

## 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*,<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>

Corporations’ 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:** Merck & Co., Inc. (“Merck” or “Company”) maintains an employee and executive annual cash incentives “scorecard,” in which 10 percent of its formula is dedicated to “sustainability” goals, which “reflects our focus on driving greater access to health to patients around the world and on the engagement and inclusion of our employees.”<sup>8</sup> These goals are grounded in DEI.

Merck offers to its employees “leadership development programs,” which “reinforces our commitment to [DEI], which remains a key differentiator and priority for us.”<sup>9</sup> Its special women’s leadership program “advance[es] the ability to recognize and manage gender differences and subtle micro-inequities by leading through courageous action.” The Company’s Diverse Leader Program “use[s] a combination of experiential and formal learning focused on”

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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://s21.q4cdn.com/488056881/files/doc\\_financials/2023/ar/2024-merck-proxy-statement.pdf](https://s21.q4cdn.com/488056881/files/doc_financials/2023/ar/2024-merck-proxy-statement.pdf)

<sup>9</sup> [https://www.merck.com/wp-content/uploads/sites/124/2024/08/Merck\\_ImpactReport\\_2023-2024.pdf](https://www.merck.com/wp-content/uploads/sites/124/2024/08/Merck_ImpactReport_2023-2024.pdf)

components including “headwinds and challenges unique to diverse, underrepresented talent,” DEI, and “social identity mapping.” Other dedicated leadership development programs focus on black professionals and LGBTQ+ leaders, and the Diverse Leader Acceleration Program is designed to speed “the career growth and increase representation of African American/Black, Latino/Hispanic and Native American employees within our U.S. leadership ranks.”

These discriminatory programs leave Merck ripe for regulatory, reputational and litigation risk. 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>10</sup>

**RESOLVED:** Shareholders request the Board of Directors’ Compensation and Management Development Committee to revisit its incentive guidelines for executive pay, to identify and consider eliminating discriminatory DEI milestones from compensation inducements.

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