The Miscalculation of Corporate DEI Risk

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We are grateful for comments from and conversations with participants in The University of Pennsylvania Law Review Symposium on The Future of Law and Multiracial Democracy.

Abstract

Corporate diversity, equity, and inclusion (DEI) efforts have undergone a dramatic reversal in a remarkably short period of time. In the wake of George Floyd's murder in 2020, public companies widely embraced DEI as a core component of corporate responsibility, governance, and human-capital risk management, responding to pressure from employees, investors, and consumers. By 2025, however, that apparent moment of reform had given way to rapid retrenchment. Project 2025 and related federal enforcement initiatives reframed corporate DEI practices as legally suspect, creating powerful incentives for firms to dismantle or obscure prior commitments. Although cycles of racial reform and retrenchment are a familiar feature of U.S. legal and political history, the current backlash is distinctive in that it is unfolding within publicly traded firms governed by boards of directors that owe fiduciary duties to identify, assess, and manage material risks. This Article argues that many firms' responses to the contemporary anti-DEI turn reflect a fundamental miscalculation of risk. By responding to legal and political uncertainty with abrupt expansion or retreat, corporations have treated DEI as a transient political or compliance issue rather than as a sustained subject of enterprise risk oversight. The result is not risk avoidance but risk amplification: both the adoption and dismantling of DEI initiatives generate legal, regulatory, disclosure, reputational, and workforce risks that demand deliberate board-level analysis. The Article demonstrates that the greatest danger lies not in DEI itself, but in boards' failure to engage in holistic, process-driven evaluation of these tradeoffs. Only by integrating DEI into ordinary risk-oversight frameworks—rather than treating it as a symbolic commitment or political liability—can corporate boards fulfill their fiduciary obligations and responsibly navigate the current era of racial retrenchment.

Keywords: DEI, corporate governance, risk assessment, risk oversight, risk management; compliance, board governance

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ABSTRACT

Corporate diversity, equity, and inclusion (DEI) efforts have undergone a dramatic reversal in a remarkably short period of time. In the wake of George Floyd's murder in 2020, public companies widely embraced DEI as a core component of corporate responsibility, governance, and human-capital risk management, responding to pressure from employees, investors, and consumers. By 2025, however, that apparent moment of reform had given way to rapid retrenchment. Project 2025 and related federal enforcement initiatives reframed corporate DEI practices as legally suspect, creating powerful incentives for firms to dismantle or obscure prior commitments. Although cycles of racial reform and retrenchment are a familiar feature of U.S. legal and political history, the current backlash is distinctive in that it is unfolding within publicly traded firms governed by boards of directors that owe fiduciary duties to identify, assess, and manage material risks.

This Article argues that many firms' responses to the contemporary anti-DEI turn reflect a fundamental miscalculation of risk. By responding to legal and political uncertainty with abrupt expansion or retreat, corporations have treated DEI as a transient political or compliance issue rather than as a sustained subject of enterprise risk oversight. The result is not risk avoidance but risk amplification: both the adoption and dismantling of DEI initiatives generate legal, regulatory, disclosure, reputational, and workforce risks that demand deliberate board-level analysis. The Article demonstrates that the greatest danger lies not in DEI itself, but in boards' failure to engage in holistic, process-driven evaluation of these tradeoffs. Only by integrating DEI into ordinary risk-oversight frameworks—rather than treating it as a symbolic commitment or political liability—can corporate boards fulfill their fiduciary obligations and responsibly navigate the current era of racial retrenchment.

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INTRODUCTION

In the summer of 2020, corporate America appeared to stand at the threshold of a racial reckoning. In the wake of George Floyd's murder, firms issued unprecedented public commitments to diversity, equity, and inclusion (DEI), pledged billions of dollars toward racial-justice initiatives, tied executive compensation to diversity metrics, and promised to embed equity into governance, hiring, and supply-chain decisions.[1] For a brief moment, the alignment of social movement pressure, investor attention, and employee activism suggested that corporate engagement with racial equity might move beyond symbolic compliance and into sustained institutional reform.[2]

By 2025, that moment has given way to a sharp and accelerating retreat. The ascendance of Project 2025—a comprehensive blueprint for dismantling what its architects label "DEI ideology" across the administrative state—has operated as both signal and sanction.[3] Federal agencies have begun to recast

[1] Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869 (2021); Lisa M. Fairfax, *Racial Rhetoric or Reality?*, 2022 COLUM. BUS. L. REV. 118, 127-28.
[2] Fairfax, *Racial Rhetoric,* supra note 1 at 152-182 (indicating that some companies followed through on commitments to DEI with changes to their board). *But see* Martinez & Fletcher, supra note 1 (critiquing corporate statements that resembled marketing rather than structural reform).
[3] PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT (Heritage Found. 2023).

corporate DEI efforts as legally suspect, with the Department of Justice invoking novel enforcement theories, including the False Claims Act (FCA), to investigate companies that maintain diversity-conscious employment practices while holding government contracts.[4] At the same time, senior regulators have openly warned that DEI commitments may count against firms in merger review, contracting, and enforcement discretion.[5] The result has been a rapid corporate recalibration: some firms have quietly abandoned programs once celebrated as core to their values, while others have stripped public references to equity from governance documents, risk disclosures, and human-capital strategies.

This oscillation—from reform to retrenchment—is neither surprising nor historically unique. As Kimberlé Crenshaw famously theorized, moments of apparent racial progress in American law and political economy are routinely followed by periods of retrenchment that re-legitimate existing hierarchies under the guise of neutrality, merit, or legality.[6] Corporate racial reform has followed a similar pattern. Periods of heightened attention to inequality often generate performative commitments that are later withdrawn once political winds shift, social pressure dissipates, or counter-mobilization gains traction. The post-2020 backlash against DEI thus fits comfortably within a longer tradition of reform being met, and ultimately constrained, by retrenchment.

What is distinctive about the present moment, however, is the institutional setting in which retrenchment is unfolding. Today's reversals are not occurring primarily within voluntary civic organizations or loosely regulated private actors. They are occurring within public companies governed by boards of directors that owe fiduciary duties of care and loyalty, including a well-established obligation to identify, monitor, and manage material risks to the firm. Corporate decisions to adopt, expand, curtail, or abandon DEI initiatives are therefore not merely expressive or political acts; they are governance choices with legal, regulatory, reputational, and operational consequences that fall squarely within the board's risk-oversight mandate.

Recent corporate governance scholarship and practitioner guidance underscore that boards cannot treat social and political volatility as exogenous noise. Effective risk oversight requires access to comprehensive information, deliberate engagement, and sustained attention to emerging risk

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[4] Lydia Wheeler, *Justice Department Using Fraud Law to Target Companies on DEI*, WALL ST. J. (Dec. 28, 2025), https://www.wsj.com/politics/policy/trump-doj-dei-fraud-investigations-93213d52?msockid=3d154fb9340967d63f40593835826699.

[5] *See Risk Management and the Board of Directors*, Wachtell, Lipton, Rosen & Katz (Sept. 2025) (discussing regulatory and enforcement risk tied to DEI and corporate culture).

[6] Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

domains.[7] As leading law firm guidance emphasizes, boards are expected to actively oversee risks tied to corporate culture, compliance, and workforce practices, particularly where shifting enforcement priorities create conflicting legal pressures.[8] Notably, the guidance highlights growing scrutiny of DEI practices as a board-level concern, warning that failure to anticipate and manage these risks—whether through overreaction or abdication—may expose directors to claims of inadequate oversight.[9]

This Article argues that many firms have fundamentally miscalculated DEI risk by responding to legal and political volatility without engaging in the sustained, process-driven risk oversight that fiduciary governance demands. By treating DEI as a transient political or compliance problem—something to be amplified in moments of reform and erased in moments of retrenchment—corporate leaders have failed to fully assess the true and fulsome scope of risk associated with both action and inaction. The core claim developed here is that DEI must be integrated into enterprise risk management, accounting simultaneously for legal exposure, regulatory uncertainty, workforce stability, reputational capital, and long-term firm value. The ease with which many firms have reversed course since 2020 does not reflect prudent caution; it reflects a governance failure to take risk seriously when it is politically uncomfortable to do so.

Part I situates contemporary DEI retrenchment within a longer cycle of corporate reform and backlash. Part II explains the board's fiduciary obligation to assess and manage risk. Part III examines how firms have actually responded to DEI-related legal uncertainty. Part IV demonstrates why many of those responses reflect a fundamental miscalculation of risk.

I. CORPORATE DEI EFFORTS: REFORMATION & RETRENCHMENT

This Part situates contemporary corporate DEI retrenchment within a longer cycle of reform and backlash in corporate governance. It traces how DEI moved, in the wake of 2020, from symbolic corporate rhetoric to a more deeply embedded feature of governance, disclosure, and board oversight—and how that integration both enabled meaningful reform and rendered DEI vulnerable to reversal when political and regulatory conditions shifted.

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[7] Hami Amiraslani et al., *The Importance of Directors' Information Access: Evidence from Board Risk Reporting*, INSEAD Working Paper (2024), https://www.insead.edu/faculty-research/publications/working-papers/importance-directors-information-access-evidence-board.

[8] Wachtell, supra note *5*.

[9] *Id.* (highlighting DEI, discrimination, and workplace culture as material risks requiring active board oversight).

A. Reformation

The corporate response to George Floyd's murder in 2020 did not arise in a vacuum. Rather, it built upon—and accelerated—a broader reorientation in corporate purpose that had already begun to take shape in the years immediately preceding the protests. Most notably, in August 2019, the Business Roundtable issued its revised Statement on the Purpose of the Corporation, repudiating shareholder primacy in favor of a stakeholder-oriented conception of corporate responsibility that emphasized commitments to employees, communities, and society alongside shareholders.[10] Although the legal force of the Statement was limited, its symbolic and normative significance was substantial: it reframed the corporation's role in American political economy and created conceptual space for firms to treat workforce equity, inclusion, and social impact as matters of legitimate corporate concern.[11]

When racial justice protests erupted in the summer of 2020, corporate leaders increasingly understood DEI initiatives as consistent with—rather than in tension with—this evolving account of corporate purpose. Public companies did not merely issue statements condemning racism or expressing solidarity with the Black Lives Matter movement; many embedded racial equity commitments into governance structures, disclosure practices, and incentive systems.[12] Fortune 500 firms pledged tens of billions of dollars toward racial justice initiatives, announced hiring and promotion goals, expanded board diversity, and reframed DEI as integral to human capital management and long-term firm value.[13] These reforms reflected a conception of the corporation as a social institution with obligations that extended beyond short-term shareholder returns, echoing the Business Roundtable's emphasis on sustainable value creation through investment in employees and communities.[14]

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[10] Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[11] Lisa M. Fairfax, *Stakeholderism, Corporate Purpose and Credible Commitment*, 108 VA. L. REV. 1163, 1171-1186 (2022).

[12] Fairfax, *Racial Rhetoric*, supra note 1 at 137-140; Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 375-377, 382-385 (2022) (discussing incorporation of board oversight of diversity and inclusion into board charters).

[13] Tracy Jan et al., *Corporate America's $50 Billion Promise*, WASH. POST (Aug. 23, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/.

[14] Jill Fisch and Steven Davidoff, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309-11 (2021); Leo E. Strine, Jr. et al., *The New Paradigm for Corporate Governance*, 64 BUS. LAW. 9 (2019); Colin Mayer, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD, 5-7, 9 (2018).

Crucially, post-2020 DEI reforms were not confined to corporate rhetoric. Boards of directors increasingly treated racial equity as a governance issue subject to fiduciary oversight.[15] Firms created board-level DEI or ESG oversight structures, elevated DEI and ESG leaders with direct reporting lines to senior leadership and boards, and integrated diversity and inclusion considerations into leadership development and talent pipelines.[16] In many cases, boards went further, tying executive compensation to measurable diversity outcomes.[17] As contemporaneous reporting documented, companies such as McDonald's, Nike, and Starbucks linked senior executive pay to improvements in the representation of women and racial minorities in leadership roles, thereby converting DEI from an aspirational value into a monitored performance objective.[18] Once embedded in compensation frameworks, DEI commitments assumed a distinctly legal character, implicating board oversight, internal controls, and disclosure accuracy.

Shareholders and institutional investors played a central role in reinforcing this reform trajectory. Investors filed dozens of shareholder proposals demanding workforce demographic disclosures, racial equity audits, and greater board diversity, often framing these demands in terms of governance quality, reputational risk, and long-term performance.[19] High-profile examples underscored that DEI was no longer treated as a matter of managerial discretion alone. BlackRock agreed to conduct an independent racial audit of its policies and practices following shareholder pressure, while Citigroup became the first major Wall Street bank to commit to a third-party racial equity audit focused on the firm's business practices and impacts.[20]

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[15] Fairfax, *Board Committee Charters,* supra note 12 at 382-85; State St. Glob. Advisors et al., *The Board's Oversight of Racial and Ethnic Diversity, Equity, and Inclusion* (2021) (on file with authors); *see also* Benjamin Colton, Jack "Rusty" O'Kelley & Holly Fetter, *Board's Oversight of Racial DE&I*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 22, 2021), https://corpgov.law.harvard.edu/2021/07/22/boards-oversight-of-racial-dei/.

[16] Fairfax, *Board Committee Charters,* supra note 12 at 382-85; State St. Glob. Advisors et al., supra note 15.

[17] Matteo Tonello, Paul Hodgson & Andrew Jones, *ESG Performance Metrics in Executive Compensation Strategies: 2024 Edition*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 7, 2025), https://corpgov.law.harvard.edu/2025/01/07/esg-performance-metrics-in-executive-compensation-strategies/.

[18] Emily Glazer & Theo Francis, *CEO Pay Increasingly Tied to Diversity Goals*, WALL ST. J. (June 2, 2021).

[19] Sullivan and Cromwell LLP, 2023 Proxy Season Review, at 10-11, 13, https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2023-proxy-season-review-part-1.pdf; *Shareholders Push Companies on Racial Justice*, Catholic News Serv. (Mar. 22, 2021); Sullivan and Cromwell LLP, 2022 Proxy Season Review, at 9-12, 21, https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2022-Proxy-Season-Part-1-Rule-14a-8.pdf.

[20] Saijel Kishan, *BlackRock Breaks From Wall Street Ranks With Planned Racial Audit*, BLOOMBERG (Apr. 5, 20210, https://www.bloomberg.com/news/articles/2021-04-

These developments illustrate that post-2020 DEI reforms were driven, in significant part, by capital market actors operating through established mechanisms of corporate law rather than by transient reputational concerns.

Regulatory and quasi-regulatory developments further entrenched DEI within corporate governance during this period. Following the SEC's 2020 amendments to Regulation S-K requiring disclosure of material human capital information, many firms began discussing diversity and inclusion in Form 10-Ks, proxy statements, and sustainability reports.[21] Some voluntarily disclosed workforce demographics or EEO-1 data, while others provided narrative descriptions of DEI strategy and progress. Federal regulators appeared to endorse this trajectory. In 2020, the SEC's Office of Minority and Women Inclusion reported that nearly all surveyed financial services firms incorporated diversity considerations into recruitment and retention frameworks, signaling an emerging consensus that DEI bore on sound governance and risk management.[22] At the same time, Nasdaq's board diversity disclosure rule—approved by the SEC in 2021—formalized expectations around board-level diversity transparency, further embedding DEI within the corporate disclosure regime.[23]

Scholarly responses to the post-2020 moment sought to translate these developments into durable governance mechanisms. Indeed, one of us argued that institutional investors should require firms to adopt standardized, measurable, and regularly disclosed metrics for racial equity—analogous to financial performance indicators—so that boards and investors could assess progress and accountability over time.[24] Related work on corporate racial responsibility emphasized that voluntary reforms, while meaningful, remained contingent on sustained investor pressure and governance

05/blackrock-breaks-ranks-with-wall-street-in-performing-race-audit); Jennifer Surane & Saijel Kishan, *Citi Becomes First Wall Street Bank to Agree to Racial Audit*, BLOOMBERG (Oct. 22, 2021), https://www.bloomberg.com/news/articles/2021-10-22/citi-becomes-first-wall-street-bank-to-agree-to-racial-audit.

21 Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Release No. 33-10825, 85 Fed. Reg. 63,726 (Oct. 8, 2020), https://www.federalregister.gov/documents/2020/10/08/2020-19182/modernization-of-regulation-s-k-items-101-103-and-105.

22 U.S. Sec. & Exch. Comm'n, Office of Minority & Women Inclusion, *2020 Diversity Assessment Report* (2020), https://www.sec.gov/files/2020_OMWI_Diversity_Assessment_Report.pdf.

23 Nasdaq Stock Mkt. LLC, *Board Diversity Rule*, SEC Approval Order (Aug. 6, 2021), https://www.sec.gov/files/rules/sro/nasdaq/2021/34-92590.pdf. This was ultimately vacated by the Fifth Circuit. *See* Maia Gez, Scott Levi & Danielle Herrick, *Nasdaq Board Diversity Disclosure Rules No Longer in Effect After Overturning by Court*, WHITE & CASE LLP (Dec. 13, 2024), https://www.whitecase.com/insight-alert/nasdaq-board-diversity-disclosure-rules-no-longer-effect-after-overturning-court

24 Martinez & Fletcher, supra note 1.

integration.[25] Empirical evidence suggests that these reforms were not merely symbolic. Studies of corporate responses to the Black Lives Matter movement indicate that many firms followed public commitments with concrete governance changes, particularly in board composition.[26] By 2025, women and nonwhite men collectively held a majority of board seats in S&P 500 companies, a demographic shift difficult to explain without reference to the post-2020 DEI push.[27] To be sure, by 2025, only 24% of directors in S&P 500 companies self-identify as under-represented minorities, while the number of new such directors has fallen to levels of a decade agao after an all-time high in 2021.[28]

Taken together, the post-2020 period represents a genuine—if fragile—moment of corporate DEI reformation. Grounded in an evolving conception of corporate purpose and reinforced by investors, regulators, and boards, firms treated racial equity as a legitimate subject of governance, disclosure, and fiduciary oversight. Yet as the next Part shows, the very features that integrated DEI into the core of corporate law also rendered it vulnerable to reversal when political and regulatory conditions shifted.

B. Retrenchment

By 2025, the post-2020 period of corporate DEI reformation had given way to a familiar pattern of retrenchment. The same firms that, only a few years earlier, had publicly embraced diversity, equity, and inclusion as matters of governance, risk management, and corporate purpose began to reverse course. Diversity language quietly disappeared from annual reports and proxy statements; board-level DEI committees were dissolved or folded into broader "talent" or "culture" functions; executive compensation metrics tied to diversity outcomes were abandoned; the portion of new directors of color steadily declined; and DEI offices were downsized, rebranded, or shuttered altogether.[29] What had once been framed as a long-term commitment to equity increasingly came to be treated as a contingent, politically sensitive exposure.

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[25] Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361 (2024).

[26] Fairfax, *Racial Rhetoric,* supra note 1

[27] Jeff Green, *White Men in the Minority as U.S. Boardrooms Enter New Era*, BLOOMBERG (May 8, 2025), https://www.bloomberg.com/news/articles/2025-05-08/s-p-500-board-seats-see-demographic-shift-as-white-men-lose-majority.

[28] Spencer Stuart, 2025 US Board Index, at 31, 35, https://www.spencerstuart.com/-/media/2025/10/ssbi2025/2025-us-board-index.pdf.

[29] Drew Hutchinson, *Boardroom Diversity Commitments Fade Amid Broad DEI Retreat*, BLOOMBERG L. (Oct. 1, 2025, 6:30 AM EDT), https://news.bloomberglaw.com/esg/boardroom-diversity-commitments-fade-amid-broad-dei-retreat; Spencer Stuart Board Index, supra note 28, at 29.

This reversal was neither anomalous nor inexplicable. As scholars of race and reform have long observed, moments of apparent progress are often followed by retrenchment once reform threatens to harden into durable redistribution of power or obligation.[30] The corporate retreat from DEI thus fits squarely within a broader historical pattern. What distinguishes the current episode, however, is the speed and coordination with which retrenchment unfolded—and the extent to which it was catalyzed by explicit political and regulatory signals directed at the private sector.

One source of pressure came from investors and shareholder activists who increasingly framed DEI as a source of legal and reputational risk rather than as a driver of long-term value. Conservative-aligned investment groups and advocacy organizations filed shareholder proposals demanding audits of DEI programs, warning boards that diversity initiatives could expose firms to discrimination claims, regulatory scrutiny, or consumer backlash.[31] Although many of these proposals failed at the ballot box, their presence altered boardroom discourse by recasting DEI not as an opportunity or obligation, but as a liability requiring containment.[32] In some cases, firms responded preemptively by scaling back public commitments or by reframing diversity initiatives in race-neutral, anodyne terms designed to minimize controversy rather than advance equity.

Perhaps more consequential than investor pressure, however, was the arrival of Project 2025 and the second Trump Administration's aggressive campaign against DEI across the federal government and beyond. Project 2025 explicitly identified diversity, equity, and inclusion as forms of ideological overreach to be dismantled, calling for the elimination of DEI programs, personnel, and language throughout the administrative state and among federal contractors.[33] Within days of taking office, President Trump issued executive orders declaring DEI initiatives presumptively unlawful, revoking long-standing affirmative-action obligations for federal contractors, and directing agencies to treat DEI as a form of impermissible discrimination.[34] These actions sent a clear signal to corporate America: DEI was no longer merely controversial—it was a potential trigger for enforcement.

Federal agencies amplified this signal through both formal and informal means. The Department of Justice announced novel theories for challenging corporate DEI programs, including the potential use of the False Claims Act

[30] Crenshaw, supra note 6.
[31] Atinuke O. Adediran, *Risky Business*, B.U. L. REV. (forthcoming 2026), Fordham L. Sch. Legal Stud. Research Paper No. 5556639 (Sept. 25, 2025), https://ssrn.com/abstract=5556639
[32] Id.
[33] Project 2025, supra note 3.
[34] Exec. Order No. 14,151, *Ending Radical and Wasteful Government DEI Programs* (2025); Exec. Order No. 14,173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (2025).

to target firms that maintained diversity initiatives while receiving federal funds.[35] The Equal Employment Opportunity Commission, under new leadership, openly declared DEI programs a priority area for investigation and enforcement, reframing civil rights law as a tool for dismantling, rather than supporting, corporate diversity efforts.[36] At the same time, agencies curtailed traditional civil rights enforcement, dissolved consent decrees, and redirected institutional resources away from addressing systemic discrimination and toward policing DEI itself.[37]

The cumulative effect of these developments was chilling. Firms that had once advertised their commitment to racial equity now faced a landscape in which DEI carried asymmetric downside risk. Public commitments risked triggering regulatory scrutiny or litigation, while quiet retrenchment promised at least temporary insulation from political attack. Unsurprisingly, many companies chose the latter. Empirical accounts document a widespread retreat from boardroom diversity commitments by 2025, including the removal of DEI language from SEC filings and the abandonment of previously announced goals.[38] This shift was not limited to symbolic change. In high-profile cases, retrenchment was accompanied by workforce reductions, program eliminations, and public disavowals of diversity initiatives that had been central to firms' post-2020 identity.[39]

For those observing corporate DEI developments from 2020 to 2025, the rapid shift from reform to retrenchment was palpable. From a corporate governance and compliance perspective, however, this whiplash is not merely descriptive; it signals a deeper failure to treat DEI as a sustained subject of fiduciary risk oversight rather than as a contingent response to shifting political pressures.

II. THE REQUIREMENT TO ASSESS AND MANAGE RISK

Part II outlines the fiduciary obligations that require corporate boards to engage in sustained oversight of material risk. Drawing on Delaware doctrine and contemporary compliance and governance practice, it explains that risk oversight encompasses legal uncertainty, compliance exposure, workforce stability, and organizational culture. This framework makes clear that DEI is

35 Hayes Brown, *How the Justice Department Could Recruit Anti-DEI Bounty Hunters*, MS NOW (Dec. 30, 2025), https://www.ms.now/opinion/doj-dei-corporations-probe-fraud.
36 Lauren Weber, *Trump's DEI Slayer Is Just Getting Started*, WALL ST. J. (Nov. 19, 2025), https://www.wsj.com/politics/policy/trumps-eeoc-chief-andrea-lucas-is-dei-slayer-just-getting-started-2d6623a6.
37 Sarah N. Lynch, *Ex-Employees of U.S. Justice Department Blast "Destruction" of Civil Rights Unit*, REUTERS (Dec. 9, 2025, 3:50 PM EST), https://www.reuters.com/legal/government/ex-employees-us-justice-department-blast-destruction-civil-rights-unit-2025-12-09/.
38 Hutchison, supra note 29.
39 Adediran, *Risky Business*, supra note 31.

not an exceptional category of risk, but part of the ordinary risk landscape boards are charged with managing.

A. The General Requirement to Manage Risk

Modern corporate governance rests on a foundational premise: boards of directors are not responsible for managing risk day to day, but they are responsible for ensuring that material risks to the firm are identified, assessed, monitored, and addressed through appropriate systems of oversight. Risk oversight is thus not discretionary or episodic. It is a core governance function, grounded in fiduciary duty, reinforced by regulatory expectations, and operationalized through enterprise risk management, compliance systems, and board-level reporting practices.[40]

Delaware law has long articulated this obligation through the *Caremark* line of cases, which holds that directors must make a good-faith effort to ensure the existence of information and reporting systems reasonably designed to provide the board with timely, accurate information about risks requiring attention.[41] While *Caremark* claims remain difficult to prove, the doctrine is clear on one point: boards may not abdicate risk oversight by remaining passive, uninformed, or disengaged.[42] Recent decisions have underscored that this obligation is especially salient where risks are "mission critical" to the company's business, operations, or legal compliance.[43] Importantly, the duty is procedural as much as substantive—it requires boards to ask, receive, and evaluate information about evolving risks, even where those risks are complex, uncertain, or politically contested.[44]

Governance best practices mirror this legal baseline. Regulators, stock exchanges, institutional investors, and proxy advisors consistently emphasize that boards must engage in ongoing risk assessment rather than reactive crisis management.[45] Enterprise risk management frameworks, including those promulgated by COSO, conceptualize risk assessment as a continuous process: identifying emerging risks, evaluating their likelihood and impact, integrating them into strategy, and revisiting assumptions as conditions

[40] Wachtell, supra note 5.
[41] In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).
[42] Stone ex rel. AmSouth Bancorp v. Ritter, 911 A.2d 362, 370 (Del. 2006).
[43] Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).
[44] Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187 (2017) ((explaining that compliance with antidiscrimination law is a core fiduciary obligation and that the quality of compliance—rather than mere formal adherence—is a matter of corporate governance).
[45] Wachtell, supra note 5. Also note, that risk matters more generally to the integrity of the financial markets. Cary Martin Shelby, *Racism as a Threat to Financial Stability*, 118 NW. U. L. REV. 757 (2023) (explaining how racialized practices generate systemic risk through cascading spillover effects that destabilize markets).

change.[46] Boards are expected to approve risk appetite statements, review management's risk assessments, and ensure that reporting structures surface both quantitative metrics and qualitative signals, including risks related to culture, workforce dynamics, and compliance.[47]

Crucially, contemporary risk oversight is not limited to financial or operational hazards narrowly construed. Boards are routinely advised that risks associated with corporate culture, human capital, and compliance failures can be as consequential as traditional balance-sheet risks.[48] Empirical research on board risk reporting shows that boards receiving more frequent and comprehensive internal risk information are better able to reduce future firm risk and improve performance—precisely because such reporting enables directors to anticipate problems rather than respond after harm has occurred.[49] The "tone at the top," often invoked in compliance guidance, is not merely symbolic; it reflects the board's role in shaping organizational culture and signaling which risks matter.[50]

Within this framework, risks associated with diversity, equity, and inclusion are neither novel nor extraneous. DEI-related risks—ranging from discrimination and harassment liability, to workforce attrition, to reputational harm, to regulatory scrutiny—fit comfortably within the categories of legal, operational, and cultural risks that boards are expected to oversee.[51] Indeed, guidance directed at boards routinely identifies discrimination, workplace culture, and human capital management as areas requiring active oversight because failures in these domains can trigger cascading legal and economic consequences.[52] Boards are therefore not free to ignore DEI-related risks simply because they are politically contested or socially charged. To the contrary, controversy itself is often a signal that heightened risk assessment is required.[53]

What risk oversight does not require is that boards reach any particular substantive conclusion about DEI. It does not mandate expansion or contraction of specific initiatives. But it does require that boards engage in a reasoned process of identifying and evaluating the risks associated with both

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[46] Comm. of Sponsoring Orgs. of the Treadway Comm'n (COSO), *Enterprise Risk Management—Integrated Framework* (2017).

[47] Gary Roboff, *The Tone at the Top: Assessing the Board's Effectiveness*, ISACA J., Vol. 6 (2016), https://www.isaca.org/resources/isaca-journal/issues/2016/volume-6/the-tone-at-the-top-assessing-the-boards-effectiveness.

[48] Elise Bernlohr Maizel, *Illegal Corporate Cultures*, 75 Duke L.J. 1 (2025).

[49] Amiraslani, supra note 7.

[50] Roboff, supra note *47*.

[51] Geoffrey P. Miller, *The Compliance Function: An Overview*, in *The Oxford Handbook of Corporate Law and Governance* 981 (2015), https://academic.oup.com/edited-volume/43491/chapter/363890193.

[52] Wachtell, supra note 5.

[53] Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

engagement and disengagement. That process necessarily includes assessing how DEI decisions interact with the firm's compliance obligations, disclosure practices, workforce stability, and stated corporate values.[54] In short, DEI risk is not a special category of risk demanding exceptional treatment; it is part of the ordinary risk landscape that boards are charged with navigating.

The problem, as the next Section explains, is not that boards lack authority to consider DEI risk. It is that many firms have failed to treat DEI as a subject of sustained, holistic risk assessment at all—responding instead with abrupt shifts driven by political pressure rather than by the governance processes that fiduciary oversight demands.

B. *The Failed Management of DEI Risk*

Ironically, corporate retrenchment from DEI initiatives has itself generated significant and foreseeable risks—many of which stem directly from the way firms framed, disclosed, and governed their earlier commitments. Companies that publicly embraced DEI after 2020 did not do so solely through aspirational messaging; many embedded those commitments in SEC filings, proxy statements, executive compensation plans, board oversight responsibilities, and human capital disclosures.[55] When firms later reversed course—quietly abandoning programs, stripping disclosures, or recharacterizing DEI as a legal liability—they exposed themselves to claims of misrepresentation, breach of fiduciary duty, and disclosure inconsistency.[56] In other words, retrenchment did not eliminate DEI-related risk; it transformed it.

The Wells Fargo "sham interview" litigation illustrates this dynamic vividly. Shareholder plaintiffs alleged that the company publicly touted diversity commitments while privately undermining them through practices designed to create the appearance of compliance without substantive change.[57] The resulting settlements and reputational fallout underscore a broader point: firms face litigation risk not only for allegedly discriminatory DEI practices, but also for overstating, mischaracterizing, or abandoning DEI commitments that had been presented to investors as meaningful components of governance and risk management.[58] This exposure is not limited to Wells Fargo. In the years following George Floyd's murder, dozens

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[54] Veronica Root Martinez, *The Diversity Risk Paradox*, 75 VAND. L. REV. EN BANC 115 (2022); Veronica Root Martinez, *Purpose-Driven Compliance*, __ TEXAS A&M L. REV. __ (2026).
[55] *See* Martinez & Fletcher, supra note 1; Fairfax, *Board Committee Charters*, supra note 12 at 382-85.
[56] David Hood, *Lawsuits Challenge Corporate Diversity Pledges After Floyd*, Bloomberg L. (Apr. 7, 2023), https://news.bloomberglaw.com/esg/host-of-companies-sued-alleging-unmet-diversity-equity-pledges.
[57] *Id.*
[58] Adediran, *Risky Business*, supra note 31.

of lawsuits were filed against major corporations alleging that DEI pledges were misleading, inadequately implemented, or strategically reversed once public scrutiny waned.[59]

Retrenchment has also heightened regulatory and enforcement risk rather than containing it. Under the second Trump Administration, DEI initiatives have been recast as presumptively suspect, with the Department of Justice advancing novel theories—most notably under the False Claims Act—to scrutinize companies that maintain DEI programs while receiving federal funds.[60] This enforcement posture has created a perverse incentive structure: firms that rapidly dismantle DEI efforts may still face scrutiny for past representations, while firms that retain them face ongoing investigatory risk. As commentators have noted, the mere threat of FCA enforcement—coupled with the possibility of whistleblower bounties—has had a chilling effect well beyond any final adjudication of legality.[61] From a risk-management perspective, this uncertainty demands careful, board-level analysis. Instead, many firms responded with abrupt retrenchment untethered from any apparent reassessment of enterprise risk.

Investor and market reactions further complicate the picture. While some activist shareholders have framed DEI as a source of legal exposure, other shareholders and proxy advisors have continued to emphasize the governance and performance risks associated with abandoning diversity and inclusion efforts.[62] In fact, one of the newest diversity-related shareholder proposal ask for disclosure around the process boards used to consider their decision to retreat from DEI commitments.[63] Empirical evidence suggests that boards' access to timely and comprehensive risk information improves firm performance and reduces future risk; yet DEI retrenchment often occurred without transparent discussion of tradeoffs, scenario planning, or disclosure of revised risk assessments.[64] In several high-profile cases, companies that rolled back DEI initiatives experienced consumer backlash, employee attrition, and declines in brand value—risks that were neither speculative nor unforeseeable.[65]

In this sense, retrenchment reflects not a rational recalibration of DEI risk, but a failure to engage in holistic risk assessment at all. By responding

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[59] Hood, supra note 56.
[60] Brown, supra note 35.
[61] *Id.*
[62] Sullivan & Cromwell LLP, 2025 Proxy Season Report, at 9-12, https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/2025-Proxy-Season-Review-Part-1.pdf (noting polarized shareholder reactions) [hereinafter 2025 Sullivan]; *see* also infra note __ and accompanying text (discussing activists that targeted Costco);
[63] *Id.*
[64] Amiraslani, supra note 7.
[65] Adediran, *Risky Business*, supra note 31; *see* infra Part III.C.

reflexively to political pressure, firms treated DEI as a transient compliance problem—something to be minimized or erased—rather than as a multidimensional governance issue implicating legal exposure, workforce stability, reputational capital, and long-term firm value.[66] This narrow framing ignored the reality that DEI-related risks are path dependent: how a firm retreats matters as much as whether it does so. Sudden reversals can amplify disclosure risk, undermine employee trust, and create precisely the kind of cultural and compliance failures that modern oversight doctrine is designed to prevent.[67]

The experience of Target Corporation illustrates how retrenchment, undertaken without holistic risk assessment, can itself generate material exposure.[68] After publicly embedding DEI commitments into its disclosures and governance practices, Target rapidly dismantled those initiatives in response to political pressure. The result was not regulatory insulation, but reputational backlash, consumer boycotts, workforce disruption, and significant market-value loss. Whatever the ultimate legality of Target's DEI programs, the episode underscores a core governance failure: the decision to retreat appears to have been driven by short-term political salience rather than by a board-level evaluation of path-dependent disclosure, reputational, and operational risk.

The resulting corporate landscape is thus defined less by principled judgment than by oscillation. Firms swing from reform to retrenchment and back again, mirroring earlier cycles of racial progress and backlash—but now within publicly traded companies whose boards are legally charged with anticipating and managing systemic risk.[69] That oscillation is itself a red flag,

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[66] Daniel Fisher, *The Board's DEI Dilemma,* CORP. BD. MEMBER (2025), https://boardmember.com/the-boards-dei-dilemma/; *see also* Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DePaul Bus. & Com. L.J. 321 (2007) (explaining how compliance regimes that prioritize formal adherence over institutional culture and enforcement create governance blind spots and amplify risk); Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. Irvine L. Rev. 1 (2021) (explaining how corporate structures and disclosure regimes enable firms to silo information, obscure material risk, and present formal compliance without substantive accountability); Cheryl L. Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 Loy. U. Chi. L.J. 611 (2018) (critiquing "diversity doublespeak" and arguing that superficial diversity compliance obscures persistent discrimination and undermines effective governance and risk management).

[67] Maizel, supra note 48.

[68] *See infra* Part III.C.

[69] Crenshaw, supra note 6. To be clear, we are not arguing that this sort of reformation and retrenchment has never occurred before within public corporations. There is a long history of corporate activity related to racial relations within the United States. *See* .e.g, Lisa M. Fairfax, *Social Activism through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129 (2019) (discussing Greyhound's actions of maintaining racial segregation even when federal law mandated integration); Jill E. Fisch*, Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113, 126 (2022); *see also* Lisa Fairfax, SHAREHOLDER DEMOCRACY 83 (2011).

suggesting that DEI risk is not being appropriately considered and managed by corporate officers and directors.

III. CORPORATE RESPONSES TO DEI UNCERTAINTY

Parts I and II show that contemporary corporate DEI retrenchment emerged from a predictable cycle of reform and backlash and unfolded within a governance framework that obligates boards to engage in sustained oversight of material risk. Part III examines how firms actually responded to this environment of legal and political uncertainty, revealing a fragmented set of corporate strategies ranging from resistance and retrenchment to quiet recalibration. Rather than reflecting a uniform assessment of risk, these responses illustrate how uncertainty has been managed unevenly across firms, investors, and intermediaries. Together, these divergent responses set the stage for evaluating whether corporate decisionmaking in this period reflects prudent risk management or a deeper failure of governance.

A. The Murky Legal Terrain

The legal landscape surrounding DEI is murky, posing challenges for a clear and straightforward legal path forward. This murkiness stems from the fact that DEI programs are not inherently illegal, and from the fact that many DEI programs are aimed at addressing illegal discrimination, and thus such programs may be critical for satisfying companies' legal compliance obligations. In this regard, there exist a real legal conundrum regarding how to distinguish between legal and illegal DEI.

Despite rhetoric aimed at recasting all DEI as illegal, it is clear that not all DEI programs are illegal. In each of its executive orders, the administration is careful to frame its orders as targeted towards "illegal" DEI programs.[70] This framing makes clear that there is a distinction between legal and illegal DEI programs, and thus that the categorial rejection of all DEI as legally impermissible is inappropriate.[71] Even as the Trump administration seeks to repudiate DEI, it acknowledges that there is a distinction between legal and illegal DEI programs, thereby acknowledging the impropriety of categorizing all DEI programs as illegal.

DEI programs also may be necessary to combat illegal discrimination. A robust array of studies consistently reveals the persistence of racial bias and illegal discrimination, particularly in the workforce.[72] These studies indicate

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[70] *See* 2025 Sullivan, supra note 62, at 11.

[71] *Compare* 2025 Sullivan, supra note 62, at 11 note 14 (pinpointing letter from state attorneys characterizing financial institutions' diversity programs as unlawful).

[72] *See* Citi GPS, Closing the Racial Inequality Gaps, Sept. 2020, at 19, https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D; *See also* David Larcker, et.al., The Limited Corporate

that racial bias and illegal discrimination lead to observed racial inequity and racial gaps related to hiring, promotion, and income.[73] Such studies further indicate that these inequities will remain if individuals and institutions fail to directly address bias and inequities.[74] DEI programs are aimed at addressing these biases and inequities, and many companies first implemented DEI programs as a remedial measure on the heels of lawsuits or other incidences of illegal discrimination within their own companies.[75] Hence, the absence of effective DEI programs increases the likelihood that illegal discrimination will persist and flourish. Indeed, research suggest that the negative consequences associated with illegal discrimination and bias are mitigated when companies strategically address DEI.[76] Consistent with this observation, many states attorneys' general responded to the executive orders and crackdown related to DEI by issuing guidance confirming the validity of DEI initiatives for creating and maintaining legally compliant workplaces that

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Response to DEI Controversies at 5, August 2025, https://www.gsb.stanford.edu/gsb-box/route-download/628306 (noting that firms with identified diversity and equity problems respond with DEI initiatives); (describing unequal work outcomes of diverse employees); Lisa M. Fairfax, *Racial Reckoning with Economic Inequalities*, 106 CORNELL L. REV. 68, 73-74 (2021); Laura Roberts and Anthony Mayo, *Toward A Racially Just Workplace*, HARV. BUS. REV. (Nov. 14, 2019) https://hbr.org/cover-story/2019/11/toward-a-racially-just-workplace; Everett J. Mitchell & Donald Sjoerdsma, *Black Job Seekers Still Face Racial Bias in Hiring Process*, LIVECAREER (Sept. 2, 2020), https://www.livecareer.com/resources/careers/planning/black-job-seekers-face-racial-bias-in-hiring-process (stating that minorities receive fewer responses to applications when they have comparable qualifications); Lincoln Quillian, Devah Pager, Arnfinn H. Midtboen, & Ole Hexel, *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV. (October 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years); Eva Zschirnt & Didier Ruedin, *Ethnic Discrimination in Hiring Decisions: A Meta-Analysis of Correspondence Tests 1990-2015*, 42 J. ETHNIC AND MIGRATION STUDIES, 1115, 1128 (2016) (explaining high rates of discrimination against minority applicants); Dina Gerdeman, *Minorities Who "Whiten" Job Resumes Get More Interviews*, HARV. BUS. REV. (May 17, 2017) ("[C]ompanies are more than twice as likely to call minority applicants for interviews if they submit whitened resumes…"); Sonia K. Kang, Katherine De Celles, Andras Tilcsik, & Sora Jun, *Whitened Resumes: Race and Self Preservation in the Labor Market*, 61 ADMIN. SCI. Q. 469–502 (2016), https://www-2.rotman.utoronto.ca/facbios/file/KangDecellesTilcsikJun2016ASQ.pdf.

[73] *See* GPS, supra note 72 at 19; *see* also Fairfax, Racial Reckoning, supra note 72 at 73-74.

[74] *See* GPS, supra note 72 at 19.

[75] *See* e.g., Seb Murray, After DEI Controversies, Companies Talk Up Diversity. Hiring Tells Another Story, Aug. 29, 2025, https://www.gsb.stanford.edu/insights/after-dei-controversies-companies-talk-diversity-hiring-tells-another-story; Larcker, supra note 72; Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795 (2005).

[76] *See* Larcker, supra note 72, at 29; *But see* Jamillah Williams, *Beyond the Business Case*, 46 SEATTLE L. REV. 299 (2023) (indicating that DEI is not as helpful as antidiscrimination law in improving workplace inequities); Jamillah Williams and Jonathan Cox, *The New Principle-Practice Gap*, 8 SOC. RACE & ETHNICITY 301 (2022) (discussing gaps in DEI programs); Frank Dobbin and Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REVIEW, July-August 2016 (noting the importance of ensuring that diversity programs are effective)

prevent workplace discrimination and harassment.[77] In this regard, legal DEI programs may be viewed as necessary for fulfilling company's legal compliance responsibilities.

Unfortunately, the effort to distinguish between legal and illegal DEI program has been fraught with confusion and overreach. Even as the administration's executive orders and guidance only discourage illegal DEI programs, they generate significant confusion around what constitutes "illegal" DEI and how best to draw effective distinctions. In July 2025 U.S. Attorney General Pan Bondie issued a letter (the "AG Letter") seeking to give guidance aimed at clarifying this confusion.[78] The AG Letter was careful to use the language of "unlawful" DEI practices, signaling that there is a distinction between legal and illegal DEI, thereby confirming that some DEI practices are in fact lawful.[79] However, the AG Letter itself—like the executive orders—did not necessarily clarify matters. First, the letter opened by restating various federal antidiscrimination laws—and thus did not break any new ground or otherwise introduce any new law.[80] Second, while the AG Letter offers a "non-exhaustive list of unlawful practices," the activities that fall within the scope of the list are not clear cut and appear to require further interpretive guidance. Thus, the AG Letter uses phrases like "may" violate the law, or otherwise indicates that certain practices violate the law unless they are narrowly tailored, a phrase that is consistent with the current law and may be subject to interpretation.[81] Third, other areas of the AG Letter may be viewed as over-broad or too subjective, thereby including behaviors that have not been declared illegal.[82]

Many state attorneys' generals have expressed serious concern about the legal uncertainty, overreach and confusion created by the executive orders

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[77] *See* 2025 Sullivan, supra note 62, at 11 and note 14 (citing letter from 15 state attorneys' generals).

[78] *See* Memorandum from the Att'y Gen. to All Fed. Agencies, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* (July 29, 2025) [hereinafter "Bondi Memo"], https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=govdelivery.

[79] *See id.* at 1. The subject line for the memo was guidance for "unlawful" discrimination. Moreover, its heading and examples focused on "unlawful" discriminatory policies and practices. *See id.* at 4.

[80] *See id.*. at 2-4

[81] For example, the letter notes: "Preferential treatment occurs when a federally funded entity provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including such practices portrayed as "preferential" to certain groups. Such practices violate federal law unless they meet very narrow exceptions." *See* Bondi Memo, supra note 78 at 4.

[82] For example, the letter notes: In another example, the letter notes that "[u]nlawful DEI training programs are those that-through their content, structure, or implementation-stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment." *See* Bondi Memo, supra note 78, at 7.

and related guidance. To be sure, some state attorneys' generals have used the executive orders as a springboard to target corporate DEI programs without any clear effort to distinguish between legal and illegal programs.[83] In sharp contrast, other state attorneys' generals have expressed deep concern. Thus, a group of 16 state attorneys' generals issued guidance to help businesses continue to create and maintain legally compliant DEI programs, and thus to shed light on how best to distinguish between legal and illegal programs.[84] The guidance included the following: "The Executive Order states what is already the law—that discrimination is illegal—but then conflates unlawful preferences in hiring and promotion with sound and lawful best practices for promoting diversity, equity, inclusion, and accessibility in the workforce. This conflation is inaccurate and misleading."[85] Similarly, a group of 12 state attorneys' generals issued a joint statement confirming the value of legal DEI programs and thereby highlighting the importance of pinpointing the distinction between legal and illegal behaviors related to DEI.[86] "These policies and programs are not only consistent with state and federal anti-discrimination laws, they foster environments where everyone has an opportunity to succeed. That is the opposite of discrimination."[87]

The legal murkiness surround DEI initiatives is confirmed by the fact that individuals and organizations have successfully challenged these executive orders. Thus, federal judges have blocked the administration's efforts to terminate federal programs that consider diversity and equity, suggesting that the executive orders may be unconstitutional and a violation of the First Amendment.[88]

The legal quagmire surrounding DEI programs causes confusion and uncertainty. This is particularly true in light of the fact that DEI programs are intended to counteract, rather than perpetuate, racial and other forms of discrimination—and thus may be viewed as an integral part of a company's business operations.

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[83] *See* 2025 Sullivan, supra note 62, at 11 note 14 (pinpointing letter from state attorneys characterizing financial institutions' diversity programs as unlawful).

[84] *See* Multi-State Guidance Concerning Diversity, Equity, Inclusion and Accessibility Employment Initiatives, Feb. 13, 2025, https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download

[85] *See id.*

[86] *See* Joint Statement of 12 Attorneys Generals, Jan. 31, 2025, https://ag.ny.gov/press-release/2025/joint-statement-12-attorneys-general-president-trump-misleading-american-people

[87] *See id.*

[88] *See* Lea Skene and Lindsay Whitehurst, *Judge Largely Blocks Trump's Executive Orders Ending Federal Support for DEI Programs,* AP, Feb. 21, 2025, https://apnews.com/article/dei-diversity-equity-inclusion-trump-federal-judge-5b04fbc742bd32adf98ca108b4b12b37

B. *Companies and Shareholders Doubling Down*

This legal uncertainty likely explains why many companies have refused to abandon their DEI efforts. Costco has been particularly vocal in its refusal to retreat from DEI. Costco's board of directors unanimously urged shareholders to reject a proposal to "probe" its DEI policies.[89] The Costco board stated that they regularly evaluate all of their practices to ensure compliance with the law, and then insisted that their DEI programs are not only legally appropriate, but also are consistent with their obligation to ensure that their business decisions are made without unlawful discrimination.[90] Costco's emphatic support for DEI aligns with the acknowledgement that DEI programs can reflect lawful efforts to combat—rather than foster—illegal discrimination.

Costco is not alone. Many major companies have refused to ditch their DEI efforts even amid significant pressure.[91] Indeed, the overwhelming majority of *Fortune* 500 had some DEI program prior to 2024, and the vast majority of them (97%) continue to promote their programming as of the end of 2025, and hence even in the midst of vigorous pushback.[92] To be sure, several well-known companies have publicly announced plans to dismantle or otherwise reshape their DEI programs.[93] However, given that DEI programs permeate the corporate landscape, these examples of DEI retrenchment may not reflect the actual state of play of DEI initiatives within the corporate ecosystem. Instead, there is reason to believe that DEI programs continue to be a prominent feature of the corporate ecosystem

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[89] *See* Alex Halverson, *When an anti-DEI activist took a swing at Costco, the board hit back*, THE SEATTLE TIMES (Dec. 27, 2024), https://www.seattletimes.com/business/when-an-anti-dei-activist-took-a-swing-at-costco-the-board-hit-back/?utm_campaign=Brand-Ethisphere&utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz--BrSQLuZJuLZF1CcNgt-XyOJELr_BFPTWF3utWQrvXBsOpAYbMK-K3dJC5_u3ENAwma373; *See* also Costco Wholesale Proxy Statement, Jan. 23, 2025, 32-33, https://s201.q4cdn.com/287523651/files/doc_financials/2024/ar/FY24-Proxy-Statement.pdf

[90] *See* Halverson, supra note 89; Costco 2025 Proxy Statement, supra note 89 at 32.

[91] *See* Miranda Jeyaretnam, *These U.S. Companies Are Not Ditching DEI Amid Trump's Crackdown*, TIME (Feb. 26, 2025), https://time.com/7261857/us-companies-keep-dei-initiatives-list-trump-diversity-order-crackdown/ (listing companies such as Apple and Ben & Jerry's that have not altered their DEI policies); *See also* Tim Paradis, The Companies Fighting Back Against Trump's War on DEI, Business Insider, Jan. 25, 2025, https://www.businessinsider.com/jpmorgan-costco-keeping-dei-despite-trump-executive-orders-2025-1

[92] *See* DEI Not Dead as 485 of Fortune 500 Companies Continue Back Diversity Goals, Dec. 9, 2024, https://www.hrgrapevine.com/us/content/article/2024-12-09-dei-not-dead-as-485-of-the-fortune-500-companies-back-diversity-goals#:~:text=Nearly%20all%20Fortune%20500%20companies,essential%20for%20fostering%20equitable%20opportunities.

[93] *See* infra notes __ and accompanying text.

even if companies are not as vocal or otherwise are not taking noticeable public stances around their DEI commitments.

Shareholders also have continued to support DEI efforts while simultaneously rejecting calls for companies in which they invest to retreat from DEI commitments and policies. For example, 97% of shareholders rejected a proposal to abolish DEI efforts at Apple.[94] Similarly, more than 98% of shareholders rejected proposals to ditch DEI plans at Deere & Co.[95] More broadly, a review of shareholder proposal activity reveals that shareholders overwhelmingly reject efforts to rollback DEI programming. The overall volume of anti-DEI shareholder proposal has overtaken pro-DEI proposals.[96] This volume stems exclusively from two groups with a self-proclaimed agenda of dismantling diversity programming.[97] However, despite this clear pushback, the broader shareholder class has overwhelmingly rejected these efforts. On average, such proposals receive less than 3% of the shareholder vote.[98] Indeed, anti-DEI proposals have historically fared far worse than pro-DEI proposals, reflecting the reality that shareholders support—rather than condemn—these efforts.[99] During the 2025 proxy season, proposals asking for a reassessment of affirmative action programs received an average of 1.6% support.[100] Overall, anti-discrimination and diversity proposals received an average of 1.4% shareholder support.[101]

In addition, shareholder support for many pro-DEI proposals has remained consistent. Thus, shareholder support for racial equity audits remained firm even amidst the significant pressure to retreat.[102] Shareholder support for disclosure of EEO1 reports actually rose from 2024 to 2025,

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94 *See* Jeyaretnam, supra note 91.

95 *See* Bill Peters, *Deere shareholders reject anti-DEI proposal, as Trump pressures Apple to abandon diversity plans*, MARKETWATCH (Feb. 26, 2025), https://www.marketwatch.com/story/deere-shareholders-reject-anti-dei-proposal-as-trump-pressures-apple-to-abandon-diversity-plans-789b1ff8?utm_campaign=Brand-Ethisphere&utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz-_MuddrR2vsxNZlTXlbKlQXFfeAH5ZVPcV-LhFK6u9s5SmAQBAD9ySxr7JDi6NlP0McFGmW.

96 *See* David A. Bell and Wendy Grasso, How DEI Shareholder Proposals are Faring in 2025, March 22, 2025, at 4, https://corpgov.law.harvard.edu/2025/03/22/how-dei-shareholder-proposals-are-faring-in-2025/; Shirley Wescott, 2025 U.S., Proxy Season Review, Alliance Advisors, at 8, https://allianceadvisors.com/2025-u-s-proxy-season-review/

97 *See* Bell and Grasso, supra note 96 at 4; 2025 Sullivan, supra note 62, at 3; Wescott, supra note 96 at 8.

98 *See* Bell and Grasso, supra note 96 at 4

99 *See id.*.

100 *See* Wescott, supra note 96 at 10.

101 *See* Gibson Dunn, Shareholder Proposal Developments during the 2025 Proxy Season, August 8, 2025, at 15, https://www.gibsondunn.com/wp-content/uploads/2025/08/DC-Shareholder-Proposal-Developments-Proxy-Season-080625.pdf

102 *See* Wescott, supra note 96 at 9.

with average support at 11.7% in 2024 and 28% in 2025.[103] Moreover, as companies pulled back from their DEI programs and commitments, 2025 saw an increase in request around disclosure and effectiveness of programs.[104]

Importantly, when companies are confronted with voting on competing DEI proposals, the pro-DEI proposal always receive more support than the anti-DEI proposals.[105] In 2025, while average shareholder support for anti-DEI proposals was less than 2%, pro-DEI proposals received an average of 14%.[106]

C. Corporate Capitulation

Of course, some companies have bowed to the pressure to dismantle their DEI programming. Probably the most well-known capitulation centers on Target. However, other companies also have walked back their DEI commitments.[107] One *Forbes* article list close to forty companies that have rolled back DEI programs.[108] This rollback includes removing webpages dedicated to DEI, renaming DEI teams, shifting away from diversity goals with respect to suppliers and employees, and halting linking executive compensation to diversity goals.[109] Many companies also announced plans to cease participating in external surveys designed to track progress related to diversity and equity.[110]

Companies also have dramatically reduced DEI disclosure. This includes "scrubbing" mentions of DEI from websites, corporate reports and federal filings.[111] In the initial years following the SEC's 2020 human capital disclosure rule, many companies expanded the scope and depth of their disclosures, experimenting with longer narratives, broader topic coverage, and, in some cases, more quantitative information related to diversity, culture,

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103 *See* Wescott, supra note 96 at 11.

104 *See* Gibson Dunn, Shareholder supra note *101,* at 16.

105 *See* Wescott, supra note 96 at 8, 11; *See* Bell and Grasso, supra note 96 at 1 (noting that pro-DEI proposals fare "far better" than anti-DEI proposals).

106 *See* 2025 Sullivan, supra note 62, at 10—down from 22% in 2024.

107 *See* Connor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing "Inherent Tensions": Here are All the Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025), https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs/; Wescott, supra note 96 at 9 (detailing DEI rollbacks, and noting that many have centered around changes to hiring and representation goals).

108 *See* Murray and Bohannon, supra note 107.

109 *See id.*

110 *See id.*

111 *See* Wescott, supra note 95 at 9. *See* also Sullivan at 12. *See* Murray and Bohannon, supra note 106.

and talent management.[112] Expansion of such disclosure is criticla to DEI disclosure because human capital management disclosure often incorporates disclosure around diversity, equity and inclusion. Over time, however, that trend shifted, with a substantial share of firms reducing the length and breadth of their disclosures and scaling back discussion of certain topics, including diversity targets and governance practices.[113] By the mid-2020s, human capital disclosures reflected not steady expansion, but selective diminishment, as firms narrowed what they chose to disclose.[114]

Institutional shareholders and their advisors, once some of the strongest advocates of DEI,[115] have similarly pulled back on DEI.[116] State Street, which led the way on diversity initiatives with its "Fearless Girl" campaign, has dropped guidance around linking their voting recommendations to diversity while erasing references to DEI in their annual report.[117] BlackRock also cut references to DEI in their annual report, three years after the company's CEO said that BlackRock planned to embed DEI in "everything we do."[118] Institutional Shareholder Services (ISS), the largest proxy advisory firm in the world, also has pulled back on its DEI initiatives.[119] Thus, after years of linking its voting recommendations to board diversity efforts, ISS announced that it would no longer consider gender, racial, or ethnic diversity of a company's board when making vote recommendations for director elections.[120]

Corporate DEI programs are in a state of flux. Legal uncertainty coupled with targeted campaigns to dismantle DEI have caused some companies to

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[112] Gibson, Dunn & Crutcher LLP, *Form 10-K Human Capital Disclosures Continue to Evolve* 1–2 (Nov. 21, 2023) (reporting increased disclosure length, expanded topic coverage, and greater use of quantitative information in the years immediately following adoption of the SEC's 2020 human capital disclosure rule).

[113] *Id.* at 2 (documenting year-over-year decreases in the number of topics covered by many firms and a decline in disclosure of diversity targets and governance practices).

[114] *Id.* (concluding that disclosure practices have shifted toward selective tailoring and contraction rather than continued expansion).

[115] *See* Fairfax LM. *The Perils and Promise of Shareholders as Stakeholder Advocates.* In: Enriques L, Strampelli G, eds. BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES. INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION. Cambridge University Press; 2024:214-241 (detailing the Big Three's leadership around setting disclosure and other expectations related to DEI).

[116] *See* 2025 Sullivan, supra note 62, at 11-12.

[117] *See id.;* Murray and Bohannon, supra note 107.

[118] *See id.*

[119] *See* 2025 Sullivan, supra note 62, at 11-12.

[120] *See* Matthew Scott, *Boards Reset As ISS Ends Consideration Of DEI In Director Elections*, CORPORATE BOARD MEMBER, https://boardmember.com/boards-reset-as-iss-ends-consideration-of-dei-in-director-elections/?_hsmi=348204981&utm_content=348204981&utm_campaign=Brand-Ethisphere&utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz-_MuddrR2vsxNZlTXlbKlQXFfeAH5ZVPcV-LhFK6u9s5SmAQBAD9ySxr7JDi6NlP0McFGmW

halt entirely their DEI initiatives. Other companies have stayed the course and have been vocal in their DEI commitments. However, many other companies remain uncertain about the appropriate path forward. Indeed, even as companies rebrand or rename their DEI program, it is not clear if such actions reflect an effort to remain committed to DEI while avoiding backlash, an effort to address shortcomings with existing DEI programs, or a serious retreat from lawful diversity, equity and inclusion practices.[121]

Taken together, these divergent corporate responses underscore the need for a more disciplined approach to DEI risk. Whether firms chose to double down, retreat, or remain strategically silent, many treated DEI as an exceptional or politically contingent concern rather than as a routine subject of enterprise risk oversight. Yet DEI-related risks—like regulatory uncertainty, disclosure exposure, workforce stability, and reputational harm—are not categorically different from the risks boards routinely assess in other contested or evolving domains. Treating DEI as any other material risk requires sustained, board-level evaluation of both the costs of engagement and the costs of disengagement, rather than reflexive action driven by political salience. As explained more fully in the next Section, the failure to engage in that fulsome assessment is what ultimately distinguishes prudent governance from miscalculation.

IV. THE MISCALCULATION OF CORPORATE DEI RISK

When it comes to initiatives designed to promote racial diversity, equity, and inclusion, many corporations appear unwilling or unable to engage in a meaningful risk analysis. Instead, firms often invoke risk itself as the decisive rationale for scaling back or abandoning DEI programs. That framing is misguided. Risk is an inescapable feature of corporate activity, and corporate law not only tolerates risk-taking but affirmatively protects it through doctrines such as the business judgment rule.[122]

Characterizing DEI programs as "risky" therefore cannot, standing alone, justify retrenchment. Corporations routinely engage in legally uncertain, controversial, and high-stakes activities, including in areas where regulatory boundaries are unsettled and potential liability is significant.[123] The business judgment rule is premised on the importance of protecting risk-taking.[124] The relevant question is not whether DEI entails risk, but whether the risks of

[121] *See* e.g., Clare Hudson, et.al., Companies Parse What Makes A DEI Program Illegal Under Trump, Bloomberg, Jan. 23, 2025, https://news.bloomberglaw.com/esg/companies-parse-what-makes-a-dei-program-illegal-under-trump

[122] *See* CFA Institute, Introduction to Risk Management, https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/introduction-risk-management

[123] *Id.*

[124] *See* In re Citigroup, 964 A.2d 106, 126 (Del. Ch. 2009).

maintaining DEI outweigh the countervailing benefits—and whether the risks of retrenchment have been adequately considered. This Part evaluates those tradeoffs and demonstrates that many firms have failed to engage in the kind of balanced, holistic assessment that corporate governance principles demand.

A. The Costs of Staying the DEI Course

Maintaining DEI programs involves risks. The legal risks associated with maintaining DEI programs are clear. Under the Trump administration, the federal government has clearly prioritized efforts to terminate DEI programs both within the federal government and in the private sphere.[125] This is made clear by the fact that the executive order related to ending "radical and wasteful DEI programs and preferencing" was one of the Trump administrations very first executive order, issued in his first week in office.[126] The administration's efforts include using the resources of the Justice Department and other agencies to probe the DEI programs of private companies, and encouraging companies to dismantle their programs lest they be subject to legal actions and sanctions.[127] In addition, several states' attorneys have singled-out companies with DEI programs, characterizing DEI programs as racial discrimination and reminding companies of the "serious legal consequences" that would flow from maintaining such programs.[128] Individuals and conservative groups also have emerged with the primary, if not exclusive, objective of challenging DEI programs as illegal.[129] Hence, companies that maintain DEI programs risks making themselves a target of legal actions from the federal government, state governments, and very motived individuals and consumer groups.[130] Companies risk their DEI programs being viewed as illegal, and this risk is heightened by the aforementioned legal uncertainty around the divide between legal and illegal DEI policies and practices. This risk includes the possibility of being successfully sued and being subjected to monetary and other penalties.

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125 *See Costco Shareholders Reject an Anti-DEI Measure, after Walmart and Others End Diversity Programs*, MONEYWATCH (Jan. 24, 2025), https://www.cbsnews.com/news/costco-dei-policy-board-statement-shareholder-meeting-vote/.

126 *See* All the Executive Orders Trump has Signed After Week 1 in Office, NPR, Jan. 28, 2025, https://www.npr.org/2025/01/28/nx-s1-5276293/trump-executive-orders.

127 *See* Costco Shareholders Reject, supra note 125; Costco 2025 Proxy Statement, supra note 89 at 32-33.

128 *See* Letter from 13 State Attorneys General, July 13, 2023, https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf#:~:text=We%2C%20the%20undersigned%20Attorneys%20General%20of%2013,should%20and%20will%20face%20serious%20legal%20consequences.

129 *See* Costco 2025 Proxy Statement, supra note 89 at 32.

130 *See* Fisher, supra note 66.

Companies with DEI programs also may be subject to business, financial, and reputational risks. Consumer choices may be impacted by a company's vocal and visible support of DEI. Research reveals that 56% of individuals on the right buy, choose or avoid brands based on politics,[131] while those who identify as conservative are more likely than any other group to choose a brand based on their political values.[132] There are investors who invest with an eye towards dismantling DEI.[133] In the shareholder proposal arena, institutions have used the shareholder proposal process to pressure companies to rollback their DEI programs and commitments.[134] As a result, the number of anti-DEI proposal submissions have overtaken the number of pro-DEI proposals. While the anemic shareholder support for these proposals suggest that they do not resonate with the broader shareholder class, they nevertheless reflect a motivated population of shareholders and expose companies with DEI programs to business and financial risks when companies fail to meet investor expectations.

B. *The Costs of Dismantling DEI*

Of course, significant attention has focused on the risks of maintaining DEI programs and commitments. This article does not aim to ignore those risks. However, this article insists that insufficient attention has been paid to the countervailing costs of dismantling DEI. Without appropriately understanding and evaluating such costs, it is impossible for corporations to engage the type of process-driven and holistic risk analysis required by law and corporate governance best practices. This section aims to draw attention to those costs and thus fill an important gap left in the current corporate calculus surrounding DEI and risks.

1. Legal Risks

This costs of dismantling DEI policies includes legal risks. Scaling back on DEI, or otherwise failing to implement robust DEI programs, exposes companies to at least two forms of legal risks. The first is the risks in failing to detect and prevent illegal discrimination. Claims related to workplace discrimination have increased substantially over recent years. Companies that fail to have programs designed to monitor for illegal activity risks failing to

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[131] *See* EDELMAN TRUST INSTITUTE, *2024 Edelman Trust Barometer Special Report: Brands and Politics* (2024), https://www.edelman.com/sites/g/files/aatuss191/files/2024-06/2024%20Edelman%20Trust%20Barometer%20Special%20Report%20Brands%20and%20Politics%20Final.pdf.

[132] *See* 2024 Edelman Trust Barometer, supra note 131 at 12.

[133] *See* Costco Shareholders Reject, supra note 125; Costco 2025 Proxy Statement, supra note 89 at 32-33.

[134] *See* 2025 Sullivan, supra note 62 at 3.

detect and prevent illegal workplace discrimination. Second, companies that pull back on DEI policies risk fostering or maintaining hostile work environments. One the one hand, decades of research reveal that workplaces are replete with illegal bias and discrimination that creates hostile work environments. One study found that one-third of Black employees faced unfair treatment at work based on race and ethnicity in the past year.[135] DEI policies represent a response to these illegal environments.[136] Without such policies, there is risks that companies will revert back to environments in which unlawful behavior flourished. These legal risks have significant financial repercussions. In 2022, for example, a major tech company settled a $10 million discrimination lawsuit after scaling back on its DEI policies.[137] Other high profile examples of racial discrimination in the workforce, resulting in settlements of close to $200 million, underscore the financial impact of failing to ameliorate discrimination in the workplace.[138] Importantly, many of the diversity and inclusion programs we see today are the direct result of corporate efforts to respond to address workplace discrimination.[139]

Importantly, research reveals that involvement in diversity controversies involves meaningful financial risks beyond those associated with litigation risks. A comprehensive study of market reaction to company accused of illegal racial discrimination found that such involvement leads to both short-term and long-term drops in stock price that are economically meaningful.[140] Hence, the failure to maintain robust DEI programming has negative capital market consequences.[141]

2. Wasted Resources

Pulling back from DEI programs exposes companies to the risks of wasted time and resources. Companies already have spent billions of dollars on various DEI programs.[142] However, an important aspect of the program are measures related to accountability, and thus tracking to ensure that DEI programs are effective and yield their desired result.[143] Without review of the

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[135] *See* The Society for Human Resource Management, *The Cost of Racial Injustice*, May 24, 2021, https://www.shrm.org/about/press-room/shrm-report-racial-inequity-persists-costs-american-workplaces-billions-annually
[136] *See* Larcker, supra note 72, at 2.
[137] *See* The Legal Risks of Scaling Back Inclusion Programs, Jan. 27, 2025, https://diversity.com/post/legal-risks-scaling-back-inclusion-programs-2025
[138] *See* Fairfax, The Bottom Line, supra note 75 at 825 (describing settlements at Texaco and Coca-Cola).
[139] *See* Larcker, supra note 72, at 2.
[140] *See id.* at 4, 25.
[141] *See id.*at 4, 25.
[142] *See* Dobbin and Kalev, supra note 76; Williams and Cox supra note 76.
[143] *See* Dobbin and Kalev, supra note 76; Williams and Cox supra note 76.

effectiveness of such programs, companies not only run the risks that their DEI programs will fail, but will have adverse effects on DEI, thereby generating more, rather than less, risk.[144] There is evidence of a significant pullback on disclosure around the effectiveness of DEI programs.[145] This pullback crates risks for companies not only that they may be wasting time and resources, but also that they may be inappropriately addressing important diversity-related issues.[146] Without effective monitoring through DEI disclosure, therefore, companies may have blind spots that could result in further risks and costs.

3. Risks Related to the Talent Pool

Companies also expose themselves to considerable risks associated with their ability to attract and retain employees. Companies that do not have robust diversity and inclusion programs risks losing out on the ability to attract the full range of talent in the workforce.[147] Corporations need to attract new employees for their growth and continued success. Thus, ensuring an ability to attract and retain employees is critical.[148] Ignoring diverse segments of the population, particularly in light of the changing demographics of the population is risky, putting companies at a competitive disadvantage in the war for talent, while undermining their ability to be innovative. A corporation that is not inclusive runs the risks of minimizing, rather than maximizing, their ability to attract and retina new employees.[149] Importantly, research reveals that all jobseekers consider whether companies have inclusive work environments in their job search. In explaining its decision to defend its DEI program, Costco insisted that its DEI program enhanced its capacity to "attract and retain employees who will help our business succeed. This capacity is critical because we owe our success to our now over 300,000 employees around the globe."[150]

Companies that do not have robust diversity and inclusion programs also risks being unable to retain talent which involve costs.[151] Corporations that do not have inclusive work environments run the risks of losing important employees or otherwise undermining their productivity, which has serious

144 *See* Dobbin and Kalev, supra note 76; Williams and Cox supra note 76.

145 *See* Wescott, supra note 96 at 9; *See* also Murray and Bohannon, supra note 107 noting companies no longer publishing diversity data); Gibson Dunn, Shareholder supra note *101*.

146 *See* Edelman Trust Institute**,** *2025 Edelman Trust Barometer: Trust and the Crisis of Grievance* at 28 (2025), https://www.edelman.com/trust-barometer. In 2024, 60% of people indicated that they choose brands that align with their beliefs.

147 *See* Fairfax, The Bottom Line, supra note 75 at 811.

148 *See* Fairfax, The Bottom Line, supra note 75 at 813.

149 *See* Fairfax, The Bottom Line, supra note 75 at 813-14.

150 *See* Costco 2025 Proxy Statement, supra note 89 at 32.

151 *See* Fairfax, The Bottom Line, supra note 75 at 811.

financial repercussions. One study found that the failure to maintain effective DEI programs had a negative impact on a company's ability to retain talent, especially at companies in which discrimination had occurred because with strong programming, employees were significantly more likely to leave.[152] Another report found that employee turnover due to racial inequity in the workplace has cost U.S. organizations up to $172 billion over the past five years.[153] Such companies also risk low productivity and other related costs stemming from the failing to promote and maintain inclusive work environments.[154] Absences due to anxiety, worry, stress or frustration stemming from experiencing—or witnessing—unfair treatment based on race or ethnicity at work may have cost U.S. businesses up to $54 billion in the past year.[155] Lost productivity during that time was even more costly, carrying a price tag of nearly $59 billion.[156] Research also reveals that inequitable work environments impact all workers, not just those that are the subject of illegal bias and discrimination. In fact, Costco insisted that their DEI programs were necessary for fostering a racially diverse and inclusive workforce, and that diversity and inclusion within their workforce was critical to their success and the "well-being of people whose lives we influence."[157]

The lack of effective DEI programming involves significant risks for company's labor and business objectives. The push for DEI programming stemmed from concern surrounding the risks of bias and discrimination on talent recruitment, advancement and retention.[158]

4. Consumer Outreach and Backlash

Retrenchment related to DEI also involves risks related to the ability to attract and retain consumers. Corporations with robust DEI programs are more likely to reach a broader range of customers and consumers, which increases their consumer base and their profitability.[159] A focus on diversity increases the likelihood that a company can more effectively market their products and services as well as the likelihood that the company can identify and develop new products and services to meet the needs of different consumers.[160] Indeed, companies have learned that diverse advertising and marketing boost sales.[161] The lack of such diversity undermines a company's

[152] *See* Larcker, supra note 72, at 3.
[153] *See* SHRM, supra note 135.
[154] *See id.*
[155] *See id.*
[156] *See id.*
[157] *See* Costco 2025 Proxy Statement, supra note 89 at 33.
[158] *See* Bell and Grasso, supra note 96 at 3.
[159] *See* Fairfax, The Bottom Line, supra note 75 at 821-22.
[160] *See* Fairfax, The Bottom Line, supra note 75 at 821-22.
[161] *See* Fairfax, The Bottom Line, supra note 75 at 822.

ability to tap into consumer markets. Put simply, DEI programs enhance companies' ability to make money by enabling companies to tap into new markets.[162] The push for DEI programming stemmed from concern that bias and discrimination was impacting the ability to reach a broader consumer base, which impacts revenue growth and other business objectives.[163]

A lack of perceived DEI commitment also could have serious negative consequences.[164] Edelman's 2025 Trust survey found that 64% of consumers choose, buy or avoid brands based on their beliefs, and this percentage has increased since the Trump administration has come into office.[165] Of note, 64% of Democrats are more likely to buy brands that commit to ending racism.[166] Importantly, among consumers who identified as Democrats, there is strong consensus that brands should do more related to diversity.[167] Then too, many consumers have switched brands or boycotted brands based on their beliefs.[168] A recent study found that most people in the U.S. boycott businesses based on social, political views.[169] Another study found that nearly 25% have stopped shopping at their favorite stores because of politics.[170] The most glaring example of this is Target. Target faced significant losses from its decision to abandon DEI efforts. $12.4 billion lost in market value and 3.1% Q4 sales decline.[171]

5. The Costs of Silence and Retrenchment

To be sure, America is polarized, particularly around matters of race. Thus, surveys show that a majority of consumers on the left, center and right

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[162] *See* Costco 2025 Proxy Statement, supra note 89 at 32.
[163] *See* Bell and Grasso, supra note 96 at 3.
[164] *See* Bell and Grasso, supra note 96 at 3.
[165] *See 2025 Edelman,* supra note at 15 (2025), https://www.edelman.com/trust-barometer. In 2024, 60% of people indicated that they choose brands that align with their beliefs.
[166] *See* 2024 Edelman Trust Barometer, supra note 131 at 4.
[167] *See* 2024 Edelman Trust Barometer, supra note 131 at 23.
[168] 2024 Edelman Trust Barometer, supra note 131 at 6.
[169] *See* Rich Exner, Most people in the U.S. boycott businesses based on social, political views, multi-country study finds, May 10, 2020, https://www.cleveland.com/datacentral/2020/03/most-people-in-the-us-boycott-businesses-based-on-social-political-views-multi-country-study-finds.html
[170] Lauren Aratani, *A quarter of US shoppers have dumped favorite stores over political stances*, THE GUARDIAN (Feb. 18, 2025), https://www.theguardian.com/us-news/2025/feb/18/shoppers-political-boycotts-spending-patterns-poll?utm_campaign=Brand-Ethisphere&utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz-_MuddrR2vsxNZlTXlbKlQXFfeAH5ZVPcV-LhFK6u9s5SmAQBAD9ySxr7JDi6NlP0McFGmW.
[171] *Target's DEI Fallout: How Much Did the Boycott Really Cost?*, DIVERSITY.COM (Apr. 3, 2025), https://diversity.com/post/target-dei-boycott-financial-impact.

choose or reject brands based on their alignment with their beliefs.[172] Moreover, conservative consumers have been willing to boycott brands based on their embrace of DEI.[173]

While this polarization may suggest that a company's best option is to be silent, and thus pull back from their DEI commitments, this suggestion may not be valid. Instead, silence is risky. The 2025 Edelman Trust survey found that if a brand ignores its obligation to address a societal issue, 60% of people 61 and older would be less likely to buy from it, while 55% of people from that group would lose trust in it.[174] Moreover, 53% of people will assume that a brand is doing nothing or hiding something if it is silent, while only 34% will assume that the brand is doing good but simply choosing not to talk.[175]

The cost of silence is magnified when it comes from companies who have previously made social commitments. In other words, the costs are magnified when a company's actions are viewed as a retrenchment. When faced with political pressure, 71% of consumers believe that brands must take a position, while only 12% of consumers believe that they must avoid taking a position.[176] Moreover, 65% of U.S. consumers indicated that they would lose trust in a brand if it did not defend its values when under attack.[177] These responses increase the likelihood a corporation's silence on an important issue will evoke suspicion and backlash. Given that most companies already have DEI programs and commitments, this data suggests that it may be riskier to retreat from them.

6. Investor Impact

There are also risks of shareholder alienation and backlash, which could have negative financial repercussions. Research reveals that shareholders are concerned about their company's diversity efforts and its impact.[178] Nondiscrimination and diversity proposals were the most popular shareholder proposal submitted in 2025 and the second most popular submitted in 2024.[179] In fact, nondiscrimination and diversity proposals accounted for 45% of all social shareholder proposals in 2025, an increase from 31% in 2024.[180] The significant uptick around diversity proposals in the

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[172] *See* 2024 Edelman Trust Barometer, supra note 131 at 6.
[173] *See e.g.*, Anson Frericks, *Working at Anheuser-Busch, I Saw What Went Wrong With the D.E.I. Movement*, N.Y. TIMES (Mar. 11, 2025), https://www.nytimes.com/2025/03/11/opinion/anheuser-busch-dei.html.
[174] 2025 Edelman Trust Barometer, supra note 165 at 19.
[175] *See* 2025 Edelman Trust Barometer, supra note 165 at 18.
[176] *See* 2024 Edelman Trust Barometer, supra note 131 at 10.
[177] *See* 2024 Edelman Trust Barometer, supra note 131 at 21.
[178] *See* Gibson Dunn, Shareholder supra note *101,* at 4.
[179] *See* Gibson Dunn, Shareholder supra note *101,* at 2.
[180] *See* Gibson Dunn, Shareholder supra note *101,* at 14.

shareholder proposal arena reveals that companies that failed to effectively manage DEI risks shareholder backlash.

To be sure, weighing how best to respond to this backlash is important. Indeed, there has been an increase in anti-DEI proposals, revealing that maintaining DEI is also risky with respect to some shareholders. However, companies must be mindful that most shareholders have rejected efforts to retreat from DEI, and that very few shareholders support DEI retrenchment. In this regard, companies must do a better job of weighing the relative risks of their DEI decisions.

C. *Toward a Holistic and Principled Assessment of DEI Risk*

The analysis above demonstrates that corporate responses to DEI have too often been driven by political salience rather than by disciplined risk assessment. In moments of reform, firms overstated the ease and benefits of DEI commitments without fully accounting for legal, operational, and disclosure risk. In moments of retrenchment, those same firms have disproportionately weighted short-term political and enforcement threats while discounting the legal, reputational, workforce, and governance costs of abandonment. Both reactions reflect the same underlying error: treating DEI as an exceptional or transient political concern rather than as a recurring, enterprise-wide risk that demands ordinary—and rigorous—board oversight.

A more defensible path forward does not require firms to either double down on every DEI initiative or abandon them wholesale. Instead, it requires boards to evaluate DEI using the same holistic, process-driven framework they apply to other contested and uncertain risk domains. Corporate law does not ask directors to eliminate risk; it asks them to engage in reasoned, good-faith assessment of tradeoffs based on the firm's purpose, risk profile, and long-term strategy.[181] DEI should be no different.

1. Reframing DEI as Enterprise Risk, Not Political Exposure

First, boards should explicitly situate DEI within enterprise risk management rather than siloing it as a reputational or compliance issue. As one of us has previously explained, firms face material exposure both when they act and when they fail to act on DEI.[182] Retrenchment can increase discrimination risk, undermine internal controls related to culture and compliance, trigger disclosure and misrepresentation claims, and erode employee trust in ways that impair long-term performance.[183] These risks are

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[181] *See* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); Marchand v. Barnhill, 212 A.3d 805, 821–24 (Del. 2019).
[182] Martinez, *The Diversity Risk Paradox*, supra note 54, at 121–27.
[183] *See id.* at 122–25; Martinez & Fletcher, supra note 1.

not speculative; they are well documented in litigation, enforcement actions, and market responses following both DEI failures and DEI reversals.[184]

Accordingly, boards should resist framing DEI primarily as a response to external political pressure. Political volatility is relevant, but it is not dispositive. Overweighting political risk—particularly when enforcement priorities are unsettled or contested—can distort decisionmaking and obscure the full range of consequences associated with retreat.[185] As with other areas of legal uncertainty, such as emerging technology regulation or evolving disclosure standards, the appropriate response is not reflexive withdrawal, but structured evaluation of downside risk across multiple dimensions.[186]

2. Conducting a Fulsome DEI Risk Assessment

Second, firms should engage in an explicit, board-level DEI risk assessment that considers both the costs of maintaining DEI initiatives and the costs of dismantling them.[187] At a minimum, this assessment should account for:

(1) Legal risk, including discrimination liability, disclosure exposure, and Caremark-style oversight claims tied to inconsistent governance or public commitments;

(2) Regulatory risk, recognizing that enforcement priorities may shift again and that retreat does not insulate firms from future scrutiny;

(3) Reputational and consumer risk, particularly in light of evidence that silence or reversal can generate backlash and loss of trust;

(4) Workforce and human-capital risk, including recruitment, retention, morale, and internal reporting dynamics; and

(5) Strategic and operational risk, including the costs of abandoning investments already made and the difficulty of rebuilding institutional credibility once lost.[188]

[184] Hood, supra note 56; Fairfax, *Racial Rhetoric,* supra note 1 at 150–58.
[185] Cf. Martinez, *Purpose-Driven Compliance*, supra note 54.
[186] *See* In re Citigroup Inc. S'holder Derivative Litig*.,* 964 A.2d 106, 126 (Del. Ch. 2009); Aksbay Ralhi, *Beyond Enforcement: The SEC's Shifting Playbook Around Crypto Regulation*, Geo. L. Ctr. for Bus. & Fin. (May 9, 2025).
[187] Wachtell, supra note 5.
[188] *See* Martinez, *The Diversity Risk Paradox*, supra note 54, at 125–29; Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 Va. L. Rev. 307, 340–48 (2023).

This approach mirrors what one of us has urged in other regulatory contexts: firms should not allow enforcement priorities alone to dictate internal governance, particularly when those priorities are subject to unpredictable (or predictable) reversal.[189] Instead, firms should ground their compliance and risk decisions in the firm's own purposes, values, and long-term risk exposure.[190] When DEI decisions are evaluated solely through a short-term enforcement or political lens, firms risk repeating the same miscalculations that have plagued enforcement-driven compliance regimes more generally.[191]

3. Aligning DEI Decisions with Corporate Purpose and Stated Values

Third, boards must confront the governance consequences of abandoning publicly stated commitments. As this Article has shown, many firms embedded DEI into their disclosures, incentive structures, and governance frameworks after 2020. Having done so, retreat is not a neutral act. It creates path-dependent risk by raising questions about credibility, candor, and oversight.[192] Behavioral ethics research underscores that when firms frame decisions as technical or political, decisionmakers are less likely to account for ethical and institutional consequences.[193] Reframing DEI decisions as questions of governance integrity—rather than political positioning—helps counteract that blind spot.[194]

Importantly, this does not mean that firms must maintain identical DEI programs indefinitely. It does mean that changes should be deliberate, transparent, and justified through a documented risk assessment rather than obscured through quiet erasure. Boards that treat DEI commitments as expendable when politically inconvenient risk signaling that other stated values and controls are similarly contingent—a message that can undermine compliance culture more broadly.[195]

189 Martinez, *Purpose-Driven Compliance*, supra note 54 at 32–39.
190 *Id.* at 33–35.
191 *See id.* at 20–24.
192 *See* Martinez, *The Diversity Risk Paradox*, supra note 54, at 122–24; Fairfax, *Racial Rhetoric,* supra note 1, at 152–56.
193 *See* Veronica Root Martinez, *Reframing the DEI Case*, 46 Seattle U. L. Rev. 399, 408–13 (2023).
194 *Id.* at 411–13; Ann E. Tenbrunsel & Kristin Smith-Crowe, *Ethical Decision Making: Where We've Been and Where We're Going*, 2 Acad. Mgmt. Annals 545, 552–61 (2008).
195 *See* Maizel, supra note 48 at, 38–45 (2025); Wachtell, supra note 5.

4. Developing Risk Mitigation Strategies

Boards also must develop a plan regarding how best to respond and mitigate known and potential risks. Boards must discuss and assess appropriate risk mitigation strategies aimed at reducing the likelihood of risky event and mitigate their consequences. Boards must consider policies and procedures aimed at improving the corporation's ability to manage or contain risks.[196] Effective risk mitigation includes continued monitoring to help gain a better understanding of how best to respond to both known and unknown risks, and to ensure that assumptions around the riskiness of certain behaviors are revisited and updated where appropriate.[197] The idea is not that boards must eliminate risks, bur rather that they must be better prepared to identify and respond to risks effectively.

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Ultimately, treating DEI as a "real" risk—neither sacrosanct nor radioactive—aligns with the core logic of corporate governance. Firms routinely operate amid legal uncertainty, contested social norms, and shifting regulatory regimes. They do so by evaluating tradeoffs, documenting processes, and revisiting assumptions over time. DEI belongs in that category of risks. The greatest danger is not that firms will choose the wrong substantive outcome, but that they will continue to substitute political reflex for fiduciary judgment. A board that conducts a fulsome, good-faith assessment of DEI risk—accounting for what the firm stands to lose by abandoning its principles as well as what it risks by maintaining them—will be better positioned to defend its decisions, whatever course it chooses. That, ultimately, is what corporate law demands: not ideological consistency, but disciplined governance.

CONCLUSION

This Article shows that the recent corporate swing from robust DEI commitments to rapid retrenchment is not merely a political or public-relations story but a governance problem: firms have repeatedly treated DEI as an exceptional, transient compliance choice rather than as a recurring, enterprise-level risk that boards are obliged to identify, assess, and manage. Because many DEI decisions were embedded into disclosures, incentives, and governance processes after 2020, abrupt withdrawal or quiet erasure produces path-dependent legal, disclosure, workforce, reputational, and

[196] *See id.*

[197] *See* Robert S. Kaplan & Anette Mikes, Managing Risks: A New Framework, HarV. Bus. Rev. (June 2012), https://hbr.org/2012/06/managing-risks-a-new-framework (noting that risk mitigation is an ongoing process).

operational harms rather than insulating firms from exposure. The Article's central claim is simple but consequential: the mistake is not that firms took DEI seriously at certain moments, but that they failed to subject DEI to the same sustained, process-driven risk oversight that corporate law requires for any other contested or uncertain domain.

This Article contributes to the legal scholarship in three distinct ways. First, it explains how oscillation between expansion and retreat systematically amplifies, rather than reduces, firm exposure to risks. Second, it translates that conceptual claim into doctrinal terms by showing how contemporary fiduciary law and oversight doctrine (including *Caremark* and the "mission-critical" inquiry) require boards to treat DEI as part of ordinary risk governance, not as an exception to fiduciary norms. Third, it offers a practical governance blueprint for boards: a principled, documented DEI risk-assessment process that (a) situates DEI within enterprise risk management, (b) weighs the costs of engagement against the costs of disengagement across legal, regulatory, reputational, workforce, and strategic dimensions, and (c) aligns any decision to change course with the firm's purpose and publicly stated commitments—thereby enabling directors to make defensible, deliberative choices rather than politically reflexive ones.

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