

**Practice  
Guides**

# DIVERSITY AND INCLUSION

Contributing Editor  
Timothy Chow



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**Getting the Deal Through**

# DIVERSITY AND INCLUSION

## Practice Guide

Contributing Editor  
Timothy Chow

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## The Business Case for Diversity and Corporate Diversity Legislation

**Samuel Danon, María Castellanos and Natalia San Juan<sup>1</sup>**

### **Introduction**

The bottom line: diversity and inclusion are good for business. While diversity and inclusion efforts in the corporate world have often been spurred by a commitment to social justice and corporate social responsibility, or by the necessity of regulatory compliance, companies should also regard diversity and inclusion as a competitive advantage and source of growth. Empirical data show that diverse companies tend to be more successful. This chapter describes the correlation between diversity and company financial performance – why companies should prioritise diversity and inclusion – and provides an overview of legislative and regulatory efforts to increase corporate diversity – why companies may have to do so.

### **The state of corporate diversity**

As of June 2021, only 41 Fortune 500 companies – just over 8 per cent – were helmed by women, and only two by Black women.<sup>2</sup> Only one major US bank has a woman chief executive.<sup>3</sup> Moreover, as of June 2021, Black Americans, who account for 13 per cent of the US population, on average held just 5 per cent of manager positions in the 80 Fortune 500 companies for which data were

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1 Samuel Danon is a partner and María Castellanos and Natalia San Juan are associates at Hunton Andrews Kurth LLP.

2 Emma Hinchliffe, *The Female CEOs on this Year's Fortune 500 Just Broke Three All-Time Records*, Fortune (2 June 2021), <https://fortune.com/2021/06/02/female-ceos-fortune-500-2021-women-ceo-list-roz-brewer-walgreens-karen-lynch-cvs-thasunda-brown-duckett-tiaa/>; Courtney Connley, *A Records 41 Women are Fortune 500 CEOs – and for the First Time Two Black Women Made the List*, CNBC (2 June 2021), [www.cnbc.com/2021/06/02/fortune-500-now-has-a-record-41-women-running-companies.html](http://www.cnbc.com/2021/06/02/fortune-500-now-has-a-record-41-women-running-companies.html).

3 Hinchliffe, *supra* note 1; Connley, *supra* note 1.

available.<sup>4</sup> Similarly, Hispanics and Latinos, who account for 18.4 per cent of the population, held just 6 per cent of manager positions.<sup>5</sup>

And these numbers, low as they are, are all-time highs. According to the 2021 McKinsey & Company study *Women in the Workplace*, between January 2015 and January 2020, 'representation of women in senior vice president positions grew from 23 to 28 per cent, and representation in the C-suite grew from 17 to 21 per cent'.<sup>6</sup> Similarly, according to the 2020 McKinsey study *Diversity Wins: How Inclusion Matters*, the representation of ethnic minorities on UK and US executive teams grew from 7 to 13 per cent from 2014 to 2019.<sup>7</sup> Thus, despite signs of progress, women and minorities remain dramatically underrepresented among corporate decision-makers.

### **The competitive advantage of diversity**

Against this backdrop, those companies that have embraced diversity in leadership find themselves ahead of the curve: empirical data demonstrate that a correlation exists between diversity and company financial performance.

In its 2012 *Gender Diversity and Corporate Performance* study, the Credit Suisse Research Institute found that companies with at least one woman on the board outperformed those with all-male boards in terms of share price performance.<sup>8</sup> Tracking the performance of 2,360 companies on the MSCI AC World Index beginning in 2005,<sup>9</sup> Credit Suisse found that companies with women board members 'delivered higher average returns on equity, lower gearing, better average growth and higher price/book value multiples'.<sup>10</sup> Credit Suisse proposed seven reasons for this finding:

- the positive signal the appointment of women sends to the market;
- greater effort and attention to detail;
- a better balance of leadership skills;
- access to a larger pool of talent;
- a better reflection of the consumer decision-maker;
- improved corporate governance; and
- risk aversion.<sup>11</sup>

Similarly, according to the 2017 McKinsey study *Women Matter: Time to Accelerate*, companies in which women are more strongly represented in management are also companies that perform

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4 David Craig, *Companies Will Need Courage to Keep Their Promises on Race*, *Fortune* (2 June 2021), <https://fortune.com/2021/06/02/racial-equity-diversity-inclusion-data-fortune-500-measure-up/>.

5 *ibid.*

6 *Women in the Workplace 2021*, McKinsey & Company (30 September 2020), [www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace](http://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace).

7 *Diversity wins: How inclusion matters*, McKinsey & Company (19 May 2020), [www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters](http://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters).

8 *Gender Diversity and Corporate Performance*, Credit Suisse Research Institute (August 2012), [https://wapph.hks.harvard.edu/files/wapph/files/gender\\_diversity.pdf](https://wapph.hks.harvard.edu/files/wapph/files/gender_diversity.pdf).

9 *ibid* at 9.

10 *ibid* at 14.

11 *ibid* at 17–19.

best.<sup>12</sup> Following an analysis of 300 companies in 10 countries from 2007 to 2009, McKinsey identified a 47 per cent difference in return on equity between companies with the most women on their executive committees and companies with none, as well a 55 per cent difference in average EBIT margin or operating results.<sup>13</sup> The 2018 McKinsey study *Delivering through Diversity* reinforced these results, finding that companies with greater gender diversity on executive teams perform better.<sup>14</sup> Companies in the top 25 per cent for gender diversity on executive teams, McKinsey found, were 21 per cent more likely to outperform on profitability and 27 per cent more likely to have superior value creation, measured using average profit as a percentage of revenues over a period of five years.<sup>15</sup>

These findings, McKinsey proposed, reveal that leadership behaviours applied more frequently by women 'strengthen organisational performance'.<sup>16</sup> Drawing upon research into behavioural psychology, McKinsey identified nine positive leadership behaviours often displayed by managers in corporations, five of which women tend to use more frequently than men: 'people development, expressing expectations and rewarding success, role-modelling, inspiration, and participative decision-making'.<sup>17</sup>

In its 2021 report *Gender 3000 in 2021: Broadening the Diversity Discussion*, Credit Suisse expanded on its conclusions regarding gender diversity and corporate performance by focusing on the LGBT community.<sup>18</sup> Based on performance data from a 'market-cap weighted and sector adjusted basket of around 400 LGBT-inclusive companies',<sup>19</sup> Credit Suisse concluded that 'investors seeking to maximise returns should focus on companies that put both women and diversity more broadly at the heart of their corporate strategy'.<sup>20</sup>

As with gender and LGBT diversity, ethnic and cultural diversity in corporate leadership has been shown to correlate with increased profitability. In its *Delivering through Diversity* study, McKinsey also examined minority representation at the executive level, finding that companies in the top 25 per cent for ethnic or cultural diversity on executive teams were '33 [per cent] more likely to outperform their peers on profitability'.<sup>21</sup> Based on data from the US, the UK, Brazil, Mexico, Singapore and South Africa,<sup>22</sup> McKinsey determined that 'companies with the most

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12 *Women Matter: Time to Accelerate*, McKinsey & Company (October 2017), [www.mckinsey.com/~/media/mckinsey/featured%20insights/women%20matter/women%20matter%20ten%20years%20of%20insights%20on%20the%20importance%20of%20gender%20diversity/women-matter-time-to-accelerate-ten-years-of-insights-into-gender-diversity.pdf?shouldIndex=false](http://www.mckinsey.com/~/media/mckinsey/featured%20insights/women%20matter/women%20matter%20ten%20years%20of%20insights%20on%20the%20importance%20of%20gender%20diversity/women-matter-time-to-accelerate-ten-years-of-insights-into-gender-diversity.pdf?shouldIndex=false).

13 *ibid* at 13.

14 *Delivering through Diversity*, McKinsey & Company (January 2018), [www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering-through-diversity/delivering-through-diversity\\_full-report.ashx](http://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering-through-diversity/delivering-through-diversity_full-report.ashx).

15 *ibid* at 10.

16 *Women Matter: Time to Accelerate* at 14.

17 *ibid*.

18 *The CS Gender 3000 in 2021: Broadening the diversity discussion*, Credit Suisse Research Institute (September 2021), [www.credit-suisse.com/about-us/en/reports-research/csri.html?WT.i\\_short-url=%2Fresearchinstitute&WT.i\\_target-url=%2Fabout-us%2Fen%2Freports-research%2Fcsri.html](http://www.credit-suisse.com/about-us/en/reports-research/csri.html?WT.i_short-url=%2Fresearchinstitute&WT.i_target-url=%2Fabout-us%2Fen%2Freports-research%2Fcsri.html).

19 *ibid* at 32.

20 *ibid* at 35.

21 *Delivering through Diversity* at 12.

22 *ibid* at 12 No. 9.

ethnically/culturally diverse boards worldwide are 43 [per cent] more likely to experience higher profits'.<sup>23</sup>

This study also demonstrates a penalty for low gender and ethnic diversity: companies in the bottom quarter for both gender and ethnic diversity were '29 [per cent] less likely to achieve above-average profitability than were all other companies in [the] data set'.<sup>24</sup>

According to McKinsey, the correlation between diversity and financial performance is likely to result from 'improved access to talent, enhanced decision-making and depth of consumer insight, and strengthened employee engagement and license to operate'.<sup>25</sup> Diversity can change the behaviour of a social majority in a way that improves thinking, decision-making and employee satisfaction.<sup>26</sup> When diverse perspectives, perceptions and beliefs are represented, shared and considered, diverse teams make higher-quality decisions and 'tend to be more creative and innovative than homogenous groups'.<sup>27</sup>

These conclusions are consistent with those of earlier research into the effect of diversity on decision-making. In *Ethnic Diversity Deflates Price Bubbles*, a 2014 study in the Proceedings of the National Academy of Sciences, academic researchers found that, in a stock-trading simulation, ethnically diverse groups assessed prices more accurately than ethnically homogenous groups.<sup>28</sup> The researchers concluded that 'ethnic diversity was valuable not necessarily because minority traders contributed unique information or skills, but [because] their mere presence changed the tenor of decision-making among all traders'.<sup>29</sup> This study, though not designed with corporate diversity specifically in mind, has important implications for the workplace. It reveals that greater ethnic diversity leads to greater scrutiny of one another among group members, which can produce 'better outcomes', whereas ethnic homogeneity may lead to overreliance on others' decisions.<sup>30</sup>

Of course, diversity is not, by itself, a panacea, as explored in the 2014 Harvard Business Review article 'Getting Serious about Diversity: Enough Already with the Business Case'.<sup>31</sup> Increasing diversity while otherwise business continues as usual, the authors suggest, will not suddenly increase a firm's effectiveness or financial performance.<sup>32</sup> In enhancing diversity, businesses must accept and support a broader definition of success that incorporates 'learning, innovation, creativity, flexibility, equity, and human dignity'.<sup>33</sup> Additionally, leaders must acknowledge

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23 *ibid* at 13.

24 *ibid* at 1, 20.

25 *ibid* at 5.

26 *ibid* at 23–24.

27 *ibid* at 23.

28 Sheen S Levine, et al, *Ethnic Diversity Deflates Price Bubbles*, 111 PNAS 18524 (30 December 2014), [www.pnas.org/content/pnas/111/52/18524.full.pdf](http://www.pnas.org/content/pnas/111/52/18524.full.pdf).

29 *ibid* at 18528.

30 *ibid* at 18525.

31 Robin J Ely and David A Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, Harvard Business Review (November – December 2020), <https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case>.

32 *ibid*.

33 *ibid*.

that increasing demographic diversity does not on its own increase effectiveness.<sup>34</sup> They must learn how to manage and utilise diversity and be willing to reshape a company's organisational structure.<sup>35</sup> Diversity has no impact when diverse members' perspectives are not elicited or valued.<sup>36</sup>

### **Corporate diversity legislation and regulation**

Empirical research confirms that diversity is good for a company's bottom line. It might well be argued, then, that the increasing legislative and regulatory efforts to increase corporate diversity are, too, good for business. Indeed, states have explicitly pointed to this research in enacting legislation intended to enhance corporate diversity – and, ultimately, the local economy.

The California legislature, for example, relied on independent studies, including McKinsey's *Women Matter* study and Credit Suisse's *Gender Diversity and Corporate Performance* study, in passing its Women on Boards law (SB-826) in 2018.<sup>37</sup> SB-826 requires all publicly held corporations with principal executive offices in California to attain minimum numbers of women on their boards.<sup>38</sup> All such corporations must have at least one woman director; corporations with five directors must have at least two; those with six or more directors, at least three.<sup>39</sup> Non-compliance is to be met with fines.<sup>40</sup>

In 2020, California similarly relied on empirical data regarding the benefits of ethnic and LGBT diversity in expanding board diversity requirements with its Underrepresented Communities on Boards law (AB-979).<sup>41</sup> AB-979 requires publicly held corporations with principal executive offices in California to have at least one director from an underrepresented community – a category that includes both ethnic minorities and LGBT individuals.<sup>42</sup> Corporations with more than four but fewer than nine directors must have at least two such directors; those with nine or more directors, at least three.<sup>43</sup> As with SB-826, fines may be imposed for failure to meet these requirements.<sup>44</sup>

States across the US are following California's lead in attempting to diversify corporate leadership, with a particular focus on boards of directors. New York, Colorado, Hawaii, Illinois,

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34 *ibid.*

35 *ibid.*

36 *ibid.*

37 SB-826 Corporations: Boards of Directors, California Legislative Information (1 October 2018), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB826](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826).

38 Cal Corp Code § 301.3 (a) and (b), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB826](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826); Cal Corp Code § 2115.5(a), [https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=2115.5&lawCode=CO RP#:~:text=2115.5,the%20foreign%20corporation%20is%20incorporated](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=2115.5&lawCode=CO RP#:~:text=2115.5,the%20foreign%20corporation%20is%20incorporated).

39 Cal Corp Code § 301.3 (a); Shirley N Weber, Women on Boards, California Secretary of State, [www.sos.ca.gov/business-programs/women-boards](http://www.sos.ca.gov/business-programs/women-boards).

40 Cal Corp Code § 301.3(e).

41 AB-979 Corporations: Board of Directors: Underrepresented Communities, California Legislative Information (2 October 2020), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB979](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB979).

42 *ibid.*; Cal Corp Code § 301.4(a), (e)(1).

43 Cal Corp Code § 301.4(b).

44 Cal Corp Code § 301.4(d)(1).

Maryland, Massachusetts, Michigan, New Jersey, Pennsylvania and Washington have passed or are contemplating requirements to enhance board diversity.<sup>45</sup> While California's legislation strictly mandates board diversity, some other states have taken a softer approach, enacting laws designed merely to encourage board diversity, often through the imposition of reporting obligations.

Illinois, for example, in 2019 amended its Business Corporation Act to impose such obligations.<sup>46</sup> Publicly held corporations with principal executive offices in the state must include information about the gender and ethnic composition of their boards, as well as their policies and procedures for promoting diversity in their boards and executive officers, in annual reports to the Secretary of State.<sup>47</sup> The University of Illinois is to review this information and publish a report rating each corporation's level of diversity in leadership.<sup>48</sup>

New York imposed similar reporting requirements, and sanctioned a similar study, with its 2019 Women on Corporate Boards Study Act.<sup>49</sup> Corporations authorised to do business in New York must biennially report the representation of women on their boards to the New York Department of State.<sup>50</sup> State agencies, in turn, are to conduct and publish a study containing 'the number of women directors, total number of directors that constitute boards of directors, analysis of the change in number of women directors from previous years, and the aggregate percentage of women directors on all boards'.<sup>51</sup>

There are signs that those states with reporting requirements may be heading toward a regime, like California's, mandating corporate diversity. In 2020, the Illinois legislature introduced SB3508, a bill imposing gender composition requirements for the boards of publicly held corporations with principal executive offices in the state.<sup>52</sup> The bill, which is currently before the Illinois Senate Committee,<sup>53</sup> mandates that covered corporations have at least one woman director, with greater numbers of women directors required for larger boards.<sup>54</sup> As in California, the Secretary of State may punish violations with fines.<sup>55</sup>

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45 Michael Hatcher and Weldon Latham, Harvard Law School Forum on Corporate Governance, States are Leading the Charge to Corporate Boards: Diversify! (12 May 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/>.

46 Public Act 101-0589, 805 ILCS 5/8.12(b), Illinois Compiled Statutes, Illinois General Assembly, [www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0589](http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0589).

47 *ibid.*

48 *ibid.*

49 Senate Bill S4278, The New York State Senate, [www.nysenate.gov/legislation/bills/2019/s4278](http://www.nysenate.gov/legislation/bills/2019/s4278); NY Bus Corp Law § 408, [www.nysenate.gov/legislation/laws/BSC/408](http://www.nysenate.gov/legislation/laws/BSC/408).

50 NY Bus Corp Law § 408, [www.nysenate.gov/legislation/laws/BSC/408](http://www.nysenate.gov/legislation/laws/BSC/408).

51 Senate Bill S4278, The New York State Senate, [www.nysenate.gov/legislation/bills/2019/s4278](http://www.nysenate.gov/legislation/bills/2019/s4278).

52 Full Text of SB3508, Illinois General Assembly, [www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=3508&GAID=15&LegID=125324&SpecSess=&Session=](http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=3508&GAID=15&LegID=125324&SpecSess=&Session=) (last visited 15 October 2021).

53 Bill Status of SB3508, Illinois General Assembly, [www.ilga.gov/legislation/BillStatus.asp?DocNum=3508&GAID=15&DocTypeID=SB&LegID=125324&SessionID=108&SpecSess=&Session=&GA=101](http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3508&GAID=15&DocTypeID=SB&LegID=125324&SessionID=108&SpecSess=&Session=&GA=101) (last visited 15 October 2021).

54 *ibid.*

55 *ibid.*

States are not the only entities regulating corporate diversity. The US Securities and Exchange Commission and market players including the Nasdaq Stock Market have adopted a data-driven approach to board diversity. In August 2020, the SEC adopted disclosure requirements on the human capital of public companies.<sup>56</sup> Under this rule, public companies must identify the number of persons employed and any human capital measures or objectives, such as gender and ethnic diversity and inclusion, which it focuses on in managing the business.<sup>57</sup> And in August 2021, the SEC voted to approve new listing rules, submitted by Nasdaq, to advance board diversity through a 'comply or explain' framework and enhance transparency of board diversity statistics.<sup>58</sup>

## Conclusion

There is a clear business case for seeking and achieving diversity: simply put, diverse companies perform measurably better financially than their non-diverse peers. Empirical evidence demonstrates that an emphasis on diverse leadership, whether or not required by legislation or regulation, provides entities with a competitive edge. When diversity becomes part of the corporate fabric beyond mere tokenism or minimum compliance, viewpoints expand, opportunities surface and doing the right thing drives the right results.

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56 SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K, US Securities and Exchange Commission (26 August 2020), [www.sec.gov/news/press-release/2020-192](http://www.sec.gov/news/press-release/2020-192); Scott H Kimpel, et al, *The New Era of Human Capital Resources Reporting*, Hunton Andrews Kurth Client Alert (September 2020), [www.huntonak.com/images/content/6/9/v3/69735/the-new-era-of-human-capital-resources-reporting-092220.pdf](http://www.huntonak.com/images/content/6/9/v3/69735/the-new-era-of-human-capital-resources-reporting-092220.pdf); Scott H Kimpel, *SEC Human Capital Reporting Rules Take Effect*, Hunton Retail Law Resource (12 October 2020), [www.huntonretailindustryblog.com/2020/10/articles/corporate-governance/sec-human-capital-reporting-rules-take-effect/](http://www.huntonretailindustryblog.com/2020/10/articles/corporate-governance/sec-human-capital-reporting-rules-take-effect/).

57 *ibid.*

58 Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Securities and Exchange Commission (6 August 2021), [www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf](http://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf).

# Appendix 1

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### **Samuel A Danon**

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Samuel Danon is a partner in the Miami office of Hunton Andrews Kurth LLP. Sam's practice focuses on litigation, with an emphasis on commercial disputes, consumer class actions, government regulatory advice and corporate compliance. He has particular experience advising manufacturers in advertising claims, as well as financial institutions and multinational corporations through multijurisdictional disputes and in connection with matters related to operations in the Americas and the Caribbean. Sam has also advised individuals and companies investigated by the government on criminal matters.

Sam serves as the firm's head of litigation. Sam has trial experience in federal and state courts and domestic and international arbitration before the American Arbitration Association (AAA), the International Chamber of Commerce and the AAA's International Center for Dispute Resolution, as well as multijurisdictional disputes. Sam has also assisted multinational companies with the creation, implementation and monitoring of global corporate compliance programmes with specific guidance on issues related to code of conduct, anti-money laundering and Foreign Corrupt Practices Act. After earning his law degree, Sam served as a law clerk for the Honorable K Michael Moore in the US District Court for the Southern District of Florida.

### **María Castellanos**

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María Castellanos is an associate in the Miami office of Hunton Andrews Kurth LLP. María focuses on complex commercial litigation, handling business torts, breach of contract claims, statutory fraud claims, claims for breach of fiduciary duty and other statutory and common law claims pertaining to financial institutions. María's experience also includes managing discovery and motion practice in connection with arbitration proceedings before the International Centre for Dispute Resolution of the American Arbitration Association. In addition, María maintains an active pro bono practice.

## About the Authors

Before joining the firm, María served as a law clerk for the Honorable Jay García-Gregory at the US District Court for the District of Puerto Rico. While in law school, María worked as a student attorney for the Harvard Immigration and Refugee Clinic, where she successfully represented clients in their asylum and special visa petitions.

María is admitted to practise before the US District Court for the Southern, Middle and Northern Districts of Florida, and the US Court of Appeals for the 11th Circuit.

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Natalia also advises clients in connection with internal investigations and regulatory matters, including with respect to OFAC.

While in law school, Natalia interned for the Criminal Division of the United States Attorney's Office for the Southern District of Florida. She also co-mediated disputes within the university through the Campus Mediation Practicum and served as managing editor of the *Cornell International Law Journal* and of the *Legal Information Institute Supreme Court Bulletin*.

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