

## Revisit DEI Goals in Executive Pay Incentives

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

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...”<sup>3</sup>

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.”<sup>4</sup>

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.”<sup>5</sup>

Many corporations dramatically reduced or eliminated their DEI programs,<sup>6</sup> 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.<sup>7</sup>

**Supporting Statement:** The American Express Company (“Amex” or “Company”) favors certain groups over others. The Company has an explicit goal to increase spending with suppliers owned by minorities, LBGT, women, veterans, and other “underrepresented” groups.<sup>8</sup>

Pay for the Company’s executive officers include annual cash incentives subjectively awarded by the Compensation and Benefits Committee. This annual award is 15% weighted for “colleague,” which includes 33% for “culture” and 33% for “diversity representation.” According to the Compensation Discussion & Analysis included in the Company’s 2024 Proxy Statement, Amex aims to increase “underrepresented segments across the Company.”<sup>9</sup>

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<sup>1</sup> [https://www.supremecourt.gov/opinions/22pdf/20-1199\\_hgdj.pdf](https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf)

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

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

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

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

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

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

<sup>8</sup> [https://www.americanexpress.com/content/dam/amex/en-us/newsroom/pdfs/AXP\\_2023\\_2024\\_ESG\\_Report.pdf](https://www.americanexpress.com/content/dam/amex/en-us/newsroom/pdfs/AXP_2023_2024_ESG_Report.pdf)

<sup>9</sup> [https://s26.q4cdn.com/747928648/files/doc\\_financials/2023/ar/2024-Proxy-Statement.pdf](https://s26.q4cdn.com/747928648/files/doc_financials/2023/ar/2024-Proxy-Statement.pdf)

These discriminatory initiatives leave Amex ripe for regulatory, reputational and litigation risk. Its attempt to cram DEI's non-GAAP nature into the proxy statement's compensation discussion demands either a legally dubious quota regime, or it fails SEC compliance.<sup>10</sup> The Council of Institutional Investors' general counsel stated that research shows "companies are engaging in an opportunistic use of non-GAAP earnings to justify higher executive pay."

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."<sup>11</sup>

**Resolved:** Shareholders request the Board of Directors' Compensation and Benefits Committee to revisit its incentive guidelines for executive pay, to identify and consider eliminating discriminatory DEI goals from compensation inducements.

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<sup>10</sup> <https://tax.thomsonreuters.com/news/council-of-institutional-investors-again-urges-sec-to-close-loophole-on-non-gaap-in-executive-pay/>

<sup>11</sup> <https://www.fticonsulting.com/insights/articles/de-risking-litigation-exposure-conflict-management-integral-business-administration>