

Revisit DEI Goals in Executive Pay Incentives

WHEREAS: Since the June 2023 U.S. Supreme Court decision in *Students for Fair Admissions v. Harvard College*,¹ hundreds of higher education institutions have shuttered their diversity, equity and inclusion (DEI) programs and positions.²

Consequently, “there has been a sharp uptick in litigation challenging corporate DEI programs and initiatives, alleging that they require unlawful employment and contracting decisions to be made on the basis of race, in violation of Title VII of the Civil Rights Act of 1964...”³

Corporate compliance lawyers now advise clients that “DEI initiatives and programs that are not open to all applicants or those that apply an explicit race- or gender-based focus will likely face continued and heightened scrutiny.” Also: “We also expect to see ongoing scrutiny of perceived hiring quotas and set-asides, particularly those that may appear to be incentivized by bonuses for management or company leadership.”⁴

Further, “companies, and their management teams and boards, should be prepared for increased employment-related litigation including litigation that seeks to hold executive officers and directors personally liable for purported breaches of their fiduciary duties in connection with the corporation’s DEI policies.”⁵

Many corporations dramatically reduced or eliminated their DEI programs,⁶ and companies face retribution for their discrimination. For example, Starbucks was the subject of a \$28.3 million judgment after a former worker claimed she was fired for being white.⁷

SUPPORTING STATEMENT: PepsiCo, Inc. (“Company”) brands its Environmental, Social and Governance (ESG) initiatives as “pep+.” Included in this program are DEI employment goals, as follows:⁸

...by improving diversity of representation at the managerial level, maintaining pay equity, and developing inclusive leaders. We achieved 45% women in management roles globally. In the U.S., we achieved 9.2% Black managerial representation and 10.3% Hispanic managerial representation. In 2020, we announced our aspirational representation goals to increase the U.S. Black and Hispanic managerial population to 10% by 2025 to mirror the workforce availability of the communities where we work. We remain on track to meet this goal with respect to U.S. Black managerial

¹ https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

² <https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei>

³ <https://www.wilmerhale.com/insights/client-alerts/20240627-corporate-dei-landscape-one-year-after-sffa>

⁴ <https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion>

⁵ <https://corpgov.law.harvard.edu/2024/02/14/how-boards-should-be-thinking-about-the-supreme-courts-sffa-affirmative-action-decision/>

⁶ <https://nypost.com/2024/09/03/us-news/how-robbey-starbuck-is-prompting-brands-like-ford-to-ditch-dei/>

⁷ <https://www.cnn.com/2023/08/17/business/starbucks-payment-racial-discrimination-white/index.html>

⁸ https://www.sec.gov/Archives/edgar/data/77476/000130817924000258/pep_courtesy-pdf.pdf

representation, and we will strive to maintain our U.S. Hispanic managerial representation to mirror workforce availability.

The Company incentivizes leadership to attain these DEI employment goals: “As pep+ is integrated into our core business strategy ... all executive officers have ESG goals incorporated into their individual performance objectives....”

This discriminatory policy leaves PepsiCo ripe for regulatory, reputational and litigation risk. Its attempt to cram DEI’s non-GAAP nature into the proxy statement’s compensation discussion demands a legally dubious quota regime.⁹

FTI Consulting advises there is a “heightened focus” on “litigation risk,” which “has transitioned from being merely an operational concern to becoming a strategic priority for the highest levels of corporate governance.”¹⁰

RESOLVED: Shareholders request the Board of Directors’ Compensation Committee to revisit its incentive guidelines for executive pay, to consider eliminating discriminatory DEI goals from compensation inducements, to reduce risk exposure.

⁹ <https://tax.thomsonreuters.com/news/council-of-institutional-investors-again-urges-sec-to-close-loophole-on-non-gaap-in-executive-pay/>

¹⁰ <https://www.fticonsulting.com/insights/articles/de-risking-litigation-exposure-conflict-management-integral-business-administration>