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# Considerations in Advising Boards of Directors on DEI-Related Risks

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*In this article, the authors explain the key considerations that boards of directors should focus on regarding diversity, equity and inclusion-related risks.*

Recent executive orders and agency actions have altered the risk assessment of corporate diversity, equity and inclusion (DEI) programs, creating a complex compliance environment that requires board oversight.

Boards of directors, particularly of public companies, will now find it necessary to focus on a number of key considerations regarding DEI-related risks.

## THE SHIFTING ENFORCEMENT LANDSCAPE

Over the course of 2025, the Trump administration issued a series of directives targeting the use of DEI programs and policies (which this article broadly refers to as DEI Programs). On January 21, 2025, President Trump issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity,"[1] which requires federal contractors to certify that they do not operate DEI programs that violate federal anti-discrimination laws and that such certification is a material contract term, triggering risks under the federal False Claims Act (FCA). It also requires federal agencies to identify "the most egregious and discriminatory DEI practitioners" for potential civil compliance investigations. Agencies have

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since taken actions to enforce this Executive Order. The Department of Justice (DOJ) announced a Civil Rights Fraud Initiative[2] targeting federal funding recipients, directed the Civil Division to pursue affirmative litigation against discriminatory practices and established a DOJ-HHS False Claims Act Working Group.[3]

The administration has also issued guidance describing its view of what constitutes unlawful discrimination in the Attorney General's memorandum "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination."[4] Although there continues to be uncertainty regarding how the administration will seek to enforce its directives against "illegal" DEI programs—and how courts will respond—the risk considerations regarding such programs have substantially increased.

## THE STATUTORY FRAMEWORK

The statutory backdrop to the Trump administration's DEI efforts consists of three primary statutes: Title VII, Section 1981 of the Civil Rights Act of 1866 (Section 1981) and the FCA.

Title VII prohibits U.S. employers from discriminating based on race, color, religion, sex or national origin and also applies to U.S. citizens who are employed in foreign countries by a U.S. employer as well as to employers who are controlled by a U.S. employer.[5] The administration interprets Title VII expansively, asserting that it can bar any "initiative, policy, program, or practice" where an employment action is "motivated—in whole or in part—by race, sex, or another protected characteristic."[6]

Section 1981 also protects against discrimination, but more narrowly applies to intentional racial discrimination, while more broadly applying to all contract formation and enforcement, not just employment.[7]

The FCA imposes liability on persons and companies who knowingly submit, or cause to submit, false claims to the government.[8] Although not specifically linked to discrimination, the FCA could be a potent enforcement tool for the Trump administration in its DEI efforts, because of the certification requirement contemplated by Executive Order 14173.

Together, these three statutes provide both the government and private parties with multiple tools to challenge DEI Programs.

## RISK CONSIDERATIONS FOR BOARDS OF DIRECTORS IN THE DEI SPACE

Understanding the legal landscape is only the first step for boards of directors to address DEI-related risks. Directors must then fulfill their fiduciary oversight obligations with respect to these risks under state law.

Under the seminal Delaware Court of Chancery decision *In re Caremark Int'l Inc. Deriv. Litig.* (*Caremark*),[9] boards are required to exercise reasonable oversight of the company's affairs. Directors may be held liable for breach of this duty if they either: (1) "completely fail to implement any reporting or information systems or controls"; or (2) "having implemented such a system or controls, consciously fail to monitor or oversee its operations."[10]

Companies should expect that any significant negative event connected to their DEI Programs may be followed by demands for books and records by shareholders, potentially followed by *Caremark* claims alleging that the board failed to exercise adequate oversight over these programs.

To ensure directors meet their fiduciary duties and to prevent successful *Caremark* claims related to DEI compliance, there should be documentary evidence of the board's oversight of DEI Programs, including changes to those programs. This is particularly important given that the Trump administration's public pronouncements indicate that many DEI Programs that were widely implemented in corporate America over the past few years may, in the administration's view, violate federal anti-discrimination laws, especially those involving perceived preferential treatment based on race, sex or other protected characteristics.

## CRITICAL CONSIDERATIONS FOR PROTECTING BOARDS OF DIRECTORS

Although the specifics of board-level oversight should be tailored to the nature of the company and the board, there are some actions that virtually all boards should take to ensure directors have fulfilled their fiduciary duties and to further protect companies and their stakeholders from DEI-related risks. Boards should consider retaining outside counsel to assist in the below actions, particularly in identifying areas of risk. Board communications regarding DEI programs should also be structured to maintain privilege, when appropriate and possible.

### *Undertake an Inventory of DEI Programs*

As an initial step, it is critical for management to conduct a thorough inventory of all aspects of the company's DEI Programs to evaluate any potential risks and raise them with the board (as discussed below).

To aid in this inventory, management should work with business unit leaders and outside counsel to ensure comprehensive coverage of DEI Programs and to build buy-in for subsequent risk mitigation efforts. In doing so, management should also consider risks associated with rolling

back DEI programs, including traditional discrimination claims, employee retention impacts, implying that past programs were unlawful and risking non-U.S. legal scrutiny. All of these countervailing risks should be considered and reported on to the board.

Some targeted areas for changes based on guidance from the current administration and observing their guidance in practice are identified below.

## Have a Thoughtful Approach to Targets, Aspirations and Demographics Tracking

Setting targets (or goals), whether phrased as such or not, could bring scrutiny, as such targets risk being characterized as a quota system and imply decision-making that uses protected characteristics as factors in employment decisions. Any demographic targets should be truly aspirational—not linked to performance requirements—and accompanied by clear guidance that no employment decisions may be made based on protected characteristics. Similarly, demographics tracking, while required for certain companies by the EEOC, risks being characterized as used for employment decisions based on protected characteristics. Companies should ensure that self-identification requests are voluntary and that guidelines clearly specify who can and cannot access demographics data and for what purpose.

## Evaluate Compensation Committee Metrics

In 2020, after the death of George Floyd, many U.S. public companies began tying compensation for executives to the achievement of certain demographic benchmarks in the workforce, whether expressly or through a bonus structure informed by DEI targets. The administration has been clear that any DEI-related disparate treatment connected with compensation is a violation of Title VII, and likely views compensation tied to DEI-related metrics as incentivizing unlawful discrimination based on protected characteristics.[11]

For multinational companies whose human capital-related goals are established outside the U.S., this risk extends even where the compensation related to DEI targets is only for non-U.S. employees. What matters is whether the compensation is tied in any way to diversity levels of U.S. employees. For example, the administration may view skeptically arrangements where global executive compensation is tied to diversity metrics that include U.S. workforce data, as this could be argued to motivate employment actions at U.S. subsidiaries that are based on protected characteristics. Counsel should assist compensation committees in undertaking a comprehensive review that includes auditing existing incentive plans that tie compensation to diversity metrics.

### *Ensure that DEI-Related Risks Are Raised with the Board of Directors and Reflected in the Minutes*

Once a thorough inventory and analysis of a company's DEI Programs and associated risks is completed, the board should be informed of all material, identified risks, mitigation steps as to such risks and whether such mitigation is future proofing only or addresses prior risk. Such information should be properly recorded in the minutes. Although the minutes of board meetings should not be overly detailed, they should reflect a summary of the DEI-related risks brought to the directors' attention, the fact that directors asked questions and a robust discussion occurred and summaries of any guidance or decisions the board makes. As a best practice for raising DEI-related risks with boards (and ensuring reflection in the minutes), it is helpful to consider a regular reporting schedule that ensures DEI-related risks are systematically addressed at board meetings, rather than handled on an *ad hoc* basis, given the current environment.

Directors should also review the "best practices" recommendations for DEI compliance outlined in the Attorney General's July 29 guidance[12] and inquire as to whether management has considered implementing any recommendations not already in effect at their company. Although these recommendations have not been tested in court and their applicability will vary by company, directors should be informed of these recommendations when assessing DEI-related risks.

### *Review D&O Insurance Coverage for False Claims Act Investigations*

Counsel should review the board's director & officers (D&O) insurance policy, especially given the administration's directives regarding prosecuting false representations about DEI Programs through the FCA. Counsel should work with insurance brokers to ensure policy language adequately covers DEI-related risks and consider whether additional coverage or higher limits are necessary given the heightened enforcement environment.

For example, D&O insurance policies should be carefully reviewed to ensure that there is coverage for FCA investigations (especially since some D&O policies specifically exclude coverage for FCA claims) and related civil enforcement actions, whistleblower and retaliation claims arising from DEI-related complaints, shareholder derivative actions alleging breach of fiduciary duties related to DEI oversight, employment discrimination claims including "reverse discrimination" allegations, regulatory investigations by the DOJ and other federal agencies and criminal fraud investigations based on false representations about DEI compliance.

## CONCLUSION

Monitoring legal developments, conducting and updating privileged risk assessments and reporting in a privileged but documented way are key to ensuring a board fulfills its fiduciary duties as they relate to the changing DEI environment.

## NOTES

1. The White House, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (January 21, 2025), available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

2. U.S. Department of Justice Office of the Deputy Attorney General "Civil Rights Fraud Initiative" (May 19, 2025), available at https://www.justice.gov/dag/media/1400826/dl?inline.

3. U.S. Department of Justice, Civil Division "Civil Division Enforcement Priorities" (June 11, 2025), available at https://www.justice.gov/civil/media/1404046/dl?inline; U.S. Department of Health and Human Services "DOJ-HHS False Claims Act Working Group" (July 2, 2025), available at https://www.hhs.gov/press-room/hhs-doj-false-claims-act-working-group.html.

4. Office of the Attorney General, "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" (July 29, 2025), available at https://www.justice.gov/ag/media/1409486/dl?inline.

5. See 42 U.S.C. §§ 2000e, 2000e-1(c), 2000e-2.

6. See U.S. Equal Employment Opportunity Commission, "What You Should Know About DEI-Related Discrimination at Work," available at https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work.

7. See 42 U.S.C. § 1981.

8. See 31 U.S.C. §§ 3729–3733.

9. 698 A.2d 959 (Del. Ch. 1996). Due to potential nuances in state law, it is important for non-Delaware incorporated companies to work with outside counsel to ensure a proper understanding of what is required for board oversight, even if the state in which the company is incorporated borrows from or applies Caremark.

10. Marchand v. Barnhill, 212 A.3d 805, 821 (Del. 2019) (internal citations omitted).

11. See, e.g., U.S. Equal Employment Opportunity Commission, "What You Should Know About DEI-Related Discrimination at Work," available at https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work.

12. Office of the Attorney General, "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" (July 29, 2025), available at https://www.justice.gov/ag/media/1409486/dl?inline.