a buyer. The percentage of women named as lead counsel for the top 100 M&A deals remained constant on the buyer side, with a slight increase from 2017 to 2020 on the target side. One substantial difference in the data through the years is the number of deal teams with at least one woman named as lead counsel, which increased significantly from 2018 to 2020. However, because most patterns in the data through the years studied are minor and nonlinear, it may be premature to say there is a trend showing women are increasingly holding more lead counsel positions.

C. Barriers to the Advancement of Women as Lead M&A Advisors

Decades after women have entered law schools, including the most elite schools, in significant numbers, the empirical study in this Article shows that they remain vastly underrepresented as leaders in M&A legal practice.

The underrepresentation of women as leaders in M&A has important implications for women lawyers more generally. M&A leaders are typically high in demand and highly compensated.¹⁵² M&A practice is often associated with high billing rates, often significantly higher than other practice groups.¹⁵³ Studies show that women’s compensation at large firms often lags behind that of men, even for

152. See *supra* notes 126–128.

153. See Julie Triedman, *Report Sees Top Deal Lawyers Pull Ahead as Billing Rates Soar*, LAW.COM: THE AM. LAW. (May 24, 2016, 1:19 PM), <https://www.law.com/americanlawyer/almID/1202758508378/report-sees-top-deal-lawyers-pull-ahead-as-billing-rates-soar/> [https://perma.cc/H9H6-MYAJ]; Badawi & de Fontenay, *supra* note 127.

equity partners.¹⁵⁴ Studies find that “men are overwhelmingly the top earners in large firms, with 93% of firms reporting that their most compensated partner is a man and of the 10 top earners in the firm, either one or none is a woman.”¹⁵⁵ The gender pay gap for women partners does not appear to be connected to the number of hours women bill but is instead due to differences in their billing rates and client billings.¹⁵⁶

A variety of factors contribute to women’s underrepresentation in M&A leadership. These include biases (both explicit and implicit) about women and perceptions about the necessary attributes for successful M&A practice; promotion, credit, and pay disparities that often result in attrition of women attorneys; a lack of flexibility in law practice overall, especially in high-end M&A practice; and a lack of significant efforts by large firms to advance gender diversity in meaningful ways.

1. *Explicit and Implicit Biases*

The data in this Article finds that the percentage of women as leaders in large M&A deals is even less than the percentage of women in law firm partnerships more generally. Thus, even women who have made the investment and sacrifice to achieve partnership are not leading the largest deals. Moreover, men who lead deals tend to do so repeatedly, while women are more likely to be deal leaders on a one-time or more sporadic basis. While more research, including qualitative interviews with M&A leaders, is needed to explicate these disparities, current research suggests that biases may play an important role in M&A practice.¹⁵⁷

Many current M&A leaders describe the long-standing male domination of M&A law practice.¹⁵⁸ Sarah Hewitt, a partner at the mid-sized law firm Schnader Harrison Segal & Lewis, described what it was like to be a woman M&A attorney in the 1980s: “The men used to go into the men’s room to decide how they were going to respond to deal terms or how they were going to negotiate.”¹⁵⁹ Because Hewitt could not go in with them, she would wait outside.¹⁶⁰ One of Hewitt’s

154. Lee, *supra* note 132, at 588–89.

155. Liebenberg & Scharf, *supra* note 25, at 1.

156. DESTINY PEERY, NAT’L ASS’N OF WOMEN LAWS., 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 6 (2019); *see also* Lee, *supra* note 132, at 589.

157. In a future project, I hope to further the findings in this Article by focusing on law firms more specifically and conduct in-depth interviews with senior M&A lawyers.

158. *See* Patrick Smith, *The Problem Is It Isn’t Improving Fast Enough: High-Profile Women M&A Attorneys Weigh in on Fixing Inequity in Big M&A*, LAW.COM: THE AM. LAW. (Jan. 19, 2021, 5:10 AM), <https://www.law.com/americanlawyer/2021/01/19/the-problem-is-it-isnt-improving-fast-enough-high-profile-women-ma-attorneys-weigh-in-on-fixing-inequity-in-big-ma/> [https://perma.cc/5LD7-HAQJ]. [Reports indicate that much of the male domination of M&A practice has also resulted in the exclusion of lawyers of color, especially Black lawyers, who are “scarce” in dealmaking. Elizabeth Olson, *In the World of Big Law Dealmaking, Black Lawyers Are Scarce*, BLOOMBERG L. (July 15, 2021, 2:55 AM), <https://news.bloomberglaw.com/business-and-practice/in-the-world-of-big-law-dealmaking-black-lawyers-are-scarce> [https://perma.cc/XNC8-5T92].

159. McLellan, *supra* note 26.

160. *Id.*

colleagues described standing outside of a meeting room telling a male colleague what to say because their client would not take advice from a woman lawyer.¹⁶¹ With a greater number of women in professional roles, such practices have dissipated somewhat. As Kathryn King Sudol, an M&A partner at Simpson Thacher stated: “I’m not sure how optimistic I am that there’s going to be a dramatic shift . . . [a]t the same time, I think the ‘I’m-the-only-woman-in-a-room-of-50’ thing is a thing of the past.”¹⁶²

In M&A practice, which tends to be more confrontational than other areas of transactional law, women often report being judged more harshly if they are perceived as aggressive or combative, but they also report expectations that M&A attorneys will act aggressively.¹⁶³ For example, Sudol described the perception of M&A attorneys being “the type of people who . . . were more aggressive, voluble people who were pound-on-the-table people.”¹⁶⁴ In many ways, perceptions about leadership in M&A law practice mirror the norms deemed necessary for success in corporate leadership.¹⁶⁵

With respect to corporate leadership, leading social psychologist Alice Eagly’s role congruity theory describes the significant challenges women executives face in their rise to leadership because of inconsistent stereotypes about the typical attributes of an effective leader and typical attributes expected from women.¹⁶⁶ While traditionally masculine attributes, including dominance and assertiveness, are seen as necessary to leadership, when women are assertive or decisive, they are viewed as unlikable.¹⁶⁷ In other words, “[w]omen who . . . seek leadership positions are subject to double standards and double binds.”¹⁶⁸

Biases, both explicit and subtle, also play a significant role in the pipeline of women to leadership in M&A practice in the law. Numerous studies have documented the inferior experience of women in law firms relative to men, noting

161. *Id.*

162. *Id.*

163. The experience of women M&A lawyers resembles that of other women and minorities leaders in other high-stakes and competitive corporate environments. *See* Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston & Joan C. Williams, *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 430–32 (2018); Andrea C. Vial, Jaime L. Napier & Victoria L. Brescoll, *A Bed of Thorns: Female Leaders and the Self-Reinforcing Cycle of Illegitimacy*, 27 LEADERSHIP Q. 400 (2016).

164. McLellan, *supra* note 26.

165. *See* Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCH. REV. 573 (2002); S. Alexander Haslam & Michelle K. Ryan, *The Road to the Glass Cliff: Differences in the Perceived Suitability of Men and Women for Leadership Positions in Succeeding and Failing Organizations*, 19 LEADERSHIP Q. 530 (2008).

166. *See* Eagly & Karau, *supra* note 165.

167. *See* Amelia Costigan, *The Double-Bind Dilemma for Women in Leadership (Infographic)*, CATALYST (Aug. 2, 2018), <https://www.catalyst.org/research/infographic-the-double-bind-dilemma-for-women-in-leadership/> [https://perma.cc/Q4PT-H6F6].

168. RHODE, *supra* note 45, at 11.

the experience of disrespect,¹⁶⁹ bias,¹⁷⁰ discrimination and harassment,¹⁷¹ and social constraints.¹⁷² In M&A practice, many women attorneys report that they continue to “encounter interruptions, reiterations of what they just said by a man in the room and, of course, ‘mansplaining.’”¹⁷³

Biases against women lawyers also “affect the allocation of work assignments to them, because partners may assume that a woman lawyer cannot handle a high-status project as well as a male colleague could, or that she is too busy with familial commitments.”¹⁷⁴ Women are often assigned support work while men are given the plum assignments that further enhance their leadership and client connections.¹⁷⁵

Biases against women also are often coupled with “in-group favoritism”¹⁷⁶ and many firms’ lack of standardized processes for client relationship management and succession planning.¹⁷⁷ Especially for elite M&A practice—a field long dominated by white men—these factors can result in women and minority lawyers being disfavored from attaining leadership positions.¹⁷⁸ For example, a well-respected

169. See Liane Jackson, *Why Do Experienced Female Lawyers Leave? Disrespect, Social Constraints*, *ABA Survey Says*, ABA J. (Aug. 3, 2018, 7:50 PM), https://www.abajournal.com/news/article/why_do_experienced_female_lawyers_leave_disrespect_social_constraints_ABA [https://perma.cc/CT9N-DJPU].

170. See, e.g., Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOCIO. REV. 702 (2005); Lee Rawles, *Why Are Women Lawyers Leaving the Profession Mid-Career? ABA Initiative Takes Up Issue*, ABA J. (Nov. 15, 2017, 7:00 AM), https://www.abajournal.com/news/article/why_are_women_lawyers_leaving_the_profession_mid_career_aba_initiative_hope [https://perma.cc/TJ9F-TDYD]; Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1 (2010); JOYCE STERLING & LINDA CHANOW, IN THEIR OWN WORDS: EXPERIENCED WOMEN LAWYERS EXPLAIN WHY THEY ARE LEAVING THEIR LAW FIRMS AND THE PROFESSION 19, 21–22 (2021).

171. See Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. L. & SOC. SCI. 299, 306–07 (2008).

172. See Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229 (2000).

173. See Smith, *supra* note 158.

174. ANNA JAFFE, GRACE CHEDIAK, ERIKA DOUGLAS & MACKENZIE TUDOR, STANFORD L. SCH., WOMEN IN L. POL’Y LAB PRACTICUM, RETAINING & ADVANCING WOMEN IN NATIONAL LAW FIRMS 13 (2016), <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf> [https://perma.cc/3MFW-V4XC].

175. See Joan C. Williams & Marina Multhaup, *For Women and Minorities to Get Ahead, Managers Must Assign Work Fairly*, HARV. BUS. REV. (Mar. 5, 2018), <https://hbr.org/2018/03/for-women-and-minorities-to-get-ahead-managers-must-assign-work-fairly> [https://perma.cc/7Z3R-9TUV]; Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 644–46 (2011).

176. Research indicates that “[l]oyalty, cooperation, favorable evaluations, and opportunities all increase in likelihood” when individuals interact with members of their own group. RHODE, *supra* note 45, at 16.

177. See PEERY, *supra* note 156, at 7–8.

178. For how subjectivity can couple with bias to disfavor women lawyers, especially in male-dominated environments, see Williams & Richardson, *supra* note 175, at 647–51. M&A partners comment on the “clubby atmosphere” of M&A practice, “where you work hard and play hard, close a deal and pound down a few.” Olson, *supra* note 158.

M&A partner at Skadden Arps—one of the country’s largest law firms and a leader in M&A practice—noted that “client handoff often favors men” and that “[a]t most firms historically the most powerful partners were white men, even here at Skadden. A lot of times the handoff is to a partner that the relationship partner feels is most like them, and thinks the client would be most comfortable with them.”¹⁷⁹ These statements are consistent with research that indicates that men are more likely than women to “‘inherit’ institutional clients—either as the sole or co-lead partner on major accounts.”¹⁸⁰

The biased experiences faced by women lawyers are heightened for women with children.¹⁸¹ Interviews of experienced women lawyers are replete with stories of the discrimination they experienced once they had children.¹⁸² For high-end M&A practice, often considered one of the most fast-paced, unpredictable, and demanding areas of law practice, the issue of family responsibilities is a vexing one. “[M]others, even those working full-time, are assumed to be less available and committed, an assumption not made about fathers.”¹⁸³ As Alison Ressler, a leading M&A Partner at Sullivan & Cromwell in Los Angeles, recounted, “everyone told me you can’t have kids and do it”; she rejected that notion, however.¹⁸⁴ Other leading women M&A lawyers, however, acknowledge that having a supportive spouse, for example a husband with primary home care responsibilities, has allowed them to advance their careers.¹⁸⁵

Overall, research suggests that gender bias plays a significant role in women’s underrepresentation in M&A leadership, as it does in women’s underrepresentation in leadership roles generally.¹⁸⁶ Even women who have risen to leadership positions in M&A repeatedly report experiencing both overt and more subtle biases.¹⁸⁷ Moreover, gender and racial bias, and the intersection of the two, continue to lead to the underrepresentation of women of color as leaders in the legal profession.¹⁸⁸

179. See Smith, *Fixing Inequity*, *supra* note 158.

180. Heidi Gardner, *Harvard Study: On Gender and Origination in the Legal Profession (Perspective)*, BLOOMBERG L. (Nov. 3, 2016, 8:41 AM), <https://news.bloomberglaw.com/business-and-practice/harvard-study-on-gender-and-origination-in-the-legal-profession-perspective> [https://perma.cc/LR5C-ULZW].

181. See McGowan, *supra* note 150, at 1206–07; JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW 132–34 (2014).

182. See STERLING & CHANOW, *supra* note 170.

183. RHODE, *supra* note 45, at 80.

184. McLellan, *supra* note 26.

185. *Id.*

186. See RHODE, *supra* note 45, at 57–64, 79–83.

187. See generally MERGERMARKET & TOPPAN VINTAGE, WOMEN DEALMAKERS: GAINING A SEAT AT THE TABLE (2018), <https://www.mergermarket.com/info/women-dealmakers-gaining-seat-table> [https://perma.cc/LW36-6PZM].

188. See PEERY ET AL., *supra* note 129.

2. Structural Biases in the Practice of M&A

Scholars have long argued that “[e]scalating workplace demands and inflexible workplace structures pose . . . obstacles to gender equity” in law firms.¹⁸⁹ Research has identified these structural factors as significant in perpetuating gender disparities in the legal profession.¹⁹⁰ Feminist scholars argue that without changing the norms of the workplace, gender disparities will persist.¹⁹¹

Anecdotal evidence from women leaders identifies the long hours and structure of M&A practice as factors in gender disparities in M&A leadership.¹⁹² As stated by a leading M&A practitioner, “[t]here is the perception that the lifestyle of an M&A lawyer is significantly worse than other areas of big law.”¹⁹³ M&A is often perceived as even more unpredictable than other practice areas, with lawyers working extremely long hours if they are trying to sign a large deal. Thus, M&A leaders point out that women, for whom family issues loom more significantly because of existing gender roles,¹⁹⁴ may select out of a transactional practice area that is perceived as extremely focused on client interaction and meeting client demands. Or it may be that M&A attorneys who are forced into part-time or

189. RHODE, *supra* note 45, at 83; *see also* DEBORAH L. RHODE, AM. BAR ASS’N, COMM’N ON WOMEN IN THE PROFESSION, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 23–24 (2001), <http://womenlaw.stanford.edu/pdf/balanced.lives.pdf> [<https://perma.cc/4GGY-FCTK>].

190. *See, e.g.*, RONIT DINOVTIZER, BRYANT G. GARTH, RICHARD SANDER, JOYCE STERLING, & GITA Z. WILDER, AM. BAR FOUND. & NAT’L ASS’N FOR L. PLACEMENT, *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* (2004), http://www.americanbarfoundation.org/uploads/cms/documents/ajd1_final_report_for_distribution.pdf [<https://perma.cc/B2ST-GC6R>]; RONIT DINOVTIZER, ROBERT L. NELSON, GABRIELE PLICKERT, REBECCA SANDEFUR, JOYCE S. STERLING, TERRY K. ADAMS, BRYANT G. GARTH, JOHN HAGAN, GITA Z. WILDER & DAVID B. WILKINS, AM. BAR FOUND. & NAT’L ASS’N FOR L. PLACEMENT, *AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* (2009), <https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf> [<https://perma.cc/6T3T-NKQ5>]; RONIT DINOVTIZER, BRYANT G. GARTH, ROBERT NELSON, GABRIELE PLICKERT, REBECCA SANDEFUR, JOYCE STERLING & DAVID WILKINS, AM. BAR FOUND. & NAT’L ASS’N FOR L. PLACEMENT, *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* (2014), http://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf [<https://perma.cc/EAM5-LEVS>].

191. *See, e.g.*, JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

192. Research has found that round-the-clock availability and the demands of “greedy professions” such as law have in general exacerbated gender inequality. *See* Claire Cain Miller, *Women Did Everything Right. Then Work Got ‘Greedy’*, N.Y. TIMES: THE UPSHOT (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html> [<https://perma.cc/SVU7-7H52>].

193. MERGERMARKET & TOPPAN VINTAGE, *supra* note 187, at 3.

194. *See* DEBORAH L. RHODE, *WHAT WOMEN WANT: AN AGENDA FOR THE WOMEN’S MOVEMENT* 59 (2014). Research has found that the inflexibility of a woman’s work environment plays a causal role in “pushing” her out of the labor force at motherhood. *See generally* Jane Leber Herr & Catherine D. Wolfram, *Work Environment and Opt-Out Rates at Motherhood Across High-Education Career Paths*, 65 *ILR REV.* 928 (2012). Moreover, in families with parents who are professionals, traditional gender roles persist, with women doing the vast bulk of caretaking. *See* Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, 10 *UC IRVINE L. REV.* 799, 827–29 (2020).

flexible work policies because of caregiving responsibilities—often women—are overlooked for promotion or leadership positions.¹⁹⁵

While there is widespread recognition of the work-life imbalance in M&A practice, as Deborah Rhode and other scholars have long noted, leaders of the bar and law firms “often place responsibility for addressing [imbalances] anywhere and everywhere else.”¹⁹⁶ Studies of law firm practices indicate that while large law firms are willing to undertake some bias reduction efforts, such as using administrative staff for administrative tasks or offering implicit bias trainings, few firms are willing to make structural changes that may support women as they progress in their careers.¹⁹⁷ Without a sufficient number of women leaders, the incentives to address major structural issues in M&A practice, as well as the support and mentorship needed to do so, may be less.¹⁹⁸

Women leaders in M&A frequently comment on the importance of women role models and mentors, and they also lament the persistent lack of sufficient role models.¹⁹⁹ As noted in a 2021 article in the *American Lawyer*, “[i]f having a strong female mentor in a position of authority, such as the lead on a deal and the owner of a client relationship, is paramount to facilitating other women into that position, you first need to have enough women in those prominent roles. There are not.”²⁰⁰ Instead, much of M&A practice and advancement seems to rely on social contacts and client development norms that perpetuate the exclusion of women and people of color from leadership in practice.²⁰¹

3. Promotion, Credit, and Pay Disparities

The disparities in women’s leadership in M&A legal practice reflect leaks in the pipeline of women from the associate level to the partnership level. Studies show that women and minority lawyers exit the profession earlier and report a variety of

195. Economist Claudia Goldin’s research shows that “many occupations have severe penalties for shorter and more-flexible hours” and provide “large windfalls to those who work hours that are less controllable.” Claudia Goldin, *Tackle Gender Inequality at Home and at Work*, CHI. BOOTH REV. (May 15, 2019), <https://review.chicagobooth.edu/economics/2019/article/tackle-gender-inequality-home-and-work> [<https://perma.cc/K5K8-X4ZN>].

196. RHODE, *supra* note 45, at 85.

197. See PEERY, *supra* note 156, at 9–14.

198. Research shows that access to leadership opportunities requires “commitment from their leadership that is reflected in workplace policies and practices.” Deborah L. Rhode, *Leadership in Law*, 69 STAN. L. REV. 1603, 1659 (2017).

199. See Smith, *Fixing Inequity*, *supra* note 158. For more on the importance of mentoring, see Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 295 (2007); Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, CONTEXTS, Fall 2007, at 21, 24.

200. Smith, *Fixing Inequity*, *supra* note 158.

201. *Id.* In this way, M&A practice resembles elite legal practice generally where leadership experiences and mentorship are “reserved for those who have traditionally been granted a large amount of privilege within the profession.” Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 819 (2019); see also Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 617–18 (2014) (describing the lack of mentorship for Black and Latinx attorneys).

barriers to advancement.²⁰² Even in senior levels, women are much more likely to leave large law firms than men.²⁰³

Some research connects the more limited opportunities for promotion, as well as the gender pay gap for women lawyers, including those in partnership levels, with the exodus of experienced women lawyers.²⁰⁴ For M&A practice specifically, the extent to which the gender pay gap and advancement disparities are connected with the disparities in women holding leadership roles needs to be further investigated. Nonetheless, an ABA study found that pay disparity was the most frequently noted reason for experienced women lawyers leaving law firms.²⁰⁵ Much of the pay disparity relates to the commonly used structures of partner compensation systems, with partners that originate deals—and are thus often recognized as the lead lawyer for a transaction—receiving substantial compensation credit.²⁰⁶ Thus, even for women that rise to law firm partnership, “biases combined with law firm structure and the absence of objective criteria for evaluating performance reduce women’s income and the credit they get for bringing in business.”²⁰⁷

D. *Women as M&A Financial Advisors*

Large M&A deals are rarely undertaken by companies without the involvement of financial advisors hired by each company involved in the deal.²⁰⁸ Financial advisors are key to management and board decision-making in M&A deals, bringing with them the necessary “expertise and experience to conceive, structure, and execute” complex transactions.²⁰⁹ Some M&A deals can even begin due to the efforts of financial advisors. For example, a financial advisor can bring to the attention of a buyer a potential acquisition candidate “at the request of its client or, alternatively, as part of the banker’s ongoing professional relationship with that particular corporate client.”²¹⁰ In other acquisitions, the deal might be instigated by company management, but eventually sellers, and often buyers, will commonly retain financial advisors.

202. See Hersch & Meyers, *supra* note 147.

203. See MARC BRODHERSON, LAURA MCGEE & MARIANA PIRES DOS REIS, MCKINSEY & CO., WOMEN IN LAW FIRMS 4 (2017); see also Roberta Liebenberg, *Too Many Senior Women are Leaving the Profession*, LAW PRAC. TODAY (Nov. 14, 2018), <https://www.lawpracticetoday.org/article/many-senior-women-leaving-profession/> [https://perma.cc/4PVY-YM9P].

204. See STERLING & CHANOW, *supra* note 170, at 8–12; Lee, *supra* note 132, at 591–92.

205. See STERLING & CHANOW, *supra* note 170, at 8.

206. See Lee, *supra* note 132, at 593–97; Williams & Richardson, *supra* note 175, at 674. For more on how origination credit contributes to gender disparities and structural discrimination, see Martinez, *supra* note 201, at 837–38.

207. McGowan, *supra* note 150, at 1208.

208. See Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1088–89 (2016).

209. *Id.* at 1088.

210. MAYNARD, *supra* note 75, at 19.

Financial advisors, especially at the leadership level, resemble their clients: they are dominated by white men.²¹¹ “Wall Street has never been hospitable to women,” and masculinity norms pervade the financial services industry.²¹² Numerous reporting highlights the male-dominated banking and finance industry.²¹³ A 2011 article in Reuters notes that women made up only 15.3% of executive and senior level managers in U.S. investment banks in 2009. Ten years later, these numbers have inched upward with recent studies indicating that women account for almost seventeen percent of senior leaders in investment banking by 2018.²¹⁴ With respect to women of color, there is little data on their leadership in M&A financial advisory work.²¹⁵ The studies on women of color in financial services more broadly paint a bleak picture.²¹⁶ Few women of color are in leadership positions at financial institutions overall, with women of color making up only three percent of senior vice presidents.²¹⁷

The numbers on women’s leadership in the financial services industry underlie the perception that investment banking is a male-dominated industry.²¹⁸ Interviews with women M&A advisors often include comments such as “I am often the only woman in the room” or “women represent a shockingly small portion of the

211. See Frankle et al., *supra* note 25; Mortlock, *supra* note 25. There is almost no disclosure on racial diversity in investment banking, but anecdotal evidence suggests that the numbers are even lower than they are for gender. See Paul Clarke & David Ricketts, *The Race and Ethnicity Gap: Finance Sector’s Deafening Silence on Diversity in Its Ranks*, FIN. NEWS (June 29, 2020, 8:11 AM), <https://www.fnlonon.com/articles/black-lives-matter-finance-20200629> [https://perma.cc/X2SN-WHB7].

212. See June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1141 (2019); see also Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms’ Risk Oversight?*, 70 SMU L. REV. 327, 329, 331 (2017); Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street’s Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J.L. & GENDER 175, 177 (2010).

213. See Cahn et al., *supra* note 31, at 456; see also Mortlock, *supra* note 25; Davies & Bansal, *supra* note 31; Hyder, *supra* note 31.

214. Julia Boorstin, *Survey: It’s Still Tough to Be a Woman on Wall Street – but Men Don’t Always Notice*, CNBC (June 26, 2018, 6:30 AM), <https://www.cnbc.com/2018/06/25/surveyon-wall-street-workplace-biases-persist—but-men-dont-see-t.html> [https://perma.cc/3LX9-DHMK].

215. As reports indicate “racism has been baked into the American banking system.” Emily Flitter, *This Is What Racism Sounds Like in the Banking Industry*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html> [https://perma.cc/2329-YF89].

216. See Stacey Chin, Alexis Krivkovich & Marie-Claude Nadeau, *Closing the Gap: Leadership Perspectives on Promoting Women in Financial Services*, MCKINSEY & CO. (Sept. 6, 2018), <https://www.mckinsey.com/industries/financial-services/our-insights/closing-the-gap-leadership-perspectives-on-promoting-women-in-financial-services> [https://perma.cc/26DY-AH47]; Arelis Diaz, La June Montgomery Tabron, Carlos Rangel, Joel Wittenberg, Stefon Burns, Aria Florant, Stacey Haas, Max Magni & Paula Ramos, *Racial Equity in Financial Services*, MCKINSEY & CO. (Sept. 10, 2020), <https://www.mckinsey.com/industries/financial-services/our-insights/racial-equity-in-financial-services> [https://perma.cc/6FE7-3HTD].

217. See generally Diaz et al., *supra* note 216. Latinx women are the least likely to reach the top level of an organization. *Id.*

218. See Boorstin, *supra* note 214.

workforce” in investment banking.²¹⁹ In an article focused on giving advice to women as they begin to climb the investment-banking ladder, the head of J.P. Morgan’s Southeast Asia M&A Practice, Ee-Ching Tay, noted that while women make up approximately half of J.P. Morgan’s 252,000 employees, they only comprise approximately thirty percent of senior leadership.²²⁰ She further commented that this is not unique to J.P. Morgan, and that “no bank has enough [senior female bankers] at the moment.”²²¹

A variety of reasons account for the lack of women as financial advisors in M&A, including the “testosterone-fueled” and competitive environment in M&A where performance of masculinities is a norm.²²² Studies indicate that investment banking’s “largely male workforce” reinforces masculine cultural norms and bias against women in the workplace.²²³ Furthermore, extremely long hours and a pressure to be seen as working long hours limits work-life balance, disadvantaging women more than men.²²⁴ Studies have found that gender differences in career interruptions and in the numbers of hours worked, attributed to career/family tradeoffs that disproportionately impact women with children, are prevalent in the business and financial sectors.²²⁵

Some articles cite the education of financial advisors as contributing to the problem of gender disparity in the profession.²²⁶ Research indicates that among MBA program graduates, only fourteen percent of women go into finance and

219. Tyler Gallagher, *Meet the Female Leaders of Finance*, AUTH. MAG. (July 17, 2019), <https://medium.com/authority-magazine/meet-the-female-leaders-of-finance-chances-of-promotion-come-with-performance-and-visibility-d2c6ab05b75b> [<https://perma.cc/7VUA-TWA3>]; see also MERGERMARKET & TOPPAN VINTAGE, *supra* note 187.

220. Mortlock, *supra* note 25.

221. *Id.*

222. See Carbone et al. *supra* note 212, at 1111; Cahn et al., *supra* note 31, at 459, 465. For an overview of masculinities theories and the construction of gender in the workplace, see Leticia M. Saucedo, *The Three Theories of Discrimination in the Brown Collar Workplace*, 2009 U. CHI. LEGAL F. 345, 362–64.

223. See Terry Morehead Dworkin & Cindy A. Schipani, *The Role of Gender Diversity in Corporate Governance*, 21 U. PA. J. BUS. L. 105, 118 (2018).

224. See *id.* at 118; Cahn et al., *supra* note 31, at 460. Of course, long hours, burnout, and the struggle for balance in investment banking, both among managers and junior bankers, are not limited to women alone. See, e.g., Sarah Kessler & Lauren Hirsch, *Wall Street’s Sleepless Nights*, N.Y. TIMES: DEALBOOK (Mar. 27, 2021), <https://www.nytimes.com/2021/03/27/business/dealbook/banker-burnout.html> [<https://perma.cc/5TSY-JV2H>]; Kate Kelly, *Goldman Sachs Partners’ Exits Point to a Changing Culture at the Bank*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/business/goldman-sachs-partner-exits.html> [<https://perma.cc/ER6U-TK9M>].

225. See Marianne Bertrand, Claudia Goldin & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sector*, 2 AM. ECON. J.: APPLIED ECON. 228, 230–31 (2010); see also Claudia Goldin & Lawrence F. Katz, *Transitions: Career and Family Life Cycles of the Educational Elite*, 98 AM. ECON. REV. 363, 367 (2008) (finding that “negative impact of children on women’s earnings is entirely accounted for by hours worked”).

226. In their study of MBAs who graduated from the University of Chicago’s business school between 1990 and 2006, Bertrand, Goldin, and Katz found that men took more finance courses while in business school. Bertrand et al., *supra* note 225, at 230.

accounting, whereas twenty-three percent of men do.²²⁷ The lack of women entering finance after MBA programs may be partly due to perceptions about the expectations of the profession and partly about the education and modeling that they receive while in business school. This Article's survey of 2019–2020 course offerings of finance, corporate finance, and mergers and acquisitions courses at the top twenty-five business schools in the United States (as reported by the 2019 U.S. News and World Report business school rankings) found that only twenty-five percent of the classes were taught by women faculty.²²⁸

III. DIVERSITY AND M&A: WHY DOES DIVERSITY MATTER?

Why does gender diversity among leaders in M&A dealmaking matter? The argument for diversity in the corporate sector more broadly rests on two primary justifications.²²⁹ The popular press accounts, and much of the business advocacy for diversity, regularly promote the business case for diversity.²³⁰ The business or “instrumental” case for gender diversity typically focuses on firm profitability, group decision-making, and good corporate governance.²³¹ Many women leaders in M&A, however, focus more vigorously on the moral and social case for diversity, arguing that equal opportunity and just being the “right thing to do” should be sufficient reasons for pursuing diversity in M&A. This Section evaluates both sets of justifications.

A. The Value of Values: Equity, Inclusion, and Access

Whether on boards, in the C-Suite, or at investment banks or law firms, women are not provided an equal opportunity to participate in M&A and gain positions of power.²³² What the numbers show instead is that a significant portion of the population is excluded from key decision-making roles in fundamental deals that greatly impact companies, their shareholders and other stakeholders, and billions of dollars trading hands. Furthermore, the barriers to inclusion involve a large financial cost for women as well, given the financial advantages that come with being a leader in M&A.²³³

227. Davies & Bansal, *supra* note 31.

228. Data collected by author from Survey of 2019–2020 Course Offerings of Finance, Corporate Finance, and Mergers and Acquisitions at Top 25 U.S. Business Schools (on file with author).

229. See Rhode & Packel, *supra* note 10, at 382.

230. For an overview of the recent literature, see Brummer & Strine, *supra* note 45.

231. See Nili, *supra* note 10, at 160.

232. See generally Will Kymlicka & Ruth Rubio-Marín, *The Participatory Turn in Gender Equality and its Relevance for Multicultural Feminism*, in GENDER PARITY AND MULTICULTURAL FEMINISM: TOWARDS A NEW SYNTHESIS 1, 3 (Ruth Rubio-Marín & Will Kymlicka eds., 2018).

233. See McLellan, *supra* note 26. For example, M&A leaders in law firms are some of the most highly compensated partners and are heavily recruited by other firms. See Stewart, *supra* note 128.

Leading women in M&A often emphasize equity and access as why firms and companies should seek to expand women's leadership in M&A.²³⁴ Some women in M&A even argue that it is "insulting that women would need to have a business case for having better representation."²³⁵ The concept of "voice" or "equal" opportunity to have a voice often comes up in interviews with leading M&A advisors.²³⁶ A leading M&A attorney, for example, emphasized the access to decision-making and the value of the "power" that comes with a leadership position.²³⁷ Importantly, these women do not claim that as M&A lawyers they speak with one voice or approach transactions in the same way.²³⁸

Scholars have similarly emphasized equity reasons for diversity, arguing that the business case for diversity has been "muddied" and vague, and it risks "inflat[ing] diversity's value."²³⁹ Scholars argue that "building the case [for diversity] on empirical evidence is a potentially dangerous strategy" and "must be secondary to a normative commitment to racial justice for its own sake."²⁴⁰ These scholars emphasize the importance of acknowledging social and moral justifications for diversity. Lisa Fairfax, for example, posits that business rationales for boardroom diversity alone are insufficient to combat existing directors' ingrained (albeit usually unconscious) racial and gender biases, which constitute significant and ongoing obstacles to the advancement of traditionally disadvantaged groups.²⁴¹ Deborah Rhode and Amanda Packel have argued that with respect to board diversity, the instrumental or business case "is less compelling than other reasons rooted in social justice, equal opportunity, and corporate reputation."²⁴² Other scholars argue that

234. See McLellan, *supra* note 26. Studies of board members indicate, however, that fairness arguments were not typically cited for increasing board diversity. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 763 (2011).

235. MERGERMARKET & TOPPAN VINTAGE, *supra* note 187 at 5.

236. See Smith, *Fixing Inequity*, *supra* note 158. Critical race theorists have furthered a rich discussion on the value of voice. See, e.g., Devon Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002). Furthermore, feminist corporate law scholars have recognized the value of women's voices in corporations and corporate law, both of which have been dominated by "economically privileged white males" who hold much power of decision-making. Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538, 546-47 (2006).

237. Hahn, *supra* note 137.

238. Scholars have long warned of the dangers of essentializing women's experiences. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

239. See Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, *supra* note 10, at 429, 436-43. Professor Brummer and former Delaware Chief Justice Strine argue, however, that "in a world of incomplete information" corporate executives and boards can derive from the various studies done that "a business case for Diversity is present." Brummer & Strine, *supra* note 45, at 30-31. Other scholars argue that business rationales can be an effective way to garner support for diversity in the corporation. See, e.g., Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1643 (2004).

240. Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 359 (2004).

241. See Fairfax, *Board Diversity Revisited*, *supra* note 10, at 883-84.

242. Rhode & Packel, *supra* note 10, at 379.

the business case for diversity “may not be a persuasive rationale when attempting to engender broad support for inclusion and encourage equitable behavior among decision makers in organizations.”²⁴³

In addition to equity reasons focused on the individual level, a culture of equal opportunity also benefits firms. Research indicates that “[o]bstacles to women’s success also decrease employees’ morale, commitment, and retention, and increase the expenses associated with recruiting, training, and mentoring replacements.”²⁴⁴

While the social and moral case for diversity is particularly compelling, especially for M&A where women have long been excluded and marginalized, there may also be value in the instrumental case for diversity for M&A deals specifically. Section B below turns to these instrumental arguments.

B. Improving the M&A Decision-Making Process

In addition to the social and moral justifications for women’s leadership in M&A, companies themselves as well as many advocates for gender and racial diversity frequently rely on the instrumental or business case for diversity and inclusion.²⁴⁵ Many scholars have cast doubt on the strength of the business case for diversity, at least when it comes to measurable empirical results such as financial performance.²⁴⁶ Nevertheless, for M&A transactions which involve a plethora of complex decisions, the instrumental case focusing on group dynamics, decision-making, and risk management has appeal.²⁴⁷

M&A transactions are often the most impactful decision that a corporation can undertake. While a good transaction can greatly enhance the value and strategic direction of a company, “a bad deal—whether the failure is rooted in the concept [i.e., the ‘logic of the deal,’ that is, the business justification for the proposed acquisition], the price, or the execution—is probably the fastest legal means of destroying [the company’s] value.”²⁴⁸

Research indicates that M&A deals are often tainted by agency problems and behavior biases. Executives are incentivized to undertake M&A deals that will

243. Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1513 (2017).

244. RHODE, *supra* note 45, at 3.

245. Scholars have criticized the use of diversity as corporate strategy. *See* Shin & Gulati, *supra* note 44, at 1053.

246. *See* Rhode & Packel, *supra* note 10, at 387–90; Brummer & Strine, *supra* note 45 (manuscript at 28–30). Some scholars have found that the business case for diversity may hamper inclusion. In an experimental study, Professor Williams found that “exposure to the business case led to more negative beliefs about inclusion and more biased behavior than a legal rationale.” Williams, *supra* note 243, at 1502.

247. For an overview of the literature on how diversity can impact decision-making and reduce risk, *see* Brummer & Strine, *supra* note 45 (manuscript at 31–36). For an analysis of how addressing power differentials can affect corporate culture, promote diversity, and lower risk, *see* generally Miazad, *supra* note 7.

248. Smith, *supra* note 36, at 48–49; *see also* Balls, *supra* note 36; Christofferson et al., *supra* note 36.

benefit themselves personally at the expense of the corporation.²⁴⁹ Relatedly, prevalent cognitive and behavioral biases, such as hubris and overconfidence, often lead to value-destroying M&A deals pushed by executives and advisors.²⁵⁰ Studies have found that executives may be overconfident about the value of a deal, and driven by their desire to win, they may be overoptimistic about their ability to successfully integrate two companies together.²⁵¹ Executive decision-making in M&A has also been found to be tainted by other factors, such as extensive social ties between managers of bidders and targets or a desire to keep up with peers undertaking acquisitions.²⁵² Furthermore, research suggests that traits such as hubris, overconfidence, or narcissism often mask for leadership skills.²⁵³ In fact, studies find that overconfident executives have a higher likelihood than rational managers of being promoted to the CEO,²⁵⁴ despite a lack of leadership effectiveness.²⁵⁵

With the strong incentives for CEOs and advisors to push forward on M&A deals,²⁵⁶ M&A dealmaking can suffer the dangers of “groupthink,” where the drive

249. See Afsharipour & Laster, *supra* note 12, at 447, 470–73.

250. For a comprehensive listing and discussion of managerial biases in M&A, see generally Sanjay Dhir & Amita Mital, *Decision-Making for Mergers and Acquisitions: The Role of Agency Issues and Behavioral Biases*, 21 STRATEGIC CHANGE 59 (2012).

251. See James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO ST. L.J. 1333, 1354–57, 1372–74 (2001); see also, e.g., Vicki Bogan & David Just, *What Drives Merger Decision Making Behavior? Don't Seek, Don't Find, and Don't Change Your Mind*, 72 J. ECON. BEHAV. & ORG. 930, 932 (2009) (noting that confirmation bias, “a situation in which an individual attaches too much importance to information that supports his views,” impacts merger decisions); Deepak Malhotra, *The Desire to Win: The Effects of Competitive Arousal on Motivation and Behavior*, 111 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 139, 139 (2010) (examining “when and why potentially self-damaging competitive motivations and behaviors will emerge”); Deepak Malhotra, Gillian Ku & J. Keith Murnighan, *When Winning Is Everything*, HARV. BUS. REV. (2008), <https://hbr.org/2008/05/when-winning-is-everything> [<https://perma.cc/LA9X-NPT6>] (identifying “three principal drivers of competitive arousal in business settings: rivalry, time pressure, and audience scrutiny”).

252. For an overview of this literature, see generally Afsharipour, *supra* note 11, at 477–79.

253. See Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), <https://hbr.org/2013/08/why-do-so-many-incompetent-men> [<https://perma.cc/KCM6-87CB>]. Gender theorists often designate these traits as “toxic masculinity.” See Berdahl et al., *supra* note 163, at 423.

254. See Anand M. Goel & Anjan V. Thakor, *Overconfidence, CEO Selection, and Corporate Governance*, 63 J. FIN. 2737 (2008).

255. See Tomas Chamorro-Premuzic & Cindy Gallop, *7 Leadership Lessons Men Can Learn from Women*, HARV. BUS. REV. (Apr. 1, 2020), <https://hbr.org/2020/04/7-leadership-lessons-men-can-learn-from-women> [<https://perma.cc/Q9KM-NVTA>]; Jack Zenger & Joseph Folkman, *Research: Women Score Higher than Men in Most Leadership Skills*, HARV. BUS. REV. (June 25, 2019), <https://hbr.org/2019/06/research-women-score-higher-than-men-in-most-leadership-skills> [<https://perma.cc/WLB3-Z625>]. For an overview of the literature on leadership style and gender, see Alice H. Eagly, *Women as Leaders: Leadership Style vs. Leaders' Values and Attitudes*, HARV. BUS. SCH. RSCH. SYMP., GENDER & WORK: CHALLENGING CONVENTIONAL WISDOM (2013), <http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/eagly.pdf> [<https://perma.cc/S6P7-6KMN>].

256. For a detailed discussion of these incentives, see Afsharipour & Laster, *supra* note 12, at 453–58 (on management incentives); *id.* at 474–77 (on incentives of advisors).

to move forward on a deal and acquiescence to the wishes of a CEO are strong.²⁵⁷ Directors as well as advisors are often susceptible to groupthink and to the biases of executives. “[U]nder the influence of an autocratic CEO/Chairman” or the pressure of advisors and corporate executives, “board members either succumb to apathy, and simply go through the motions, or hubris can come to define their collective decision-making such that members believe every decision they make as a group will indubitably foster positive results.”²⁵⁸

1. *Improving Decision-Making*

Research in management and social psychology suggest that gender and racial diversity could lead to better decision-making processes in M&A transactions.²⁵⁹ Experts argue that homogenous groups are more prone to high levels of cohesiveness, frustrating the process of meaningful and critical discussion.²⁶⁰ Cohesive homogenous groups can succumb to groupthink and be less likely to individually analyze or question the decisions that they are asked to make. Moreover, as seen in many corporate environments,²⁶¹ homogeneous firms can suffer from “masculinity contest cultures” which “make winning at all cost the test of success, and tolerate self-interested, unethical, and counterproductive behavior.”²⁶² These cultures both punish women and push them out of leadership roles, presenting women with what scholars Carbone, Cahn, and Levit describe as a “triple bind.” In other words,

women lose if they do not play by the same terms as the men, lose if they do try to play on the same terms by being disproportionately punished for

257. Groupthink is a type of “in-group bias” more common in homogeneous groups and results in dysfunctional decision-making outcomes. See Sharpe, *supra* note 13, at 1435, 1450.

258. Brummer & Strine, *supra* note 45 (manuscript at 33).

259. See Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391 (2002) (explaining that diversity generates “conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of interpretations, alternatives, and consequences”); SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES 324–35 (2007); Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 814–15 (2010).

260. See Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 492–96 (1999). “Cohesiveness” is defined as “the degree to which board members are attracted to each other and are motivated to stay on the board.” *Id.* at 493. Some studies have found, however, that diversity may reduce group cohesion, resulting in more difficult decision-making and greater dissatisfaction. For a discussion, see Dobbin & Jung, *supra* note 259, at 815–17.

261. See, e.g., Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1891–96 (2019) (discussing how “masculinity contest cultures” drive out women in Silicon Valley).

262. June Carbone & William K. Black, *The Problem with Predators*, 43 SEATTLE U. L. REV. 441, 478 (2020). Studies find that lack of diversity is often associated with negative workplace environments. See Berdahl et al., *supra* note 163, at 422; Kenneth Matos, Olivia (Mandy) O’Neill & Xue Lei, *Toxic Leadership and the Masculinity Contest Culture: How “Win or Die” Cultures Breed Abusive Leadership*, 74 J. SOC. ISSUES 500, 502–03 (2018).

displaying the self-centered, rule-breaking behavior of the men, and over time become less likely to apply for such positions and thus more likely, individually and as a group, to be perceived as lacking what it takes to succeed in such environments.²⁶³

More diverse decision-making groups benefit from a healthy level of “cognitive conflict” and are more likely to hold different opinions about how to characterize and address issues that arise.²⁶⁴ The presence of these differing opinions leads to more critical discussion and consideration of more alternatives, thus positively contributing to the overall decision-making process.²⁶⁵ For example, in a 2014 article, Joan Heminway merges both trait-based and psychology-based interpretations when assessing the effect of female directors on corporate performance.²⁶⁶ Specifically, Heminway argues that female traits influence the three conditions to the social psychology concept of “crowd wisdom”: diversity, independence, and “a particular kind of decentralization.”²⁶⁷

Diversity may also encourage better problem-solving as those with different life experiences, such as women and people of color, may approach an analysis of a problem from a different perspective or lens. While women and people of color do not speak with one voice,²⁶⁸ greater aggregate diversity allows for different voices and perspectives to be heard when solving problems.²⁶⁹ Advocates for gender diversity on boards argue, for example, women’s life experiences differ significantly from those of men and provide the board with a wider range of knowledge, concerns, questions, and perspectives from which to discuss decisions. Furthermore, “[m]en’s and women’s differing knowledge and experience can affect how they seek and evaluate information, which affects their decision-making

263. Carbone et al., *supra* note 212, at 1126–27.

264. “Cognitive conflict refers to task-oriented differences in judgment among group members” and “is concerned with the presence of issue-related disagreement among members.” Forbes & Milliken, *supra* note 260, at 494; *see also* Janet Sniezek & Rebecca A. Henry, *Accuracy and Confidence in Group Judgment*, 43 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 20 (1989) (“The more disagreements that group members reported, the more accurate were their group judgments.”); David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter> [<https://perma.cc/7S44-529D>].

265. *See* Forbes & Milliken, *supra* note 260, at 494; Alison Reynolds & David Lewis, *Teams Solve Problems Faster When They’re More Cognitively Diverse*, HARV. BUS. REV. (Mar. 30, 2017), <https://hbr.org/2017/03/teams-solve-problems-faster-when-theyre-more-cognitively-diverse> [<https://perma.cc/74KE-YR32>].

266. Heminway, *supra* note 10, at 61 (“[T]his article describes theories of the crowd from social psychology and applies them to the literature on female corporate directors, looking at the effects on both women as crowd members and boards as decision-making crowds.”).

267. *Id.* at 68.

268. Many scholars have rejected the notion that there is “a unitary, ‘essential’ women’s experience [that] can be isolated and described independently of race, class, sexual orientations, and other realities of experience.” Harris, *supra* note 238, at 585.

269. For a discussion of how different voices can provide different perspectives in decision-making, *see* Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 11–22 (2004).

processes and collective intelligence.”²⁷⁰ And because there is no singular woman’s voice, a critical mass of women, including women of color, is needed to bring to the fore the diversity of perspectives that can help enrich decision-making.²⁷¹

For large firms, diversity is also valuable because it “requires greater cooperation and trust,” which in turn need “institutionalization,” “procedural regularity,” and transparency—all elements that can help improve decision-making.²⁷²

Research suggests that diversity pays off particularly for complex decisions that involve problem-solving and prediction—in other words, exactly the type of decision-making undertaken in M&A deals.²⁷³ Having more women involved in fundamental corporate decisions could lead to less groupthink, more efficient decision-making, and perhaps better performance of M&A transactions.²⁷⁴ It may be that higher levels of participation in M&A decision-making by women can affect the dynamics of M&A transactions in several ways. For example, the due diligence process that is central to a deal could be more thorough and comprehensive, with women advisors providing additional information to boards to address the risks of a transaction more fully.²⁷⁵ The presence of women as leaders may also impact deliberations about whether to move forward on a deal because of higher monitoring of and strategic guidance provided to executives in connection with a deal.²⁷⁶

2. Diversity and M&A: Implications from Empirical Studies

Over the past two decades, there has been a proliferation of empirical research and case studies investigating the effects of diversity on decision-making and performance in M&A transactions.²⁷⁷ This literature has primarily focused on board

270. RHODE, *supra* note 45, at 4.

271. On tokenism and marginalization, see ROSABETH MOSS KANTER, *THE PROBLEMS OF TOKENISM* 39 (1974). On the dangers of tokenism on corporate boards, see Afra Afsharipour, *The One Woman Director Mandate: History and Trajectory*, in *CORPORATE GOVERNANCE IN INDIA: CHANGE AND CONTINUITY* 99–101 (Asish K. Bhattacharyya ed. 2016); Joan Macleod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 *PACE L. REV.* 249, 257–64 (2009). On the application of critical mass theory generally, and with respect to boards, see Lissa Lamkin Broome, John M. Conley & Kimberly D. Krawiec, *Does Critical Mass Matter? Views from the Boardroom*, 34 *SEATTLE U. L. REV.* 1049, 1052–56 (2011).

272. Carbone & Black, *supra* note 262, at 495.

273. See SCOTT E. PAGE, *THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY* 24 (2017) (“Many of our complex challenges involve understanding the actions, preferences, and capabilities of diverse people. Thus, identity diversity also contributes relevant cognitive diversity.”); see also PAGE, *supra* note 259, at 324–26.

274. See Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 *U. CIN. L. REV.* 1233, 1306–08 (2003); Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, *supra* note 10, at 458–460.

275. See DHIR, *supra* note 10, at 124–26.

276. *Id.* at 125–26.

277. See Anzhela Knyazeva, Diana Knyazeva & Lalitha Naveen, *Diversity on Corporate Boards*, 13 *ANN. REV. OF FIN. ECON.* 301, 305–06 (2021).

composition.²⁷⁸ Among the board composition scholarship is an abundance of literature evaluating the implications of director diversity, particularly gender diversity. For example, studies suggest that increased female board representation is associated with more vigorous board monitoring. A study by Adams and Ferreira is illustrative of gender diversity's association with more vigorous board monitoring.²⁷⁹ They find evidence that women board members are more likely to have better attendance records and sit on "monitoring-related" committees (e.g., audit, nominating, corporate governance).²⁸⁰ They also find that boards with greater gender diversity were more likely to hold CEOs accountable for poor stock price performance.²⁸¹

Other studies suggest that increased gender diversity on boards is associated with less overpayment in acquisitions and with fewer acquisitions overall.²⁸² For example, a 2014 study by Levi, Li, and Zhang examines the impact of director gender on M&A activity, finding a negative association between the fraction of a firm's women directors and both the number of acquisition bids and the average size of bid premiums.²⁸³ The authors theorize that their evidence is consistent with women on bidder boards having "lower overconfidence in the precision of their estimates of an acquisition and/or in the expected value of an acquisition."²⁸⁴ The authors argue that these results further support the importance of board diversity in acquisition decisions.²⁸⁵ Furthermore, related research finds that gender diversity on boards helps temper the overconfidence of male CEOs.²⁸⁶

A 2016 study by Chen, Crossland, and Huang also addresses gender diversity in the M&A context by examining the effect of female board representation on corporate acquisition intensity.²⁸⁷ Similar to the 2014 Levi study, they find that greater female board representation was negatively associated with both overall firm acquisitiveness and target acquisition size.²⁸⁸ Developing an explanation borrowed

278. *Id.*

279. Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291 (2009).

280. *Id.* at 296–301.

281. *Id.* at 301.

282. See Maurice Levi, Kai Li & Feng Zhang, *Director Gender and Mergers and Acquisitions*, 28 J. CORP. FIN. 185, 185–86 (2014); see also Guoli Chen, Craig Crossland & Sterling Huang, *Female Board Representation and Corporate Acquisition Intensity*, 37 STRATEGIC MGMT. J. 303, 303–05 (2016).

283. See Levi et al., *supra* note 282, at 185.

284. *Id.* at 186. A related study finds that male CEOs at firms with women directors exhibit less overconfidence. See Jie Chen, Woon Sau Leung, Wei Song & Marc Goergen, *Why Female Board Representation Matters: The Role of Female Directors in Reducing Male CEO Overconfidence*, 53 J. EMPIRICAL FIN. 70, 71 (2019).

285. See Levi et al., *supra* note 282, at 185.

286. Jie Chen, Woon Sau Leung, Wei Song & Marc Goergen, *Research: When Women Are on Boards, Male CEOs Are Less Overconfident*, HARV. BUS. REV. (Sept. 12, 2019), <https://hbr.org/2019/09/research-when-women-are-on-boards-male-ceos-are-less-overconfident> [<https://perma.cc/9TM3-UPFK>].

287. See Chen et al., *supra* note 282, at 303–05.

288. *Id.*

from social psychology called “social identity theory,” they posit that “the presence of multiple salient categories [e.g., gender] within a board will be associated with more competitive interactions, decision-making processes are likely to be more contentious, thorough, and comprehensive, and less likely to be categorized by acquiescence, rapid consensus, or groupthink.”²⁸⁹

Studies have also begun to address gender diversity and the C-Suite. Like the research on board diversity and M&A, the research on executive diversity and M&A also suggests that women executives approach M&A transactions differently from male executives.²⁹⁰ One of the leading studies on this issue is a 2013 study by Huang and Kisgen, which examines the presence of female executives on the buy-side and investigates the effect of the executive’s gender on acquirer returns for a sample of large publicly listed firms in which male executives were replaced by female ones.²⁹¹ Huang and Kisgen find that male executives undertake more acquisitions and issue debt more often than female executives.²⁹² With respect to acquirer announcement returns, the study finds that returns are two percent higher for deals conducted by female executives relative to the ones led by male executives.²⁹³ Huang and Kisgen posit that there is some evidence that male executives are more likely to seek empire-building and suffer from overconfidence, which results in more value-destroying acquisitions.²⁹⁴

Given the absence of systematic data on diversity among M&A advisors, empirical studies have yet to explore the relationship between diversity of M&A advisors and transaction outcomes or decision-making.

IV. TOWARDS WOMEN’S INCLUSION IN M&A

Diversity matters for M&A; it matters for moral and social reasons, and it matters for instrumental reasons. The data discussed in this Article shows that women’s underrepresentation and slow progress in leadership roles in M&A dealmaking is still far from fully understood. Furthermore, research on women and leadership indicates that solutions that have succeeded in moving toward greater gender diversity on boards—including shareholder advocacy, disclosure, and quotas—are only a few of the many tools necessary to transform M&A practice.

289. *Id.* at 305.

290. *See* Jiekun Huang & Darren J. Kisgen, *Gender and Corporate Finance: Are Male Executives Overconfident Relative to Female Executives?*, 108 J. FIN. ECON. 822, 822–23 (2013); *see also* Ralph Estes & Jinoos Hosseini, *The Gender Gap on Wall Street: An Empirical Analysis of Confidence in Investment Decision Making*, 122 J. PSYCH. 577, 577 (1988) (finding that women exhibit less confidence in investment decision-making than men); Alicia R. Ingersoll, Christy Glass, Alison Cook & Kari Joseph Olsen, *Power, Status and Expectations: How Narcissism Manifests Among Women CEOs*, 158 J. BUS. ETHICS 893, 893 (2019) (finding that women CEOs are less likely to exhibit narcissistic personality traits compared to men CEOs).

291. *See* Huang & Kisgen, *supra* note 290, at 822.

292. *See id.* at 829.

293. *See id.* at 831–32.

294. *See id.* at 835.

This Part discusses the various tools that may be useful for advancing diversity in leadership ranks in M&A. In evaluating and deploying these tools, disclosure and transparency regarding each institutional actor involved M&A are critical. As the discussion in Parts I and II shows, while there is substantial disclosure and information about some institutions, such as the board, there is significantly less information on leadership, incentives, and the ground problems for other actors, including executives, legal advisors, and especially financial advisors. Furthermore, the disparities examined in Parts I and II of this Article—few women as leaders in M&A transactions—focus on the outcome of long-percolating problems, but these outcomes tell us little about specific barriers in each institution. Studies show that for institutions where there has been greater disclosure and transparency, such as boards, stakeholders have been able to mobilize both to pressure firms and to provide solutions for achieving greater diversity. But at other end of the spectrum—for example financial advisors—advocacy and strong normative recommendations are significantly more challenging because diversity disparities and the reasons for such disparities are less well studied and well understood. Nevertheless, some of the existing data does suggest that pipeline issues are a challenge for the C-Suite, law firms, and financial advisors in M&A. However, without further understanding of disparities in each of these institutions, it is unlikely that solutions to impact the path to leadership can be transplanted from one institution to another.

A. Disclosure and Transparency

Institutions value what they measure, and they measure what they value. For M&A dealmaking, data regarding leadership has thus far remained unmeasured and undisclosed. Instead, companies and firms often provide broad and unquantifiable information regarding their commitment to diversity generally without making substantial progress. Yet, disclosure and transparency are critical to understanding gender disparities, and associated barriers and incentives. Without accurate diversity data, stakeholders have limited opportunity to pressure M&A leaders to invest in fostering diversity among their leaders, and firms have fewer incentives to prioritize the inclusion that the literature shows may benefit them.²⁹⁵ Moreover, disclosure and transparency can better allow collaboration among leaders in M&A to advance the leadership of women in M&A.

Disclosure and transparency have been critical for efforts to impact board diversity. Both research from academia and industry have highlighted and examined gender diversity among board members. Transparency in disclosure regarding board makeup has facilitated efforts by a variety of stakeholders to hold boards accountable and to place greater pressure on boards to diversify. Furthermore, as Jamillah Bowman Williams has argued, transparent diversity data would incentivize

295. See Williams, *supra* note 9, at 1723; see also Alexander M. Nourafshan, *From the Closet to the Boardroom: Regulating LGBT Diversity on Corporate Boards*, 81 ALB. L. REV. 439, 481 (2017).

companies to pursue “effective” diversity initiatives as a variety of stakeholders could use this information to further diversity goals.²⁹⁶

Disclosure and transparency remain low for many of the actors involved in M&A. While greater information and metrics about diversity in the C-Suite have emerged over the past few years, there is little systematic data on a per-company basis.²⁹⁷ For example, since 2015, McKinsey and LeanIn have issued a *Women in the Workplace* report with data on women’s leadership at 317 companies, yet much of this literature focuses on only the largest firms (i.e., the Fortune 500) and there is little company-specific data. Furthermore, gender disparities extend beyond the C-Suite to other senior executive positions.²⁹⁸ However, there is little data on women’s leadership in roles that lead to the C-Suite although news stories suggest that women are often sidelined from executive roles that can lead to the CEO or CFO positions.²⁹⁹

Similarly, ABA studies on women in law firms present an important overall picture of women’s leadership in firms. Yet, there is little practice-group- or firm-specific information in many of these studies. While some firms disclose the number of women partners at the firm, few differentiate between equity partners and non-equity partners, and even fewer provide information on partner leadership in various practice groups.³⁰⁰ For the financial services industry, the lack of disclosure or transparency is even more substantial. Not only do leading investment banks fail to provide any systematic data on leaders, but many resist efforts to provide greater transparency with respect to their diversity data.³⁰¹

Disclosure and transparency also can facilitate stronger collaboration among leaders in M&A to advance the leadership of women in M&A. Following the formation of the ABA’s Women in M&A Taskforce, in 2017, a number of prominent women M&A leaders launched the Women in M&A Network to “seek to advance the success and leadership of women in the field of M&A across the legal, banking, in-house, business development, and boardroom functions.”³⁰² The broadening of accurate data about M&A data could incentivize groups such as these

296. See generally Ann Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499 (2020) (arguing for the explicit acknowledgement of the importance of disclosure for stakeholders beyond shareholders).

297. See Martinez & Fletcher, *supra* note 4, at 888–89.

298. See WOMEN IN THE WORKPLACE 2020, *supra* note 17, at 58.

299. See Fuhrmans, *supra* note 47.

300. Large law firms also typically lack transparency with respect to compensation decisions. See Lee, *supra* note 132, at 599–600.

301. Even outside of the financial services industry, firms resist disclosing diversity data so as to hide gender and racial disparities. See generally Williams, *supra* note 9.

302. *New York Women in M&A Network Dinner*, SULLIVAN & CROMWELL (Nov. 29, 2017), <https://www.sullcrom.com/events-new-york-women-in-manda-network-dinner-2017> [<https://perma.cc/3WZN-YFMU>].

to learn from each other about the strategies to retain and promote women and to address structural barriers that hinder women's rise to leadership.³⁰³

For example, interviews with women leaders in M&A highlight the importance of flexibility. How to address this need for flexibility is a structural issue that may need leaders across firms to collaborate on solutions, especially for a field that is seen as requiring longer, unexpected hours, which can hinder the ability to attend to family responsibilities and maintain a personal life.³⁰⁴ While there has been a shift in child-rearing responsibilities, women are still often the primary caretakers. Women's family responsibilities are often seen as impacting their ability to move up through the ranks of M&A advisory work. As Mary Anne Citrino, former Senior Managing Director at Blackstone said, "[i]t's hard to get through the years when you are raising children—when you get a phone call, 'get on a plane in two hours' and oh well, it's my six-year-old's birthday party . . . [g]uys can get away with that somehow."³⁰⁵ Similarly, many women lawyers express that M&A practice needs to develop greater flexibility to support women's rise to leadership.³⁰⁶

B. *Attacking Bias*

Corporations and firms have spent decades espousing their commitment to gender equality, yet progress has lagged.³⁰⁷ To some extent, "bias in favor of preserving the status quo" plays a role in undermining the advancement of diverse leaders.³⁰⁸

Like many women professionals and leaders, women executives, attorneys, and financial advisors often remark on the significant bias that they experience in negotiations, in interacting with clients, and in their workplaces.³⁰⁹ For most M&A transactions, women do not make up a critical mass of principals or advisors on a

303. See, e.g., Lizzy McLellan, *The Women in the Room*, AM. LAW., Apr. 2017, at 44 (discussing the need for creating more flexible deal structures to facilitate lawyers to stay on top of deals while attending to family responsibilities).

304. See generally Frankle et al., *supra* note 25.

305. Davies & Bansal, *supra* note 31.

306. McLellan, *supra* note 303.

307. For a discussion of the research exploring the reasons for shortcomings in corporate diversity efforts, see Martinez & Fletcher, *supra* note 4, at 885–88.

308. Stefanie K. Johnson, David R. Hekman & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, HARV. BUS. REV. (Apr. 26, 2016), <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> [<https://perma.cc/QP9W-DEXD>].

309. See Elisabeth Kelan, *Why Aren't We Making More Progress Towards Gender Equity*, HARV. BUS. REV. (Dec. 21, 2020), <https://hbr.org/2020/12/why-arent-we-making-more-progress-towards-gender-equity> [<https://perma.cc/LN2W-KG6U>] (examining the role of "gender fatigue," which is "the phenomenon of simultaneously acknowledging that gender inequality exists in general while denying that it exists in one's immediate work environment," in perpetuating the gender career gap in organizations); RHODE, *supra* note 45, at 57–64, 79–83.

deal and are hampered by gender norms.³¹⁰ Furthermore, with few women in leadership roles in M&A, women have few role models to help them navigate the complex dynamics of M&A negotiations.

While women's representation in leadership has increased, women executives frequently report significant implicit and explicit biases in the workplace.³¹¹ Women leaders across industries often report a variety of aggressions from being talked over and repeatedly interrupted to being "mansplained."³¹² An unidentified Business Development Director at a Fortune 100 company described her experiences as she moved up the ranks:

[A] bias against a woman negotiator is probably something that most women in a deal environment could relate to . . . "[w]hen you are the only woman at the table, it's very common that others may interrupt, finish your sentence, or not give you subtle encouragement to continue. So, you have to 'take command of a room' to establish yourself as the deal lead, something that a man might be given naturally."³¹³

Even when women do rise to leadership ranks, it has been hard to be recognized as leaders. In a 2011 article, the authors described the makeup of speakers at "nearly every private equity, M&A or investment banking conference" as majority men in crisp, gray suits.³¹⁴ While this trend remains, a quick survey of recent conferences shows there has been some improvement. For example, at the Practising Law Institute 2017 M&A conference, seven of the twenty-five speakers were women.³¹⁵ This group included Jennifer Muller, then chair of the ABA Women in M&A Task Force and the Honorable Tamika Montgomery-Reeves, then a Vice-Chancellor of the Delaware Chancery Court.³¹⁶ While seven of twenty-five speakers, which represents twenty-eight percent, is certainly not an end goal, it is an improvement over prior conferences where speakers had been primarily white men.

Firms have long used trainings to attack bias in various professions, yet research shows that the "positive effects of diversity training rarely last beyond a day or two" and may even "activate bias or spark a backlash."³¹⁷ To attack such

310. See Smith, *supra* note 158. For a discussion on the importance of critical mass, see Vicki W. Kramer, Alison M. Konrad & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* 8–9 (Wellesley Ctrs. For Women, Working Paper No. 11, 2006).

311. Despite persistent reports of harassment and gender bias in the workplace, studies indicate that many boards fail to address or even discuss sexism in the workplace. See Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 382 (2020).

312. See generally Adam Grant, *Who Won't Shut Up in Meetings? Men Say It's Women. It's Not.*, WASH. POST (Feb. 18, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/02/18/men-interrupt-women-tokyo-olympics/> [<https://perma.cc/5F8Y-E8C9>]; Smith, *supra* note 158.

313. Terrarosa & Keitz, *supra* note 119, at 7.

314. Davies & Bansal, *supra* note 31.

315. See *Speaker Bio, Mergers and Acquisitions 2017: Advanced Trends and Developments*, PLI PLUS (Jan. 12, 2017), https://plus.pli.edu/Browse/Title?rows=10&fq=~2B~title_id~3A282B~180651~29~&facet=true&q=legal_boolean#authorbio [<https://perma.cc/4ZVR-JE4C>].

316. *Id.*

317. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52; see also Williams, *supra* note 243, at 1512–13.

biases, firms need to not only implement bias reduction training but to do so in a way that addresses institutional structures and impacts gatekeepers.³¹⁸ Anti-bias and diversity efforts need to be designed in ways that have proven effective, including engaging leaders and holding those in positions of power accountable for their performance on these matters.³¹⁹ Furthermore, disclosure and transparency are necessary components for attacking bias in M&A.

Research indicates that mentoring programs are particularly effective in reducing bias.³²⁰ Many firms have launched various women's initiatives or affinity groups to promote diversity, but their efficacy and impact are unclear.³²¹ Instead, experts suggest engaging leaders and managers broadly in mentoring programs.³²²

C. Stakeholder Pressure

1. Stakeholder Pressure for Board Diversity

Stakeholder advocacy has played a key role in board diversity efforts. Professor Lisa Fairfax's examination of stakeholder advocacy reveals the multi-pronged efforts of influential shareholders to advance board diversity through statements, diversity engagement with companies, shareholder voting campaigns for board elections, and shareholder proposals.³²³ The largest asset managers, including BlackRock, State Street, and Vanguard, have all engaged public companies in board diversity efforts.³²⁴ For example, in 2018, BlackRock, the world's largest asset manager with over \$6.3 trillion under management, stated that the companies in which it invests should have at least two female directors. Furthermore, BlackRock then asked about 300 companies in the Russell 1000 with fewer than two women directors to disclose their approaches to diversity and to establish a timeframe for improvement.³²⁵ Studies have found that the campaign by the largest three institutional investors had a large impact on gender diversity on boards.³²⁶

318. RHODE, *supra* note 45, at 90–91.

319. See Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589, 591–95 (2006); Dobbin & Kalev, *supra* note 199, at 293–94.

320. See Dobbin & Kalev, *supra* note 317.

321. See Kalev et al., *supra* note 319, at 590; PEERY, *supra* note 156, at 14. Research has found that affinity groups rarely involve those in top managerial positions. See generally Frank Dobbin, Soohan Kim & Alexandra Kalev, *You Can't Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOCIO. REV. 386, 388 (2011).

322. See Dobbin & Kalev, *supra* note 317.

323. See Fairfax, *All on Board?*, *supra* note 10, at 1040–51.

324. See BLACKROCK, PROXY VOTING GUIDELINES FOR U.S. SECURITIES (2019); Cydney Posner, *BlackRock Advocates That at Least Two Women Be on Each Company Board*, COOLEY PUBCO (Feb. 6, 2018), <https://cooleypubco.com/2018/02/06/blackrock-advocates-that-at-least-two-women-be-on-each-company-board/> [<https://perma.cc/9HGU-8BM5>].

325. See Posner, *supra* note 324.

326. See, e.g., Gormley et al., *supra* note 84, at 3 (finding that “The Big Three’s campaigns led firms to add 2.5 times as many female directors in 2019 as they had in 2016, accounting for at least

Other important investors have recently updated their voting policies to reflect an increasing focus on diversity in their portfolio companies' top ranks. For example, the California Public Employee's Retirement System (CalPERS), one of the country's largest public pension funds, has a policy which focuses on board diversity.³²⁷ Furthermore, CalPERS has committed to withholding votes from directors at companies that inadequately respond to board diversity engagement and to voting in support of shareholder proposals related to diversity.³²⁸ CalPERS has also paired with other major pension funds to develop an online database of diverse executive-level candidates for companies to use in their recruitment strategies for board membership.³²⁹

2. Stakeholder Pressure for C-Suite Diversity

The multi-pronged efforts on board diversity have increased significantly since 2017, resulting in substantial changes in overall board composition. Critics have argued, however, that board diversity efforts have “serve[d] as a smokescreen to conceal just how white [and male] a company's leaders (the CEO and his team) are.”³³⁰ For boards, many have responded to diversity advocacy by increasing the size of the board. Increasing the size of the C-Suite or splitting up coveted C-Suite positions of power, however, would face considerable opposition and practical difficulties at most companies.³³¹ Furthermore, even the success of board diversity efforts has been considerably less promising at companies beyond the Fortune 500.³³²

Nonetheless, stakeholder pressure on diversity beyond the board to the C-Suite is emerging, although the path to gender parity is significantly more complex than the path to board diversity.³³³ A variety of investors and investor

three-fourths of the total 2016-to-2019 increase in the net number of females firms add per year and more than a third of the overall increase”).

327. See CALPERS, CALPERS' GOVERNANCE & SUSTAINABILITY PRINCIPLES (2019), <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf> [<https://perma.cc/JLW3-J87S>].

328. See *Corporate Engagement*, CALPERS, <https://www.calpers.ca.gov/page/investments/corporate-governance/corporate-engagements> [<https://perma.cc/3YPS-489S>] (last visited Jan. 8, 2021).

329. See *Diverse Director DataSource (3D)*, EQUILAR, <http://marketing.equilar.com/24-equilar-diversity-network> [<https://perma.cc/K4YJ-ZE42>] (last visited Nov. 15, 2021).

330. Reed, *supra* note 19.

331. For some companies, a male-dominated culture is established much before the company becomes a publicly traded company. See Fan, *supra* note 98, at 348–49.

332. See Fairfax, *All on Board?*, *supra* note 10, at 1055–56.

333. See, e.g., *Alphabet, Inc. – Senior Executive Diversity (2019)*, TRILLIUM ASSET MGMT., <https://trilliuminvest.com/shareholder-proposal/alphabet-inc-senior-executive-diversity-2019/> [<https://web.archive.org/web/20190203075946/https://trilliuminvest.com/shareholder-proposal/alphabet-inc-senior-executive-diversity-2019/>] (last visited Feb. 3, 2019); *Carter's, Inc. – Executive Leadership Diversity (2019)*, TRILLIUM ASSET MGMT., <https://trilliuminvest.com/shareholder-proposal/carters-inc-executive-leadership-diversity-2019/> [<https://web.archive.org/web/20190204185222/http://www.trilliuminvest.com/shareholder-proposal/carters-inc-executive-leadership-diversity-2019/>] (last visited Feb. 4, 2019); *Newell Brands – Executive Leadership Diversity (2019)*, TRILLIUM ASSET MGMT., <https://trilliuminvest.com/shareholder-proposal/newell-brands-executive-leadership-diversity-2019/>

advocacy groups have begun to raise the issue of diversity at the executive level and among a company's workforce, as a top engagement and stewardship priority.³³⁴ Institutional investors have begun to focus on diversity disclosure in senior leadership, with a renewed focus on racial justice in 2020 serving as an important impetus for investors to focus on diversity beyond the board. For example, in 2020, BlackRock asked companies to include in their sustainability report the company's long-term plans to improve diversity, equity, and inclusion, including addressing diversity beyond the board of directors to employees and other leaders.³³⁵ Similarly, in 2020, the New York City Comptroller, on behalf of the New York City Employees' Retirement System, Teachers' Retirement System of the City of New York, and New York City Board of Education Retirement System, asked Fortune 100 companies to disclose publicly their EEO-1 reports, which are filed with the Equal Employment Opportunity Commission.³³⁶ Arguing that "[p]ublicly disclosing the demographics of employees by race, gender, and ethnicity—including and most notably those in leadership and senior management positions—will provide critical information for shareowners to better understand workforce practices, identify areas for improvement, and benchmark diversity performance," the request is a major step towards shareholder pressure on diversity beyond the board.³³⁷

Some of America's largest companies recently have experienced pressure through shareholder proposals to diversify the C-Suite.³³⁸ Shareholder diversity proposals have taken several forms. Some proposals focus on disclosure and transparency, such as requesting a report on workforce diversity or on the company's strategic plan to increase diversity on its board and workforce.³³⁹ Others

diversity-2019/ [https://web.archive.org/web/20190326173819/https://trilliuminvest.com/shareholder-proposal/newell-brands-executive-leadership-diversity-2019/] (last visited Mar. 26, 2019).

334. See Matteo Tonello, *2021 Proxy Season Preview and Shareholder Voting Trends (2017-2020)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2021), <https://corpgov.law.harvard.edu/2021/02/11/2021-proxy-season-preview-and-shareholder-voting-trends-2017-2020/> [https://perma.cc/Z75Z-7VXJ].

335. See BLACKROCK, OUR APPROACH TO ENGAGEMENT ON HUMAN CAPITAL MANAGEMENT (2021), <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-capital.pdf> [https://perma.cc/VZX9-ZWEK]; Martinez & Fletcher, *supra* note 4, at 893.

336. Press Release, N.Y.C. Comptroller Brad Lander, Comptroller Stringer, NYC Funds Escalate Campaign Calling on Major Companies to Publicly Disclose Workforce Demographics (Dec. 10, 2020), <https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-escalate-campaign-calling-on-major-companies-to-publicly-disclose-workforce-demographics/> [https://perma.cc/2JU9-F67A] [hereinafter NYC Comptroller].

337. *Id.*

338. *Id.*

339. See Angelo Martinez, *Shedding Light on Diversity-Based Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 16, 2018), <https://corpgov.law.harvard.edu/2018/10/16/shedding-light-on-diversity-based-shareholder-proposals/> [https://perma.cc/J5VQ-33A8] ("Shareholder proposals dealing with gender and diversity are defined as proposals that request companies to disclose measures taken to create greater diversity on the board or in the workplace, prepare a report with a comprehensive breakdown of its workforce by race and gender, or provide

seek action from the company. One example is proposals to include diversity targets into senior executives' compensation packages.³⁴⁰

A set of 2018 proposals at Alphabet (Google's parent company) is illustrative of the pressure companies are facing. Diversity proposals at Alphabet were backed by a group of shareholder-employees in coordination with Zevin Asset Management, a boutique, socially responsible investment manager.³⁴¹ These proposals sought to tie executive pay to obtaining diversity goals, for the company to complete a report on its gender pay-gap, and to report on the diversity of the board. All three proposals were opposed by management, and all three failed to receive a majority vote.³⁴²

Other leading companies have also received shareholder proposals focused on diversity at the executive level. For example, in 2017, a non-employee shareholder of Apple, again with the backing of Zevin Asset Management, made a diversity proposal to Apple.³⁴³ This proposal sought a recruitment strategy to increase diversity at the executive level and on the board.³⁴⁴ Like many other proposals on diversity beyond the board, Apple's management opposed the proposal stating that they were already engaged in diversity recruitment strategies beyond the scope of this proposal, and it was not needed.³⁴⁵ Yet by 2021, almost all of the company's senior vice presidents in charge of important business units continue to be men.³⁴⁶

3. Advisors and Client Pressure to Diversify

The gender and racial disparities at law firms are long-standing and have been well-known for decades. Thus far, many of the initiatives to address such disparities have fallen short of their goals.

information regarding the policies and goals of the company to reduce and address the gender pay gap.”); *see also* NYC Comptroller, *supra* note 336.

340. *See, e.g., Alphabet, Inc., supra* note 333.

341. *See* Vibhuti Sharma & Paresh Dave, *Alphabet Shareholders Reject Diversity Proposal Backed by Employees*, REUTERS (June 6, 2018, 10:14 AM), <https://www.reuters.com/article/us-alphabet-inc-agm/alphabet-shareholders-reject-diversity-proposal-backed-by-employees-idUSKCN1J22BS> [<https://perma.cc/MBX6-PAUG>]. Zevin Asset Management is a “boutique investment manager” that specializes in socially responsible investing and sustainability. ZEVIN ASSET MGMT., <https://www.zevin.com/> [<https://perma.cc/FUN6-4TDP>] (last visited Oct. 24, 2021).

342. *See* Luke Stangel, *Alphabet Kills Shareholder Proposal Tying Diversity Goals to Executive Pay*, SILICON VALLEY BUS. J. (June 7, 2018, 8:39 AM), <https://www.bizjournals.com/sanjose/news/2018/06/07/goog-shareholder-proposal-diversity-executive-pay.html> [<https://perma.cc/JVJ6-SA2Z>]; *see also* Alphabet, Inc., Current Report (Form 8-K) (June 6, 2018).

343. *See* Queena Sook Kim, *Apple Shareholder Proposal Seeks More Diverse Company Leadership*, KQED NEWS (Feb. 24, 2017), <https://www.kqed.org/news/11330108/apple-shareholder-proposal-seeks-more-diverse-company-leadership> [<https://perma.cc/W4V3-AFET>].

344. *Id.*

345. *See* Apple Inc., Definitive Proxy Statement (Schedule 14A) (Dec. 30, 2016), <https://www.sec.gov/Archives/edgar/data/320193/000119312517003753/d257185ddef14a.htm> [<https://perma.cc/4HJ4-JH6Z>].

346. *See Apple Leadership*, APPLE INC., <https://www.apple.com/leadership/> [<https://perma.cc/5BL7-SA4U>] (last visited Jan. 8, 2022).

Over the past few years, law firms have begun to face increasing client pressure to add diversity to their legal teams.³⁴⁷ For example, in response to a 2019 Paul Weiss partnership announcement that was dominated by white men, more than 170 general counsels and chief legal officers came together to express their desire to see partnership announcements that “reflect the diversity of the legal profession.”³⁴⁸ A variety of large corporations have advocated for diversity among outside counsel, in part due to rising diversity among in-house counsel teams.³⁴⁹ In 2017, for example, Kim Rivera, HP’s chief legal officer and general counsel, announced a diversity mandate to outside law firms stating that women represented fifty-five percent of HP’s legal team and that the company would withhold invoice fees from firms that did not meet diversity requirements.³⁵⁰ HP’s mandate required firms to “field (i) at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues; or (ii) at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters.”³⁵¹ For clients that seek to effectively advocate for diversity, their insistence on diverse deal teams may need to be more nuanced and backed by their spending, so that diversity goals are not achieved solely through representation of the most junior members of a deal team but also among the senior leaders and managers of teams.

With respect to client pressure, disclosure and transparency are critical to help clients better advocate for diversity among outside counsel. A few clients appear poised to place more heavy emphasis on diversity disclosure and leadership at law firms. For example, in January 2021, Coca-Cola’s then-general counsel issued new guidelines stating that not only must firms provide Coca-Cola with quarterly analysis of the diversity of teams working on the company’s matters, but they must commit that for each new matter, thirty percent of each billed associate and partner time will be from diverse attorneys, with half such amounts from Black attorneys.³⁵² “The firms also have to be transparent about how origination credit is awarded and

347. For a list of examples, see *Clients Push for Diversity*, DIVERSITY LAB, <https://www.diversitylab.com/knowledge-sharing/clients-push-for-diversity/> [https://perma.cc/X9US-P77D] (last updated July 8, 2017).

348. See Noam Scheiber & John Eligon, *Elite Law Firm’s All-White Partner Class Stirs Debate on Diversity*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/us/paul-weiss-partner-diversity-law-firm.html> [https://perma.cc/4MPD-DSVQ].

349. Phillip Bantz, *More Minority Women General Counsel at Top US Companies Than Ever Before*, LAW.COM: CORP. COUNS. (Aug. 31, 2020, 3:06 PM), <https://www.law.com/corpcounsel/2020/08/31/more-minority-women-general-counsel-at-top-us-companies-than-ever-before/?sreturn=20210925014936> [https://perma.cc/979N-N7FV].

350. See Letter from Kim Rivera, Chief Legal Officer and Gen. Counsel, HP Inc., on Diversity Mandate to Partner Law Firms (Feb. 8, 2017) (on file with author).

351. *Id.*

352. See Bradley M. Gayton, *Commitment to Diversity, Belonging, and Outside Counsel Diversity*, COCA-COLA CO. (Jan. 27, 2021), <https://www.coca-colacompany.com/media-center/bradley-gayton-on-commitment-to-diversity> [https://perma.cc/U7RD-BWNK].

identify at least two diverse attorneys as a potential successor to a partner on Coca-Cola's book of business."³⁵³

Whether client-led efforts such as Coca-Cola's will result in significant diversity shifts among partners at law firms remains to be seen.³⁵⁴ Shortly after the announcement of the initiative, Coca-Cola's then-general counsel was ousted, with concerns that his dismissal may dissuade other similar diversity goals.³⁵⁵ Moreover, Coca-Cola's own initiative was placed on hold as it became the subject of significant controversy, including potential legal challenge under federal antidiscrimination laws.³⁵⁶

With respect to M&A financial advisors, however, there is little evidence of clients insisting on the diversity of deal teams or advisors.

D. Quotas and Mandates

In many countries, board diversity was first ushered in through legislative efforts. Professor Darren Rosenblum has described the variety of quotas and mandates to advance board diversity, beginning with Norway being the first country to enact a gender quota law.³⁵⁷ While quotas were commonly viewed as unachievable in the United States, in 2018, California became the first U.S. state to mandate gender diversity on boards. Senate Bill 826 requires publicly traded companies headquartered in California to have at least one female director by the end of 2019 and at least two (three) female directors on five (six or more) member boards by the end of 2021.³⁵⁸ Studies suggest that the California legislation has had a considerable impact on the number of women on boards.³⁵⁹ For example, a 2020 study by Greene, Intintoli, and Kahle found that as a result of the California

353. Phillip Bantz, *Coca-Cola General Counsel Says Diversity Efforts Aren't Working, Unveils New Guidelines*, LAW.COM: CORP. COUNS. (Jan. 28, 2021, at 11:15 AM), <https://www.law.com/corpcounsel/2021/01/28/coca-cola-general-counsel-says-diversity-efforts-arent-working-unveils-new-guidelines/> [https://perma.cc/EF6C-MCPS].

354. See Meredith Hobbs, *Will Coke's New Guidelines Move the Needle for Law Firms?*, LAW.COM: DAILY REP. (Feb. 1, 2021, 5:52 PM), <https://www.law.com/dailyreportonline/2021/02/01/will-cokes-new-guidelines-move-the-needle-for-law-firms/> [https://perma.cc/TLW2-EE88].

355. See Varsha Patel, *The Coca-Cola Effect: Is This The Beginning of the End for GC-Led Diversity Initiatives?*, LAW.COM INT'L (May 10, 2021, 7:36 AM), <https://www.law.com/international-edition/2021/05/10/the-coca-cola-effect-is-this-the-beginning-of-the-end-for-gc-led-diversity-initiatives/> [https://perma.cc/3ETD-A4CG].

356. See Chris Opfer, Erin Mulvaney & Ruiqi Chen, *Coca-Cola Diversity Policy in Review May Get Legal Challenge (3)*, BLOOMBERG L. (Apr. 30, 2021, 1:20 PM), <https://news.bloomberglaw.com/business-and-practice/coca-cola-diversity-policy-under-review-may-get-legal-challenge> [https://perma.cc/VRR8-B98A].

357. See generally Darren Rosenblum, *Diversity and the Board of Directors: A Comparative Perspective*, in RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 179, 179 (Afra Afsharipour & Martin Gelter eds., 2021).

358. *Id.* For an analysis of the new California quota, see generally Rosenblum, *California Dreaming?*, *supra* note 10, at 1435.

359. See Cydney Posner, *California Mandates Board Diversity for "Underrepresented Communities"*, COOLEY PUBCO (Oct. 1, 2018), <https://cooleypubco.com/2020/10/01/california-mandates-board-diversity-underrepresented-communities/> [https://perma.cc/5UHZ-J4RW].

legislation, the number of board seats held by female directors increased by twenty-three percent (143 board seats).³⁶⁰ Nevertheless, seventy of the 488 firms subject to the legislation continued to have all male boards as of their 2019 proxy filing.³⁶¹ Other states have also enacted legislation to increase diversity on boards.³⁶²

In addition to state legislation, stock exchanges have also announced a move toward diversity requirements for listed companies. For example, in 2020, Nasdaq submitted a rule to the Securities and Exchange Commission to require that companies listed on Nasdaq appoint at least one woman and at least one minority or LGBTQ+ person to their boards or explain why they have failed to do so.³⁶³ The SEC approved the Nasdaq listing rule in August 2021.³⁶⁴

To date, no country has mandated diversity in the C-Suite or among executives more generally. Germany, which mandated a thirty percent gender diversity quota for the supervisory board of companies, is the first country to hint at diversity beyond the board of directors.³⁶⁵ In early 2021, Germany approved a draft law that would mandate the inclusion of at least one woman on the management board of listed companies.³⁶⁶ In the United States, one would expect considerable political opposition to any such efforts, as well as a variety of legal hurdles.³⁶⁷ For example, in the United States, even board diversity advocates have largely eschewed quotas in favor of disclosure.³⁶⁸

360. See Daniel Greene, Vincent J. Intintoli & Kathleen M. Kahle, *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. CORP. FIN. (2020). The study also found that of the 136 firms that add a female director, forty percent replace male directors while sixty percent expand the board. *Id.* Firms expand (replace) when pre-SB 826 board size is smaller (greater), suggesting that increasing the board above a certain size is costly. *See id.*

361. *Id.*

362. See *supra* notes 91–97 and accompanying text; see also Hatcher & Latham, *supra* note 91.

363. See Ron S. Berenblat & Elizabeth Gonzalez-Sussman, *Nasdaq Proposes New Listing Rules Related to Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 13, 2020), <https://corp.gov.law.harvard.edu/2020/12/13/nasdaq-proposes-new-listing-rules-related-to-board-diversity/> [<https://perma.cc/MGZ7-R586>].

364. See Cydney Posner, *SEC Approves Nasdaq “Comply-or-Explain” Proposal for Board Diversity*, COOLEY PUBCO (Aug. 9, 2021), <https://cooleypubco.com/2021/08/09/sec-approves-nasdaq-diversity-proposal/> [<https://perma.cc/JJ82-UJZN>].

365. See Geneva Abdul, *German Parliament Backs ‘Milestone’ Gender Quota for Company Boards*, N.Y. TIMES (June 11, 2021) <https://www.nytimes.com/2021/06/11/world/germany-gender-quota-boards.html> [<https://perma.cc/CCN8-MKHHC>].

366. See Martina Ortner & Judy Witten, *Women’s Quota on the Executive Board in Germany*, JD SUPRA (Feb. 16, 2021) <https://www.jdsupra.com/legalnews/women-s-quota-on-the-executive-board-in-6733092/> [<https://perma.cc/RA26-K2UE>]. In 2021, women accounted for only 11.5 percent of positions on management boards of the largest 100 listed companies in Germany. Maria Sheahan, *German Cabinet Agrees Quota for Women on Company Boards*, REUTERS (Jan. 6, 2021, 2:28 AM), <https://www.reuters.com/article/us-germany-women-companies/german-cabinet-agrees-quota-for-women-on-company-boards-idUSKBN29B16U> [<https://perma.cc/98KX-Q2HZ>].

367. For example, efforts toward board diversity quotas in the United States have faced considerable opposition, resulting in a largely disclosure-based model. See DHIR, *supra* note 10, at 78–82; see generally Véronique Magnier & Darren Rosenblum, *Quotas and the Transatlantic Divergence of Corporate Governance*, 34 NW. J. INT’L L. & BUS. 249, 266 (2014).

368. See Rhode & Packel, *supra* note 10, at 422–23.

E. Improving the Pipeline in Professional Schools

Women leaders in M&A have pointed to the pipeline of women into M&A practice as one of the root causes of leadership disparity. In studying gender disparities in M&A legal advisors, a study conducted by the ABA's Women in M&A Task Force focused on law schools as the potential root of the problem.³⁶⁹ The study looked at several top schools which tend to produce a significant portion of M&A attorneys and noted that while women make up, on average, forty-six percent of the student body population, they make up only thirty-seven percent of students in M&A related classes.³⁷⁰

Why do women students under enroll in M&A-related classes? The makeup of faculty teaching such classes may provide some clues.³⁷¹ Hand-collected data on file with the author indicates that in general women rarely makeup a majority of the corporate law faculty at the top fifty law schools, especially at the schools ranked in the top ten. For example, Harvard Law School and Columbia Law School are frequently identified as the leading feeders to elite law firms.³⁷² In 2021, at Harvard Law School, one woman is listed out of eleven faculty members who are identified as being within the corporate law curriculum, while at Columbia Law School, women make up four of the twenty-one faculty members identified as having expertise in the corporate law curriculum.³⁷³

In hand-collected data, this Article found that for M&A courses taught at the top fifty law schools over the year 2018–2019 and 2019–2020, only fifteen instructors out of 101 were women.³⁷⁴ This includes seven (out of thirty-eight) full-time female faculty members (including the author), seven women adjunct faculty (out of sixty adjunct faculty), and three visiting faculty.³⁷⁵ Students often

369. See Frankle et al., *supra* note 25.

370. *Id.* The authors considered enrollment figures at Berkeley, Chicago, Columbia, Duke, Harvard, Michigan, Northwestern, NYU, Penn, Stanford, Virginia, and Yale. See *id.*

371. Studies have found gender divisions in subject areas taught at law schools, with women underrepresented in certain fields. See generally Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99. Studies have also found shortcomings in legal education's inclusion of women students. See generally Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J. L. & FEM. 389 (2006).

372. See Ilana Kowarski, *10 Law Schools that Lead to Jobs at Big Firms*, U.S. NEWS & WORLD REP. (May 26, 2021, 9:00 AM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/slideshows/10-law-schools-that-lead-to-full-time-jobs-at-big-law-firms?slide=13> [<https://web.archive.org/web/20210527194448/https://www.usnews.com/education/best-graduate-schools/top-law-schools/slideshows/10-law-schools-that-lead-to-full-time-jobs-at-big-law-firms>].

373. See *Faculty Profiles, Corporate Law*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/?g=&i=CORPORATELAW&d=Corporate%20Law> [<https://perma.cc/5ENL-WG3T>] (last visited Aug. 1, 2021); *Faculty Directory, Corporate, Business, and Transactional Law*, COLUM. L. SCH., <https://www.law.columbia.edu/faculty-and-scholarship/all-faculty?type=23&aos=273> [<https://perma.cc/3MRN-8YZ7>] (last visited Aug. 1, 2021).

374. Data collected by author from faculty pages of top 50 law schools (data on file with author). Schools were selected based on the 2019 US News & World Report law school rankings.

375. Data collected by author from faculty pages of top 10 law schools (data on file with author).

report that role models are important in pursuing practice areas. But, without sufficient role models teaching M&A classes, there is little surprise that few women or students of color enter the profession or envision themselves as leaders in M&A.³⁷⁶

CONCLUSION

Corporations, law firms, and investment banks all state that diversity matters. Women leaders in M&A, and a growing number of male leaders, increasingly are recognizing the case for gender equity in leadership. Yet, the data in this Article shows that when it comes to some of the most important business decisions made by companies and their advisors, there is a glaring chasm between stated commitment and action. Uncovering this gap is important for two reasons. First, from an equity standpoint, a significant portion of the population is excluded from key decision-making roles in fundamental deals that greatly impact companies, their stakeholders, and financial markets more broadly. Second, research on group decision-making suggests that greater diversity could improve M&A transactions—often plagued by decision-making shortcomings—in meaningful ways.

To date, scholarly discourse on M&A has largely overlooked gender equity. Moreover, the discourse on gender equality in corporate law and corporate governance has remained primarily focused on the board of directors. The focus on gender equality on boards of directors has begun to make an impact on board composition. But disclosure and transparency about the gender gap among leaders at other important institutional actors involved in M&A deals—executives, legal advisors, and financial advisors—remain low. This Article argues that understanding, documenting, and disclosing the gender disparity in leadership in M&A beyond the board is critical for increasing accountability and for determining the solutions that may work to reduce such disparities.

376. Professor Meera Deo has done important work that addresses the gender and racial disparities that continue to exist in law schools and how such disparities impact legal education and the training of students. *See* DEO, *supra* note 32.

APPENDIX A—METHODOLOGY

The data presented in this Article represents an original dataset that was hand-collected by the author and a team of researchers. To identify the top 100 announced public M&A deals, focusing on targets that were U.S.-reporting companies, we first searched the Bloomberg Law Deal Analytics Mergers and Acquisitions database. Bloomberg Law uses a proprietary method to populate their M&A database, using EDGAR filings and press releases as common sources. We searched the Bloomberg Law database first because it presented the most high-value announced transactions even if the parties to the transaction never filed with the Securities and Exchange Commission. We then checked the information obtained from Bloomberg Law against West Law's PracticalLaw What's Market Public Merger Agreements database to ensure that we captured the highest value transactions from each year in the event that Bloomberg Law failed to include any deals in their report. To compile their database, PracticalLaw pulls information and documents from public filings through the SEC, EDGAR filings and disclosures, SEDAR (Canada), Australian Stock Exchange, Annual Reports to Shareholders, EDGAR Precedent Agreements, and any other publicly filed papers or information.

In some cases, the announced transactions were terminated, withdrawn, or still pending. For these deals, it was very difficult to find any information other than the parties involved, the announced date, and the announced dollar value. If neither Bloomberg Law nor West Law had information about the lead counsel for the parties for these deals, we first searched through the SEC's EDGAR database for documents filed two weeks from the announced date. Next, we searched LexisNexis' Law360, which tended to contain more information about the parties than other sources for deals that were pending or proposed. If we could not find the information there, we then searched the internet to look for press releases from either the parties involved or the law firms representing them. If none of these searches yielded the names of lead counsel on both sides of the transaction, we did not include the transaction in the study.

Lead attorneys were identified by evaluating the publicly filed acquisition agreements. Bloomberg's dataset include the "Deal Data" link to the acquisition agreement on file in the "Documents" tab. For each transaction, we also evaluated whether the parties had filed an 8-K "current report" filing with the SEC with the acquisition agreement as an exhibits contract labeled under the term "merger" or "2.1".³⁷⁷ A current report on Form 8-K must be filed by companies subject to the periodic reporting requirements of the Securities and Exchange Act of 1934 within four business days from the date when the company enters into a definitive material agreement, including a merger agreement.³⁷⁸ In general, the reporting firm includes

377. Form 8-Ks are not the exclusive means that agreements are filed in acquisitions and can be filed on other SEC forms such as tender offer documents.

378. For the current rules under Form 8-K, see SEC, FORM 8-K, <http://www.sec.gov/about/forms/form8-k.pdf> [<https://perma.cc/2EDL-5FVA>]; SEC, FINAL RULE: ADDITIONAL FORM 8-K

the actual agreement as an exhibit to the Form 8-K.³⁷⁹ The agreements are therefore available online via the EDGAR system of the SEC. We also collected data from press releases issued in connection with the transactions. After identifying the transactions, we hand collected data on the following: the date the deal was announced, the value of the transaction when it was announced, the names of the buyer and target companies, the buyer's country of origin, whether the target and buyer were responsible for reporting to the SEC, the names and law firms for lead counsel representing each party, the gender of lead counsel, and a link to each counsel's professional bio.

DISCLOSURE REQUIREMENTS AND ACCELERATION OF FILING (2004) [hereinafter SEC, FINAL RULE] (noting that “[i]tem 1.01 [Entry into a Definitive Material Agreement] requires disclosure of all material definitive agreements specified by the item, including business combination agreements and other agreements that relate to extraordinary corporate transactions”).

379. See SEC, FINAL RULE, *supra* note 378 (“[W]e encourage companies to file the exhibit with the Form 8-K when feasible, particularly when no confidential treatment is requested.”). The company is required to file the agreement as an exhibit to its next periodic filing if it does not file the agreement as an exhibit to an 8-K. *Id.*

APPENDIX B—ADDITIONAL DATA CHARTS

Lead Counsel in 2014 by Deal Size

Deals by Size (quartiles)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	6	53	11.3%	4	60	6.7%
26 - 50	2	59	3.4%	5	54	9.3%
51 - 75	4	47	8.5%	7	46	15.2%
76 - 100	6	48	12.5%	5	49	10.2%
Total	18	207	8.7%	21	209	10.0%

Lead Counsel in 2015 by Deal Size

Deals by Size (quartiles)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	6	63	9.5%	11	61	18.0%
26 - 50	5	47	10.6%	2	47	4.3%
51 - 75	4	49	8.2%	5	51	9.8%
76 - 100	6	50	12.0%	4	45	8.9%
Total	21	209	10.0%	22	204	10.8%

Lead Counsel in 2016 by Deal Size

Deals by Size (quartiles)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	4	57	7.0%	6	70	8.6%
26 - 50	6	61	9.8%	5	46	10.9%
51 - 75	5	53	9.4%	5	46	10.9%
76 - 100	6	54	11.1%	5	52	9.6%
Total	21	225	9.3%	21	214	9.8%

Lead Counsel in 2017 by Deal Size

Deals by Size (quartiles)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	4	54	7.4%	3	60	5.0%
26 - 50	6	54	11.1%	5	59	8.5%
51 - 75	10	51	19.6%	3	49	6.1%
76 - 100	7	49	14.3%	8	55	14.5%
Total	27	208	13.0%	19	223	8.5%

Lead Counsel in 2018 by Deal Size

Deals by Size (quartiles)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	5	62	8.1%	4	65	6.2%
26 - 50	4	54	7.4%	8	63	12.7%
51 - 75	10	57	17.5%	7	54	13.0%
76 - 100	3	56	5.4%	10	54	18.5%
Total	22	229	9.6%	29	236	12.3%

Lead Counsel in 2019 by Deal Size

Deals by Size (quartile)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	3	62	4.8%	11	67	16.4%
26 - 50	6	70	8.6%	10	61	16.4%
51 - 75	6	54	11.1%	11	59	18.6%
76 - 100	11	56	19.6%	10	55	18.2%
Total	26	242	10.7%	42	242	17.4%

Lead Counsel in 2020 by Deal Size

Deals by Size (quartile)	Women on Buyer Side	Total Lead Counsel- Buyer	Percentage	Women on Target Side	Total Lead Counsel- Target	Percentage
1 - 25	7	60	11.7%	12	58	20.7%
26 - 50	8	53	15.1%	12	63	19.0%
51 - 75	7	47	14.9%	9	53	17.0%
76 - 100	3	52	5.8%	13	64	20.3%
Total	25	212	11.8%	46	238	19.3%