

## With Ambiguity Comes Opportunity:

### AFFIRMING DIVERSITY, EQUITY, AND INCLUSION STRATEGY AND MEASUREMENT

AUGUST 2023



Blair Jones



Austin Vanbastelaer



Michelle Garrett

The recent Supreme Court decision in *Students For Fair Admissions, Inc. v. President and Fellows of Harvard College* to overturn affirmative action in college admissions has sparked concerns about potential challenges to companies prioritizing diversity, equity, and inclusion (DE&I). According to Semler Brossy, 55% of the companies in the S&P 500 have DE&I metrics in their executive incentives, prompting executives, board members, and legal experts to question how *Students for Fair Admissions*, and increased politicization of DE&I initiatives at large, might impact their companies.

While we don't anticipate immediate clarity on these questions, we see this as an opportunity for companies to reflect on their DE&I policies, practices, and metrics to ensure they align with business and communication strategies.

#### What Is the Business Case for DE&I Initiatives?

Companies that have advanced their DE&I efforts in the talent management and executive compensation spheres inherently believe that these policies and practices maximize long-term business performance, often referred to as "sustainability." This conviction is supported by numerous studies, including several by McKinsey & Company. Though many "unknowns" remain on where the DE&I conversation will move in the political and judicial systems, companies can proactively use the current moment to clarify the purpose of their DE&I initiatives and their ties to strategic business objectives and sustainability. This is particularly true of companies with DE&I-related metrics in their compensation programs.

As a starting point, companies could take a fresh look at the motivation for their DE&I-related initiatives to ensure that: (i) they clearly tie to an overarching business objective such as sustainability and (ii) the initiatives are communicated within these objectives. The “on the ground” business case for DE&I can take several forms, for example:

- The broadest possible talent pipeline allows companies to find the highest caliber of talent which adds the most value to their services or products (almost all industries could fit into this grouping).
- A company’s workforce needs to broadly reflect its customer base to understand its end-users and how they will engage with its product (relevant industries may be consumer products companies, healthcare providers, automotive manufacturers, etc.).
- A company’s ability to serve its clients is enhanced if it can meet them “where they are” and for who they are (relevant industries may be software services, banking, pharma, etc.).
- A company’s high-performing employee hire and retention rates will increase if its culture is inclusive and representative of all communities and geographies in which it operates.

### **What Is the Appropriate Framework for Measuring DE&I Success?**

Currently, there is a risk that Students for Fair Admissions opens the door for analogous cases against companies under Title VII (which protects employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin). Also at stake, regardless of legal arguments, is reputational harm that could come from increased interest in DE&I-related initiatives and issues. The possibility of these cases, and the very immediate risks that the politicization of DE&I initiatives pose, create an opportunity for boards and management teams to step back and consider the efficacy of their measurement approaches and alignment of DE&I metric selection with their newly-clarified DE&I strategy.

The metrics below could work well to incentivize collaborative and dynamic talent environments through different channels. These metrics may also be appealing to companies that will be introducing DE&I-related metrics into their incentive programs for the first time or for companies that want to take a cautious approach to measurement in light of the uncertain legal and social environment surrounding DE&I:

- Metrics Incentivizing the Building of a Diverse Talent Pipeline: percentage of hiring slates with diverse candidates, economic diversity of schools/areas from which it hires, “return” on investment into local underserved areas (e.g., through job training, etc.), geographic background of candidates, social mobility of workforce, etc.
- Metrics Incentivizing an Inclusive Culture: employee engagement (generally), “inclusiveness” score within engagement surveys, percentage of employees who believe rewards align with job performance, etc.

We suggest maintaining a constant pulse on the framework for measuring success against DE&I objectives, particularly as companies periodically revisit the purpose and grounding of these strategies. To supplement these pulse checks, companies should ensure they have comprehensive annual pay equity and hiring equity audits that identify and remedy structural biases in the recruiting and total rewards systems. As a part of this process, company leadership can commission a third-party audit on employee performance ratings relative to employee demographics to understand better whether biases exist. And, as always, internal and external legal counsel will be crucial to navigating DE&I-related issues and opportunities.

### **How Can Companies Optimize Communication of DE&I Initiatives?**

The uncertainty surrounding the current DE&I environment, and the perceived stress it may place on a company’s ability to nurture many of its core cultural values, create the need for clear and consistent

---

communication of its DE&I strategy. Absent consistent communications, and clarifications where appropriate, employees may question whether companies will abandon initiatives that promote and support a safe, thoughtful, and high-performing work culture absent clarification. Investors and other stakeholders will want to know the rationale behind any pivots in DE&I strategy and how these pivots best support the business's long-term health. So how does a company effectively communicate its strategy across these stakeholders?

We suggest as a general principle that companies ground their DE&I-related efforts in the “business case” in both external and internal communications to make the importance of these efforts resonate with all stakeholders. At the end of the day, a company's strategy and its prosperity are inextricably linked. This remains true when discussing DE&I-related strategies. As a result, we suggest that companies remain transparent in their affirmation of their DE&I strategies and the related implementation of these strategies. Anchoring to one or more of the illustrative business cases above can help create consistent language for addressing various stakeholders when discussing the direction a company is taking. This approach can also provide investors with greater insight into the importance of the company's talent investments and approach to human capital management at large.

For internal communications, crystallizing the “how DE&I impacts us” part of a company's story is critical. This messaging can help personalize the topic and directly illustrate how the team's efforts will contribute to the enterprise's success. We also suggest that companies highlight the desire among employees for fair, equitable, and diverse workplaces, which are typically captured in employee engagement surveys and other forums

(e.g., exit interviews, the talent acquisition process, etc.). Companies can also highlight that efforts to increase employee engagement and hire the best candidates from the broadest possible talent pool create meritocratic opportunities for all to win together (rather than creating a “zero-sum” system with winners and losers). This internal forum might also provide periodic opportunities for more fulsome discussions about the company's cultural values and how DE&I-related strategies uphold those principles.

---

**We suggest as a general principle that companies ground their DE&I-related efforts in the “business case” in both external and internal communications to make the importance of these efforts resonate with all stakeholders. At the end of the day, a company's strategy and its prosperity are inextricably linked.**

---

Public companies can also consider with outside legal counsel whether talent-related risks, including those involving DE&I issues, ascend to levels warranting reporting in the risks section of the annual 10-K, which is another opportunity to engage with investors on the topic.

The current legal uncertainty and politicization surrounding DE&I present a good opportunity for companies to revisit their DE&I efforts to ensure alignment with their business strategy and employee value proposition. Many of today's DE&I strategies and practices were implemented just before or in the early days of the Covid-19 pandemic. But many things have since changed since then: the legal context surrounding DE&I has evolved with the increasing likelihood of legal challenge and the related reputational impact, regardless of the outcome, as have companies' talent-related challenges (e.g., deciding on "return to office" or "hybrid working" rather than "work from home" policies), and investor preferences. Companies cannot resolve the legal uncertainty and political challenges surrounding DE&I in their employment practices and incentive plans. However, they can use these uncertainties as a catalyst for a constructive discussion around the efficacy of their existing programs and initiatives and whether any changes are warranted as matters unfold. ■

*For more information, visit us at [SEMLERBROSSY.COM](https://SEMLERBROSSY.COM),  
or reach us at 310.481.0180.*

**Blair Jones**, Managing Director  
[bjones@semlebrossy.com](mailto:bjones@semlebrossy.com)

**Austin Vanbastelauer**, Principal  
[avanbastelauer@semlebrossy.com](mailto:avanbastelauer@semlebrossy.com)

**Michelle Garrett**, Principal  
[mgarrett@semlebrossy.com](mailto:mgarrett@semlebrossy.com)

