

Boards face new scrutiny on diversity, equity, and inclusion programs

January 2024



On November 9–10, 2023, members of the Audit Committee Leadership Network met in Washington, DC, for a discussion that included the impact of the Supreme Court’s affirmative-action ruling on corporate diversity, equity and inclusion (DEI) initiatives. On December 8, 2023, members of the East Audit Committee Network met in New York, with a similar topic on the agenda.

For the Washington meeting, members were joined by Jeffrey Wall, partner at Sullivan & Cromwell LLP and former acting solicitor general of the United States; for the New York meeting, members were joined by Marc Treviño, co-head of Sullivan & Cromwell’s corporate governance practice.

For a list of participants in each meeting, please see the Appendix 1 (page 6).

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Tapestry Networks strongly believes that diversity is essential to corporate performance and sustainability. Tapestry has prepared this *Board Briefing* to make directors aware of trends that could disrupt companies as they pursue this important goal.¹

This briefing covers three themes:

[Legal challenges to DEI are on the horizon](#)

[Boards should review implementation and communication](#)

[Companies will continue to face divergent views on DEI](#)

Legal challenges to DEI are on the horizon

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,² the Supreme Court held that race-based admissions programs at Harvard College and the University of North Carolina violate the Equal Protection Clause of the Fourteenth Amendment.

DEI initiatives in large companies typically aim to create diverse workforces at every level and ensure that diverse employees are treated equitably and given a voice in decision-making. These initiatives have been controversial. On the heels of the *Harvard* decision, 13 state attorneys general wrote to the CEOs of Fortune 100 corporations, calling on them to “refrain from discriminating on the basis of race, whether under the label of ‘diversity, equity, and inclusion’ or otherwise” and warning of “legal consequences” for employers who do so.³ A few days later, attorneys general from 21 other states sent their own letter to the same CEOs, repudiating the claims of the previous letter and encouraging businesses to “double-down on diversity-focused programs.”⁴

Members discussed the implications of the *Harvard* ruling for a wide range of DEI practices in their companies. The Supreme Court’s decision relates to Title VI of the Civil Rights Act of 1964, which prohibits discrimination by programs that receive federal funds, and does not technically extend to Title VII, which governs the employment practices of businesses. Some pre-*Harvard* Supreme Court decisions suggest that Title VI and Title VII do not apply in the same way; corporate affirmative action may be permissible, provided that it is aimed at business performance and sustainability.

Nevertheless, Mr. Wall said, the current Supreme Court may be willing to reexamine those decisions. *“We’re seeing a wave of suits in lower courts over various corporate DEI proposals. Right now, those are aimed at programs with harder quotas and targets.”* These suits are in early stages and it will take years for legal challenges to play out in the courts, he explained, *“but that is where it is headed,”* and companies should prepare for judicial rulings and legislation around DEI. Mr. Treviño suggested that a state attorney general could bring a case to the Supreme Court, which might decide that race-based classification conflicts with Title VII in companies, as it does with Title VI in college and university admissions.

Mr. Wall said that, as with employment practices, companies who set explicit targets for their vendors may face similar challenges and warned about *“criteria specifying that a vendor will be hired only if the team has a certain percentage of diverse members.”* Mr. Treviño spoke of the *“highly politicized environment that we’re operating in now,”* citing lawsuits filed since the *Harvard* decision—for example, against Fearless Fund Management LLC, alleging that reserving grants, mentorship, and business support services for businesses owned by Black women violates provisions of the 1866 Civil Rights Act, now part of the United States Code.⁵

In general, Mr. Treviño said, the current Supreme Court *“has an anticlassification view.”* He warned that practices that companies are most proud of may be at risk. *“Even the Rooney Rule may be tested in the post-Harvard landscape,”* he said, referring to the National Football League’s policy that requires teams to interview minority candidates for a wide variety of senior coaching

and management decisions. *“Any time you have a program that targets prohibited characteristics, you have to ask what this will look like in five years. What risks will it create for the company? And is there another way to accomplish the goal?”*

Boards should review implementation and communication

Companies should examine DEI policies and programs to ensure that they align with their corporate values and risk tolerance, said Mr. Wall. *“There is nothing wrong with debiasing the workplace,”* Mr. Treviño said, but he advised caution with internal programs related to evaluations, hiring, and promotion that explicitly take race or other protected characteristics into account: *“Systems where you are not adding people in but reserving percentages or spots for diverse candidates could be problematic.”*

Execution of DEI programs is often led by managers who may not consider risk exposure with the same breadth as top management and the board. While corporate leaders may not intend for DEI programs to use hard targets or other practices that expose the company to risk, *“people may implement it in a much more rigorous way,”* Mr. Wall said. *“You have to simplify some of these programs. Clarify what the program is and ensure the people running it know what it is and what it is not and that internal documentation reflects the right messaging about the programs.”*

Members asked about long-standing practices to foster diversity within the board, such as a written or unwritten rule that a diverse director who leaves the board must be replaced by another diverse director. *“Diversity is important to board composition,”* said Mr. Treviño, *“but those practices may carry litigation risk post-Harvard.”*

Most companies have mentorship programs, often aimed at helping underrepresented leaders build their skills and confidence and advance within companies. Audit chairs asked what litigation risk these initiatives could create. Mr. Treviño suggested that such opportunities, when offered based on membership in a protected class, could be deemed problematic if the *Harvard* reasoning is extended to Title VII. Members discussed the possibility of opening up mentorship programs to any high-performing employee, but worried that resources were limited and that program impact could be blunted.

A member described a program of recruiting from historically Black colleges and universities (HBCUs), which has enhanced both diversity and the performance of the business. *“If you frame that as broadening the applicant pool, that should be low risk,”* said Mr. Treviño. *“But if you have a goal of a certain amount of hiring from HBCUs, then you’re well into a higher-risk activity.”*

Companies will continue to face divergent views on DEI

Audit chairs pointed to the consequences of reduced diversity in executive suites and boardrooms. Beyond its well-documented impact on business performance,⁶ poor diversity outcomes can put businesses at odds with institutional investors and proxy advisors. A director pointed to low shareholder votes for a board in which women held fewer than 30% of the seats. Activist investors have used low diversity numbers as a wedge issue as they seek control of a public company.

The European Union’s reporting requirements also affect large, global public companies. The Corporate Sustainability Reporting Directive requires firms to disclose both supplier and workforce diversity data.⁷ *“Should you publish explicit racial goals?”* asked a director. *“Can we track diversity in our companies?”* asked another. Both experts agreed that tracking on its own did not raise concerns even if *Harvard’s* reasoning is applied to the employment context, though they suggested that access to tracking data should probably be restricted and that communications around diversity outcomes should be managed with care.

Linking executive pay to explicit diversity numbers could be challenged under the Supreme Court’s *Harvard* reasoning, according to Mr. Treviño. At the same time, he pointed out that stepping back from previous diversity commitments could create reputational and other risks for companies. *“We may have made it harder for companies to do what they need to do,”* said a director.

Members and experts agreed that there are no easy solutions here. Boards may choose to accept some litigation risk, both to create the diversity needed for corporate sustainability and to deal with external pressures for equity. Communication around DEI initiatives may need much tighter management, and extensive training may be needed to ensure that worthwhile efforts are not derailed by litigation.

Curtailing DEI programs: a bridge too far?

Diverse workforces have many benefits, and members expressed concern about curtailing corporate DEI programs. *“The workforce of the future will be considerably more diverse. We have to be more open and inclusive,”* one said. Another asked if cancelling diversity-focused mentorship programs is a *“bridge too far.”*

Marsha Ershaghi Hames, a partner at Tapestry Networks who leads the firm’s work on equity, people, ethics, and culture matters, underscored the talent challenges that companies face and the need for strong pipelines of diverse candidates. *“What is the cost of exclusion?”* she asked. *“In the next 50 years, we will have five generations in the workforce, driven by global shifts in age, race, immigration, disabilities, gender, religion, and identity. Businesses cannot thrive without inclusive talent pathways.”*

Mr. Wall acknowledged the difficulty: *“The courts and these laws are blunt objects that do not allow for the nuance and sensitivity that these conversations deserve. The affirmative action ruling is a sign that the court doesn’t seem to like the road we’re headed down. That’s not to say there isn’t a lot you can do outside of that sphere; it’s more the manner in which you take it into account and how you frame it.”*

“How can this conversation be reshaped?” asked Ms. Ershaghi Hames. *“Large companies face a major resiliency challenge if they can’t adapt to the forces at work.”*

About Tapestry Networks

Since 2004, Tapestry has been the premier firm for building collaboration platforms with leaders of the world's foremost organizations. Tapestry Networks brings senior leaders together to learn and to shape solutions to today's most pressing challenges. We are a trusted convener of board directors, executives, policymakers, and other stakeholders, connecting them with information, insight, and each other. Top experts join our discussions to learn from the leaders we convene and to share their knowledge. Our platforms help educate the market, identify good practices, and develop shared solutions. We call this the power of connected thinking.

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Appendix 1: Participants

The following members participated in all or part of the meetings

Fernando Aguirre, Audit Committee Chair, CVS Health
 Joan Amble, Director, Booz Allen Hamilton
 Jeff Campbell, Audit Committee Chair, Aon
 Mary Ann Cloyd, Audit Committee Chair, Fresh Del Monte Produce
 Ted Craver, Audit Committee Chair, Wells Fargo
 Bill Easter, Audit Committee Chair, Delta Air Lines
 Lynn Elsenhans, Audit Committee Chair, Saudi Aramco
 Tom Freyman, Audit Committee Chair, AbbVie
 Art Garcia, Audit Committee Chair, ABM Industries and American Electric Power Co.
 Tom Gayner, Audit Committee Chair, Graham Holdings
 Bella Goren, Audit Committee Chair, General Electric and Marriott International
 Gretchen Haggerty, Audit Committee Chair, Johnson Controls
 David Herzog, Audit Committee Chair, MetLife
 Akhil Johri, Audit Committee Chair, Boeing and Cardinal Health
 Debra Perry, Audit Committee Chair, Korn Ferry
 Paula Price, Audit Committee Chair, Accenture and Warner Bros. Discovery
 Tom Schoewe, Audit Committee Chair, General Motors and Northrop Grumman
 Leslie Seidman, Audit Committee Chair, Janus Henderson
 Cindy Taylor, Audit Committee Chair, AT&T
 John Veihmeyer, Audit Committee Chair, Ford
 Gina Wilson, Audit Committee Chair, Charles River Labs

EY was represented by the following in all or part of the meetings:

Julie Boland, US Chair and Managing Partner and Americas Area Managing Partner, EY
 Dante D'Egidio, Americas Vice Chair – Assurance, EY
 Jennifer Lee, Managing Director, Americas Center for Board Matters, EY
 Pat Niemann, Partner, Americas Center for Board Matters, EY
 Molly Tucker McCue, US-East Assurance Managing Partner, EY

Tapestry Networks was represented by the following:

Noni Abdur-Razzaq, Associate
 Beverly Bahlmann, Principal
 Kate Cady, Project and Event Manager Team Leader
 Jonathan Day, Chief Executive
 Marsha Ershaghi Hames, Partner
 Kelly Gillen, Associate
 Todd Schwartz, Principal
 Ashley Vannoy, Project and Event Manager
 Abigail Ververis, Project and Event Manager

Endnotes

- ¹ This document reflects the network's use of a modified version of the Chatham House Rule whereby names of members and their company affiliations are a matter of public record, but comments are not attributed to individuals or corporations. Italicized quotations reflect comments made in connection with the meeting by network members and other meeting participants.
- ² "[Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. \(2023\)](#)," *Justia*, accessed December 21, 2023.
- ³ Kris W. Kobach et al. to Fortune 100 CEOs, [letter](#), July 13, 2023.
- ⁴ State of Nevada Office of the Attorney General to Fortune 100 CEOs, [letter](#), July 19, 2023.
- ⁵ Frederick Von Bryant II, Byron J. McLain, and Kelvin L. Thomas, "[Five Things to Know Regarding American Alliance for Equal Rights v. Fearless Fund](#)," *National Law Review*, August 10, 2023.
- ⁶ Dame Vivian Hunt, Dennis Layton, and Sara Prince, "[Why Diversity Matters](#)," McKinsey, January 1, 2015.
- ⁷ European Financial Reporting Advisory Group, [Draft European Sustainability Reporting Standards: ESRS S1: Own Workforce](#) (EFRAG, November 2022).