

## BIAS, IDENTITY AND M&A

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### INTRODUCTION

Corporate executives, i.e. officers of a corporation, play a central role in a firm’s decision to undertake a merger or acquisition (M&A). M&A deals are often done at the behest of executives, who also largely run the deal-making process.<sup>1</sup> For example, M&A deals can be initiated because management is under pressure to sell the company due to shareholder or other market demands, or because managers see an opportunity to run an even bigger company or build an empire.<sup>2</sup>

Over the past two decades, a rich body of academic literature has explored the role of executives in M&A, seeking to understand the motivations and incentives of management undertaking M&A deals. One important strand of this literature explores the behavioral biases of

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1. See Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 355, 365 (2016) [hereinafter Shaner, *Officer Accountability*].

2. For an overview of trends in the M&A market, see Claire A. Hill et al., *Mergers and Acquisitions: A Cyclical and Legal Phenomenon*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 13, 13–27 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

management in M&A transactions.<sup>3</sup> Studies support the claim that behavioral biases, such as overconfidence and ego gratification, are important drivers for M&A deals.<sup>4</sup> Other studies show that social factors, such as extensive business or educational ties between managers of bidder and target firms, can undermine decision making in M&A deals.<sup>5</sup> Managers may also be induced to engage in M&A in order to keep up with peers.<sup>6</sup>

A related strand of more recent literature focuses on the identity of managers and explores the impact that manager identity has on the incentives for and outcomes of M&A deals. One study suggests that women executives approach M&A transactions differently from male executives, finding that male chief executive officers (CEOs) undertake more acquisitions, with worse performance, and exhibit relative overconfidence in significant acquisitions compared with women CEOs.<sup>7</sup> Other studies suggest that increased gender diversity on boards is associated with less overpayment in acquisitions and with fewer

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3. See, e.g., Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 212 (1986); see also RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 50–62 (1992); Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 601–05, 624 (1989); Mark L. Sirower & Mark Golovcsenko, *Returns from the Merger Boom*, MERGERS & ACQUISITIONS: DEALMAKER'S J., Mar. 2004, at 34; Richard H. Thaler, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSP. 191, 193–201 (1988).

4. See generally Adam Steinbach et al., *Peering into the Executive Mind: Expanding Our Understanding of the Motives for Acquisitions*, in ADVANCES IN MERGERS & ACQUISITIONS 145, 147 (Sydney Finkelstein & Cary L. Cooper eds., 2016).

5. See, e.g., Joy Ishii & Yuhai Xuan, *Acquirer-Target Social Ties and Merger Outcomes*, 112 J. FIN. ECON. 344, 346 (2014) (studying 539 mergers between publicly-traded U.S. firms over the period between 1999 and 2007 and finding that significant social connections between bidder and target management, derived from educational background and employment history, are associated with lower value creation post-merger and a greater likelihood of subsequent divestment for performance reasons).

6. See, e.g., Wei Shi et al., *Ripple Effects of CEO Awards: Investigating the Acquisition Activities of Superstar CEOs' Competitors*, 38 STRATEGIC MGMT. J. 2080, 2081 (2017) (finding that “CEOs engage in more intensive acquisition activities in the period after their competitors won CEO awards . . . compared to the preaward period” and that acquisitions during the post-award period “realize lower announcement returns compared to acquisitions by the same CEOs in the preaward period”); James D. Westphal et al., *Second-Order Imitation: Uncovering Latent Effects of Board Network Ties*, 46 ADMIN. SCI. Q. 717, 723–24 (2001) (finding that firms tend to mimic the acquisition behavior of firms that they are connected to through interlocking directorships).

7. 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. PSYCHOL. 577, 577 (1988) (finding that women exhibit less overconfidence in investment decision-making).

acquisitions overall.<sup>8</sup> And related research finds that gender diversity on boards helps temper the overconfidence of male CEOs.<sup>9</sup>

The literature on biases in M&A and the literature tying identity to both the biases of executives and the ability of boards to tamp down these biases raise important questions about the current corporate governance mechanisms in place to monitor and hold officers accountable. Existing corporate governance solutions, such as fiduciary duty litigation, board independence and greater disclosure, have not addressed the root causes of executive bias.<sup>10</sup> And, if identity appears to be playing a large role in behavioral biases, then it suggests that we need to have a much clearer understanding of the root causes of such biases so as to design solutions that address these root causes.

This Essay proceeds as follows. Part I briefly outlines the respective roles and functions of senior management and directors in M&A transactions. Part II discusses the findings of the empirical literature on behavioral biases and identity of management in M&A transactions. Because the findings of this literature raise questions about the accountability of executives, Part III addresses the implications of the bias and identity literature for the law's approach to officer accountability and for future research.

## I. THE ROLE OF EXECUTIVES IN M&A TRANSACTIONS

Undertaking a significant M&A deal involves many different actors—a corporation's board of directors, its senior management, and often a myriad of advisors, including legal and financial advisors.<sup>11</sup> Each of these actors plays a critical role in the decision to move forward on an M&A deal and is deeply involved in the decision-making and planning for

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8. See Maurice Levi et al., *Director Gender and Mergers and Acquisitions*, 28 J. CORP. FIN. 185, 185–86 (2014); see also Guoli Chen et al., *Female Board Representation and Corporate Acquisition Intensity*, 37 STRATEGIC MGMT. J. 303, 303–05 (2016).

9. Jie Chen et al., *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/MB5Y-5FMX>].

10. See Afra Afsharipour, *A Shareholders' Put Option: Counteracting the Acquirer Overpayment Problem*, 96 MINN. L. REV. 1018, 1061–72 (2012) [hereinafter Afsharipour, *Put Option*]; Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TRANSACTIONS: TENN. J. BUS. L. 65, 75–78 (2011) [hereinafter Langevoort, *Behavioral Economics*].

11. Large M&A deals are rarely undertaken by companies without the involvement of advisors. See Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1088 (2016).

a deal. For purposes of this short Essay, I focus on the significant role played by senior executives and directors in M&A transactions.<sup>12</sup>

### *A. The Role of Senior Management in M&A*

For today's large public company, senior executives, especially CEOs, dominate corporate decision-making.<sup>13</sup> CEOs "wield tremendous power and influence in running corporate America. Indeed, 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."<sup>14</sup> The Economist magazine recently described CEOs as the "new aristocrats of power" and like the aristocrats of old "[m]ost are white and male."<sup>15</sup>

CEO domination is particularly acute in the M&A context. CEOs shape M&A strategy and are often under immense pressure to undertake M&A deals.<sup>16</sup> It is the rare, large M&A deal that is done without the CEO, together with other senior managers, serving as the chief negotiator, powerbroker and decision-maker. Experts frame the role of the CEO in M&A transactions as a multifaceted one where the CEO plays 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.<sup>17</sup>

The focus by CEOs on M&A transactions, which tend to be risky but potentially incredibly rewarding, is not a surprise. CEOs are often financially and reputationally rewarded for undertaking M&A deals.<sup>18</sup>

12. In a related work, currently entitled *Women and M&A*, I explore further the relationship among the entire ecosystem of actors involved in the M&A deal-making process, the glaring absence of women as leaders among all of these actors, and the implications for deal-making arising from this lack of diversity.

13. See, e.g., Shaner, *Officer Accountability*, *supra* note 1, at 367 (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").

14. Shaner, *Officer Accountability*, *supra* note 1, at 358–59.

15. See, e.g., *The New Aristocrats of Power*, THE ECONOMIST, Feb. 23, 2019, at 71; *Meet the New Boss: What it Takes to Be a CEO in the 2020s*, THE ECONOMIST, Feb. 6, 2020, at 9.

16. See Michael Birshan et al., *A Deal-Making Strategy for New CEOs*, MCKINSEY Q. (Apr. 2017), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/a-deal-making-strategy-for-new-ceos> <https://perma.cc/4HMB-8A4V>].

17. Orit Gadiesh et al., *A CEO's Guide to the New Challenges of M&A Leadership*, 30 STRATEGY & LEADERSHIP 13, 13–14 (2002).

18. See generally Afra Afsharipour & J. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443, 453–54 (2019) (surveying literature on agency costs in M&A); Afra Afsharipour, *Reevaluating Shareholder Voting Rights in M&A Transactions*,

Furthermore, risk taking is likely an essential characteristic of CEOs who often accede to such a role due to earlier successful risks.<sup>19</sup>

### *B. Board Monitoring of Senior Management in M&A*

To emphasize the essential role of senior managers is not to say that their actions are not subject to significant oversight in M&A deals. Board involvement in M&A deals is implicated by the board's central role in corporate governance.<sup>20</sup> Under state corporate law, 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.<sup>21</sup>

Generally, state corporate law requires that the boards of directors of companies involved in a merger transaction must approve the transaction. For the target entity, no matter the type of merger transaction (i.e. a straight merger or a triangular merger), approval of the board is statutorily required.<sup>22</sup> For tender offers, the target board's role is not statutorily delineated under state corporate law, but dictated by the board's fiduciary responsibilities and the requirements of SEC regulations pursuant to the Williams Act.<sup>23</sup> The statutory role given to bidder boards is somewhat more limited. While Delaware law requires board approval in order to effect a statutory merger, most public company acquisitions do not follow the route of a statutory merger.<sup>24</sup> Instead, for commonly used transaction

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70 OKLA. L. REV. 127, 133–34 (2017) (same) [hereinafter Afsharipour, *Voting Rights*]; Afsharipour, *Put Option*, *supra* note 10, at 1032–34 (same).

19. See Langevoort, *Behavioral Economics*, *supra* note 10, at 71.

20. 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).

21. See DEL. CODE ANN. tit. 8, § 141 (2020); MODEL BUS. CORP. ACT § 8.01 (AM. BAR ASS'N 2016).

22. See CAL. CORP. CODE § 1200 (West 2020); DEL. CODE ANN. tit. 8, § 251(b) (2020); MODEL BUS. CORP. ACT § 11.04(a) (AM. BAR ASS'N 2016).

23. See STEPHEN BAINBRIDGE, MERGERS AND ACQUISITIONS 217–20 (3d ed. 2012).

24. See DEL. CODE ANN. tit. 8, § 251 (2020); John C. Coates, *Mergers, Acquisitions, and Restructuring: Types, Regulation, and Patterns of Practice* 4–5 (Harvard

structures, such as triangular mergers and tender offers, Delaware law does not specifically require the approval of the bidder board.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup> For bidder directors, the board's role is somewhat less certain and involved. Bidder boards are generally not involved in identifying acquisition targets, although once a target has been identified and significant efforts are made to move forward with an acquisition, boards should become more involved in the acquisition process.<sup>28</sup>

As part of their role as fiduciaries, directors must undertake sufficient investigation and obtain all reasonably available information regarding an M&A transaction. 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."<sup>29</sup>

Thus, boards are an important governance tool to monitor managers. And boards are often appreciably involved in M&A sale scenarios. However, experts indicate that bidder boards appear to be somewhat

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John M. Olin Discussion Paper Series, Paper No. 781, 2014), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Coates\\_781.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_781.pdf) [https://perma.cc/4Z87-2H3A].

25. For a detailed discussion of this structuring, see generally Afra Afsharipour, *Deal Structure and Minority Shareholders*, in *COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES* 35 (Umakanth Varottil & Wan Wai Yee eds., 2018).

26. See THERESE H. MAYNARD, *MERGERS AND ACQUISITIONS* 29–30 (4th ed. 2017). As experts note, 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, *The 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/ZT4P-JHHD].

27. See BAINBRIDGE, *supra* note 23, 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).

28. See FOLEY & LARDNER LLP, *THE BOARD'S ROLE IN M&A* (2007), <https://www.foley.com/en/insights/publications/2007/03/the-boards-role-in-ma> [https://perma.cc/8VBG-W5YS].

29. Lajoux, *supra* note 26; see also KPMG, *THE BOARD'S PERSPECTIVES ON M&A: FROM DUE DILIGENCE TO DAY 1 AND BEYOND* (2013), <http://www.kpmginfo.com/role-of-the-board/pdf/The%20Boards%20Perspective%20on%20MA.pdf> [https://perma.cc/AJC8-KD2L].

reluctant to be deeply involved in acquisitions.<sup>30</sup> Experts urge bidder boards to challenge management's often optimistic assumptions about a deal's value and to "be sensitive to possible management bias."<sup>31</sup> And, a survey of directors about the board's role in M&A found that at least one-third of directors believe that their boards "could be more involved in shaping M&A strategy and in evaluating deals proposed by management."<sup>32</sup>

## II. EXECUTIVE BIAS AND EXECUTIVE IDENTITY

Because M&A transactions are such important events in the life of a company, a significant body of research has explored the motivations of managers in deals. To be sure, there is considerable potential for managerial conflicts of interests and other agency costs in connection with M&A transactions.<sup>33</sup> And there is a robust literature that explores managerial agency costs (such as personal benefits in the form of increased management compensation tied to an M&A deal) on both the buy-side and the sell-side of M&A deals.<sup>34</sup> But agency costs do not tell the full story of managerial incentives in M&A.

In numerous studies, behavioral corporate finance scholars have sought to understand how psychology affects M&A decision-making and more recently, to how managers' traits, such as gender, affect M&A decision-making.<sup>35</sup> Part A provides a brief overview of the behavioral bias literature while Part B addresses the identity literature.

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30. See, e.g., Chinta Bhagat & Bill Huyett, *Modernizing the Board's Role in M&A*, MCKINSEY Q. (Feb. 2013), <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/modernizing-the-boards-role-in-m-and-a> [<https://perma.cc/5CAK-XECX>] ("Many boards, reluctant to cross the line between governance and management, miss opportunities to help senior executives win at M&A.").

31. See KPMG, *supra* note 29, at 3; see also Holly J. Gregory, *The Board's Role in M&A Transactions*, PRACTICAL L.J., May 2014, at 36.

32. See KPMG, *supra* note 29, at 1.

33. In fact, much of the Delaware case law on enhanced scrutiny was developed by courts recognizing the potential risk of soft conflicts of interest and self-interested behavior by corporate fiduciaries. See Afsharipour & Laster, *supra* note 18, at 447, 470–73.

34. For a summary of this literature, see Afsharipour, *Voting Rights*, *supra* note 18, 134–36; Afsharipour, *Put Option*, *supra* note 10, 1034–38.

35. See, e.g., Chen et al., *supra* note 9; Steinbach et al., *supra* note 4, at 146–51; Sarah Green Carmichael, *Boards with Women Pay Less for Acquisitions*, HARV. BUS. REV. (Dec. 20, 2013), <https://hbr.org/2013/12/boards-with-more-women-pay-less-for-acquisitions> [<https://perma.cc/Q4GV-WXGC>].

*A. Behavioral Biases of Senior Executives in M&A Deals*

Research in management studies and behavioral corporate finance suggests that public company acquisitions are plagued by behavioral biases—such as hubris and ego gratification—on the part of management.<sup>36</sup> Managers may be overconfident about the value of a deal, including their ability to accurately price the target company, and driven by their desire to win, they may be overoptimistic about their ability to successfully integrate the target into the buyer’s business.<sup>37</sup> Managers may also be flawed in their decision-making regarding targets by other factors, such as extensive social ties between managers of bidders and targets, or due to a desire to keep up with peers undertaking acquisitions.<sup>38</sup>

Richard Roll was one of the first scholars to suggest that hubris and overconfidence explained bidder overpayment.<sup>39</sup> According to Roll, managers engage in acquisitions in part due to hubris, preferring to leave cash flows within companies because they assume that they can better use the cash than shareholders.<sup>40</sup> Roll argued that over-confident managers

36. See Steinbach et al., *supra* note 4, at 147–51. Behavioral biases can play an important role in corporate decision-making generally. See generally James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83 (1984); Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833 (2007); Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853 (1995); Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135 (2002); Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635 (2003).

37. 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 et al., *When Winning Is Everything*, HARV. BUS. REV., May 2008, at 78, 80 (identifying “three principal drivers of competitive arousal in business settings: rivalry, time pressure, and audience scrutiny”).

38. See *infra* notes 47–53 and accompanying text.

39. For an argument against the hubris hypothesis, see Mark Humphery-Jenner et al., *Do Wealth Creating Mergers and Acquisitions Really Hurt Bidder Shareholders?* 20 (FIRN Research Paper No. 2517209, Feb. 14, 2017), <https://ssrn.com/abstract=2517209> (finding that bidder stock falls in response to exogenous bid failure, but “[i]f bids are value destroying or bidders are subject to hubris and overpay, as is often contended, then bid failure should greatly improve bidder value, not destroy it.”).

40. See Roll, *supra* note 3, at 200–01, 212; see also Black, *supra* note 3, at 624 (“Managers who are successful in one business may be especially prone to overestimate their ability to run another business.”). Research indicates that following an acquisition,



tend to be overly optimistic in their valuation of the target company and accordingly engage in value-destroying acquisitions.<sup>41</sup>

Inspired by Roll, studies have sought to examine the hubris hypothesis for bidder overpayment. Hayward and Hambrick find “losses in acquiring firms’ shareholder wealth following an acquisition, and the greater the CEO hubris and acquisition premiums, the greater the shareholder losses” following an acquisition.<sup>42</sup> Other studies address overconfidence by CEOs. Malmendier and Tate evaluate a sample of Forbes 500 firms from 1980 to 1994 using two proxies for overconfidence—CEOs’ personal over-investment in their company and their press portrayal.<sup>43</sup> They hypothesize: (1) “[i]n firms with abundant internal resources, overconfident CEOs are more likely to conduct acquisitions than non-overconfident CEOs”<sup>44</sup> and (2) “[i]f overconfident CEOs do more mergers than rational CEOs, then the average value created in mergers is lower for overconfident than for rational CEOs.”<sup>45</sup> Malmendier and Tate find “that the odds of making an acquisition are [sixty-five percent] higher if the CEO is classified as overconfident,” and that “[t]he effect is largest if the merger is diversifying and does not require external financing.”<sup>46</sup>

A CEO’s M&A decisions may also be influenced by other biases such as social factors, including the CEO’s position in the social hierarchy and their social ties to the executives of the other merging firm. El-Khatib et al. find that CEOs with strong personal connections and high-status in a

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CEOs tend to exercise options and sell their stock in the acquirer, indicating that “they do not appear to anticipate long-term value creation from their acquisitions.” Cynthia E. Devers et al., *Do They Walk the Talk? Gauging Acquiring CEO and Director Confidence in the Value Creation Potential of Announced Acquisitions*, 56 ACAD. MGMT. J. 1679 (2013).

41. See Roll, *supra* note 3, at 199–201.

42. Mathew L. A. Hayward & Donald C. Hambrick, *Explaining the Premiums Paid for Large Acquisitions: Evidence of CEO Hubris*, 42 ADMIN. SCI. Q. 103, 103 (1997). Hayward and Hambrick identify four indicators of CEO hubris as relevant to the acquisition premium, “the acquiring company’s recent performance, recent media praise for the CEO, a measure of the CEO’s self-importance, and a composite factor of these three variables.” *Id.*; see also Arijit Chatterjee & Donald C. Hambrick, *It’s All About Me: Narcissistic Chief Executive Officers and Their Effects on Company Strategy and Performance*, 52 ADMIN. SCI. Q. 351, 351–52 (2007) (arguing that narcissistic CEOs favor strategic dynamism and grandiosity, and tend to deliver extreme and volatile performance for their organizations).

43. See Ulrike Malmendier & Geoffrey Tate, *Who Makes Acquisitions? CEO Overconfidence and the Market’s Reaction*, 89 J. FIN. 20, 20–21 (2008) [hereinafter Malmendier & Tate, *Who Makes Acquisitions?*]; see also Ulrike Malmendier & Geoffrey Tate, *CEO Overconfidence and Corporate Investment*, 60 J. FIN. 2661, 2661 (2005) (“Overconfident managers overestimate the returns to their investment projects and view external funds as unduly costly.”).

44. See Malmendier & Tate, *Who Makes Acquisitions?*, *supra* note 43, at 22.

45. *Id.* at 23.

46. *Id.* at 20.

social network, i.e. “high centrality” CEOs, are more likely to initiate acquisitions of other public companies, but also have more negative returns for those acquisition announcements.<sup>47</sup> Relatedly, Ishii and Xuan find that significant social connections (focusing on educational background and employment history) between bidder and target management are associated with lower value creation after the merger.<sup>48</sup> They claim that cross-firm bidder-target social ties lead to value losses due to weaker critical analysis, lower due diligence, and social conformity. Ishii and Xuan also find that bidder CEOs “are more likely to receive bonuses and are more richly compensated for completing transactions with target firms that are highly socially connected to the acquiring firms.”<sup>49</sup> Moreover, Ishii and Xuan find that acquisitions with significant social connections are more likely to be divested for performance-related reasons.<sup>50</sup>

Scholars have also examined envy and peer comparisons as a motivator for acquisition activity. For example, Goel and Thakor demonstrate how envy can be a driver of acquisitions and merger waves more generally.<sup>51</sup> They posit that “[i]f CEOs envy each other based on relative compensation and CEOs of bigger firms get paid more, then a merger in the industry that increases firm size for one CEO will cause other envious CEOs to be tempted to undertake value-dissipating but size-enhancing acquisitions, thereby starting a merger wave.”<sup>52</sup> A desire to keep up with peers has been identified as a motivator for acquisitions. Shi, Zhang and Hoskissan, for example, find that CEOs undertake more acquisitions “after their competitors won CEO awards (i.e., postaward period), compared to the preaward period. . . . [and] that acquisitions by [such] CEO firms in the postaward period realize lower announcement returns compared to acquisitions by the same CEOs in the preaward period.”<sup>53</sup>

Other studies have found that “CEOs who are underpaid relative to peer CEOs engage in higher levels of acquisition activity than other CEOs, perhaps, as a means of increasing their own compensation to better align with peers’ pay.”<sup>54</sup>

Like the research on buy-side executives, target executives have also been extensively studied. Much of this literature addresses agency

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47. See Rwan El-Khatib et al., *CEO Network Centrality and Merger Performance*, 116 J. FIN. ECON. 349, 350 (2015).

48. See Ishii & Xuan, *supra* note 5, at 346.

49. *Id.*

50. *See id.*

51. See Anand M. Goel & Anjan V. Thakor, *Do Envious CEOs Cause Merger Waves?*, 23 REV. FIN. STUD. 487, 510 (2010).

52. *See id.*

53. See Shi et al., *supra* note 6, at 2080.

54. Steinbach et al., *supra* note 4, at 146.

problems that drive target CEOs in the sale process.<sup>55</sup> For example, Hartzell et al. find that golden parachutes for CEOs are frequently increased at the time a merger is approved, and that these payments are associated with decreased target shareholder premium.<sup>56</sup> Other studies find that target CEOs trade power for premium by negotiating shared control in mergers of equals in exchange for lower premiums for their shareholders.<sup>57</sup>

Overconfidence has also been shown to plague target CEOs. For example, research shows that target CEOs may also be overconfident “in their business plan and in their ability to manage the company going forward” and thus may adopt takeover defenses to drive away unsolicited bids.<sup>58</sup> And managerial overconfidence could thwart negotiated deals that may be beneficial for the target company.<sup>59</sup>

### *B. Executive Identity and M&A*

Much of the literature on executive behavioral biases fails to recognize and take into account that the vast majority of senior executives are men.<sup>60</sup> Across the globe, gender diversity among top executives, especially in the C-Suite, has been and remains very low.<sup>61</sup> Even the most progressive countries on gender equality issues fail to have women represent ten percent of CEOs of publicly traded companies.

Recently, emerging literature in finance and business studies addresses gender-based differences in corporate decision-making by

55. See Buhui Qiu et al., *Do Target CEOs Trade Premiums for Personal Benefits?*, 42 J. BANKING FIN. 23 (2014). *But see* Leonce L. Barger et al., *What Is the Shareholder Wealth Impact of Target CEO Retention in Private Equity Deals?* 46 J. CORP. FIN. 186 (2017) (finding that CEO retention is associated with higher acquisition premiums for private equity acquirers and that target CEOs do not prevent target shareholders from receiving a larger premium from a public firm acquirer).

56. See Jay C. Hartzell et al., *What's in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37 (2004).

57. See, e.g., Julie Wulf, *Do CEOs Trade Power for Premium? Evidence from “Mergers of Equals,”* 20 J.L. ECON. ORG. 60 (2004).

58. See Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 676 (2005).

59. See Langevoort, *Behavioral Economics*, *supra* note 10, at 76–77.

60. See generally Bettina Binder et al., *The Plight of Women in Positions of Corporate Leadership in the United States, the European Union, and Japan: Differing Laws and Cultures, Similar Issues* 106 (Ross Sch. of Bus., Working Paper No. 1396, 2019), <https://ssrn.com/abstract=3493684> (documenting the small proportion of female senior managers and CEOs).

61. See Subodh Mishra, *Women in the C-Suite: The Next Frontier in Gender Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 13, 2018), <https://corp.gov.law.harvard.edu/2018/08/13/women-in-the-c-suite-the-next-frontier-in-gender-diversity/> [<https://perma.cc/3TQN-PLFM>].

executives. This literature has provided interesting results with important implications for firm management. For example, firms run by women CEOs appear to have lower leverage and less volatile earnings, and are more likely to remain in operation compared to firms run by male CEOs.<sup>62</sup> Other studies find that firms where women have significantly more power experience fewer operation-related lawsuits.<sup>63</sup> A recent comprehensive synthesis of 146 research papers on how female representation in the upper echelons (i.e., top management teams and chief executive officer positions) might affect firm performance found that long-term returns were more positive for women-led firms, as were accounting metrics such as return on assets.<sup>64</sup>

Studies that address executive identity and M&A specifically are in a nascent stage. The leading study is a 2013 study by Huang and Kisgen that examines the presence of female executives on the buy-side, investigating 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.<sup>65</sup> Huang and Kisgen find that male executives undertake more acquisitions and issue debt more often than female executives.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

It is not surprising that the literature on executives and gender in M&A is so slim. Few women lead companies in corporate America.<sup>69</sup> Less than six percent of CEOs of Fortune 500 companies are women, and women make up less than a quarter of C-level executives.<sup>70</sup> Studies find

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62. See Mara Faccio et al., *CEO Gender, Corporate Risk-Taking, and the Efficiency of Capital Allocation*, 39 J. CORP. FIN. 193, 193 (2016).

63. See Binay Adhikari et al., *Do Women Managers Keep Firms Out of Trouble? Evidence from Corporate Litigation and Policies*, 67 J. OF ACCT. & ECON. 202, 203 (2019).

64. See Seung-Hwan Jeong & David A. Harrison, *Glass Breaking, Strategy Making, and Value Creating: Meta-Analytic Outcomes of Women as CEOs and TMT Members*, 60 ACAD. MGMT. J. 1219, 1228, 1230–31 (2017).

65. See Huang & Kisgen, *supra* note 7, at 822.

66. *Id.* at 829.

67. *Id.* at 831–32.

68. *Id.* at 835.

69. As Darren Rosenblum has noted: “More men named James hold CEO positions than all women combined.” Darren Rosenblum, *California Dreaming?* 99 B.U. L. REV. 1435, 1438–39 (2019).

70. See Vanessa Fuhrmans, *Where Are All the Women CEOs?*, WALL STREET J., (Feb. 6, 2019), <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>; Claire Cain Miller, *The Number of Female Chief Executives Is Falling*, N.Y. TIMES (May 23, 2018),

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.<sup>71</sup> Studies find that even when women are brought into the C-Suite, they are often in positions, such as head of human resources or legal, that rarely lead to becoming chief executives.<sup>72</sup> Moreover, few of the executives that are responsible for executing M&A transactions, that is, the corporate development teams of companies, are women.<sup>73</sup>

Unlike the slow pace of gender diversity in the C-Suite, gender diversity on boards has advanced somewhat more forcefully. While women directors continue to remain underrepresented on corporate boards, in recent years, boards have seen a moderate increase in the proportion of women's representation.<sup>74</sup> This increase is at least partially due to the introduction of reporting guidelines in corporate governance regulations,<sup>75</sup> movements endorsed by corporate business leaders,<sup>76</sup> and, in some jurisdictions, mandatory board diversity quotas.<sup>77</sup>

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<https://www.nytimes.com/2018/05/23/upshot/why-the-number-of-female-chief-executives-is-falling.html> [<https://perma.cc/JT6G-4F5H>]. See generally Amanda Kimball, U.C. DAVIS STUDY OF CALIFORNIA WOMEN BUSINESS LEADERS 2015–2016 (Nov. 17, 2015) [https://gsm.ucdavis.edu/sites/main/files/file-attachments/ucdaviswomenstudy2015\\_web.pdf](https://gsm.ucdavis.edu/sites/main/files/file-attachments/ucdaviswomenstudy2015_web.pdf) [<https://perma.cc/5YV8-P28W>]; Mishra, *supra* note 61.

71. Miller, *supra* note 70; Steven Neil Kaplan & Morten Sørensen, *Are CEOs Different? Characteristics of Top Managers* 3–5 (Nat'l Bureau of Econ. Research, Working Paper No. 23832, 2017), <https://ssrn.com/abstract=3038660>.

72. See Fuhrmans, *supra* note 70; Binder et al., *supra* note 60, at 107; see also Mishra, *supra* note 61 (“The picture seems even bleaker for the future of gender parity at the CEO level when examining the types of roles that female top executives currently occupy within their organizations. . . . [W]omen are more highly concentrated in positions that rarely see a promotion to the top job, such as Human Resources Officer, General Counsel, and Chief Administrative Officer.”).

73. See Janet Burns, *The Results Are In: Women Are Great for Business, But Still Getting Pushed Out*, FORBES (Sept. 22, 2017), <https://www.forbes.com/sites/janetwburns/2017/09/22/2016-proved-women-are-great-for-business-yet-still-being-pushed-out/#26e3a83d188b>.

74. 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/6LHC-LY87>].

75. 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 SHAREHOLDER SERVS., GENDER DIVERSITY ON BOARDS: A REVIEW OF GLOBAL TRENDS 3–4 (2014).

76. 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. *Id.* at 3.

77. See 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).

Scholars have observed connections between the extent of gender diversity on corporate boards and disposition toward certain M&A strategies.<sup>78</sup> With respect to monitoring of executive decisions in complex fundamental transactions like M&A deals, a key role for the board, women board members may prove valuable.<sup>79</sup> A study by Adams and Ferreira is illustrative of gender diversity's association with more vigorous board monitoring.<sup>80</sup> 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).<sup>81</sup> They also find that boards with greater gender diversity were more likely to hold CEOs accountable for poor stock price performance.<sup>82</sup>

Two studies have examined the impact of board diversity on M&A specifically. 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.<sup>83</sup> This study theorizes that this 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."<sup>84</sup> The authors argue that these results further support the importance of board diversity in acquisition decisions.<sup>85</sup> 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.<sup>86</sup> Similar to Levi et al., they find that greater female board representation was negatively associated with both overall firm acquisitiveness and target acquisition size.<sup>87</sup> Developing an explanation borrowed from social psychology called "social identity theory," they posit that "the presence of

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78. Corporate diversity advocates make wide reaching instrumentalist claims about the business case for diversity, arguing that "diversity propels firms toward greater profits, share prices, and better governance." See Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 430 (2017). Darren Rosenblum correctly acknowledges that this evidence is incomplete and mixed, and urges for more "contextually accurate work" in this area. *Id.* at 484.

79. See *id.* at 458–60.

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

81. *Id.* at 292.

82. *Id.*

83. See Levi et al., *supra* note 8, at 185.

84. *Id.* at 186. A related study finds that male CEOs at firms with women directors exhibit less overconfidence. See Jie Chen et al., *Why Female Board Representation Matters: The Role of Female Directors in Reducing Male CEO Overconfidence*, 53 J. EMPIRICAL FIN. 70, 71 (2019).

85. See Levi et al., *supra* note 8, at 185.

86. See Chen et al., *supra* note 8, at 303.

87. *Id.* at 311–12.

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.”<sup>88</sup>

### III. EXECUTIVE BIAS AND IDENTITY: IMPLICATIONS FOR OFFICER ACCOUNTABILITY

Corporate executives play critical roles in M&A transactions. Research suggests that the M&A decisions of these officers are tainted by bias and may be more a reflection of overconfidence or a desire to keep up with peers than a reflection of considerations about the best interests of the firm.<sup>89</sup> The research on executive bias in M&A is further complicated by more recent research that connects behavioral biases with executive identity and connects the ability to tamper down on bias with board diversity.<sup>90</sup> These findings provide insights for how the law currently addresses officer accountability.

#### *A. Holding Officers Accountable—Formal Mechanisms*

To date, the law has struggled with how to respond to the findings in behavioral finance regarding executive decision-making in M&A.<sup>91</sup> How to respond becomes even more complex in light of the literature on executive identity and in attempting to understand the role that identity plays in perpetuating behavioral biases. Existing corporate governance solutions, such as fiduciary duty litigation, board independence and greater disclosure, have not addressed the root causes of executive behavioral biases.<sup>92</sup> It is doubtful that they can easily adequately address behavioral biases if such biases are also tied to gender identity.

The complexity of the challenges raised by the bias and identity literature defy simple legislative interventions.<sup>93</sup> For example, even if

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88. *Id.* at 305. Relatedly, Joan Heminway merges both trait-based and psychology-based interpretations when assessing the effect of female directors on corporate performance. 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.” See Joan MacLeod Heminway, *Women in the Crowd of Corporate Directors: Following, Walking Alone, and Meaningfully Contributing*, 21 WM. & MARY J. WOMEN & L. 59, 68 (2014).

89. See *supra* Part II.A.

90. See *supra* Part II.B.

91. See *id.*; Langevoort, *Behavioral Economics*, *supra* note 10, at 75–76.

92. See Afsharipour, *Put Option*, *supra* note 10, at 1062–71; Langevoort, *Behavioral Economics*, *supra* note 10, at 75–78.

93. That is not to say that some other interventions may not be worth considering. See, e.g., Afsharipour, *Put Option*, *supra* note 10, at 1080; Afsharipour, *Voting Rights*, *supra* note 18, at 127–28.

empirical evidence suggests that bias and identity play important roles in M&A decisions, the question remains as to the extent to which the law should and can be proactive in encouraging additional executive diversity. For now, legislation in some states, including California, have addressed board diversity, but no state has moved toward making a legislative push for diversity in the C-Suite.<sup>94</sup>

It also seems unlikely that we can address bias and identity via officer accountability through litigation and the courts. Fiduciary duty obligations are the “most central way” to hold officers accountable in state corporate law.<sup>95</sup> Much of the guidance on accountability and behavioral norms for corporate fiduciaries comes from the lessons that can be drawn from judicial pronouncements in such cases.<sup>96</sup> Officer fiduciary duty doctrine has developed at a slow pace leaving little judicial guidance.<sup>97</sup> But the law has largely insulated officers from meaningful oversight and discipline from the courts.<sup>98</sup>

Courts have devoted much effort to examining director conduct in M&A transactions. This is particularly the case in the context of the sale of a corporation. Since the monumental decision in *Smith v. Van Gorkom*,<sup>99</sup> which held directors personally liable for breaching their fiduciary duties in an all-cash M&A sale transaction where the court deemed the process inadequate, the Delaware courts have continued to

94. See CAL. CORP. CODE § 301.3 (West 2019). For a discussion of California’s board diversity mandate, see Rosenblum, *supra* note 69. It is doubtful that any state would move toward quotas for diversity in the C-Suite. See Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079, 1089 (2019) (“[Q]uotas are not broadly favored in American lawmaking on diversity and inclusion.”).

95. Megan W. Shaner, *The (Un)Enforcement of Corporate Officers’ Duties*, 43 U.C. DAVIS L. REV. 271, 279 (2014) [hereinafter Shaner, *(Un)Enforcement*].

96. See, e.g., Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1105 (1997) (describing Delaware fiduciary duty case law as normative stories “well suited to the articulation and expression of standards of managerial conduct”); Megan Wischmeier Shaner, *How “Bad Law, Bad Economics and Bad Policy” Positively Shaped Corporate Behavior*, 47 AKRON L. REV. 753, 784–85 (2014).

97. Shaner, *Officer Accountability*, *supra* note 1, at 408; Megan W. Shaner, *Stockholder Litigation, Fiduciary Duties, and the Officer Dilemma*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 3 (Sean Griffith et al. eds., 2018) [hereinafter Shaner, *Stockholder Litigation*].

98. Shaner, *(Un)Enforcement*, *supra* note 95, at 276. This is in part because stockholder derivative litigation to enforce officer fiduciary duties faces significant hurdles. Thus, stockholders are not incentivized to bring derivative lawsuits against officers because such suits are burdensome, expensive, and have “little chance of success.” Shaner, *Officer Accountability*, *supra* note 1, at 370; Shaner, *(Un)Enforcement*, *supra* note 95, at 283, 312.

99. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), *overruled in part on other grounds by Gantler v. Stephens*, 965 A.2d 695, 713 n.54 (Del. 2009).



grapple with director conduct in third-party M&A transactions.<sup>100</sup> While the Delaware Supreme Court has made clear that Delaware jurisprudence on director conduct in M&A cases does not impose specific conduct obligations,<sup>101</sup> the reasonableness review and guidance provided by courts in such cases has been crucial for lawyers advising boards on how to conduct themselves in sale scenarios.<sup>102</sup>

With respect to officers, even with the flexible tools of the common law, courts have thus far struggled with addressing officer accountability. It was not until 2009 that the Delaware Supreme Court held in *Gantler v. Stephens*<sup>103</sup> that corporate officers “owe the same fiduciary duties to the corporation and its stockholders as directors.”<sup>104</sup> And the Delaware courts post-*Gantler* have yet to provide much additional guidance on officer responsibility and accountability.<sup>105</sup> The lack of judicial exploration into officer fiduciary duties has also meant that directors are in large part left without “moral guidance” on best practices for holding officers accountable.<sup>106</sup>

Moreover, the scholarship on executive bias and identity in M&A transactions raises questions about whether litigation as a formal mechanism for holding officers accountable is the right tool for addressing shortcomings in the M&A process. While Delaware jurists at both the Chancery and Supreme Court level are “aware of structural biases and egotistical inferences that can affect high-stakes transactional judgments,” combining an analysis of these psychological observations together with

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100. For a discussion of *Van Gorkom* as part of Delaware’s efforts to address board conduct in third-party M&A transactions, see Afsharipour & Laster, *supra* note 18, at 461–63.

101. See, e.g., *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009) (“No court can tell directors exactly how to accomplish [the] goal [of obtaining the best value reasonably available], because they will be facing a unique combination of circumstances, many of which will be outside their control.”); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) (“[T]here is no single blueprint that a board must follow to fulfill its duties.”).

102. There is admittedly much less useful jurisprudence to inform board conduct for buy-side boards. See Afsharipour & Laster, *supra* note 18, at 447, 482.

103. 965 A.2d 695 (Del. 2009).

104. Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer’s Duty of Obedience*, 66 BUS. LAW. 27, 29, 58 (2010); see Lyman P.Q. Johnson, *Dominance by Inaction: Delaware’s Long Silence on Corporate Officers 2–3* (Wash. & Lee Public Legal Studies Research Paper Series No. 2017–11, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2964033](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2964033).

105. See Shaner, *Stockholder Litigation*, *supra* note 97, at 21; Lyman Johnson, *The Three Fiduciaries of Delaware Corporate Law—And Eisenberg’s Error 4* (U. of St. Thomas (Minn.) Legal Studies Research Paper No. 19–21, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3499272](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3499272).

106. Shaner, *Stockholder Litigation*, *supra* note 97, at 21.

the gender of the officers and directors making transactional judgments pushes the institutional boundaries and “willingness” of the courts.<sup>107</sup>

### *B. Holding Officers Accountable—Other Mechanisms*

Litigation is not the only avenue for holding officers accountable and improving corporate governance in M&A. A variety of informal mechanisms, including market constraints, market effects, social norms, and shaming, also play an important role in officer accountability.<sup>108</sup> For these other mechanisms to work, it is important for boards, market actors, investors, and advisors to be aware of the findings on behavioral biases and identity and their impact on fundamental decisions such as M&A transactions. Such awareness may further promote actions that are already underway. For example, institutional investors have advocated for a greater number of women in the boardroom.<sup>109</sup> Shareholder pressure is also forcing boards to confront diversity head on. For example, a shareholder proposal for Amazon to adopt a so-called “Rooney Rule”<sup>110</sup> and include women and people of color among candidates for each board seat was eventually supported by the board.<sup>111</sup> These market reactions may be as appropriate of a response to the literature discussed in this paper as legal interventions.

The research on bias and identity should also inform the work of dealmakers. As Don Langevoort has argued, “the rich body of behavioral M&A research can and should inform how deals are negotiated, structured, and approved, even in the setting of minimal judicial review.”<sup>112</sup> And a plethora of research from a variety of fields suggests that increased gender diversity could lead to better decision-making

107. Langevoort, *Behavioral Economics*, *supra* note 10, at 75–76.

108. See Shaner, *Officer Accountability*, *supra* note 1, at 371.

109. See Angelo Martinez, *Shedding Light on Diversity-Based Shareholder Proposals*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 16, 2018), <https://corpgov.law.harvard.edu/2018/10/16/shedding-light-on-diversity-based-shareholder-proposals/> [<https://perma.cc/JU9H-F7FH>]; *BlackRock Investment Stewardship’s Approach to Engagement on Board Diversity*, BLACKROCK (Jan. 2020), <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf> [<https://perma.cc/4LEH-F7XZ>]. For a discussion of the limits of the business case for diversity, see Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 860–64 (2011).

110. Jason Del Rey, *Amazon Shareholders Are Getting Opposite Advice on Whether Diversity Should Be Mandated for the Company’s Board*, RECODE (May 12, 2018), <https://www.recode.net/2018/5/12/17345502/amazon-jeff-bezos-rooney-rule-diversity-proposal-board-iss-glass-lewis> [<https://perma.cc/9KZY-N6PH>].

111. See Sharon Florentine, *Amazon’s Board Adopts Shareholder-Backed Diversity Proposal*, CIO (May 18, 2018), <https://www.cio.com/article/3273488/amazons-board-adopts-shareholder-backed-diversity-proposal.html> [<https://perma.cc/MQN7-YPSX>]; Amazon.com, Inc., Proxy Statement (Section 14a) (Apr. 18, 2018).

112. Langevoort, *Behavioral Economics*, *supra* note 10, at 76.

processes in complex transactions.<sup>113</sup> As fiduciaries charged with exercising an informed judgement, boards should be aware of the research on bias and identity so that in exercising oversight over M&A deals they are mindful of the role that overconfidence and identity plays in deals, and conscious of the need for gender diversity at the upper echelons of decision-making with respect to M&A transactions.<sup>114</sup>

#### CONCLUSION

M&A transactions are often the most fundamental corporate actions taken by companies. Corporate executives, especially CEOs, play a pivotal role in crafting, negotiating, and closing deals. They are also the chief seller or “cheerleader” of the deal to shareholders and other stakeholders. The actions of executives in M&A deals are aided by, and at times monitored by, other corporate actors, including the board of directors.

Research on executives’ decisions to move forward on M&A deals suggests that these decisions are often tainted, whether by agency problems or by executive biases. The behavioral corporate finance literature has delved deeply into the question of whether behavioral biases and the identity of management impact decision-making in M&A. This research suggests that CEOs, the vast majority of whom are men, are overconfident and driven by peer effects in making M&A decisions, that male CEOs exhibit more overconfidence than women CEOs and that gender diversity on the board can help check CEO overconfidence.<sup>115</sup>

Existing legal solutions, such as fiduciary duty litigation, board independence, and greater disclosure, appear ill-designed to address officer accountability, especially if officer gender identity plays a significant role in officer biases. And designing solutions to address bias and identity requires a much deeper understanding of the interplay between these factors and M&A transactions.

To further our understanding about the role of bias and identity in M&A, other research methods can enrich and contextualize the empirical findings in the current literature and elucidate how corporate governance

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113. See, e.g., Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT’L ACAD. SCI. U.S. 16385 (2004); 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”); see also SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* 325–28 (2007).

114. See Kellye Y. Testy, *From Governness to Governance: Advancing Gender Equity in Corporate Leadership*, 87 GEO. WASH. L. REV. 1095, 1100–01 (2019).

115. See Chen et al., *supra* note 84, at 71.

functions on the ground.<sup>116</sup> For example, in-depth qualitative research<sup>117</sup> can help unpack the complicated relationship between bias and identity in M&A to better understand a variety of questions, including: (i) Whether women CEOs make decisions differently in M&A transactions because women executives view their role differently<sup>118</sup> and/or because boards monitoring women CEOs exercise oversight differently over a woman CEO?<sup>119</sup> (ii) What processes do boards with a critical mass of women adopt when advising on and monitoring executives with respect to M&A transactions? Do these processes differ from those adopted by boards without a critical mass of women? (iii) Does the relationship and advice of advisors differ in M&A transactions when the CEO is a woman? (iv) What roles do biases, whether explicit or implicit, play in the interaction of advisors when women lead the C-Suite? (v) If women CEOs do indeed execute M&A transactions differently than male CEOs, what are the norms of behavior that can be evolved from the processes undertaken by women CEOs?<sup>120</sup>

In short, a better understanding of how executives actually experience and execute M&A deals on the ground is vital for us to have a clearer understanding of the root causes of behavioral biases and the role that identity plays in perpetuating behavioral biases, and to be able to design solutions that address these root causes.

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116. See Stewart Macaulay, *New Legal Realism: Unpacking a Proposed Definition*, 6 U.C. IRVINE L. REV. 149, 151–52 (2016).

117. For an example of qualitative research on how boards view the value of diversity on the board, see John M. Conley et al., *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, in DISCOURSE PERSPECTIVES ON ORGANIZATIONAL COMMUNICATION 175, 177–78 (Jolana Aritz & Robyn C. Walker eds., 2010) and Lissa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 768, 805 (2011).

118. It is not clear or a given that women executives function any differently than their male counterparts generally, although there is no specific qualitative research that I am aware of that focuses on how they approach M&A deals specifically. See Theresa A. Gabaldon, *In Her Own Words: What Corporate Women May—and May Not—Teach Us About Law and Legal Theory*, 87 GEO. WASH. L. REV. 1163, 1210–11 (2019).

119. For example, stories of prominent executives seem to suggest that women executives may approach their jobs differently and may be subject to different rules. See June Carbone et al., *Women, Rule-Breaking, and The Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1107–09 (2019).

120. In a related work, currently entitled *Women and M&A*, I use research from finance, organizational behavior, feminist legal theory, and other social sciences to further explore these questions.