GENDER PAY GAPS WHITE PAPER

This report was produced by members of the IPO Women in IP Committee's Push Forward Subcommittee.

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INTRODUCTION

The gender pay gap has become the focus of increasing media and corporate attention; however, awareness of the problem is not enough. As this paper explains, the gender pay gap is not solely a women's issue, but is an issue that impacts both genders as well as a company's bottom line. Thus, meaningful action must be taken by all to provide significant impact. This paper outlines the impact of the gender pay gap on a company's bottom line and investigates many of the factors that contribute to the gender pay gap. Understanding the impact and the cause of the gender pay gap leads to solutions that compel meaningful change.

I. Impact of the Gender Pay Gap on a Company's Bottom Line

There has been much more focus on the gender pay gap in recent years, both among corporate leaders and in the media. Organizations have ramped up their diversity and inclusion strategies to demonstrate that the organization is serious about diversity and that compensation is fair for female employees; however, this focus may not recognize that gender pay gaps affect a company's bottom line. [1]

Companies should be concerned with the gender pay gap as this inequality has major strategic consequences. One major strategic consequence illustrates achieving equal pay can increase an organization's profitability.[2] Achieving equal pay at the organization level signals more equal pay at higher levels of the company.[3] One study that analyzed data from 21,980 global publicly-traded companies in 91 countries from different industries shows that having at least 30% women in leadership positions, or the "C-suite", adds 6% to net profit margins.[4] In another example, a 2015 McKinsey study finds that companies in the top quartile for gender diversity are 15% more likely to have financial returns above their respective national industry means.[5] Ultimately, businesses achieving equal pay with more women in top management positions are more profitable.

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[1] Ania Krasniewska, *5 Things Most Companies Don't Realize About Pay Equity* (Oct. 19, 2017, 12:01 PM), https://www.cebglobal.com/talentdaily/reimaginehr-5-things-most-companies-dont-realize-about-pay-equity/.

[2] Knowledge @ Wharton, *How Pay Inequality Affects the Bottom Line* (Oct. 17, 2017), http://knowledge.wharton.upenn.edu/article/pay-inequality-impacts-firms/.

[3] Kellie McElhaney & Genevieve Smith, *Eliminating the Pay Gap: An Exploration of Gender Equality, Equal Pay, and a Company that is Leading the Way* (Jan 2017), https://www.icrw.org/wp-content/uploads/2017/11/Eliminating-the-Pay-Gap-Kellie-McElhaney-and-Genevieve-Smith.pdf.

[4] Anderson, Jenny, *The Estrogen Effect Huge Study Finds that Companies with More Women Leaders are more Profitable*, (Feb. 8, 2016), https://qz.com/612086/huge-study-find-that-companies-with-more-women-leaders-are-more-profitable.

[5] Claudia Olivetti & Barbara Petrongolo, *The evolution of gender gaps in industrialized countries* (Nat. Bureau of Economic Research, Working Paper No. 21887, 2016).

By addressing the gender pay gap, employers can improve employee retention - one easy way for a company to control costs and sustain productivity.[6] It can cost as much as $10,000 to replace an employee being paid $50,000, and even more to replace a senior level employee.[7] By addressing the gender pay gap, employers increase the odds of retaining current employees and avoiding this cost. Not surprisingly, employees desire to work for organizations that share their values.[8] This issue is not gender specific. When employees believe their employer is not taking action to address an existing gender inequity, 71% of women and 74% of men said they planned to find a new job within six months.[9] Improving employee retention may be as easy as increasing transparency about the existence of any pay gaps and the steps being taken to close any existing gaps.[10] By improving transparency, employers can improve employee perceptions about the company. This contributes to good morale among the employees, particularly if the employer demonstrates a plan to fix any existing problems.[11,12]

Not only can gender pay disparity affect employee retention, it may also affect a company's brand, particularly in the form of negative publicity.[13] For example, Google was sued by the Department of Labor over alleged widespread gender pay discrimination.[14] Google has also been sued by four female employees, "claiming that they have been paid less and promoted more slowly than their male peers."[15] Employee discrimination lawsuits resulting from the unequal pay will inevitably affect a company's brand, which would likely affect the company's ability to attract new talent.

Recognizing the potential negative impact that gender pay inequity can have on a company's brand, a few US companies have proactively addressed this disparity.[16] For example, Salesforce was heralded for proactively researching the issue, and then agreeing to invest three

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[6] Tanya Tarr, *How Citigroup And Other Leading Corporations Are Making Equal Pay A Reality* (Jan. 23, 2018), https://www.forbes.com/sites/tanyatarr/2018/01/23/how-citigroup-and-other-leading-corporations-are-making-equal-pay-a-reality/#223887405ab5.
[7] *Id.*
[8] *Payscale Research Shows Employees (Men, Too!) More Likely to Leave Companies Not Proactively Addressing Gender Inequity*, (Dec. 6, 2016), https://www.payscale.com/about/press-releases/2016-gender-pay-gap-report.
[9] Jade Makana, *How the Gender Pay Gap Impacts Business Performance* (Dec. 21, 2016), http://hrotoday.blogspot.com/2016/12/how-gender-pay-gap-impacts-business.html; *see also supra* note 1 (employees who perceive a pay gap exists at their organization, regardless of whether this perception is correct, demonstrate a 16% decrease in intent to stay at the organization).
[10] *Supra* note 1.
[11] *Supra* note 6 ("employees who give low ratings to their employers on pay transparency are . . . 80% more likely to plan on leaving in the next six months than those who give high marks").
[12] *Supra* note 1.
[13] Rohma Abbas, *Why should employers care about the gender pay gap?* (Apr. 26, 2017), https://resources.workable.com/blog/gender-pay-gap.
[14] Kellye Whitney, *Google, Just Come Clean Already*, Workforce (May 31, 2017), http://www.workforce.com/2017/05/31/google-just-come-clean-already/.
[15] Laura Colby & Ellen Huet, *Google's Equal-Pay Claim for Women Comes With an Asterisk*, Bloomberg News (Mar. 15, 2018), https://www.bloomberg.com/news/articles/2018-03-15/google-s-equal-pay-claim-for-women-comes-with-an-asterisk.
[16] Kristen Bellstrom, *Salesforce Spent $3 Million to Close the Gender Pay Gap. Here's Why That's a Big Deal,* Fortune (Nov. 7, 2015), http://fortune.com/2015/11/07/salesforce-3-million-close-pay-gap/.

million dollars to correct a gender pay disparity it discovered.[17] Nevertheless, some countries are requiring gender pay disparity reporting. For example, under a newly enacted UK law, businesses having more than 250 employees were required to report gender pay disparities.[18] In an effort to avoid bad publicity, many of the companies reporting large gender pay disparities have publicly committed to ending the disparity.[19,20] For example, the chief executive at EasyJet took a pay cut "saying he wanted to 'show my personal commitment' to equal pay."[21] Importantly, many UK companies are recognizing how gender pay disparities could affect their brand and are taking action.

As attention to gender pay disparity rises, it is imperative for US companies to investigate the issue proactively. As discussed above, addressing gender pay disparity as well as diversity in senior level positions will increase a company's bottom line, as well as improve employee retention and satisfaction.

II. Causes of Pay Gap

In order to narrow the gender pay gap, it is critical to understand the causes of the gap. While there are no clear-cut answers, the following provides some insight into the factors that appear to contribute to the gender pay gap.

A. The Motherhood Penalty

One of the most commonly identified causes of the pay gap is what has become known as the "motherhood penalty."[22] The motherhood penalty is the idea that motherhood negatively impacts the wages of an employed woman.[23] Some sources report that "[m]otherhood is the biggest cause of the gender pay gap,"[24] and analysts have attributed the persistence of the pay gap to "the effects of children on the careers of women relative to men at large."[25]

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[17] Jena McGregor *Why one tech giant is investing another $3 million to close its pay gap*, The Washington Post (Apr. 4, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/04/04/why-salesforce-is-investing-another-3-million-to-close-its-pay-gap/?noredirect=on&utm_term=.d992d0f7d7da.

[18] Liz Alderman, *Britain Aims to Close Gender Pay Gap with Transparency and Shame*, NY Times (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/britain-gender-pay-gap.html.

[19] Jon Chapple, *'Not Good Enough': UK Biz commits to Closing Gender Pay Gap* (Apr. 5, 2018), https://www.iq-mag.net/2018/04/not-good-enough-uk-biz-commits-closing-gender-pay-gap/#.WvyCGaQvwdU.

[20] Olivia Blair, *These are the companies with some of the biggest gender pay gaps* (Apr. 5, 2018), https://www.cosmopolitan.com/uk/reports/a19680356/gender-pay-gap-companies-with-biggest-gap/.

[21] Pilita Clark, *Gender pay gap will not be fixed by cutting men's salaries*, The Irish Times (Feb. 5, 2018), https://www.irishtimes.com/business/work/gender-pay-gap-will-not-be-fixed-by-cutting-men-s-salaries-1.3379540.

[22] *See, i.e.*, Michelle J. Budig and Paula England, *The Wage Penalty for Motherhood*, 66 AMERICAN SOCIOLOGICAL REVIEW 204 (Apr., 2001).

[23] *Id*.

[24] Claire Cain Miller, *Children Hurt Women's Earnings, but Not Men's (Even in Scandinavia)*, The New York Times (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/upshot/even-in-family-friendly-scandinavia-mothers-are-paid-less.html.

[25] Henrik Kleven et al., *Children and Gender Inequality: Evidence from Denmark* (Nat. Bureau of Economic Research, Working Paper No. 24219, 2018), available at http://www.nber.org/papers/w24219.

When men and women exit school and enter the workplace, they are paid "pretty much equally" for comparable work and their earnings increase at similar rates.[26] Though it has been reported that a pay disparity at hiring does exist between men and women[27], a 2018 working paper by the National Bureau of Economic Research reported that the hiring pay gap is relatively small.[28] However, between the ages of 26-33, depending on the birth of the first child, the pay gap suddenly becomes apparent and then continues to widen.[29] After a first child, the study observed that a mother's gross earnings decrease on average by 30%, with only slight recovery over the course of a mother's career: mothers are penalized "close to 20%" in earnings over their lifetimes.[30]

A census study by Chung et al. compared the pay gap between opposite-gender spouses and found that "the transition to parenthood leads to a sharp and persistent increase in the gap between the earnings of male and female spouses."[31] Specifically, this gap sharply widens "during the year of birth and the year after the child is born."[32] During years following, the gap continues to grow, but at a much slower rate than during the years immediately following birth.[33] Couples experienced similar trends after the birth of each subsequent child.[34] Kleven et al. attributed this early division of pay to the fact that women often take on the brunt of time-consuming child-rearing activities and therefore accept lower-paying jobs that permit flexible work hours.[35] When parents need to adjust their workloads to accommodate parental responsibilities, such as tending to children, mothers largely bear—or are expected to bear—the career sacrifice.

Researchers have observed that because fathers generally spend less time on parenting and the related responsibilities, it "become[s] a distinction in the eyes of employers between potential male and female workers."[36] Michelle Budig, Professor of Sociology at University of Massachusetts, Amherst has characterized the pay gap as a self-reinforcing cycle, where women are initially disadvantaged because of their assumed maternal obligations[37], but also often decide to take on more of the parenting duties and household work because they are the lower earners in

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[26] Claire Cain Miller, *The Gender Pay Gap Is Largely Because of Motherhood*, The New York Times (May 13, 2017), https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html.
[27] Marco Francesconi & Matthias Parey, *Early gender gaps among university graduates*, EUROPEAN ECONOMIC REVIEW 1 (2018).
[28] Kleven, *supra* note 25.
[29] Claire Cain Miller, *The Gender Pay Gap Is Largely Because of Motherhood*, The New York Times (May 13, 2017), https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html.
[30]Kleven, *supra* note 25.
[31] YoonKyung Chung et al., *The Parental Gender Earnings Gap in the United States* (U.S. Census Bureau, Center for Economic Studies, Working Paper No. CES 17-68, 2017), available at https://www2.census.gov/ces/wp/2017/CES-WP-17-68.pdf.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Kleven, *supra* note 25.
[36] Miller, *supra* note 24.
[37] Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, Third Way (Sept. 2, 2014), https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay.

a partnership.[38] Notwithstanding, the Bureau of Labor Statistics reported that in 2014, 71% of mothers were also active in the work force, and in 40% of families with children, women were the sole or primary source of income.[39]

A telling indicator of the reality of the motherhood penalty is the gap that exists between mothers and women without children. Budig has reported that single, childless women earned 96 cents for every dollar earned by men, whereas married mothers earned 76 cents.[40] Similarly, Kleven et al. observed that women that do not have children are not subject to the steep decrease in gross earnings.[41] A study by Correll et al. compared equally qualified women job candidates and found that "mothers were recommended for significantly lower starting salaries, perceived as less competent, and less likely to be recommended for hire than non-mothers."[42] (However, it has also been reported that married women without children still almost inevitably earn less than male counterparts because "because women are more likely to give up job opportunities to either move or stay put for their husband's job."[43])

By contrast, men experience enhanced compensation when they enter fatherhood.[44] The same study by Correll et al. found that "fathers were actually recommended for significantly higher pay and were perceived as more committed to their jobs than non-fathers."[45] Michelle Budig has noted that "[e]mployers read fathers as more stable and committed to their work; they have a family to provide for, so they're less likely to be flaky." But for women, "the conventional story is they work less and they're more distractible when on the job."

The pay gap is more significant than mere dollars earned. It has implications for experience, upward mobility, and lateral mobility as well. Industrial economists in Sweden released a working paper which observed that female executives were just 50 percent as likely as

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[38] Miller, *supra* note 29.

[39] Claire Cain Miller, *The Motherhood penalty vs. the Fatherhood Bonus*, The New York Times (Sept. 6, 2014), https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html (citing BLS Reports, *Women in the Labor Force: A Databook* (U.S. Bureau of Labor Statistics, Report 1049, May 2014) https://www.bls.gov/cps/wlf-databook-2013.pdf; Wendy Wang et al., *Breadwinner Moms*, Pew Social Trends (May 29, 2013), http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/).

[40]Budig, *supra* note 37.

[41] Kleven, *supra* note 25.

[42] *Workplace Justice: FAQs About the Wage Gap* (National Women's Law Center, Fact Sheet, Sept. 2017), https://nwlc.org/wp-content/uploads/2017/09/FAQ-About-the-Wage-Gap-2017.pdf (citing Shelley J. Correll, Stephan Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty*, 11 AM. J. SOCIOLOGY 1297 (Mar. 2007), available at http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf).

[43] Miller, *supra* note 29.

[44] Miller, *supra* note 39.

[45] *Workplace Justice: FAQs About the Wage Gap* (National Women's Law Center, Fact Sheet, Sept. 2017), https://nwlc.org/wp-content/uploads/2017/09/FAQ-About-the-Wage-Gap-2017.pdf (citing Shelley J. Correll, Stephan Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty*, 11 AM. J. SOCIOLOGY 1297 (Mar. 2007), available at http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf).

men (even less-qualified men) to become chief executives.[46] The study found that "child rearing plays a crucial role in the formation of gender gaps in top-executive appointments."[47]

Despite legislative efforts to mitigate penalization for mothers, such as mandatory maternity leave and anti-discrimination policies, the effect of the motherhood penalty on the pay gap has worsened over time. The National Bureau of Economic Research reported that "the fraction of child-related gender inequality has increased dramatically over time, from 40% in 1980 to around 80% in 2013."[48] This data may suggest that while factors that have traditionally influenced the pay gap are playing less of a role, the penalty that women face in the workforce for having children has not improved and therefore has a greater impact on the pay gap.

B. Unconscious Gender Bias

Unconscious gender bias is an intertwined factor that "still plays a significant role in the gender differences in pay."[49] Unconscious gender bias stems from common stereotypes about typical characteristics of men and women, such as the notion that women are nurturing and superior caretakers or that men are superior leaders and managers. The bias is considered "unconscious" because "the activation of these stereotypes happens so quickly" that typically, the opinion-former is not aware of it.[50] As the working paper by the National Bureau of Economic Research pointed out, that the pay gap is largely attributable to motherhood does not rule out gender bias or discrimination as a cause. Instead, "discrimination operates through the impacts of children."[51]

Unconscious gender bias impacts the pay gap because it affects both hiring and compensation decisions.[52] For example, one 2012 study surveyed science faculty from research universities to identify unconscious bias. The participants were asked to rate the identical application materials of a student who was randomly assigned the name "John" or "Jennifer." The imaginary candidate was applying for a laboratory manager position. The male candidate was rated as "significantly more competent and hireable than the (identical) female applicant."[53] The participants selected a lower starting salary and offered fewer career mentoring opportunities to the female candidate. Interestingly, the gender of the study participants did not affect the responses. The study concluded that "female and male faculty were equally likely to exhibit bias against the female student."[54]

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[46] Matti Keloharju et al., *What Prevents Female Executives from Reaching the Top?* (Research Institute of Industrial Economics, Working Paper No. 1111, 2018), http://www.ifn.se/wfiles/wp/wp1111.pdf.
[47] *Id.*
[48] Kleven, *supra* note 25.
[49] Kim Elsesser, *Unequal Pay, Unconscious Bias, And What To Do About It*, Forbes (Apr. 10, 2018), https://www.forbes.com/sites/kimelsesser/2018/04/10/unequal-pay-unconscious-bias-and-what-to-do-about-it/.
[50] *Id.*
[51] Kleven, *supra* note 25.
[52] Elsesser, *supra* note 50.
[53] Corrine A. Moss-Racusin et al., *Science faculty's subtle gender biases favor male students*, Proceedings of the National Academy of Sciences of the United States of America (Aug. 2012), http://www.pnas.org/content/109/41/16474.abstract#aff-1.
[54] Elsesser, s*upra* note 50.

Correll et al. subsequently conducted another study that confirmed these results.[55] The researchers sent fictitious resumes and cover-letters describing equally-qualified applicants to various job listings, and non-mothers received about double the amount of interest than did mothers.[56] Fathers faced no advantage or disadvantage over non-fathers.

C. Gender Division Within the Labor Force

"[G]ender differences in experience and labor force attachment have been seen as central to the understanding of the gender wage gap."[57] Skeptics have argued that the gender discrepancy in pay exists because of women's occupational choices: namely, they opt to enter into career fields that happen to be underpaid.[58] However, as National Women's Law Center has pointed out, "this argument ignores the fact that 'women's' jobs often pay less precisely because women do them, because women's work is devalued, and that women are paid less even when they work in the same occupations as men."[59]

The reality is that higher-paying jobs are dominated by men, whereas women occupy the majority percentage of lower-paying jobs.[60] The National Women's Law Center has identified barriers that women face in achieving higher-wage jobs, such as "[i]solation, active discouragement, harassment, outright exclusion, and lack of information about alternative job options."[61] As a result, women make up over half of all jobs that pay less than $11 per hour, and about 69% of all jobs earning less than $10 per hour.[62] A study by labor economists Blau et al. concluded that "gender differences in occupations and industries are quantitatively the most important measurable factors explaining the gender wage gap."[63]

Blau et al. observed that women tend to "avoid jobs requiring large investments in firm-specific skills" because they are less likely to remain with a particular employer and reap the benefits of that investment (likely due to the obligations of motherhood).[64] Jobs requiring such investment, however, often include or lay the foundation for higher-paying positions. Similarly,

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[55] Shelley J. Correll, Stephan Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty*, 11 AM. J. SOCIOLOGY 1297 (Mar. 2007), available at http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf.
[56] *Id.*
[57] Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* (Nat. Bureau of Economic Research, Working Paper No. 21913, 2016), available at http://www.nber.org/papers/w21913.pdf
[58] *Workplace Justice: FAQs About the Wage Gap* (National Women's Law Center, Fact Sheet, Sept. 2017), https://nwlc.org/wp-content/uploads/2017/09/FAQ-About-the-Wage-Gap-2017.pdf.
[59] *Id.* (citing Philip N. Cohen, *Devaluing and Revaluing Women's Work*, The Huffington Post (May 25, 2011), available at http://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html; Clair Cain Miller, *As Women Take Over a Male-Dominated* Field, the Pay Drops, The New York Times (Mar. 18, 2016)).
[60] *Workplace Justice: FAQs About the Wage Gap* (National Women's Law Center, Fact Sheet, Sept. 2017) https://nwlc.org/wp-content/uploads/2017/09/FAQ-About-the-Wage-Gap-2017.pdf.
[61] *Id.*
[62] Jasmine Tucker and Kayla Patrick, *Women in Low-Wage Jobs May Not Be Who You Expect*, National Women's Law Center (Aug. 30, 2017), https://nwlc.org/resources/women-in-low-wage-jobs-may-not-be-who-you-expect/.
[63] Blau, s*upra* note 58.
[64] *Id.*

"employers are expected to be reluctant to hire women for such jobs because they bear some of the costs of firm-specific training."[65]

D. The Equity Partnership Barrier

Despite the facts that for over a decade women have comprised approximately fifty percent of law school students, and law firms have been proportionately recruiting female associates, women remain a dismal minority among equity partners at law firms throughout the country.[66] According to the 2017 National Association of Women Lawyers Annual Survey Report, the percentage of women equity partners has seen only a slight increase in the past decade from 15-16 percent in 2007 to 19 percent in 2017.[67] And only 33 percent of the new equity partners promoted in 2015 and 2016 were women,[68] so it is unlikely that there will be major changes in the gender gap anytime in the immediate future.

One variable that may be contributing to the inequitable representation of women among equity partners is the current shift in partnership models at law firms. More specifically, law firms have been increasingly moving from one-tier partnership models to multi-tier partnership models.[69] Women are slightly more likely to be equity partners in firms with a one-tier partnership model (21 percent) as compared to firms with two-tier models (19 percent),[70] and this makes it harder for women to achieve equity partnership.

Another factor that may be impacting the number of female equity partners is the size of law firms. Larger firms have slightly higher percentages of women equity partners (19.3 percent) compared to smaller firms (17.4 percent),[71] and because women have a greater chance of working at smaller firms,[72] their chances of equity partnership are stilted.

While the number of female equity partners has remained largely stagnant, the difference between compensation of equity and non-equity partners has grown considerably, resulting in a direct impact on the gender pay gap in compensation.[73] A 2013 study reported that equity partners at that time averaged approximately 2.5 times the compensation of their non-equity partners.[74]

Further exacerbating the gender pay gap is the fact that male equity partners receive higher mean and median compensation than female equity partners when origination, billable hours,

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[65] *Id.*
[66] DESTINY PEERY, 2017 ANNUAL SURVEY REPORT: NUMBER OF WOMEN EQUITY PARTNERS IN LAW FIRMS MAINTAINS A SLOW AND STEADY PACE 1-2 (National Association of Women Lawyers 2017), http://www.nawl.org/page/2017; LAUREN STILLER RIKLEEN, CLOSING THE GAP: A ROAD MAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION 11 (American Bar Association 2013), https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf.
[67] PEERY, *supra* note 67 at 2.
[68] *Id.*
[69] *Id.* at 4.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] RIKLEEN, *supra* note 67 at 11.
[74] *Id.* at 11.

partner tenure, and size of firm are controlled.[75] This gap is particularly prevalent at high levels of origination and within law firms of 1,000 or more attorneys.[76]

E. Credit Allocation and Succession Structure Hurdles

Another apparent cause of the gender pay gap at law firms is the credit allocation and succession structures that affect how attorneys build their books of business. Men are getting credit for bringing in and maintaining more big-ticket cases—whether it's deserved or not is the question. A closer look at credit allocation and succession structures at law firms gives some insight.

The first important factor to consider is: who is making the decisions about credit allocation and succession. Studies show that while the numbers have been improving, women have been consistently underrepresented on law firm governance and compensation committees that oversee the operations of the firm and set compensation.[77] It comes as no surprise that having underrepresentation of women on an otherwise all-white-male committee can lead to biased results and marginalization of the minority participants, but how many women is enough to make a difference? According to a study of women directors, CEOs, and corporate secretaries, the dynamic does not shift until there is a "critical mass" of three or more women.[78] A 2011 study by the New York City Bar Association (NYCBA) also found that a "critical mass" of three women on governance committees was the magic number to impact promotion of women into the partnership role.[79] The NYCBA study notes that the results may not prove causality, but "it does suggest that having women at the leadership table, not as tokens but reflecting the full diversity of women in the profession and across levels at signatory firms, likely helps to prioritize diversity over the long term."[80]

According to the 2017 NAWL study, on average, law firm governance committees and compensation committees were comprised of three women out of 12 members (25 percent).[81] This is an increase over previous years and provides hope that the tides may start turning now that the "critical mass" has been reached, and that we may start to see changes in the coming years including a narrowing of the gender pay gap.

A 2016 survey by Major, Lindsey & Africa confirmed the impact of origination as a major factor impacting the gender pay gap at law firms. According to Jeffrey A. Lowe from Major, Lindsey, they asked partners to identify the factors underlying the pay differences, "and the No. 1

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[75] *Id.* at 12 (citing Harry Keshet, Keshet Consulting Inc. & Angela A. Meyer, *Compensation in Law Firms: The Impact of Gender, Race and Ethnicity* 6 (2013).
[76] *Id.*
[77] RIKLEEN, *supra* note 67 at 17-18; PEERY, *supra* note 67 at 7.
[78] RIKLEEN, *supra* note 67 at 18 (citing VICKI W. KRAMER, ALISON W. KONRAD, AND SUMRU ERKUT, CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE (Wellesley Centers for Women, Report No. WCW 11, 2006).
[79] RIKLEEN, *supra* note 67 at 18.
[80] *Id.*
[81] PEERY, *supra* note 67 at 7.

factor was origination."[82] If the majority of committee members making decisions on who should be given credit for origination are men, it is understandable that men are being given the larger share of credit for origination, and thus being paid more.

A 2013 study by Keshet Consulting revealed that client pitch group participation was far more significantly correlated with origination credit for men than for women.[83] Additionally, Keshet found that male attorneys received significantly more internal firm referrals for new work and had a higher percentage of the origination from internal referrals.[84]

Yet another factor that may impact the gender pay gap is gender inequality in the distribution of bonuses. The use of bonuses as a component of partner compensation and the amount of such bonuses has significantly increased over the last decade.[85] Allocation of bonus pools can result in arbitrary distribution of additional compensation further disadvantaging women. This is particularly so in light of the lack of representation of women on compensation committees.

III. Potential Solutions to the Gender Pay Disparity

A. Identifying the Problem

Although many firms pay all of their first-year associates the same starting salary and some firms operate in a lockstep model, the legal profession has one of the largest gender gaps in terms of compensation.[86] Median pay for full-time women attorneys is only 77.4% of the median pay for their full-time men counterparts.[87] That drops to about 69% when it comes to law firm partners,[88] although that is an improvement from 2010, when female partners made only 47% of the compensation of their male counterparts.[89] Other studies have found that even when accounting for or considering billable hours, origination, tenure, and firm size, male partners still receive higher compensation than female partners.[90] Women of color (2.5% of partners in 2015)

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[82] Elizabeth Olson, *A 44% Pay Divide for Female and Male Partners, Survey Says*, N.Y. TIMES, Oct. 13, 2016, https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html.

[83] RIKLEEN, *supra* note 67 at 12 (citing Harry Keshet, Keshet Consulting Inc. & Angela A. Meyer, *Compensation in Law Firms: The Impact of Gender, Race and Ethnicity* 6 (2013).

[84] *Id.*

[85] RIKLEEN, *supra* note 67 at 16 (citing ED WESSERMAN & NICK JARETT-KERR, THE EDGE INTERNATIONAL 2012 GLOBAL PARTNER COMPENSATION SYSTEM SURVEY 3 (May 2012).

[86] Debra Cassens Weiss, *Full-Time Female Lawyers Earn 77% of Male Lawyer Pay*, ABA JOURNAL, Mar. 17, 2016, http://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations/.

[87] *See id.*

[88] Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, NEW YORK TIMES, Oct. 12, 2016, https://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html?mcubz=2.

[89] *See id.*

[90] LAUREN STILLER RIKLEEN, ABA PRESIDENTIAL TASK FORCE ON GENDER EQUITY AND THE COMM'N ON WOMEN IN THE PROFESSION, CLOSING THE GAP: A ROADMAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM PARTNER COMPENSATION 12 (2013), https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf (citing a study by Keshet Consulting).

fare the worst across all firm sizes and most jurisdictions, receiving less compensation and fewer promotions than men and white women and seeing the highest rates of attrition (85% within 7 years).[91]

According to some sources, women attorneys bill an average of 24 minutes more each day than their male counterparts do, but are billed at much lower rates.[92] Such disparities result in women working more hours (and even having more experience) but earning less.[93] Some of the reason for the disparity may arise from distribution across different practice areas, as women are less represented in practices associated with higher prestige and higher salaries.[94]

The New York Times reported that the gender gap in pay at the partner level appears to be directly related to disparities in origination credit.[95] In particular, it was noted that the "old boys network"—the primarily male network of decision-makers within the law firm and within its client organizations—still has a disproportionate effect on who is credited with bringing in business.[96] Men receive more internal firm referrals for new work, as well as a higher percentage of origination credit from such referrals.[97]

Retention and attrition levels between genders may further contribute to the pay gap—as more senior women drop out of the job market.[98] As such, the gender pay gap in the legal industry is the most pronounced among the partnership ranks.[99] Once an attorney attains partnership, many firms' compensation models may become subjective—and therefore subject to implicit bias. Even factors such as origination—which are ostensibly gender-neutral metrics—rely on a credit or award system that is subject to bias.[100]

Firms and companies may identify rough indicators of pay gaps by comparing average pay for men to average pay for women as a group.[101] Such an approach—unadjusted for education, seniority, and other factors —may be misleading, but may also reveal areas of over- or under-representation among certain roles.[102] For example, women may be over-represented

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[91] Jackson, *supra* note 39.
[92] Alison Monahan, *Understanding the Gender Wage Gap in the Legal Profession*, THE BALANCE, Feb. 23, 2017, https://www.thebalance.com/understanding-the-gender-wage-gap-in-the-legal-profession-4000621.
[93] *See id.*
[94] *See id.*
[95] Olson, *supra* note 88.
[96] *See id.*
[97] RIKLEEN, *supra* note 91, at 12(citing a study by Keshet Consulting).
[98] Simons, Hugh A. et al., "What the Data on Women Laterals Can Teach About Retention," THE AMERICAN LAWYEr, Jan. 29, 2018, https://www.law.com/americanlawyer/2018/01/28/what-the-data-on-women-laterals-can-teach-about-retention/
[99] Olson, *supra* note 89.
[100] Chen, Vivia, "Male Clients Disfavor Women Partners," THE AMERICAN LAWYER, Jan. 17, 2018. https://www.law.com/americanlawyer/sites/americanlawyer/2018/01/17/male-clients-disfavor-women-partners/
[101] Chamberlain, Andrew, "How to Analyze Your Gener Pay Gap: An Employers's Guide," GLASSDOOR, https://www.glassdoor.com/research/app/uploads/sites/2/2017/04/GlassdoorHowtoAnalyzeGenderPayGap.pdf
[102] Id.

among administrative assistant positions versus being under-represented among leadership roles.[103]

A more revealing metric would compare apples-to-apples, i.e., men and women in similar situations, thereby accounting for differences in education, experience, practice, performance evaluations, and other roles within a firm or company.[104] Economists identify pay gaps by gathering data regarding a number of individuals (*i.e.*, at least a sample size of 200), their gender, years of experience, job role, base pay, bonus pay, recent performance scores, and other factors.[105] In a law firm setting, such other factors may include hours billed, billing rates, and origination credits.[106] Using regression analytical tools available via common statistical software, one may then obtain estimates of the impact of each factor.[107]

In a recent appearance on news television's *60 Minutes*, Salesforce CEO Marc Benioff discussed Salesforce's efforts to close the gender pay gap in recent years.[108] In 2015, Salesforce had conducted two equal pay assessments and paid out $6 million in compensation adjustments to close the identified pay gaps.[109] Attributing the continuing gap to acquisition of other companies and firms, legacy industry practices, and other market changes, Salesforce announced in 2018 that it paid out another $2.7 million to close pay gaps among its employees.[110]

Benioff observed, "We're going to have to do this continuously."[111] And Salesforce Chief People Officer Cindy Robbins reported that each assessment takes more factors into account, and "there is no finish line to equal pay."[112]

B. Proposed Solutions

1. Standardizing Compensation

One potential solution is standardizing compensation-setting and eliminating salary negotiation -- negotiations exacerbate pay gaps.[113] Women generally are not as comfortable

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103 Id.
104 Id.
105 Id.
106 Olson, *supra* note 88.
107 Chamberlain, supra note 101.
108 Green, Alisha. "Salesforce spent another $2.7 million on closing its pay gaps for gender, race and ethnicity," San Francisco Business Times, April 17, 2018. https://www.bizjournals.com/sanfrancisco/news/2018/04/17/salesforce-spending-close-pay-gap.html.
109 Id.
110 Id.
111 Id.
112 Robbins, Cindy. "2018 Salesforce Equal Pay Assessment Update," Salesforce Blog, April 17, 2018. https://www.salesforce.com/blog/2018/04/2018-salesforce-equal-pay-assessment-update.html
113 Maya Raghu & Caitlyn Lowell, *Employer Leadership to Advance Equal Pay: Examples of Promising Practices*, National Women's Law Center (March 2017), https://nwlc.org/wp-content/uploads/2017/03/Equal-Pay-Practices-4.19.17.pdf at 3.

negotiating as men, which is compounded over years through raises, promotions, and new jobs to cause an even greater pay gap.[114]

Corporations have had some success in closing the gap through such measures,[115]however, law firm compensation is substantially different from corporate compensations, and therefore, corporate tactics may not make sense in the law firm setting. However, as extensively reported and analyzed by the American Bar Association's Presidential Task Force on Gender Equity and the Commission on Women in the Profession, the compensation gap in law firms is clear.[116]

It has been shown that a difference in origination credit accounts for much of the difference in average compensation for male partners and female partners.[117] However, allocation of credit is incredibly complex when there are multiple attorneys involved, and in particular when the client is an institutional client.[118] In an origination-based compensation system, examination of the types of origination (institutional client, inherited from senior or retiring partner, sharing of credit, expansion of work from an existing client, development of new client) may be insightful as to why a discrepancy in origination credit exists within a firm.[119]

One cause for differences in origination is the underlying difference in average bill rates (which may, in part, be based on gaps in equity partnership).[120] If bill rates are unequal, the person with a lower bill rate must do more work to have the same amount of origination credit.[121] One reason for this difference may also be lower equity partnership percentages. In an origination-based system, having thoughtful consideration of succession planning (as

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[114] Liz Davidson, *A Powerful Way to Close the Pay Gap: Don't Negotiate Salaries*, Forbes (April 11, 2018), https://www.forbes.com/sites/financialfinesse/2018/04/11/a-powerful-way-to-close-the-pay-gap-dont-negotiate-salaries/#3f6f8f4f2209; *see also* Gareth John Duggan, *Salary Negotiation Perceptions by Gender and Their Role on the Gender Pay Gap*, University of Pretoria (November 7, 2016), https://repository.up.ac.za/bitstream/handle/2263/59823/Duggan_Salary_2017.pdf?sequence=1.

[115] *Supra* note 104 (providing "examples of those that have established compensation structures and practices to increase transparency and reduce discretion in pay-setting, including the use of salary ranges and objective criteria to set compensation, creating fixed salaries based on position or title, and prohibiting negotiation.").

[116] Lauren Stiller Rikleen, *Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation*, ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession (2013), https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf.

[117]Debra Cassens Weiss, *Male Partners Make 44% More On Average Than Female Partners*, ABA Journal, (October 13, 2016), http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f (average origination was $2.59 million for male partners and $1.73 million for female partners).

[118] *Supra* note 107.

[119] *Supra* note 107 ("Analysis of these metrics may reveal that the reason why men have statistically more business credit is because they are better positioned within the firm to inherit or otherwise share in credit as a result of their relationships with more senior male colleagues.").

[120] *Supra* note 108; Jordan Furlong, *Law Firms' Problem with Women*, Law21 (July 27, 2017), https://www.law21.ca/2017/07/law-firms-problem-women/.

[121] Douglas Eisenberg, *Big Law Survey Shows Big Pay Gap, Equity Disparity for Women* (December 12, 2016), https://www.eandblaw.com/employment-discrimination-blog/2016/12/12/big-law-survey-shows-big-pay-gap-equity-disparity-women/.

appropriate) and consideration of diversity in developing pitch teams and successors can help to remedy one facet of the gap.[122]

Allocating or rewarding activities that are necessary to the firm's success may help reduce the overall gap.[123] These can include firm leadership or management activities, externally focused activities (speaking engagements, engagement in bar groups or other community organizations), mentorship, or creation/utilization of diverse teams - all of which are important to a firm's success and sustainability.[124]

In addition to addressing allocation of points, whether through an origination based system or otherwise, the make-up of the compensation committee itself that performs the allocation greatly impacts the gap: having no or few women or diverse individuals can lead to biased results.[125] The Mansfield Rule, discussed later in greater detail, proposes that women and minorities form at least 30 percent of a firm's leadership and governance, which would include the compensation committee.[126] In addition to having a diverse committee, bias can be eliminated through the use of a blind evaluation.[127] Further, providing compensation committees, as well as all individuals involved with evaluations, advancement, and promotion, with training on how to objectively link performance (not limited to origination) with business goals may also be effective to reduce or eliminate unconscious bias.[128]

2. Women's Initiatives

In addition to firm policies standardizing compensation, firms can address gender pay gaps in the profession of law by implementing Women's Initiatives as part of a firm's strategic plan. [129] As recognized in the 2017 NAWL Survey Report, "Women's Initiatives have emerged as well-accepted, well-utilized efforts for improving the experiences and trajectories of women in law firms."[130]

Many Women's Initiatives include training offerings, as well as women and family friendly policies. "Most firms reported offering both flexible and part-time work schedules, as well as on-ramping for those attorneys returning from family leave."[131]

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[122]*Supra* note 107.
[123]*Supra* note 107 ("Firm leaders should reward behaviors that they *state* are important by *valuing* those behaviors in the compensation system. This includes monitoring and recognizing the varied contributions that partners make to the long-term viability of the firm. The failure to do so negatively impacts women disproportionately…").
[124] *Supra* note 107.
[125] *Supra* note 107.
[126]Debra Cassens Weiss, *Law Firms Test 'Mansfield Rule' to Promote More Women and Minorities into Leadership Roles*, ABA Journal (June 12, 2017), http://www.abajournal.com/news/article/law_firms_test_mansfield_rule_to_promote_more_women_and_minorities_into_lea.
[127] *Supra* note 104.
[128]*Supra* note 107.
[129] 2017 NAWL Survey Report, at 9-11.
[130] 2017 NAWL Survey Report, at 9.
[131] 2017 NAWL Survey Report, at 11.

Importantly, providing uniform leave policies regardless of the "primary caregiver" status would allow a couple to share parenting responsibilities more evenly. Firms can also create business resource groups to help transition caregivers back into the workplace.[132]

3. Rooney/Mansfield Rule

Firms can also address gender inequality issues by implementing a Rooney/Mansfield rule.[133] Last year, 30 law firms entered into a one year pilot program that requires the firms to consider women and minority lawyers for new positions and promotion within the firm.[134] Under the pilot program, law firms must consider both minorities and women for at least 30 percent of the candidate pool.

4. Federal/State Involvement

While firm initiatives can help to bridge the gap related to gender pay disparity, government involvement might also be necessary. As discussed above, the U.K. enacted gender pay gap reporting requirements for companies in the U.K. with over 250 employees.[135] Early data suggests that the gender pay gap reporting has had an "explosive but positive effect."[136] "Put simply, the rules are a game changer."[137] While not mandatory, some companies have taken the initiative to identify a gender pay gap, and then adjust salaries accordingly. Salesforce did it by investing $8M to close the gap.[138]

In 2016, President Obama proposed new rules that would compel companies with more than 100 employees to provide annual data for how they pay their employees based on gender, race, and ethnicity.[139] Just a year later, President Trump has halted the proposed new rules that

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[132] Michelle P. Wimes, *Trends in Parental Leave Come to Legal Industry: A Call to Action for Law Firms?*, Ogletree Deakins (January 23, 2018), https://ogletree.com/shared-content/content/blog/2018/january/trends-in-paid-parental-leave-come-to-the-legal-industry/.

[133] *Supra* note 126; Debra Cassen Weiss, *Law Firms Test 'Mansfield Rule' to Promote More Women and Minorities Into Leadership Roles*, ABA Journal (June 12, 2017), http://www.abajournal.com/news/article/law_firms_test_mansfield_rule_to_promote_more_women_and_minorities_into_lea/.

[134] Casey Sullivan, *Law Firms Adopt Policy to Promote Women and Minorities*, Bloomberg Law (June 7, 2017), https://biglawbusiness.com/law-firms-adopt-policy-to-promote-women-and-minorities/.

[135] David Hellier, *U.K. Employers Urged to Provide Gender Pay Gap Details*, Bloomberg (February 2, 2018), https://www.bloomberg.com/graphics/2018-uk-gender-pay-gap/uk-employers-report-gender-pay/.

[136] Susannah Donaldson and Helen Corden, *Gender Pay Gap Reporting Has 'Explosive' But Positive Effect,* Out-Law.com (April 6, 2018), https://www.out-law.com/en/articles/2018/april/gender-pay-gap-reporting-explosive-positive-effect/.

[137] *Id.*

[138] Jena McGregor, *Why One Tech Giant is Investing Another $3 Million to Close Its Pay Gap,* The Washington Post (April 4, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/04/04/why-salesforce-is-investing-another-3-million-to-close-its-pay-gap/?utm_term=.b3ea21014616.

[139] Erik Ortiz, *President Obama Announces Rules for Closing Gender Pay Gap,* NBC News (January 29, 2016), https://www.nbcnews.com/news/us-news/obama-announce-new-rules-closing-gender-pay-gap-n506941.

would have taken effect in March, 2018, simply concluding that it wouldn't have worked.[140] This position is unsupported, as data from the U.K. indicates otherwise.

States, such as Massachusetts, have also taken action to address the gender pay gap, such as enacting pay laws that ban employers from asking about previous salaries.[141] Even without specific legislation, a recent case coming out the 9th Circuit Court of Appeals held that that is it a violation of the Equal Pay Act to consider a new employee's prior compensation when determining their starting salary.[142]

CONCLUSION

As discussed above, the gender pay gap is a multi-faceted problem, requiring a multi-faceted solution. Firms must actively engage in the process by developing policies that minimize, rather than perpetuate, the gender pay gap. To have meaningful change, men will also need to be committed to the process. As change has been unacceptably slow, government action will likely be needed, as in the U.K., where change is already occurring.

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[140] Suzy Khimm, *Trump Halted Obama's Equal Pay Rule. What it Means for Working Women*, NBC News (August 31, 2017), https://www.nbcnews.com/politics/white-house/trump-killed-obama-s-equal-pay-rule-what-it-means-n797941.

[141] Chapter 177 of the Acts of 2016, *An Act to Establish Pay Equity,* https://www.mass.gov/massachusetts-equal-pay-law.

[142] Liz Elting, *How the Rizo Case Will Affect the Gender Pay Gap,* Forbes (April 13, 2018), https://www.forbes.com/sites/lizelting/2018/04/13/how-the-rizo-case-will-affect-the-gender-pay-gap/#7f799d9d620e.