Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America

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Introduction: The Genesis of this Report

George Floyd's murder led many in corporate America to ask what they could do to address centuries-old social injustices. For many, the initial response has meant committing to increased diversity, equity, and inclusion within their own employee ranks, boards of directors, and third-party business relationships.

But meaningful change will require more than simply wanting to do the right thing. It will require conscious effort, commitment, and a plan. It also requires strategies that comply with the law to both protect the company and to obtain buy-in from key company stakeholders that will ensure the long-term success of inclusive strategies.

In 2020, supporters of racial equity from some of the nation's best-known corporations approached the Joint Center for Political and Economic Studies – a Washington, D.C. think tank focused on issues affecting Black communities – for ideas on how to effectively counter racial bias in compliance with the law.

Accordingly, the Joint Center asked WilmerHale to create a toolkit for companies intent on diversifying their ranks and addressing systemic bias while minimizing legal risks.

Why Do We Need This?

Today, only four Fortune 500 CEOs are Black – there have been fewer than two dozen in the list's 66-year history. Black professionals hold only 3.2% of senior leadership roles at large U.S. companies. And research suggests the scarcity of Black professionals in companies puts them at a higher risk of social isolation and attrition, worsening the problem. This remains true despite the rapid increase of Black professionals in the workforce.

Absent intervention, we can expect that the COVID-19 pandemic – with the economic stress it has spawned across the country, especially in communities of color – will further contribute to the growing disparities between Black and White professionals.

Our five-part toolkit aims to inform employers of the barriers to equal employment for Black professionals and offers achievable recommendations. It provides insights on understanding bias and aligning incentives to values; best practices for improving hiring, recruitment, and retention of Black professionals in corporate America (from entry-level positions to the boardroom); and guidance on third-party business relationships – all while minimizing legal risk.

Understanding Workplace Bias & Establishing Responsibility for Diversity

Companies can reduce workplace bias by first promoting an organization-wide understanding of how bias impedes professionals from historically underrepresented groups. For example, employees responsible for recruitment and hiring should participate in implicit bias training and learn action-oriented strategies for managing bias.

A second step requires increasing transparency through collecting and analyzing diversity metrics and data about experiences of inclusion or exclusion. To increase accountability, companies should bolster in-house responsibility by, among other things, tying executive compensation to efforts toward progress. Creating a plan to overcome barriers to equal employment opportunities is critical to long term success.

Establishing Initiatives to Improve Diversity and Promote Hiring & Retention

Recruitment and hiring, followed by promotion and retention, are the greatest levers for change. Research on racial discrimination in hiring since 1990 shows that Black applicants experience far greater bias than Whites throughout the hiring process, and hiring rates for Black applicants have not significantly changed.

Broadening the applicant pool through strategic partnerships with educational institutions, organizations, and executive pipeline programs focused on diversity; requiring final applicant pools to include multiple diverse candidates; and establishing a standardized interview and selection process are essential to successfully increasing the rate of Black hires. Once hired, reducing social isolation for Black professionals through formal mentoring programs, employee resource groups, retention equity programs, and increasing the visibility of Black employees within organizations will help retain talent.

Why Expanding Diversity on Corporate Boards is Critical

Diversity at the highest levels of organizations – their boards of directors – has the propensity to drive diversity initiatives. But it continues to lag. In 2019, 37% of S&P 500 companies lacked a single Black director, and in 2020, only 9% of Fortune 500 board members were Black. The exclusion of Black professionals from corporate leadership and boardrooms has a cascading effect on communities of color, further expanding the class and wealth gap. Again, broadening the candidate pool, creatively identifying potential candidates, and supporting and creating opportunities for Black directors to lead is critical.

Promoting Diversity Among Suppliers and Service Providers

It will come as no surprise that companies can, through contracting and retention practices, effectively persuade suppliers of goods and services to prioritize racial equity in hiring and promotions. Corporate clients increasingly request that service providers engage diverse teams or risk not being retained – an approach that could be used far more widely. Other approaches include having concrete spending goals – such as Facebook's commitment of at least $1 billion annually to diverse suppliers, including $100 million annually to Black-owned businesses (from facilities and construction to marketing agencies and more).

Minimizing the Legal Risk of Diversity Initiatives

Finally, the affirmative steps companies take to increase racial equity may cause some employees to file lawsuits alleging reverse discrimination – a risk that will presumably only increase as the percentage of Whites in the U.S. declines. Designing a plan that increases opportunities for Black professionals, while not unduly burdening traditionally overrepresented communities or triggering legal exposure under Title VII and other laws, is a challenge we tackle in this part of the toolkit.

Title VII, for example, permits diversity initiatives designed to expand opportunities for all applicants. Thus, companies should avoid implementing policies that limit, rather than expand, the pool of candidates. Companies should also consider tying compensation to D&I efforts rather than results. The toolkit provides guidance and analysis on strategies that can greatly reduce the risk of successful litigation challenges.

Improving the representation of Black professionals in corporate America requires companies to be committed, strategic, and decisive. Not only is this important for achieving racial equity, but it is essential to improving business performance and operating at maximum efficiency in today's competitive global environment. Corporate America cannot wait to engage in these efforts.

Part I:
The Building Blocks of a Diverse Workplace — Understanding Bias and Aligning Incentives to Values

Despite demographic changes in the workforce and clear evidence that diversity improves business performance, the advancement of Black professionals in corporate America remains stagnant, and in some cases, is reversing. Only four Fortune 500 CEOs are Black,[1] consistent with the finding that Black people hold only 3.2% of leadership roles at large U.S. companies.[2] For decades, corporate America has failed to hire, retain, and promote Black people. The exclusion of Black professionals from corporate boardrooms has a cascading effect on communities of color—worsening the class and wealth gap. As discussed in Part II of this report, *Recruitment, Hiring, and Retention Initiatives*, companies can reduce the potential for systemic bias against Black people by adopting initiatives aimed at recruiting, hiring, retaining, and promoting the development of Black employees (including C-suite leadership). But as a foundational matter, companies can take certain steps to lessen bias in the workplace and align incentives to the company's anti-racist values, including:

- **Understanding implicit bias.** Companies can improve the workplace and support Black employees—consistent with the law—through training and processes to mitigate implicit bias, which manifests in assumptions based on stereotypes of a person's race, gender, age, or ethnicity. Implicit bias training is increasingly being used by companies to raise awareness of employees' implicit biases, provide strategies to reduce the impact of these biases, and change practices to allow for fairer outcomes. Beyond implicit bias training, companies can design and implement performance reviews that evaluate Black employees equitably through clearly-defined performance measures, limits on manager discretion, and 360-degree feedback loops. Companies can also make the individuals responsible for recruiting and hiring aware of potential bias against Black people through targeted trainings and feedback while providing action-oriented strategies for managing bias. Companies should also follow up with individuals responsible for hiring to ensure that trainings are effective.

- **Increase transparency and accountability through the collection of hiring, recruitment, and retention data.** A critical step to remedying disparities in the recruitment, hiring, retention, and promotion of Black employees and leadership is collecting and analyzing data to track trends among Black employees, as well as data measuring employee experiences of inclusion or exclusion. Companies should consider making this data public—to both internal and external audiences—to promote the accountability of senior executives for progress toward diversity goals.

- **Establish responsibility for diversity efforts within the company through executive compensation and performance metrics.** Companies can increase transparency and accountability by establishing responsibility for diversity initiatives within the organization. Companies should consider tying executive compensation to efforts to promote diversity and inclusion initiatives—a measure that both rewards senior executives for efforts towards meeting diversity goals and demonstrates the company's dedication to diversity in the workforce.

- **Identify barriers to equal employment opportunities and create strategies to expand access to opportunities.** A company cannot make a significant or meaningful impact in recruitment and hiring practices without first understanding the barriers Black people face to equal employment. Awareness of these barriers will allow companies to establish short and long-term strategic goals and a roadmap for improving diversity and inclusion efforts.

- **Enhance public awareness of internal diversity initiatives.** Companies that publicly disclose diversity data and commit to efforts to increase the numbers of Black people hired to senior and leadership positions stand a better chance of attracting talent from untapped resources. A number of companies have recently announced commitments to increasing the representation of Black people within the corporate ranks. Such commitments allow stakeholders to hold corporations accountable for diversity and inclusion efforts.

As discussed in *Part V: Minimizing the Legal Risk of Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America*, companies should design these initiatives to both effectively promote diversity and minimize legal risk.

Understanding Implicit Bias

Because research demonstrates that most individuals hold unconscious assumptions that influence their perceptions of others, implicit biases can create an unfair and destructive workforce environment, whether the behaviors resulting from the implicit bias manifest in actions or in the absence of action.[3] To reduce bias in the workplace, company employees, including **individuals responsible for recruitment and hiring**—interviewers and hiring managers—**should be aware of the presence of bias and stereotypes and how those biases can affect hiring decisions**. This might occur in two ways: first, broadly providing employees with anti-bias or implicit bias training, and second, establishing initiatives to train managers on bias to support the retention and advancement of Black employees.

Implicit Bias Training

Anti-bias or implicit bias training is one method to assist employers in understanding how attitudes, stereotypes, and actions can affect how they engage with Black colleagues at work.[4] Companies should consider the following guidance when implementing unconscious bias training:

- **Structured Around Workplace Situations:** Training is most effective when it includes relevant scenarios that allow employees to make concrete commitments to changed activities and behaviors in the workplace.[5] A company should focus on examples from workplace practices likely to arise as well as actionable steps to prevent bias from affecting decision-making. For example, if a situation arises where a Black employee alleges that they are experiencing microaggressions or discrimination, managers should be equipped with skills to appropriately respond to the employee's concerns.[6] This type of training typically proves more effective than solely focusing on concepts and terminology. Employees are also better able to remember information and themes from training if it relates to what they already know (e.g., organizing training around specific situations that participants encounter in their day-to-day work).[7]

- **Make Training Action-Oriented:** To be effective, bias training needs to teach employees to counteract bias in specific scenarios.[8] Training should not solely teach employees that bias exists, but show them *how* to fight it.[9] Training that equips employees with action-oriented strategies for managing bias has a long-ranging impact on participants.[10] Helpful strategies, for example, include asking the same set of questions to candidates applying for the same role, conducting interviews without resumes to reduce bias in expectations of a candidate's potential ability, and committing to speaking up when someone is being interrupted.[11]

- **Mandatory vs. Voluntary Training**: Providing employees with an option to receive bias training—as opposed to forced training requirements—may reduce the likelihood that an employee will respond with anger and resistance.[12] It may also help employees more easily accept critiques that will reduce bias towards Black people.[13] Voluntary training allows a participant to believe, for example, "I chose to show up, so I must be pro-diversity."[14] However, a company must balance the benefits of voluntary participation by individual contributors and non-supervisory employees with the gains from ensuring that company leaders participate in the training. Companies might require leadership to participate in mandatory bias training because company leaders are responsible for shaping organization culture, as well as creating a fair and inclusive environment.

- **Assessment of Training Effectiveness**: Companies should regularly assess hiring managers' understanding of bias in the workplace to ensure that trainings are effective.[15]

- **Make Diversity Education a Part of Company Culture:** Instead of planning a single annual workshop or day of training, companies should implement a diversity and inclusion series of events, celebrations, and programs that promote continued education and awareness.[16] Ensuring that the entire company is aware of culturally diverse events, such as through the use of an online diversity calendar, helps promote a shift in education about diversity from lecture to culture.[17]

Racial stereotypes can negatively affect the experience of Black employees in the workplace, and anti-bias training can help managers and employees understand how their comments and actions may adversely affect their colleagues' work experience. Recent examples of companies that have adopted implicit bias training into their processes include:

- Starbucks closed more than 8,000 stores in 2018 for training on how to combat racial bias following an incident in which two Black men were arrested after sitting in a store in Philadelphia.[18] Starbucks also provides inclusion training and tools to managers on an ongoing basis to prepare them to foster a diverse and inclusive culture.[19]

- Microsoft provides training about the concept of allyship, which refers to employees in majority groups supporting the workplace advancement of Black employees (or otherwise underrepresented groups). Allyship training can include tools and techniques to address and prevent workplace inequality and marginalization.[20]

Manager Training and Evaluating Employees Equitably

In addition to broad implicit bias training, initiatives that target training and feedback to moderate managerial bias can also support the retention and development of Black employees without legal risk. Performance evaluations are one avenue through which managerial bias may harm Black employees, particularly due to the managerial discretion inherent in the process. Studies on racial biases in the evaluation process have indicated that interpretations of performance are influenced by the races of supervisor and subordinate, and that raters evaluate job performance of Black employees less favorably than that of White employees.[21] **Companies can mitigate potential bias against Black employees by implementing an inclusive and equitable performance evaluation process**. For example, companies may use continuous or 360-degree feedback loops that provide a more complete picture of employee performance through multiple touchpoints. Companies may also limit the discretion of managers during the performance evaluation process, as managers without a significant structure to guide their decisions are more likely to be influenced by implicit bias. This performance evaluation structure could include:

- a rubric with guidelines for evaluations;
- specific performance measures clearly derived from job requirements;
- bias prompts to interrupt potential bias by the manager during the evaluation process, such as prompts to support evaluation ratings with explanations and specific examples from the relevant period, or prompts to not make assumptions about what employees are able or want to do; and
- evaluating each manager's performance ratings of other employees for bias.[22]

Companies should constantly evaluate technologies used in the evaluation process to ensure they do not perpetuate or magnify inequalities and disparate impacts on employees by race. Companies can also use analytic tools to increase transparency and detect unfairness in evaluations, promotions, and pay processes.[23]

Increase Transparency and Accountability through the Collection of Hiring, Recruitment, and Retention Data

Companies can increase transparency and accountability around diversity by **collecting and analyzing data** on the hiring, retention, and promotion of Black employees and leadership over time, as well as data measuring employee experiences of inclusion or exclusion. Without data, it is impossible to assess whether a company's diversity efforts are effective tools or mere window dressing. Tracking personnel transitions allows companies to (1) identify trends in recruitment, hiring, promotion, retention, and pay;[24] (2) compare the data to organizations of a similar size in similar industries; and (3) share the data with key stakeholders.[25] Companies should consider preparing and sharing a Diversity Report, which highlights the company's diversity and inclusion mission, and includes information regarding diversity-related demographics and programs and initiatives.

The identification of relevant diversity metrics (including hiring, promotions, and terminations (voluntary and involuntary)) and collection and analysis of data allow companies to develop goals around diversity and timelines for their efforts to reach those goals.[26] Even for organizations in which Black employees represent a small percentage of the workforce, small samples can be used to identify patterns to be addressed, such as high attrition among Black employees who work in a particular department or report to a particular manager. When analyzing data and structuring diversity initiatives, a company should not revert back to broader categories—such as "employees of color"—as doing so may cause the company to miss the unique experiences within the company of distinct groups.[27] Indeed, disaggregating data on categories of Black employees (e.g., by gender, pay, education, company department) may provide an even deeper understanding of challenges and opportunities for progress.

Inclusion, like diversity, is a critical ingredient to the success of any organization and should also be measured. Diversity and inclusion experts have identified certain categories which represent examples of areas in which individuals' experiences may make them feel excluded.[28] These include, for example, compensation and benefits, respect, work-life balance, and career opportunities.[29] To measure inclusion, companies should ask employees to share specific experiences that have made them feel excluded, as well as how often they have felt that their personal traits prevented them from feeling included in each category.[30] Employees should then specify the category of inclusion in which their experience falls.[31] For example, an employee that is asked to get coffee during a meeting may categorize this experience under "Respect," and someone who was passed over for promotion in favor of a more junior colleague may categorize the experience under "Career Opportunities."[32] Through collecting data that measures inclusion and examining it in conjunction with demographic information, companies may identify experiences that may cause employees to feel excluded and how these experiences vary across different groups.[33] Inclusion data sheds light on the underlying behavior that contributes to or inhibits the benefits of diversity.[34]

Close analysis of metrics provides a clearer roadmap for establishing diversity and inclusion goals and realistic timelines to achieve them.[35] Further, maintaining a record of discrimination-related complaints and outcomes allows companies to develop practices that demonstrate a commitment to equal opportunities.[36] The age-old adage remains true—what gets measured gets done. But while awareness of diversity data and trends is the first step, collecting data and establishing hiring and retention goals is not enough. **Disclosure of diversity metrics and data** promotes transparency by giving employees and shareholders insight into whether companies (and departments within companies) are making progress with their diversity commitments. Disclosure thereby provides a foundation for internal and external stakeholders to hold the company accountable.[37]

In September 2020, more than 30 S&P 100 companies agreed to publicly disclose employee diversity data that reflects the race, ethnicity, and gender of company employees, including senior management (i.e., personnel within two reporting levels of the CEO).[38] This commitment was prompted by the New York City comptroller and three New York retirement systems that mailed letters to the CEOs of 67 S&P 100 companies to request that they adopt a policy requiring disclosure of this data.[39] Specifically, the comptroller asked the companies to publicly disclose their EEO-1 Reports, a federally mandated compliance survey that requires companies to categorize employment data by race/ethnicity, gender, and job category.[40] The report also provides employee numbers for each employment category instead of solely representation by percentage.[41] Consistent with the stated goals of the comptroller, such disclosures allow investors to measure the success of diversity and inclusion practices and facilitates board oversight of the company's human capital management practices.[42] Full public disclosure also helps standardize employment data across companies and industries so investors can assess the representation and progress of Black employees, other employees of color, and women throughout the organization.[43]

In sum, the disclosure of key diversity metrics after collection will allow company stakeholders—internal audiences, regulators, and the public—to access demographic patterns and disparities and hold senior executives accountable for outcomes. Transparency around the progress made toward diversity goals should serve as the foundation for accountability.

Identify Barriers to Equal Employment Opportunities and Create Policies and Strategies to Expand Access

Corporations can also improve diversity and inclusion in the workforce by **identifying barriers to recruitment, hiring, and retention** and **creating policies and strategies that expand access to opportunities** for Black employees. A report published by the EEOC to aid employers in addressing workplace discrimination issues examined policies and practices at various companies that improved hiring and recruitment.[44] The report advised companies to engage in short and long-term strategic planning that identifies barriers to equal employment opportunity, establishes hiring and recruitment goals, and establishes a roadmap for implementing a strategic plan.[45]

Barriers to Reducing Bias in the Workplace

The EEOC enumerated potential barriers to recruitment and hiring experienced by companies, including (1) a failure to know where to appropriately recruit; (2) a failure to advertise widely; (3) recruitment practices that overlook or fail to seek all qualified individuals; (4) overreliance on informal networks of recruitment or word-of-mouth; (5) a lack of formal systems for recruiting; and (6) a limited pool of targeted groups of persons with required qualifications.[46] Senior company leaders must be intentional about identifying the barriers present within their corporations and boldly respond to these hindrances—as the company would any other business challenge.

Any steps taken to identify barriers to recruitment and hiring should include examining potential differences in the way bias in the workplace differently impacts Black men and Black women, as well as other race and ethnic groups.[47] For example, Black women remain severely underrepresented in the workforce, particularly in manager, vice president, and C-suite roles. While Black women comprise 7.4 percent of the U.S. population, they account for only 1.6% of vice president roles and only 1.4% of C-suite positions.[48] Since 1999, there have been fewer than two dozen Black CEOs of *Fortune* 500 companies.[49] Only four have been Black women.[50]

Establishing a Diversity Plan

To combat these barriers, the EEOC explained that it is best practice for companies to establish recruitment and hiring policies that:

- enumerate criteria and procedures for selection of employees;
- identify the individuals responsible for efforts to meet recruitment and hiring goals (i.e., increase the percentage of people of color and other candidates in recruitment and hiring pools); and
- contain a formal statement explaining how diversity and affirmative action are intertwined in the company's hiring and retention practices.[51]

Certain federal contractors are required to maintain formal affirmative action programs, or formal plans intended to recruit and advance qualified underrepresented candidates. These programs help increase equal employment opportunities by, among other things, assessing the composition of the employer's workforce as compared to the composition of relevant labor pools. Affirmative action programs are action-oriented. In connection with these programs, federal contractors assess their recruitment and hiring activities and create comprehensive multi-faceted plans to best recruit and hire qualified individuals from underrepresented groups. While covered federal contractors are required to maintain these affirmative action programs, other companies can choose to voluntarily establish affirmative action programs to recruit and advance qualified underrepresented candidates. Companies may utilize a number of mechanisms to implement such plans:

- scholarships for the education of diverse students;
- work/study programs;
- posting notices on job hotlines and in diverse publications;
- participating in career fairs;
- working with predominantly Black professional associations or organizations that target a diverse demographic (e.g., National Bar Association, National Society of Black Engineers, National Association of Black Accountants, National Black MBA Association, National Association of Securities Professionals, National Association of Real Estate Brokers, etc.);
- targeting HBCUs and other educational institutions with diverse student populations; and
- using recruiters, referral, and search firms that present diverse candidate pools.[52]

A review of current policies and practices at select companies indicates that a strong diversity and inclusion strategy can help attract talent:

- In 2016, Pinterest partnered with Paradigm, a diversity and inclusion training company, to establish a diversity plan that facilitated a 30% increase of engineering roles held by women and an 8% increase for historically underrepresented ethnic groups. The company implemented strategies like unconscious bias training for each employee, and required candidate lists to include at least one person from an underrepresented background and one woman. The company nearly achieved its goals in 2018, with 30% of tech roles being held by women and 7% held by individuals from underrepresented ethnic backgrounds.[53]
- Liberty Mutual established a diversity plan focused on five key pillars—talent (i.e., attraction, advancement, retention), development (i.e., building the company's D&I capability), workplace environment, customer and community, and communications (i.e., D&I messaging and language). The company established internal programming, including

a diversity and inclusion council and employee resource groups, and events focused on identifying a pipeline of potential candidates among college students.[54]

- A part of Verizon's diversity and inclusion strategy includes a partnership with the Center for Talent Innovation to examine factors affecting whether people of color and women advance in, stay in, or leave marketing, media, and communications jobs.[55]

Hiring Diversity Managers

To ensure that diversity and inclusion remain priorities in employee hiring (and beyond, to retention and in executive service on boards), organizations should dedicate an individual or build a team of personnel focused on diversity.[56] Companies readily build sales and marketing teams, event planning staff, and sustainability teams.[57] Diversity managers should be responsible for creating, recognizing, and implementing actions that promote and encourage diversity within the company.[58] Diversity managers also bolster social accountability.[59] If a hiring manager is responsible for explaining a hiring decision, he or she is less likely to act on bias.[60] Having a diversity manager within a company allows for discussion with hiring managers that prompts them to pause and consider all candidates who are qualified and not solely the person that comes to mind.[61] Companies that appoint a diversity manager report 7 to 18% increases in all underrepresented groups[62] in management within five years.[63] These hiring decisions lead to improved decision-making, increased revenue and profits, and more robust innovation.[64]

Establish Responsibility for Diversity Within the Company: Executive Compensation and Performance Metrics

As a foundational step, collecting and analyzing data on the retention and promotion of Black employees and leadership allows companies to develop targeted goals and timelines. Companies can then incentivize senior leaders to have ownership in promoting diversity by **tying performance evaluations and compensation to diversity and inclusion efforts**. This approach treats diversity and inclusion as a business imperative, advances accountability, and provides executives with a financial incentive to become invested in diversity and inclusion initiatives.[65] The role of senior executives in spurring diversity and inclusion within an organization is indispensable. Rewarding executives for taking ownership of diversity and inclusion goals underscores the value a company places on creating a diverse and inclusive workforce.

Fewer than one in five companies offer financial incentives for senior leaders who make efforts towards meeting or exceeding diversity goals.[66] An analysis by Pearl Meyer, a compensation consulting firm, found that only 78 of about 3,000 companies indicated that a portion of their chief executive's compensation was based on making efforts toward fulfilling diversity goals, which is a significant missed opportunity to increase diversity.[67] Yet studies have shown that these programs can be remarkably effective. A study by DiversityInc found that companies that tied more than 10% of executive compensation to diversity initiatives or goals also had 85% more Black, Latino, and Asian employees at the level of CEO and direct reports to the CEO, and 40% more in the level below direct reports, than companies that tied less than 10% of executive compensation to diversity.

But recent public statements show a trend toward tying executive compensation to these efforts. Several major companies have formally incorporated diversity metrics into executive compensation programs. Companies that have formally linked executive compensation to efforts to increase diversity include:

- Wells Fargo, which announced in June 2020 that over the next five years a portion of senior leaders' year-end executive pay will be tied to goals around increasing representation and inclusion of diverse employees in the company.[68]
- Uber, which is considering progress toward its 2022 diversity and inclusion goals when it determines executive pay and evaluates executives' job performance,[69] and announced a plan to factor in company progress on measurable diversity and inclusion goals when evaluating job performance and determining bonuses for its CEO and other senior executives, including the CFO, General Counsel, and Chief People Officer.[70]
- Johnson & Johnson, which rewards employees and executives for specific goals tied to diversity and inclusion.[71]

- Microsoft and Intel, which have announced that 50% of their executives' annual cash bonuses are based on several strategic performance goals, including diversity.[72] Intel further provided an additional incentive to all employees of up to 7% of each employee's total bonus if the company hired 40% people of color and women and achieved a retention rate for people of color and women that at least equaled the retention of White and Asian men. With the help of these incentives, Intel reported that it reached its representation goals ahead of schedule.[73]

Linking diversity efforts to executive compensation can significantly influence the success of diversity and inclusion initiatives. Black corporate executives—such as Mellody Hobson, co-chief executive of Ariel Investments and a board member at the Rockefeller Foundation, J.P. Morgan, and Starbucks—have rallied for companies to renew their focus on the lack of diversity in corporate America. Hobson, too, called for companies to tie executive compensation to diversity metrics and maintains that progress for Black people requires establishing these hard incentives.[74] Similarly, former Xerox CEO and Uber board member Ursula Burns cautions that companies must be more "affirmative about the way [they] approach hiring" and business leaders must proactively lead discussions about social injustices.[75] In short, companies must incorporate diversity goals into management expectations and performance reviews to signal—and act upon—a stated commitment to diversity and inclusion.[76]

Make a Company an Attractive Place to Work by Enhancing Public Awareness of Internal Diversity Initiatives Affecting Black People

Making diversity and inclusion an integral part of a company's external branding is important to showcasing its commitment to racial equity and improving diversity. It can also aid a company's long-term strategy for attracting talent from untapped resources. For example, the Bloomberg Women's Community connects and supports female employees through gender awareness programs, career development, and relationship building initiatives.[77] The company invites companies around the world to participate in the Gender-Equality Index, which selected 230 companies in 2020 that were all committed to advancing women's equality in the workplace.[78] IBM has used employer branding to improve diversity-related recruiting and hiring. The company's diversity and inclusion website highlights key diversity milestones using a timeline from 1899 to present, and the company uses the hashtag "#inclusiveIBM" to promote and demonstrate its inclusive culture on social media sites.[79]

Some companies couple external branding initiatives with **pledges to increase the number of Black executives** hired to senior and leadership positions. For example:

- Amazon reported that it would aim to double the number of Black employees in senior leadership roles, as well as hire 30% more Black people as corporate employees throughout the United States in 2021.[80]
- Wells Fargo committed to doubling Black leadership by 2025.[81]
- Google announced that it would aim to increase representation of underrepresented groups in leadership by 30% by 2025.[82]
- Microsoft pledged to double the number of Black employees in senior and leadership positions by 2025.[83]
- PepsiCo announced a five-year, $400 million initiative that includes increasing Black managerial representation by 30% by 2025.[84]
- Twitter has set a goal of having 25% of its workforce be underrepresented people of color by 2025.[85]
- Pandora publicized specific diversity and inclusion goals, stating that it will increase the percentage of United States employees of color from 35% to 45%, as well as committing to gender, racial, and ethnic promotion parity by 2020.[86]
- McKinsey pledged to double its Black leadership and hiring of Black colleagues by 2024.[87]

- By 2022, Uber has committed to growing the percentage of women at Uber's manager level and above to 35% and growing the percentage of other categories of underrepresented employees to 14%.[88]

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International Business Machines; Johnson & Johnson; JPMorgan Chase & Co.; Kraft Heinz; Lockheed Martin; Lowe's; MasterCard Inc.; McDonald's Corp.; Medtronic PLC; Merck & Co.; MetLife Inc.; Mondelēz International; Morgan Stanley; Netflix; Nike, Inc.; PayPal Holdings; PepsiCo; Pfizer Inc.; Procter & Gamble Co.; Qualcomm Inc.; Southern Company; Starbucks Corp.; Target Corporation; The Coca-Cola Company The Walt Disney Company; U.S. Bancorp; Union Pacific Corp.; United Parcel Service; UnitedHealth Group; Verizon Communications; Visa Inc.; Walgreens Boots Alliance; Walmart; and Wells Fargo.

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Part II:

Recruitment, Hiring, and Retention Initiatives

A first step to combating systemic bias in corporate America requires a focus on the entry point to the workforce—a company's recruitment and hiring policies and practices. Research prepared by the National Opinion Research Center at the University of Chicago found that Black people represent fewer than 1% of Fortune 500 CEOs, and only 3.2% of executives and senior manager-level employees at large U.S. companies.[1] Research on racial discrimination in hiring since 1990 shows that Black and Latino applicants experience greater bias than White applicants at various points throughout the hiring process. For example, a review of 54,000 applications found that White applicants received significantly greater callbacks than Black and Latino applicants with identical resumes: on average, White applicants received 36% more callbacks than Black applicants and 24% more callbacks than Latino applicants.[2] Hiring rates have not changed in any significant way since 1990.

In addition to a focus on recruitment and hiring, companies can reduce systemic bias against Black people by adopting initiatives aimed at retaining and promoting the development of Black employees and leadership. Once hired, Black professionals are more likely to encounter prejudice and microaggressions than any other racial or ethnic group, experience a lack of support from managers, and fall victim to a cycle of prejudice.[3] Organizations can work to combat systemic bias in the recruitment, hiring, and retention of Black individuals by implementing certain steps, including:

- **Broaden the applicant pool.** Initiatives focused on increasing diversity in applicant pools can also directly affect a company's ability to improve the recruitment and hiring of Black employees. Research suggests that where there are at least two underrepresented candidates in a final applicant pool, the likelihood that the underrepresented candidate will be hired increases significantly. The study examined hiring results among 598 candidates for academic jobs where the finalist pool ranged from three to 11 candidates (the average was four).[4] The odds of hiring a minority candidate were 193.72 times greater if there were at least two minority candidates in the finalist pool.[5] This was the outcome irrespective of the finalist pool size (e.g., six, eight, etc.).[6] As such, companies would be well-served by partnering with executive talent pipelines and diversity-focused recruiters because these entities have direct access to talented Black candidates. Partnerships with talent pipelines and diversity-focused recruiters will help ensure that companies expand outreach and increase the likelihood that diverse candidates will apply for a particular role.

- **Establish a standardized interview and selection process.** Research suggests that maintaining structured interview processes helps reduce disparities in hiring and limits the prevalence of social stereotypes about applicants that influence hiring decisions. Coupling standardized interview processes with other tools to ensure fair hiring procedures—a diversity-focused pre-hiring selection process, revising language in job postings to be more inclusive, and adjusting compensation to be based on fair market rates—will help companies to curb bias in hiring.

- **Reduce social isolation**. Black professionals are generally at higher risk of social isolation and attrition, but companies can address these issues through formal mentoring programs and Employee Resource Groups, increasing employee visibility (e.g., more opportunities for internal and external presentations, networking, public speaking, and participating on committees), programs that analyze and address factors that drive attrition, and providing various mechanisms for employees to raise issues and concerns that allow companies to detect and address potential bias and related problems early.

Companies stand to benefit financially by implementing many of these inclusive initiatives. Such practices provide companies with a competitive advantage in an increasingly global economy. A 2017 Boston Consulting Group study identified diversity as a key driver of innovation and found that diverse teams provide 19% more revenue.[7] A study in Harvard Business Review of venture capitalist professionals determined that diversity improves financial performance: "Thriving in a highly uncertain competitive environment requires creative thinking in those areas, and the diverse collaborators were better equipped to deliver it."[8] But the systematic exclusion of diverse groups denies companies the opportunity to compete and lessens a chance for financial success.[9] Diversity maximizes business performance in other ways: inclusive teams make better business decisions up to 87% of the time, and decisions made and executed by diverse teams deliver 60% better results.[10] As such, companies should think critically about fostering diverse and inclusive workplaces—which begins with front-end recruiting and hiring processes and continues with retaining and promoting the development of Black individuals.[11]

Broaden the Applicant Pool

Companies remain responsible for ensuring that the sources from which they recruit and hire are not structured in a biased way. Initiatives focused on increasing diversity in sourcing, screening, and selecting candidates can directly affect a company's ability to improve the recruitment and hiring of Black employees. The EEOC has advised that companies should **recruit from racially diverse sources to ensure that the applicant pool reflects the diversity of the qualified labor force**. For example, where a company needs to address a lack of Black candidates in a recruiting pool, the EEOC has advised that, if an employer's primary recruitment source is a university that has few Black students, the employer should adopt other recruitment strategies, such as also recruiting at predominantly Black colleges.[12] Particularly important are long-term strategies that tap into sustainable pipelines of talent.

Historically, some companies have excused their inability to meet diversity goals by pointing to what they deem a lack of qualified Black talent from which to recruit. Wells Fargo's CEO made such a pronouncement in June 2020, stating: "[w]hile it might sound like an excuse," the company's lack of diversity was the result of "a very limited pool of Black talent."[13] Broad, generalized statements such as these are harmful and are often not borne out by the data. The lack of Black professionals in corporate executive roles or on corporate boards is frequently not due to a lack of preparation but to a failure on the part of the organization to ensure access to opportunities for advancement for Black candidates.[14]

Establishing Strategic Partnerships to Expand the Diverse Talent Pool

Strategic partnerships with programs that host diversity networking events, pipeline programs, and recruiters focused on representing and advancing diverse communities provide companies with ongoing opportunities to tap into talented pools of Black candidates.[15] Corporations should consider which partnerships will yield the best results, how an association's mission aligns with the company's goals, values, and culture, and whether an association's membership is the appropriate talent source.[16] Consider the following types of strategic partnerships below.

First, at the heart of a company's strategic approach to enhancing its talent pipeline should be establishing or expanding participation in the development of institutions that are likely to have diverse talent pools, such as historically black colleges and universities ("HBCUs") and other historically diverse academic institutions. For example, in 2019, PwC hosted the inaugural HBCU Faculty Forum for HBCU faculty members and PwC partners and staff—a tool that provides significant institutional support of HBCUs.[17] Launched with the goal of strengthening PwC's relationships in the HBCU community, PwC's HBCU forum serves a number of purposes: (1) PwC leadership facilitated discussions with the faculty about the importance of HBCUs in the company's national recruiting strategy and how to incorporate the critical skills HBCU students need into existing curriculum of the various HBCUs; (2) PwC provides HBCU professors with free access to hands-on upskilling opportunities that in turn allow faculty to better prepare students for their future careers; (3) PwC offers scholarships to assist students in overcoming the hurdles associated with the growing cost of education, including recently awarding $150,000 in HBCU scholarships; and (4) PwC continues to work with signatories to the CEO Action for Diversity and

Inclusion initiative to plan events to promote the pipeline of talent from HBCUs and strengthen connections between HBCU deans and executives of leading companies.[18]

Second, companies can identify talented prospective Black candidates through **sponsorship and participation in diversity networking events, job fairs, and special-interest websites**. Research has found, for example, that five years after a company implements a college recruitment program that targets female employees, the proportion of White, Black, Hispanic, and Asian-American women in management rises by 10%.[19] Programs focused on diversity recruitment experience an increase of Black male managers and Black female managers by 8% and 9%, respectively.[20] Activities that may attract Black candidates include:

- Partnerships with associations that represent women and diverse groups;
- Sponsorship and participation in national diversity networking events, including diversity conferences;
- Presence at diversity job fairs, including fairs for Black students or other underrepresented groups; and
- Online recruitment and job postings through special-interest focused job websites.

Third, expanding the pool of qualified candidates can be aided by **partnering with executive talent pipelines**, such as INROADS[21], Management Leadership for Tomorrow (MLT)[22], Sponsors for Educational Opportunity (SEO)[23], the Consortium for Graduate Study in Management[24], Calibr Global Leadership Network[25], and the Executive Leadership Council[26], to identify highly qualified Black executives.

Finally, in order to create repeated opportunities to identify diverse candidates, companies can **establish a relationship with recruiters that prioritize, or work exclusively with, diverse candidates**. Informing recruiters of diversity-related goals and instructing recruiter-partners to present diverse candidate pools can also aid companies in sourcing a diverse range of candidates.

Reducing Unconscious Bias in the Applicant Pool

Maintaining a diverse slate of qualified candidates—in particular, more than a single diverse candidate in the final applicant pool—can significantly increase the likelihood that a diverse individual will be hired.[27] A study by the University of Colorado's Leeds School of Business found that when companies included only a single woman or historically underrepresented person in an applicant pool, there was a zero percent chance that the applicant would get the job.[28] But a hiring committee has a 50/50 chance of selecting a non-White or female applicant if the applicant pool is half non-White or female.[29] Being the only diverse candidate in a pool of finalists highlights this individual as different, and decisionmakers may implicitly view deviating from the norm as risky because there is a tendency to ostracize people who are from different groups.[30] But when hiring a Black candidate is perceived to be the status quo (i.e., the pool included two Black candidates and one White candidate), individuals who scored average in unconscious racism tended to rate a

Black candidate 10% better than the White candidate.[31] Therefore, companies should consider requiring **that final applicant pools include multiple diverse candidates**.

Businesses in the finance, technology, legal, and sports industries have implemented rules attempting to increase the number of diverse candidates in an applicant pool:

- Under the Rooney Rule, updated in May 2020, NFL hiring managers are required to interview at least two external diverse candidates during the hiring process for vacant head coaching roles, and at least one diverse candidate for vacant offensive, defensive, or special-teams coordinator roles (i.e., a company's leadership might specify to recruiters that there must be at least two candidates from underrepresented groups on a position shortlist).[32]

- In 2019, Goldman Sachs announced a policy requiring managers to interview two new diverse candidates for any open position. Specifically, half of all new analyst and entry-level associate candidates must be women. For the first time, the company issued additional targets for Black and Latino hires.[33]

- Walmart similarly reported in its 2019 Culture, Diversity & Inclusion report that it has established an officer (VP and above) selection protocol to create a consistent and objective selection process, such as including at least three candidates on each internal and external slate with at least one candidate being a woman and/or person of color.[34]

- More than 100 major law firms signed onto the Mansfield Rule, which measures whether law firms have affirmatively considered at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.[35] Research suggests that the 30% requirement is the critical mass necessary to disrupt biases.

Companies should consider memorializing these protocols in company policies to ensure more opportunities for Black people to "get in the door" and to interview for key roles. But the inclusion of Black candidates on interview shortlists should not be merely perfunctory. Instead, companies should couple policy requirements with bias training for hiring managers – as discussed in *Part I: The Building Blocks of a Diverse Workplace – Understanding Bias and Aligning Incentives to Values* – to ensure that potential individual bias does not serve as an obstacle to creating a more inclusive workforce.

Establish a Standardized Interview and Selection Process

Initiatives that allow for a **fair and standardized interview process will help mitigate bias in the interview process**. For example, making job postings more inclusive, using pre-hiring selection platforms, facilitating structured interviews that allow a company to obtain the same baseline knowledge about candidates, and recommending salaries based on fair market rates will help ensure that companies are interviewing with an eye toward inclusion.

Make Job Postings More Inclusive

Research conducted by the Harvard Business Review found that job descriptions can and do alienate potential candidates when the description insufficiently focuses on the expectations of the role and instead includes limiting language (e.g., potentially gendered language such as "outspoken," "competitive," "nurturing," or "loyal") or language that may discourage diverse or unconventional applicants (e.g., a requirement that an applicant have two-years' experience if that experience is not actually required for the job). For example, a report published by LinkedIn on how words impact men and women in the workplace found that 44% of women would be discouraged from applying for a role if the description included the word "aggressive."[36] This means that companies should consider **removing from job descriptions potentially exclusionary language and unnecessary requirements that could be barriers to underrepresented groups**. Enlisting technology solutions to review job descriptions, as the companies below have done, can also allow companies to efficiently avoid some of these issues.

- Google has described its efforts to reduce bias in job descriptions via a tool that analyzes the text in job descriptions to remove words or phrases that could bias a candidate from an underrepresented group against applying.[37]

- Cisco uses data science and the Textio Hire app to identify potentially problematic words or phrases in job descriptions and suggest language that will attract more diverse applicants.[38]

- Slack has focused on removing bias from the interview process by utilizing technology to analyze potentially biased language in job descriptions that would rebuff female candidates. Its talent acquisition strategy also includes clearly defining candidate criteria, asking interviewees the same question, and favoring a blind code review that wipes all personal identifiers from a candidate's interview work product, as well as recruiting from coding bootcamps focused on historically underrepresented groups.[39]

Establishing a Standardized Interview Process

Pre-selection or pre-employment assessments can be used to evaluate traits or characteristics about a candidate's fitness for a position. Such platforms should require companies to **focus on a candidate's qualifications** rather than allowing implicit bias concerning a candidate's racial or ethnic background to potentially influence the process. For example, KPMG, Netflix, Uber, Peloton, Booking.com and Heineken are among companies using pre-hiring assessments created by Harver to do just that.[40] The Harver platform is equipped with 15 customizable modules—from culture fit, language, and multitasking, to personality, cognitive ability, and typing skills—and allows hiring managers to create situational judgement tests to show candidates what to expect from the job while evaluating how the candidate reacts in certain situations.[41] KPMG noted that after using the recruitment platform, the company increased the number of female hires by 44%.[42]

Companies that **implement a structured process for interviews** can also reduce disparities and limit the opportunities for social stereotypes about applicants to guide interviews.[43] Research suggests that unstructured interviews that lack defined questions are often unreliable for predicting job success. In comparison, structured interviews that ask all candidates the same set of questions minimize bias and allow employers to "focus on the factors that have a direct impact on performance."[44] The EEOC has also advised that companies should attempt to standardize interview questions to help avoid discrimination or limit liability.[45] Companies have already begun to consider following this model. TD Ameritrade's Kate Healy, a managing director who works to promote initiatives to attract underrepresented groups in the finance industry, recommends that companies adhere to a pre-scripted series of questions when interviewing prospective hires.[46] She also recommends establishing a panel of at least three interviewers to guard against unconscious bias when hiring.[47]

Blind hiring—or removing information like a job applicant's name, gender, religion, or academic qualifications like GPA from resumes—also reduces bias during the talent acquisition process.[48] Rather than evaluating a candidate's academic details, employers should assess candidates based on skills testing or sample projects, then select the top performers to participate in interviews.

Adjusting Compensation-Setting Policies

Recommending salaries based on fair market rates instead of compensation from a prior job can also curb bias. A recent study suggests that setting a new hire's salary using prior compensation data perpetuates inequities. Research by James Bessen, a Boston University economist, found that Black employees in states that have made it illegal to ask candidates about prior salary saw a 13% pay increase.[49] But use of prior salary history provides employers with a "bargaining advantage"—with knowledge that an applicant is underpaid, an employer may offer only slightly more than an applicant's current pay. To remedy concerns that an employer should know salary history to ensure that a new offer is commensurate with prior pay, employers might include a salary range with a job posting to allow applicants to self-select whether a range is acceptable when deciding whether to apply.[50]

Reduce Social Isolation of Black Employees

Companies can also promote retention and development by reducing the social isolation experienced by Black employees and supporting the development of their professional networks.

One study found that Black women were less likely than non-Black coworkers to interact with senior leaders and receive support from their managers (e.g., showcasing work, advocating for new opportunities). Additionally, less than a quarter of Black women reported feeling that they have the sponsorship needed to advance their careers.[51]

Supporting the creation and funding of Employee Resource Groups can reduce the social isolation of Black employees. Studies have shown that Black employees receive informal mentoring through these groups, which aid in retention and internal mobility.[52] **A formal mentoring program** may also help companies retain, engage, and develop diverse talent, and Black talent in particular.[53] One study found that organizations' formal mentoring programs increased the representation of women and people of color in management by 9% to 24% on average, with some of the largest increases in leadership positions among Black women.[54] Another study also found that mentoring programs improved promotion and retention rates for underrepresented groups.[55] To develop a healthy pipeline of Black talent, companies can prioritize career development and mentorship—

- Microsoft relies on mentoring and support networks for employees from underrepresented groups, including internal networks and partnerships with outside organizations to connect employees to communities of professionals that can help give a sense of belonging and opportunity.[56]

- General Motors encourages a mentoring program through Employee Resource Groups ("ERGs"), in which participants are assigned to small group mentoring cohorts that engage with leaders on career development, complete at least one community service team activity, and discuss a leadership book. General Motors reports that the program gives the company a competitive advantage in attracting, developing, and retaining Black employees.[57]

Retention equity programs can also help reduce attrition rates, which are generally higher among Black professionals.[58] Retention equity programs analyze and address factors contributing to higher attrition rates, and allow companies to intervene and provide support—such as connecting employees with the right resources, training, and community—before employees leave the company. Retention equity programs can help offset the cost of recruitment,[59] and studies also show that engaging employees boosts productivity.[60]

Expanding the visibility of a larger number of diverse employees, such as through more opportunities for presentations at internal meetings and external conferences, can also help facilitate Black employee engagement and reduce bias. Research indicates that enhanced visibility can counteract stereotyping and tokenism of underrepresented groups over time.[61]

Providing a clear process for employees to address bias and related problems, including mechanisms for employees to raise concerns around discrimination, may help with employee retention and promotion. A fear of retaliation may deter Black employees from reporting problems through a formal complaint system, which may cause bias and related problems to go undetected, fester, and ultimately increase attrition rates among Black employees. By providing employees with access to a variety of mechanisms for them to raise concerns—such as Employee Assistance Plans ("EAPs"), ombuds offices, and transformative dispute resolution systems—companies can intervene early, provide support and guidance to employees, resolve problems, and promote the retention of Black employees.[62]

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Part III:
Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America: Boards of Directors

Diversity at the board of directors level, particularly in terms of Black directors, continues to lag. As of 2020, among Fortune 500 companies, only 9% of board members were Black men or women.[1] In 2019, of S&P 500 companies, 37% lacked a single Black director.[2] The Center for Talent Innovation has found that Black people hold only 3.2% of leadership roles at large U.S. companies,[3] and only four Black individuals are currently Fortune 500 CEOs.[4] Steps that can have a meaningful impact on Black membership on boards of directors—by changing the selection process and promoting growth and development of selected Black directors—include:

- **Broadening the candidate pool and expected qualifications for directors**. Historically, companies have often recruited directors from a relatively small pool of C-suite level personnel, such as CEOs and COOs, from other major companies. Common criteria often include prior experience on other corporate boards, which can act as a self-reinforcing restriction on increasing diversity. Altering the expected (or required) background and professional experience for directors can also remove an impediment to increasing diversity and the pool of potential Black directors. Changes to the selection criteria used to identify potential directors can also make a significant difference in increasing Black representation.

- **Utilize different methods to identify potential director candidates.** Companies often rely on personal connections and networks of their executives to identify potential board candidates, which can limit the number of Black candidates. Retaining an executive search firm and providing clear guidelines can help broaden the candidate pool and move the search away from one driven by personal relationships. Looking to non-profit boards for potential candidates can also help companies identify more Black candidates.

- **Undertaking measures to promote and support Black board members.** The work does not stop for companies even after they have increased the number of Black directors. Companies must then work to ensure the existence of an egalitarian culture in which the CEO, Chairman, or lead director help to create a more open communication environment that will better take advantage of board diversity. In addition to the benefits inherent in increased diversity, taking these steps can also increase the development and satisfaction of Black directors. Boards that value open communication may also be more likely to engage in conversations about diversity.

Benefits of a Diverse and Inclusive Board

Increasing diversity, both among the broader workforce and at the higher levels of boards of directors, has become an increasing focus of companies in recent years. This push is supported by research showing tangible benefits to increased diversity, as well as increased risks that companies face relating to a lack of diversity.

Studies have shown that a diverse and inclusive board can lead to both tangible and intangible benefits for companies. A 2020 McKinsey report found that in 2019, top-quartile companies in terms of racial diversity at the executive level outperformed those in the bottom quartile by 36 percent in profitability.[5] McKinsey's analysis of prior years showed similar correlations between racial diversity and profitability, with top quartile to bottom quartile improvement of 33 percent in 2017 and 35 percent in 2014. The McKinsey study also found that these increases in profitability were significantly higher than comparisons between the top quartile and bottom quartile in terms of gender diversity, where increases in profitability were 15 percent in 2014, 21 percent in 2017, and 25 percent in 2019.

Surveys of directors also show a universal recognition of the benefits that come with increased diversity on boards. More than nine in ten directors agree that board diversity brings unique perspectives to the boardroom, according to PwC's 2019 Annual Corporate Directors Survey.[6] Similarly, 87 percent of directors surveyed by PwC in 2019 said board diversity enhances board performance and 76 percent said it enhances company performance.

In addition to the multitude of benefits that can accrue from a racially diverse board, a lack of diversity on boards is also beginning to present *risks* to companies. Perhaps most importantly, in recent years major institutional investors have attempted to leverage their significant influence to incentivize companies to take tangible steps to increase board (as well as executive and employee) diversity. In March 2017, for example, State Street Global Advisors announced that it would start voting against board members tasked with nominating new board members if progress is not made to improve female diversity on the board.[7] CalPERS, another large institutional investor, sent letters in 2017 to more than 500 US companies in the Russell 3000 index regarding lack of board diversity[8] and reported that through May 2018 it withheld votes or voted against 271 directors at 85 companies as a result of board diversity concerns. Finally, in February 2018, Blackrock announced that it was prepared to vote against director nominees when boards fail to make progress on improving diversity.[9]

Other steps taken by institutional investors have highlighted the importance of increasing racial diversity at the board level. State Street Global Advisors, for example, has integrated Sustainability Accounting Standards Board diversity metrics into its Environmental, Social and Governance scoring system. In August 2020, State Street Global Advisors followed up earlier initiatives targeting increased racial diversity by expanding its expectations for companies.[10] Specifically, State Street asked U.S. companies in its portfolio to provide specific communications to shareholders in five key areas, one of which called for companies to "[a]rticulate goals and strategy related to racial and ethnic representation at the board level, including how the board reflects the diversity of the company's workforce, community, customers and other key stakeholders."[11]

States have also started passing laws that mandate certain publicly-held companies to have diverse boards of directors. For example, in September 2018, California enacted a law requiring publicly-held corporations based in the state to have at least one female director by the end of 2019. And in September 2020, California enacted a law requiring publicly-held companies based in the state to include board members from historically underrepresented groups. This law will require one board member from historically underrepresented groups in 2021, with the requirement expanding to as many as three members from historically underrepresented groups (depending on the size of the board) starting in 2022. Other states have also considered or passed similar legislation in recent years. For example, in March 2019, the Illinois House passed a bill which would have required Illinois-based publicly-listed corporations to have at least one female director *and* at least one Black director. Although these provisions did not make it into the final law, these two efforts point to a trend of states taking more concrete steps to mandate increased board diversity.

Finally, a lack of board of diversity is potentially turning into a source of legal risk for companies in the form of shareholder derivative lawsuits. Several recent complaints filed against major corporations illustrate this potential risk.

In July 2020, a shareholder of Oracle Corporation filed a derivative suit alleging that Oracle's failure to appoint racially diverse directors and officers while making public statements avowing a commitment to racial diversity constituted securities fraud. The complaint contains allegations that Oracle's directors "deceived stockholders and the market by repeatedly making false assertions about [Oracle's] commitment to diversity. In doing so, the Directors have breached their duty of candor and have also violated the federal proxy laws." According to the complaint, as of the date of the complaint, "Oracle's Board today in 2020 has no African-Americans and no Latinos; and no Asian-American or other minority representatives aside from [one director]." In summarizing the theme of the complaint, plaintiffs opined that "[p]latitudes in proxy statements are not progress. Simply put, Oracle has no *real* commitment to diversity and its Board is turning a blind eye to the Company's miserable failure to ensure the 'diversity' trumpeted by the Directors in Oracle's filings with the Securities and Exchange Commission ("SEC") and its annual reports to shareholders."

Since the filing of the shareholder derivative lawsuit against Oracle, similar suits have been filed against Facebook, Qualcomm, NortonLifeLock, and The Gap. Rather than seeking damages to plaintiffs, as is often in the case, these recent shareholder derivative lawsuits have requested specific changes to corporate personnel or practices. For instance, the derivative suit filed against Qualcomm requested the following relief:

- Qualcomm should fire its Chief Diversity Officer and replace her with an African American;
- Qualcomm should replace three of its directors with two African Americans and one other diverse member;
- Qualcomm should create an $800 million fund to hire Black professionals and other diverse member and promote them to management positions at the company;

- Qualcomm should publish an annual Diversity Report with median pay data and should require annual training of its Board regarding diversity and anti-discrimination topics; and

- Qualcomm should replace PwC (which plaintiff alleges failed to hold the company accountable for its diversity initiatives and related internal controls) as its auditor.

As these derivative suits are novel in their legal theory it is difficult to predict whether courts will end up providing the relief requested by the plaintiffs. Regardless, companies facing such lawsuits may find it more sensible to undertake certain initiatives and steps independently, whether to render potential lawsuits moot or because they align with the company's diversity goals.

Recruiting a Diverse and Inclusive Board

In general, companies should carefully consider what they are looking for in their directors; the search and hiring process that they undertake; and the consequences of rules on director age caps and tenure limits. Companies should avoid reflexively filling open board seats with people already in the personal and professional networks of existing directors, and instead broaden the range of professional backgrounds considered for board member positions, which will allow room for more social and professional diversity.[12]

Broadening the Candidate Pool and Selection Criteria for Potential Board Candidates.

As a critical first step, companies can **broaden the candidate pool from which they select their directors**. Historically, companies have often recruited directors from a relatively small pool of C-suite level personnel, such as CEOs, CFOs, and COOs, from other major companies. Executives at major companies have historically lacked diversity due to a number of factors, which in turn has also limited diversity at the board level. As such, companies should consider recruiting from outside of this pool (and especially the CEO, CFO, and COO pool) to increase Black representation on boards and foster boards that have more diverse experiences and views.

Broadening the range of professional backgrounds and experience considered for board member positions is another step that companies can take to attract more Black directors. Indeed, Spencer Stuart's 2019 board survey found that new diverse directors in 2019 had a wider variety of professional experiences than non-diverse directors. Specifically, 18% of the diverse directors selected in 2019 by S&P 500 companies had professional experiences falling into categories not typically associated with corporate board members, such as academics, non-profit, consultants, and government or military service, compared to just 7% of the non-diverse directors.[13] Altering the expected (or required) background and professional experience for directors can remove an impediment to increasing diversity and the pool of potential Black directors.

In a similar vein, companies can **reassess their goals for the board and alter their selection criteria** in a way that will help accomplish these goals. For example, common criteria often include prior experience on other corporate boards, which can act as a self-reinforcing restriction on increasing diversity. Spencer Stuart's 2019 Board Index found that only 19% of the diverse directors appointed in 2019 were current or former CEOs, compared to 44% of non-diverse men.[14] This statistic shows how growth of Black directors would be inhibited by a continued restriction of the candidate pool to former CEOs. Similarly, 34% of the diverse directors appointed in 2019 were first-time corporate directors, which was nearly double the 18% of the non-diverse directors.[15]

Tangible Steps to Help Identify Black Director Candidates.

Companies can take several tangible steps to help identify Black director candidates. In an effort to identify a broader candidate pool that includes more Black candidates, companies can **partner with executive talent pipelines** to identify highly qualified, board-ready Black executives. As noted above, the Corporate Board Initiative, the Executive Leadership Council, the Black Corporate Directors, and the African American Directors Forum are organizations poised to aid organizations in identifying highly qualified, diverse board-ready executives. Entering into relationships with these types of organizations can increase the likelihood that companies diversify their boards of directors.

Utilizing an executive search firm, rather than relying on a selection process that is likely to be driven by the networks and preferences of current board members and executives, can help increase the likelihood that Black directors are identified, nominated, and elected. Corporate board member searches often are based on relationships and do not involve retention of a search firm.[16] Perhaps unsurprisingly, as noted above, the relationships of current directors will often fall largely within the circle of current executives and directors, which is often a less diverse group than the wider population of qualified candidates. Engaging search firms more frequently may result in more qualified and diverse candidates being selected, rather than those with established relationships with existing board members. This will particularly be the case if companies provide direction and instructions to the executive search firm that make clear that diversity, both in terms of background and professional experiences, should be among the primary factors considered in the search.

There are some indications that companies are beginning to expand their candidate pool in this way, with benefits for both racial diversity and diversity in professional backgrounds more generally. For instance, Spencer Stuart's 2019 Board Index report found that in several respects, the new directors selected in 2019 by S&P 500 companies generally came from beyond the traditional pool of CEOs and existing boards of directors. Specifically:

- 65% of the 2019 class of new directors come from outside the top executive positions of CEO, chair/vice chair, president and COO;
- 27% of the 2019 class of new directors had no previous experience serving as a director for a public company.[17]

Finally, companies can make efforts to **recruit more directors from non-profit boards**, which often have a higher percentage of Black directors. The Black Corporate Directors Time Capsule Project, which was conducted by a former Black director to obtain the views and experiences of Black directors at major companies, found that the vast majority had significant experience on non-profit boards prior to obtaining corporate board positions.[18] Companies should focus recruitment efforts on these boards, both to focus on increasing diversity and to obtain directors with experiences that will enable them to excel from their first day on the board.

Measures to Encourage Board Turnover.

In practice, the low turnover rate of boards of directors – particularly those of larger corporations – presents a significant impediment to increased diversity. Several statistics from the 2019 Spencer Stuart Board Index survey highlight this lack of turnover:

- In 2019, 29% of S&P 500 boards were unchanged, which dramatically reduces the number of open seats for which Black candidates could be selected.
- Of the S&P 500 directors that departed their posts in 2019, the average age was 68.7 years old, with 60% over 70 years old. The average tenure of these departing directors was 12.3 years.

In certain respects, companies seem to have regressed in terms of formulating board policies that encourage more turnover (and therefore more seats available to new candidates who may be diverse, whether racially or in terms of gender). In 2019, 46% of S&P 500 boards with a retirement age set it at 75 or older, whereas in 2009 only 15% of such companies set the mandatory retirement age at 75 or older. This allows directors to serve on boards for very long terms, thereby reducing turnover.

Research shows that lowering the age cap on directors could serve as a powerful tool to induce more turnover and create opportunities to fill empty seats with Black candidates. In 2019, for example, more than three-quarters of the independent directors who departed S&P 500 boards in 2019 served on boards that have a mandatory retirement age, and of those, 55% of departures were of directors who either met or exceeded the age cap or were within three years of the cap. Alternatively, companies can consider shortening the maximum terms of directors to incentivize more turnover. This latter approach may be more palatable for companies, as it is does not target any specific age cohort but instead is designed to ensure more frequent turnover of board members.

Make Firm Commitments and Pledges.

Companies should join initiatives and make firm commitments to adding more Black directors. For instance, in August 2020, a number of companies, including Zillow and Nextdoor, joined the Board Challenge, pursuant to which the companies pledged to add a Black director within the next twelve months.[19] Public commitments to these types of initiatives make it more likely that companies will actually take action to further diversity goals and should be strongly encouraged.

Diversity Advisory Boards

For foreign companies with a large presence in the U.S. that do not have U.S.-based boards, a Diversity Advisory Board can play an important role in fostering a diverse and inclusive company culture. An external Diversity Advisory Board can strengthen a company's diversity and inclusion efforts by meeting regularly with senior management and providing guidance on the implementation and development of the company's diversity strategy. For example, Toyota's Diversity Advisory Board, which was created in 2002, is charged with working with senior leadership to help ensure executive accountability and drive adoption of best practices.[20] U.S.-based companies have also created similar external advisory entities. Comcast Corporation created an external Diversity Advisory Council in 2011 to advise the senior executive teams on areas including corporate governance, employment/workforce recruitment & retention, procurement, programming, and philanthropy & community investment.[21]

Promoting a Diverse and Inclusive Board

The work does not stop for companies even after they have increased the number of Black directors. Companies must then work to ensure the existence of an egalitarian culture in which the CEO, Board Chair, or lead director help to create a more open communication environment that will better take advantage of board diversity. In addition to the benefits inherent in increased diversity, taking these steps can also increase the development and satisfaction of Black directors. Boards that value open communication may also be more likely to engage in conversations about diversity.

As a critical first step, companies can increase accountability and transparency around board diversity by **tracking and analyzing data** on the diversity of their board of directors over time, comparing the data to organizations of a similar size and in a similar industry, and sharing the data with key stakeholders.[22] Collecting and analyzing this data on the number of Black directors is a foundational step for other diversity initiatives, but not the end of the road. Indeed, a company's board of directors is generally publicly available information that can be readily obtained by the public and employees. Nonetheless, clear steps by companies to track these metrics and regularly develop concrete plans to address any shortcomings can increase the likelihood that goals of diversifying boards of directors are actually achieved.

Building off the tracking of diversity metrics, companies can encourage board members to take ownership in the process of promoting diversity and to hold leadership accountable by **tying compensation to diversity and inclusion efforts**. Compensation is an important tool through which companies mold incentives and can therefore be used to reinforce diversity values. By tying diversity and inclusion efforts to performance evaluations and compensation, companies will be treating diversity and inclusion as a business imperative and providing executives with a financial incentive to become invested in diversity and inclusion initiatives.[23] As the corporate body that typically sets executive compensation, Board members are in a unique position to have a powerful impact in setting a tone from the top by including diversity objectives in executive compensation.

Furthermore, the design and implementation of these programs will likely play a significant role in their success. For example, factors that may affect whether a plan sparks improvement in diversity may include how heavily this measure is weighted in a compensation or bonus program and how difficult the diversity-related goals are to achieve.[24] For instance, if bonus compensation is tied to a broad portfolio of strategic performance goals, one of which is a diversity initiative, executives may be able to obtain the bonus while focusing on other factors which are taken into account, with no progress being made on diversity efforts. Additionally, directors who seek to push for these types of compensation schemes should expect to receive resistance from at least some of their fellow board members, as only 39 percent of directors surveyed by PwC in 2019 said that diversity objectives should be included in their company's executive compensation plans.[25]

Once companies have a board of directors that includes Black and other diverse directors, they should take steps to ensure that these directors are well-integrated into the board. Long-term retention of Black and other diverse directors is critical to maintaining and continuing to develop diversity on boards. All board members should be given responsibility for and play a role in diversity and inclusion initiatives. For instance, on equity issues such as resolving pay disparities or ensuring a safe workplace environment, the board should involve a diverse group of leaders, rather than simply relying on Black and other diverse directors to handle these issues.[26] Relying solely on Black directors to handle issues relating to racial equity initiatives could have several negative effects. *First*, relying on a small group of directors to handle equity issues can create a perception that there is not full buy-in from the entire board. *Second*, relying on a small group to handle equity issues can create a perception that this group speaks for the entire board. Instead, key equity issues should be handled by the entire board and should be communicated accordingly. *Finally*, relying on Black or other diverse directors to handle all equity issues can harm the morale of these directors and create a perception that they were primarily brought onto the board to handle these issues, rather than other significant corporate issues that the board typically handles.

Companies should also undertake clear efforts to ensure that **Black directors are able to obtain leadership positions on corporate boards**. According to a recent Harvard Business Review study, despite often having stronger academic qualifications and similar levels of experience on corporate boards, Black directors are less likely to hold leadership positions on corporate boards.[27] The study found that only 25 percent of Black directors were board chairs or lead directors, compared to 37 percent of White directors. Furthermore, only 42 percent were committee chairs (including the nominating committee, which controls board nominations) compared to 52 percent of White directors. Ensuring that Black directors frequently chair the nominating committee in particular can help ensure that companies actually consider and nominate more Black directors. And ensuring that Black directors are able to obtain leadership positions on corporate boards will increase longer-term retention of these directors.

On a related note, companies should take clear steps to **provide opportunities to new Black directors for mentoring and developing relationships with corporate leaders**. The Black Corporate Directors Time Capsule Project, which was conducted by a former Black director to obtain the views and experiences of Black directors at major companies, found that one of the primary indicators of success for Black directors is a strong relationship with the CEO, along with strong relationships with other board members.[28] Companies should therefore help foster the development of these relationships to enable Black directors to succeed.

Similarly, to create conditions that will enable Black directors to thrive, companies should provide clear support for existing Black corporate board members in their diversity efforts (including in procurement and philanthropy).

Another measure that companies can take to help ensure that Black directors are able to excel in their directorships is to **encourage and assist Black board members in obtaining concurrent non-profit board positions.** The Black Corporate Directors Time Capsule Project discussed above found that many Black directors viewed service on non-profit boards as providing invaluable training and experience that helped them prepare for and excel on corporate boards.[29] To achieve this goal, companies can incentivize *all* board members to also serve on non-profit boards (and to assist each other in obtaining these types of directorships).

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Part IV:
Promoting Economic Equality Through Expanded Business Corporate Relationships

Being a good corporate citizen by promoting and implementing diversity efforts extends beyond a company's employees, executives, and directors. The professional service firms and suppliers that a company chooses to enter relationships with can also have a significant and profound impact on racial equity across the economy. These types of initiatives should be advanced by all corporations, which pose little legal risk and can yield great benefits.

Law Firms

Large corporations often devote significant spending to legal services. This spending presents an opportunity for companies to make conscious decisions about which firms they choose to work with based on various diversity metrics.

Companies should hire and retain law firms that rank highly for diversity and engage in intentional inclusion practices by collecting and measuring outside counsel metrics on Black personnel, both at the senior and junior levels. These measures of diversity are generally publicly available for major law firms, most of which provide underlying data on an annual basis to The American Lawyer, which then publishes an annual diversity scorecard. The 2020 version of that report shows that since 2010, the representation of people of color in major law firms has increased 3.9%.[1] However, the 2019 report also noted that most of this growth has been driven by Asian and Latino attorneys. Since 2011, Black attorney representation at major law firms has increased by only 0.2%, whereas both Asian and Latino representation has increased 1.1%.[2]

To combat this problem, the single most important initiative that companies can undertake to impress upon law firms the urgency of improving diversity among Black attorneys is making a concerted effort to hire Black partners to serve as relationship partners for their organizations. This will impress upon law firms, in a very real and meaningful manner, the critical nature of not only hiring—but also retaining and promoting—Black attorneys within those law firms, if those firms wish to continue receiving revenue from their corporate clients. Without taking this sort of significant remedial action, law firms can often achieve diversity goals by having associates work on projects, without making meaningful changes within the firms to eliminate the barriers to advancement among Black associates. Along these lines, in January 2021 a major beverage company informed its outside law firms that it expects them to identify at least one Black attorney, among other diverse attorneys, as having the potential to succeed as the relationship partner for the company.

Companies should also consider asking law firms to participate in the Mansfield Rule certification process and to achieve certification within a certain period. The Mansfield Rule requires law firms to consider at least 30% women, attorneys of color, lawyers with disabilities, and LGBTQ+ lawyers for all senior lawyer lateral hiring, equity partner promotions, and appointments or elections to governance and leadership roles such as managing partner, practice group leaders, and compensation committee. Over the first three years that Mansfield Rule certification has been in effect, firms have reported significant improvements:[3]

- 96% of firms reported that after adopting the Mansfield Rule, their teams of lawyers participating in formal pitch meetings have become more diverse.
- 65% of firms reported that more lawyers from underrepresented groups were appointed or elected to their Management/Executive Committee than before they adopted the Mansfield Rule.
- 63% of firms reported that they have increased the percentage of lawyers from underrepresented groups promoted into equity partnership since adopting the Mansfield Rule.
- 58% of firms reported that their lateral partner hiring pool was more diverse following the adoption of the Mansfield Rule.

Similarly, companies can require their law firms to provide concrete information and plans on meeting diversity goals. For example, in January 2021, Coca-Cola began requiring its outside law firms to provide information on a number of diversity-related goals and metrics, such as:

- Self-identified diversity data on a quarterly basis for analysis to be conducted by the company;
- Published commitments to diversity, inclusion and belonging, and also set concrete, measurable goals; and
- Transparency about how the law firm allocates origination, relationship, and matter credit for matters for the company.[4]

Companies can consider **building in accountability for law firms towards achieving diversity goals**, with rewards or consequences. For instance, companies may ask firms to commit that at least a certain percentage of billed attorney time will be by diverse attorneys, with a certain proportion of that being from Black attorneys. This can be a powerful incentive for law firms to work to increase their diversity, as failure to do so could result in a reduction in fees or a loss of business.[5] Companies can also create awards for outside law firms that perform the best on diversity measures. For example, companies can consider awarding bonuses to law firms that meet certain diversity improvement goals, or otherwise recognizing those firms.[6] These types of programs can help with altering incentives at law firms to increase diversity.

Finally, companies can also partner with law firms and other professional service firms to provide Black students with job and development opportunities. For example, companies can ask their law firms to participate in law student hiring initiatives focusing on historically underrepresented groups or offer scholarships focusing on these groups. Companies can also encourage and create programs for partnering with outside law firms for secondments/internships for Black lawyers and accountants that involve splitting time between the firms and the company.

Accounting Firms

Perhaps even more so than in law firms, Black representation (and representation of other historically underrepresented groups more generally) in accounting firms lags behind other professional services industries. According to data published by the American Association of CPAs, only ***one percent*** of CPAs at public accounting firms in 2016 were Black and only ***0.3 percent*** partners at public accounting firms in 2016 were Black.[7] In comparison, approximately 13% of the U.S. population is Black. These are staggeringly low numbers that companies should consider when selecting which accounting firms to engage.

Many of the same recommendations made above are potentially applicable to accounting firms as well. Companies may nonetheless struggle, however, to identify accounting firms that meet their desired diversity targets, particularly with regard to Black accountants. This heightens the importance of programs that will help foster a young generation of Black accountants through corporate relationships and programs with universities and accounting firms to provide internships and other development opportunities to young Black accountants.

Supply Chain Diversification

An equally important step that companies can take is to **commit to a certain level of supply chain spend on Black-owned suppliers**. This approach enables major corporations to have a broad impact on numerous industries across the economy – many of which will be small- or medium-sized business – to help foster and empower Black-owned businesses and entrepreneurs. Furthermore, many consumers have started to make purchasing decisions based on factors beyond brand, price, and quality, and now consider corporate responsibility factors, such as the company's environmental record or the company's record on racial and diversity issues.

When establishing goals for supplier diversity programs, companies should examine industry standards and set benchmarks that are both achievable and measurable.[8] For example, instead of only tracking diverse supplier spend, companies should consider tracking diverse supplier count to keep track of where companies might need to expand their supplier base.[9] Expanding the number of diverse suppliers may also help businesses avoid potential challenges to meeting diversity goals if, for example, a diverse supplier is purchased by a majority-owned company or if diverse companies let their certifications lapse.[10] Suppliers should also consider, among other things, the economic impact of working with Black-owned suppliers. For example, companies should examine: How many jobs are being created and/or sustained when your Tier 1 partners work with diverse suppliers?[11] How much tax revenue is generated for local, state, and federal governments as a result of that Tier 2 activity?[12]

Many companies have made these types of commitments in recent years. For example, since 2007, Proctor & Gamble has spent more than $2 billion with diverse-owned business (defined as at least 51% owned, operated and controlled by a United States citizen who is a person of color, woman, LGBTQ+, Veteran or Person with Disability) every year.[13] In February 2019, AT&T expanded its diversity supplier program with a commitment to spend $3 billion with Black suppliers across the U.S. by 2020.[14] And since the launch of its substantive supplier diversity program in 2016, Facebook has invested more than $1.1 billion with suppliers that are certified as having diverse ownership.[15] Beginning in 2021, the company has committed to spend $1 billion annually with diverse suppliers, including $100 million specifically earmarked for Black-owned businesses.[16]

A supply chain diversity program can cover several types of supply chain diversity metrics. A "single-tier" program involves contracting with or purchasing from suppliers that meet some metric of diverse ownership. A "two-tier" program involves contracting with vendors that may themselves not have diverse owners, but can qualify for the program so long as they subcontract with other companies with diverse ownership. Similarly, companies can require that their suppliers *also* implement some type of supply chain diversity program to qualify for RFPs or other types of business contracting arrangements. Mandatory regular reporting on these metrics or annual target spend by Tier 1 suppliers can be a powerful incentive to encourage diversity throughout a company's supply chain.

A multi-tier supply chain diversity program can be particularly important for companies that might struggle to locate Black-owned suppliers that have the scale to serve as Tier 1 suppliers. Companies in this situation should consider taking steps to assist their Tier 1 suppliers in locating Black-owned sub-suppliers. For instance, companies can hold supplier conferences to help Black-owned suppliers develop relationships with Tier 1 or Tier 2 suppliers. Other options for larger companies are the formation of a supplier-development institute, which provides knowledge and insights to Black entrepreneurs on starting and operating successful businesses, or (particularly in higher-tech industries) the adoption of a Science and Technology Entry Program (STEP) to support Black entrepreneurs through training, education, and mentorship.

To help with identifying third-party suppliers that are Black-owned, corporations can look to organizations, such as the National Minority Supplier Development Council (NMSDC), which advocate for and assist Black-owned suppliers with integrating into corporate supply chains. These organizations offer certification programs which suppliers can use to market themselves as bona fide minority-owned businesses. Companies should also consider supporting these organizations through financial support or leadership roles to help these organizations thrive.

One possible way to incentivize the diversification of a company's supply chain is to **tie executive compensation to meeting certain supply chain diversification metrics**. For instance, stock option awards or cash bonuses (as opposed to salary payments) could be tied to achieving certain supply chain diversity metrics.

Endnotes

[1] Dylan Jackson, "The 2020 Diversity Scorecard Shows Progress, but It's More Precarious Than Ever," *The American Lawyer*, May 26, 2020.
[2] Dylan Jackson, "Diversity Scorecard: African American Lawyers Are Being Left Out," *The American Lawyer*, May 28, 2019.
[3] "100 Law Firms Announced as Mansfield Rule 3.0 Certified," Diversity Lab.
[4] Michele Gorman, "Coke's GC Tells Firms To Diversify—Or Risk Getting Canned," *Law360*, January 28, 2021.
[5] For instance, in 2017, HP informed its outside law firms that it may withhold up to 10% of invoiced fees if the firms failed to meet certain diversity goals. Debra Cassens Weiss, "HP general counsel tells law firms to meet diversity mandate or forfeit up to 10% of fees," *ABA Journal*, February 15, 2017. Similarly, in January 2021, Coca-Cola informed its outside law firms that it may withhold up to 30% of invoiced fees if the firms fail to meet diversity goals for two consecutive quarters. Michele Gorman, "Coke's GC Tells Firms To Diversify—Or Risk Getting Canned," *Law360*, January 28, 2021.
[6] For instance, Bank of America's Legal Department has established an annual law firm diversity and inclusion award. *See, e.g.*, "O'Melveny Earns Bank of America Legal Department's 2017 Diversity and Inclusion Business Council Award," June 1, 2017, O'Melveny & Meyers LLP.
[7] 2017 Trends, American Institute of Certified Public Accountants.
[8] John Suarez, "5 Quick Wins to Grow Your Company's Supplier Diversity," January 26, 2020, CVM Solutions.
[9] Id.
[10] Id.
[11] CVM Solutions, "Multi-Tier Diverse Spend Tracking and Why It Is Important," June 15, 2020.
[12] Id.
[13] P&G, "Supplier Diversity at Procter & Gamble," 2020.
[14] "AT&T Commits $3 Billion Spend with Black Suppliers across the U.S. by 2020," February 18, 2019, AT&T.
[15] Sonia Thompson, "How Facebook Uses Their Supplier Diversity Program to Invest In And Connect With Minority Communities," *Forbes*, December 29, 2020.
[16] Id.

Part V:
Minimizing the Legal Risk of Initiatives to Promote Diversity and Reduce Systemic Bias in Corporate America

The Equal Employment Opportunity Commission ("EEOC") has warned companies that programs designed to break down patterns of segregation and to open employment opportunities for targeted groups must not unduly burden the rights of non-targeted groups.[1] For example, a program cannot require that non-targeted employees be discharged and replaced with targeted employees, nor create an absolute bar to the advancement of non-targeted employees. Nor may a company establish quotas, which the EEOC refers to as "the inflexible reliance solely on numbers that ignore qualifications."[2] By contrast, Employee Resource Groups that foster mutual support among employees and provide targeted training opportunities will not subject employers to Title VII liability as a general matter, unless there is some other proof of the employer's discriminatory conduct.[3] However, Employee Resource Groups that operate as a "pathway to leadership," but are not open to all employees, could increase an employer's risk of Title VII liability by not providing equal access to resources that directly affect employees' opportunities for advancement.[4]

While there is little case law that specifically addresses private employers' implementation of systemic diversity and inclusion programs, these initiatives are not immune to legal challenges, such as lawsuits alleging "reverse discrimination" pursued under Title VII of the Civil Rights Act of 1964, which is a federal law that prohibits employment discrimination based on race, color, national origin, sex, and religion. Employees bringing such actions would assert "that their employers' interest in diversity caused them to unlawfully consider race, ethnicity, and/or gender in hiring, termination, and/or promotion decisions."[5]

Employers, however, are able to successfully defend a challenged employment action where they can present a "legitimate, nondiscriminatory business reason [for their action] unconnected to the candidate's race, ethnicity, and/or gender."[6] Also, private employers should be thoughtful about potentially overestimating the risk of a successful "reverse discrimination" discrimination suit by a majority-group plaintiff, because doing so could "stifle legitimate employment decisions to diversify and correct the historical imbalance for which Title VII was enacted."[7]

Aside from studies showing diverse teams are more productive,[8] research suggests a potential link between a lack of workplace diversity and discriminatory conduct. For example, the EEOC has concluded that discriminatory harassment is more likely to occur in workplaces that lack diversity.[9] In particular, racial or ethnic harassment has been found more likely to occur when one race or ethnicity predominates.[10] The EEOC has explained that, in homogenous environments, workers who are part of a minority demographic may feel isolated and be vulnerable to pressure from others.[11] Conversely, employees in the majority may feel threatened by those deemed "different" or "other," and may hold concerns that their job is at risk or that workplace culture may change due to the presence of minority employees.[12] As a result, promoting workplace diversity is not only the right thing to do, but can also work to minimize acts of discrimination that may result in an organization facing significant financial penalties and settlements, as well as reputational costs. Recent settlements of cases involving allegations of discriminatory conduct include Ford Motor Company agreeing to pay more than $10 million in 2017 to settle a sex and race harassment case investigated by the EEOC;[13] Bass Pro Outdoor World LLC paying $10.5 million in 2017 to settle a hiring discrimination and retaliation lawsuit brought by the EEOC alleging the company discriminated against Black and Hispanic individuals in hiring;[14] and Target Corp. settling with the EEOC for $2.8 million in 2015 in a case alleging that the company's hiring tests discriminated against applicants based on race, sex, and disability.[15] In other words, the legal risks associated with allegations of discrimination and the perpetuation of bias against underrepresented minorities may far exceed any risks associated with efforts to right those historical wrongs.

Affirmative Action Programs

Implementing protocols to improve the recruitment and hiring of Black Americans is generally permissible under Title VII if a company does not consider race or color when making an ultimate employment decision. Indeed, certain federal contractors are required to implement affirmative action programs to further equal employment opportunity for people of color and women, among others.[16] And, as expressed in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, Title VII does not prohibit a private employer from *voluntarily* enacting a legally valid affirmative action program. An affirmative action program is more than passive nondiscrimination.[17] Instead, it contemplates that companies "take affirmative steps to encourage and promote equal opportunity, to create an environment free from discrimination, and to address any barriers to equal opportunity."[18] Courts and the EEOC have concluded that employers may adopt voluntary affirmative action programs to remedy a clear imbalance in a traditionally segregated job market.[19]

Companies should be mindful that affirmative action or diversity plans that include a pledge to increase the ranks of Black leaders in companies—by targeting specific goals—may receive additional scrutiny from government regulators, including the U.S. Department of Labor. But while Title VII prohibits employment decisions based on race, establishing and communicating aspirational hiring objectives is not per se unlawful.

In October 2020, the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") publicly raised concerns with Wells Fargo and Microsoft about whether the companies' commitments to diversity and inclusion—including doubling the number of Black managers and senior leaders in the U.S. workforce by 2025—constituted unlawful discrimination on the basis of race in violation of Title VII.[20] The Labor Department expressed an interest in understanding how the companies intend to implement their commitments without making race-based employment decisions.[21] In response, both Microsoft and Wells Fargo reiterated their commitments to increasing diversity in the workforce in full conformity with federal law.[22] Microsoft stated that it intends to focus on creating more opportunities, including through specific programs designed to cast a wider net for talent, and then hire and promote the most qualified person.[23] Wells Fargo indicated that it has already launched efforts to implement changes in the company to make it more diverse and inclusive, all of which, the company says, will comply with U.S. employment laws.[24] While companies may face legal challenges for establishing diversity plans, so long as the plans for increasing racial diversity do not include hiring quotas, set-asides, specific hiring numbers, or making individual employment decisions based on race, they should be able withstand such challenges.

The most effective way to minimize legal risk when establishing these recruitment and hiring plans may be to rely on long-standing precedent that asks the following:

(1) Is the diversity plan remedial in nature and therefore designed to correct a manifest imbalance in a traditionally segregated job category?;
(2) Does the plan unnecessarily trammel the interests of majority or male employees who would be adversely affected by the favoring of another protected group (for example, a plan that replaces an existing employee in favor of a protected group)?;
(3) Is the plan indefinite or is there a time when it will no longer be necessary?; and
(4) Does the plan focus on expanding the recruiting pool or otherwise expanding opportunity generally to persons in the protected class, while still allowing an individualized employment decision that is not based on a protected characteristic?[25]

Courts have not provided a bright line rule to explain what might constitute a historical racial imbalance in a traditionally segregated job market that would warrant an affirmative action plan for private[26] or public employers.[27] But case law provides some guidance. In *Shea v. Kerry*, a white Foreign Service Officer brought suit alleging that the hiring plan maintained by the U.S. Foreign Service violated Title VII because the plan required plaintiff to enter the Foreign Service at a lower level than would be the case if he was a minority candidate.[28] The Foreign Service's race-conscious plan provided a single advantage to minority applicants: minority applicants for mid-level positions could be considered without having to provide a certificate of need.[29] Here, the court concluded that the imbalance between white and non-white Senior Foreign Service Officers was overwhelming—of the 655 officers, 631 were white—and might even indicate that discriminatory practices were afoot.[30] Testimony before Congress also established evidence of pervasive historical discrimination in the Foreign Service as early as the 1960s.[31] The plan was deemed adequately tailored to address imbalances at senior levels because it focused on hiring mid-level positions.[32]

Courts may examine statistics concerning the presence of minorities in a workforce population to assess whether an imbalance exists. In *Higgins v. City of Vallejo*,[33] a white man filed a reverse discrimination suit against the City of Vallejo, California, alleging that the hiring of a Black man in a firefighter/engineer position, instead of plaintiff, violated Title VII and other laws.[34] The court upheld the affirmative action plan, relying on evidence from the California Fair Employment Practices Commission of past discriminatory practices by the City of Vallejo: only 11.4% of the municipal workforce included diverse minorities (compared to the city's 30% minority population), and 7.3% of the workforce was Black (compared to 17% of the population).[35] Records also showed a racial imbalance in the city's fire department—only three Black people, including plaintiff, ever served as firefighter/engineer in the history of the fire department.[36] The court considered a number of factors in finding that the plan conformed with Title VII, including: (1) the plan did not establish any rigid quotas or discriminatory exclusions; (2) plaintiff did not have an absolute entitlement to the firefighter/engineer position because the city manager had discretion to choose among the top three applicants, and each candidate had some hope of promotion, but no "legitimate expectation of promotion"; (3) when he was denied promotion, plaintiff retained his job as firefighter, his salary, his seniority, and his eligibility for future promotion; and (4) the city's plan "[was] a temporary program designed to attain racial balance.

Employers that already maintain a racially balanced workforce may not grant a non-remedial preference in employment decisions merely to promote "racial diversity" where the plan is not intended to remedy discrimination or effects of past discrimination. In *Taxman v. Board of Education*, budgetary concerns required a public high school in New Jersey to reduce its teaching staff by one; the school had to decide whether to fire an equally qualified and tenured Black teacher or White teacher.[37] Relying on the school district's affirmative action plan, the school retained the only Black teacher in the school's business department and terminated the White employee.[38] The Third Circuit concluded that the voluntary affirmative action plan violated Title VII because it was not adopted "with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities" within the school district.[39] Data suggested that in 1976 and 1985, the percentage of Black employees in the job category, including teachers, exceeded the percentage of Black people available in the workforce.[40] The court relied on two additional grounds to make its findings: first, that the plan was devoid of sufficient definition and structure, which left the school board free to grant racial preferences that did not promote the policy's claimed purpose, if the board chose to do so; and second, the layoff of the White employee unnecessarily trammeled the rights of nonminority employees.[41]

Reducing Bias in the Applicant Pool

The EEOC's April 2006 Compliance Manual clearly states that Title VII forbids recruitment practices that purposefully discriminate because of race. However, the EEOC has acknowledged that Title VII permits diversity initiatives designed to expand opportunities for all applicants. For example, Section 15 of the Compliance Manual provides that if an employer notices that prospective Black employees are not applying for jobs in the numbers that would be expected given their presence in the labor force, the employer can lawfully adopt strategies to expand the applicant pool of qualified Black candidates—such as by recruiting at schools with high Black enrollment.[42]

Employment practices that are designed to achieve some identified numerical representation of minorities warrant careful implementation under Title VII and other civil rights laws prohibiting discrimination on the basis of race. But setting specific hiring goals to increase the percentage of Blacks in the workplace generally does not violate federal law as long as the targets remain goals and *not* quotas or inflexible goals. The diversity plan must be sufficiently flexible to allow each candidate to compete against all other candidates.[43]

When establishing hiring practices, a company should avoid implementing policies that limit, rather than expand, the pool of candidates. Establishing diversity protocols, such as diversity-focused talent sourcing initiatives and implementing a Rooney Rule[44] counterpart will likely be deemed permissible under Title VII because these protocols increase the number of minority candidates in the hiring pool itself. While some critics have claimed that the Rooney Rule is a form of reverse discrimination, the rule and similar counterparts do not establish an impermissible quota or require that any hiring decision be made on the basis of race. Instead, policies like the Rooney Rule seek to eliminate the racial imbalance that has persisted in traditionally segregated job categories by increasing the number of diverse candidates who are able to reach beyond the first round of the hiring process.

Because minority status is not the deciding factor in the hiring decision, courts have found similar rules to be valid under Title VII.[45] For example, in *Mlynczak v. Bodman*, four White male plaintiffs brought a discrimination suit alleging that the Department of Energy's affirmative action policy reflected a sub-culture of "reverse discrimination" that resulted in intentional discrimination against White males.[46] The plan stressed the active recruitment of women and minority candidates, but it did not contain quotas[47] and expressly prohibited decisionmakers from basing hiring and/or promotion decisions on race, ethnicity, and/or gender.[48] The plan also did not authorize management to give preference to less-qualified female or minority applicants for jobs or promotion.[49] The Seventh Circuit upheld the affirmative action plan as lawful under Title VII because it was designed to promote workplace diversity and expanded the pool of candidates for hiring and/or promotion.[50] The court concluded that an interest in ensuring a diverse applicant pool justified the active recruitment of non-White and women candidates notwithstanding the prohibitions on considering gender and race under Title VII.[51]

Tying Executive Compensation to Efforts to Promote Diversity and Inclusion Initiatives

To minimize the legal risk of tying executive compensation to diversity initiatives, compensation should reward diversity-related efforts, not results. A program that assesses executive performance and compensation with reference to diversity goals is not per se unlawful under Title VII. However, there is an increased risk of employer liability if an employee can demonstrate that the incentives under the compensation or evaluation policy caused a decisionmaker to impermissibly consider race when making a hiring, promotion, or termination decision.[52] For example, a White male plaintiff brought a discrimination suit against Walmart, alleging that a Hispanic woman was promoted instead of him due to Walmart's diversity placement goals and the evaluation of managers on efforts to support diversity. But the court held that "[a]lthough ten percent of a manager's job evaluation was based on attending one annual diversity event," the plaintiff had not presented evidence to demonstrate that managers were "influenced by [the diversity] policies" in making the challenged employment decisions.[53]

Therefore, in designing and implementing such a plan, *compensation incentives should not cause decisionmakers to unlawfully consider race when making individual personnel decisions*. But designed appropriately, such a compensation program can foster diversity and the inclusion of Black employees without significantly increasing legal risk to the company. Initiatives can avoid tying compensation to numerical hiring or promotion goals, and instead link compensation to diversity efforts, such as serving as an executive sponsor of an employee resource group, being a cross-cultural mentor, participating in regular implicit bias evaluations and training, identifying and remedying evaluation and development processes that may facilitate bias, or attending diversity events.[54]

Board Diversification Efforts

Decisions about who will be added to a Company's board generally carry less legal risk because directors are typically elected by shareholders and are not employees. Guidance issued by the EEOC supports this view. For instance, the EEOC Compliance Manual notes that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees."[55] Indeed, the test for whether an individual is a covered person under Title VII focuses on "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control" and "[i]f the individual is subject to the organization's control, s/he is an employee."[56]

By their very nature, directors are often independent and are not controlled by the company, as their role is to oversee the company's executives and management. Therefore, companies may have the opportunity to be more aggressive in their board diversification efforts. The specter of shareholder derivative lawsuits also provides further incentive for board diversification efforts. These suits, which highlight a lack of diversity and request specific changes to corporate personnel or practices, also raise reputational risks.

Although decisions relating to the composition of a board of directors are not employment decisions and therefore are not covered by the anti-discrimination framework of Title VII, making board composition decisions based on a racial preference may raise potential concerns under Section 1981 of the Civil Rights Act of 1866, which prohibits discrimination on the basis of race, color, or ethnicity when making and enforcing contracts.[57] Thus, even in the absence of an employment relationship, a board member's relationship with a company may be deemed to be a contractual relationship that triggers Section 1981 coverage.[58] As a result, establishing a race-based quota could arguably constitute a facial violation of Section 1981,[59] although a plaintiff asserting a Section 1981 claim must prove that race was the "but-for cause" of the alleged injury—a very high burden, particularly if a board diversity plan does do not dictate that a company select any director based solely on their race.[60]

In short, although board members are not employees and thus not subject to protection under Title VII, there remains some risk under Section 1981 when making board composition decisions based on racial preference. Companies should provide clear guidance in board diversity proposals or plans that support aggressive efforts to diversify their boards, while mitigating against the potential risks of establishing quotas.

Supplier Diversity Commitments

In general, making commitments to spend a certain amount on Black-owned suppliers or only engage accounting/law firms that meet certain diversity targets presents few legal risks to companies. Companies (and individuals) are generally entitled to enter into contracts or transact with third parties based on the factors that they consider important, whether that is a long-term relationship with the supplier, the price, the perceived quality, or corporate social responsibility metrics such as Black ownership. That said, the same legal considerations around acceptable parameters of diversity-enhancing programs will be pertinent to the suppliers, who will bear the attendant risks in this area and should avoid basing hiring and other employment decisions on race.

Companies are equally entitled to include supply chain diversity requirements in the conditions contained in requests for proposals, as there are no federal or state laws prohibiting the inclusion of such contractual conditions. A company's decision to include supply chain diversity requirements as one condition that must be met by potential suppliers is unlikely to open it to liability under Section 1981. As noted above, the Supreme Court held in 2020 that "[a] [§1981] plaintiff bears the burden of showing that [the plaintiff's] race was a but-for cause of its injury."[61] The mere inclusion of supply chain diversity requirements would likely be viewed as just one factor permissibly considered by the contracting company and therefore not a but-for cause of any injury sustained by a supplier who does not win a contract.

On the other hand, a company lacking a supplier diversity program can be foreclosed from certain government contracting opportunities. Specifically, the U.S. government's Small Business Subcontracting Program requires certain federal contractors (any contractor whose federal contract is expected to exceed $700,000 (or $1.5 million for construction projects)) to define and meet certain spending thresholds on goods or services subcontracted out to companies owned by underrepresented groups, including Black-owned businesses.[62]

Endnotes

[1] Best Practices of Private Sector Employers, U.S. Equal Employment Opportunity Commission (website).
[2] Id.
[3] Sinio v. McDonald's Corp., 2007 WL 869553 (N.D. Ill. 2007) (holding that the existence of an African American Employee Resource Group and evidence of more favorable treatment of African American employees, was sufficient to raise triable issue of fact on disparate treatment claim brought by Asian American employee).
[4] Stacy Hawkins, "How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession," *Fordham Law Review* 83 (2015): 2456.
[5] Id.
[6] Id. at 2472.
[7] Ryan Mainhardt and William Volet, "The First Prong's Effect on the Docket: How the Second Circuit Should Modify the McDonnell Douglas Framework in Title VII Reverse Discrimination Claims," *Hofstra Labor & Employment Law Journal* 30 (2012): 259-260.
[8] *See* Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt, and Sara Prince, "Diversity Wins: How Inclusion Matters" (McKinsey and Co., May 2020); Paul Gompers and Silpa Kovvali, "The Other Diversity Dividend," *Harvard Business Review*, July-August 2018; David Rock and Heidi Grant, "Why Diverse Teams Are Smarter," *Harvard Business Review*, November 4, 2016; David Rock, Heidi Grant, and Jacqui Grey, "Diverse Teams Feel Less Comfortable – and That's' Why They Perform Better," *Harvard Business Review*, September 22, 2016.
[9] U.S. Equal Employment Opportunity Commission, "Select Task Force on the Study of Harassment in the Workplace," Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016).
[10] Id.
[11] Id.
[12] Id.
[13] "Ford Motor Company to Pay up to $10.125 Million To Settle EEOC Harassment Investigation," August 15, 2017, U.S. Equal Employment Opportunity Commission.
[14] "Bass Pro to Pay $10.5 Million To Settle EEOC Hiring Discrimination and Retaliation Suit," July 25, 2017, U.S. Equal Employment Opportunity Commission.
[15] Significant EEOC Race/Color Cases, U.S. Equal Employment Opportunity Commission (website).
[16] Separate from voluntary affirmative action programs, certain federal contractors are required to implement affirmative action programs pursuant to three laws: Section 503 of the Rehabilitation Act of 1973 (applies to contractors with 50 or more employees and contracts over $50,000); the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (applies to contractors with 50 or more employees and a contract of $150,000 or more); and Executive Order 11246 (applies to federal contractors and subcontractors with 50 or more employees who have entered into at least one contract of $50,000 or more). Affirmative Action Program Requirements, Employment and Training Administration, U.S. Department of Labor.
[17] Affirmative Action Program Requirements, Employment and Training Administration, U.S. Department of Labor.
[18] Id.
[19] Id.
[20] Dev Stahlkoph, "Responding to the OFCCP on our June Diversity Commitments," October 6, 2020, Microsoft.
[21] Id.
[22] Kristopher J. Brooks, "Microsoft and Wells Fargo Committed to Diversity – the Feds Say Not So Fast," *CBS News*, October 9, 2020.
[23] Id.
[24] Clare Duffy, "Plans at Microsoft and Wells Fargo to Increase Leadership are Under Scrutiny from the Labor Dept.," *CNN Business*, October 7, 2020.
[25] United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979); Patrick D. Smith and Katherine E. Anderegg, "Employer Diversity Initiatives: Where Are the Legal Risks," 2018, Bradshaw Law.
[26] "[P]rivate employers' affirmative action plans (1) must respond to a manifest imbalance in the work force; (2) must not 'unnecessarily trammel[ ]' the rights of members of the non-preferred class or 'create an absolute bar to their advancement'; and (3) must do no more than is necessary to attain a balance." Sharkey v. Dixie Electric Membership

Corp., 262 F. App'x 598, 604 (5th Cir. 2008) (citing Doe v. Kamehameha School/Bernice Pauahi Bishop Estate, 470 F.3d 827, 840 (9th Cir. 2006)).
[27] *Shea v. Kerry*, 796 F.3d 42, 57 (D.C. Cir. 2015).
[28] Id. at 46.
[29] Id. at 49–50.
[30] Id. at 59.
[31] Id.
[32] Id. at 64. Over a span of three calendar years, only sixteen minority candidates were hired into the mid-level roles through the affirmative action plan. Id. This data suggests a modest effect on the hiring process, and a plan that is limited in the extent to which it could trammel on plaintiff's rights "unnecessarily." Id.
[33] Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987).
[34] Id. at 352.
[35] Id. at 356. When determining whether an affirmative action plan is established in response to a manifest imbalance in a traditionally segregated job category, courts may consider statistical disparities between the racial makeup of the employer's workforce and that of a "comparator population." Kerry, 796 F.3d at 57.
[36] *Higgins v. City of Vallejo*, 823 F.2d at 356.
[37] *Taxman v. Bd. Of Educ.*, 91 F.3d 1547, 1550 (3d. Cir. 1996).
[38] Id. at 1550.
[39] Id. "Given the clear antidiscrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster." Id.
[40] Id. at 1551–52.
[41] Id. at 1564.
[42] Cf. *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) ("An employer's affirmative efforts to recruit minority and female applicants [do] not constitute discrimination. An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to avoid lawsuits.") (citations and quotation marks omitted).
[43] EEOC, Section 15, available at https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#N_111_/.
[44] The Rooney Rule is a policy of the National Football League requiring every team with a head coaching, general manager, or equivalent front office vacancy to interview at least one diverse candidate.
[45] The EEOC has cautioned, however, that as the workplace becomes more diverse and voluntary efforts are made by companies to recruit and hire from all groups, white males or other groups who traditionally have been the predominant employees of a particular workforce or occupation may perceive a direct threat to their employment opportunities. These individuals may attempt to impede the prospects of others. Best Practices of Private Sector Employers, U.S. Equal Employment Opportunity Commission (website).
[46] *See* Mlynczak v. Bodman, 442 F.3d 1050 (7th Cir. 2006).
[47] Quotas establish a fixed number or proportion of opportunities reserved exclusively for certain minority groups.
[48] See Mlynczak v. Bodman, 442 F.3d 1050 (7th Cir. 2006).
[49] Id.
[50] Id.
[51] Id.
[52] Stacy Hawkins, How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession, 83 FORDHAM L. REV. 2456 (2015).
[53] *Coppinger v. Wal-Mart Stores, Inc.*, No. 3:07cv458, 2009 WL 3163211 (N.D. Fla. Sept. 30, 2009); *see also Bajor v. Wal-Mart Corp.*, No. 08-12401, 2010 WL 779240, at *6–8 (E.D. Mich. Mar. 8, 2010).
[54] Stacy Hawkins, How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession, *Fordham Law Review* 83 (2015): 2456.
[55] EEOC Compliance Manual, Section 2 Threshold Issues, § 2-III.A.1.d, U.S. Equal Employment Opportunity Commission.
[56] Id.
[57] 42 U.S.C. § 1981. The U.S. Securities and Exchange Commission is currently considering a Nasdaq proposal to have companies publicly disclose and increase the diversity of their corporate boards. Alexander Osipovich, "Ruling on Nasdaq Diversity Plan for Boards Is Delayed by SEC," Wall Street Journal, March 10, 2021. The proposal requires, among other things, that at least two board members be diverse. Id. In the past, however, a similar proposed rule

(which was not ultimately adopted) drew criticisms that it could violate Section 1981. Specifically, a 2009 comment to a proposed rule by the SEC, the Center for Equal Opportunity stated: "Usually 'diversity' is understood to include racial and ethnic diversity. We strongly oppose any consideration of race or ethnicity in selecting individuals for a position on a corporate board. Such discrimination is wrong. It is also illegal. For a company to engage in racial or ethnic discrimination would violate 42 U.S.C. section 1981, which forbids such discrimination in any contractual relationship, which would include the relationship between a board member and a corporation. If board members are considered company employees, then it would also violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. section 2000e et seq.").

[58] Such protection may exist even without an express written contract because of the board member's fiduciary duty to the board.

[59] In September 2020, Governor Gavin Newsom enacted AB 979, which requires California-headquartered public companies to have at least one director on their boards who is from an underrepresented community by the end of 2021. "Underrepresented" is defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender." Although companies in theory could potentially face some liability under Section 1981 for board quotas, even if mandated by California law, it does not appear that any companies have been subject to such a lawsuit since the enactment of AB 979. In addition, the California law has been challenged under the Equal Protection clause of the U.S. Constitution as well as provisions of the California Constitution. As such, the potential legal liability implications of AB 979 for corporations remains unclear.

[60] *See* Comcast Corp. v. National Association of African American-Owned Media, 140 S. Ct. 1009, 1014 (2020).

[61] Id.

[62] FAR Subpart 19.7.