

Eliminate DEI and ESG Goals From Executive Pay Incentives

Resolved: 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: Mastercard Inc. (“Mastercard” or “Company”) favors certain groups over others on the basis on immutable characteristics.

The Company’s “racial equity” goals include “initiatives to attract, grow and retain candidates from diverse backgrounds,” and an explicit target to increase black representation at the vice president level and above by 50%.⁸ The Company has also has a “Start Path in Solidarity program”⁹ focused on “women and people of color.”¹⁰

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-starbucks-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.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/mastercard-esg-sustainability-report-2023.pdf>

⁹ <https://www.mastercard.com/global/en/business/fintech/fintech-programs/startpath/for-startups/startpath-solidarity.html>

¹⁰ <https://www.mastercard.com/news/perspectives/featured-topics/fintech/supporting-underrepresented-fintech-founders-to-spur-innovation-and-growth/>

Mastercard includes an “ESG modifier under our bonus plan that impacts compensation for all bonus-eligible employees based on our performance against carbon emissions, financial inclusion and gender pay goals.”¹¹ This ESG modifier is included in executive compensation.¹²

These discriminatory initiatives leave Mastercard 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.¹³ 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.”¹⁴

Resolved: Shareholders request the Board of Directors’ Human Resources and Compensation Committee to consider eliminating discriminatory DEI and ESG goals from compensation inducements.

¹¹ <https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/mastercard-esg-sustainability-report-2023.pdf>

¹² https://www.mastercardannualmeeting.com/media/feob5hra/426720-1-_11__mastercard-2024_nps_workiva_wr.pdf

¹³ <https://tax.thomsonreuters.com/news/council-of-institutional-investors-again-urges-sec-to-close-loophole-on-non-gaap-in-executive-pay/>

¹⁴ <https://www.fticonsulting.com/insights/articles/de-risking-litigation-exposure-conflict-management-integral-business-administration>