

The Miscalculation of Corporate DEI Risk

Law Working Paper N° 896/2026

September 2026

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ECGI Working Paper Series in Law

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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 their internal governance and workforce management efforts. Firms were responding, at least in part, to pressure from investors, consumers, and employees. 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 retreat from their 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 current anti-DEI turn reflect a fundamental miscalculation of risk. By responding to legal and political uncertainty with abrupt expansion or retreat, corporations have framed DEI as a temporary political or compliance issue rather than as a sustained subject of enterprise risk oversight. The result is not the avoidance of risk. Both the adoption and dismantling of DEI initiatives generate legal, regulatory, disclosure, reputational, and workforce risks that demand deliberate board-level analysis. This Article suggests that the greatest danger for public companies lies not in DEI itself, but in boards' failure to engage in a holistic, process-driven evaluation of the tradeoffs associated with embracing or turning away from their DEI commitments. By integrating DEI into ordinary risk-oversight frameworks - rather than treating it as a symbolic commitment or political liability - boards can better fulfill their fiduciary obligations and responsibly navigate future periods of reform and retrenchment as it relates to racial equity within corporate firms.

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This Article argues that many firms' responses to the current anti-DEI turn reflect a fundamental miscalculation of risk. By responding to legal and political uncertainty with abrupt expansion or retreat, corporations have framed DEI as a temporary political or compliance issue rather than as a sustained subject of enterprise risk oversight. The result is not the avoidance of risk. Both the adoption and dismantling of DEI initiatives generate legal, regulatory, disclosure, reputational, and workforce risks that demand deliberate board-level analysis. This Article suggests that the greatest danger for public companies lies not in DEI itself, but in boards' failure to engage in a holistic, process-driven evaluation of the tradeoffs associated with embracing or turning away from their DEI commitments. By integrating DEI into ordinary risk-oversight frameworks—rather than treating it as a symbolic commitment or political liability—boards can better fulfill their fiduciary obligations and responsibly navigate future periods of reform and retrenchment as it relates to racial equity within corporate firms.

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We are grateful for comments from and conversations with participants in the University of Pennsylvania Law Review 2025 Symposium on *The Future of Law and Multiracial Democracy* and the 2026 *Private Law and Multicultural Identities Workshop* in Arona, Italy.

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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 (i) issued unprecedented public commitments to diversity, equity, and inclusion (DEI), (ii) pledged billions of dollars toward racial-justice initiatives, (iii) tied executive compensation to diversity metrics, and (iv) 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 efforts and into meaningful institutional reform.²

By 2025, the moment of racial reckoning had given way to a sharp and significant retreat. The essential adoption of Project 2025—a comprehensive blueprint for dismantling what its architects label the “DEI agenda” across

¹ See Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869, 873-74 (2021) (describing the corporate response to George Floyd’s murder); Lisa M. Fairfax, *Racial Rhetoric or Reality?*, 2022 COLUM. BUS. L. REV. 118, 127-28 (2022) [hereinafter Fairfax, *Racial Rhetoric*] (same).

² See Fairfax, *Racial Rhetoric*, *supra* note 1, at 162-82 (indicating that some companies followed through on commitments to DEI with changes to their board). *But see* Martinez & Fletcher, *supra* note 1, at 883-84 (critiquing corporate statements that resembled marketing rather than structural reform).

the federal government—has served as both a signal and a warning.³ Federal agencies have begun to recast 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 engaged as government contractors.⁴ At the same time, regulators have openly warned that firms' DEI commitments may count against them in merger review, contracting, and enforcement discretion.⁵ The result has been a rapid corporate retrenchment of DEI efforts. Some firms have quietly abandoned programs once celebrated as core to their values, while others have stripped public references to equity from internal 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 or merit.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 priorities shift or social pressure dissipates. 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 where 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 active governance choices with legal, regulatory, reputational, and

³ PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT, HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 6, 258, 582 (Paul Dans & Steven Groves eds., 2023).

⁴ See 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> [<https://perma.cc/9A5K-8FZT>].

⁵ See WACHTELL, LIPTON, ROSEN & KATZ, RISK MANAGEMENT AND THE BOARD OF DIRECTORS 12-13 (2025), <https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.29839.25.pdf> [<https://perma.cc/HDR5-TNYP>] (discussing regulatory and enforcement risk tied to DEI and corporate culture).

⁶ See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1347-49 (1988) (describing the retrenchment subsequent to the civil rights movement).

operational consequences that fall squarely within the board's risk-oversight mandate.

Recent corporate governance scholarship and practitioner guidance underscore that boards must meaningfully engage with areas of social and political volatility. Effective oversight efforts require boards to obtain access to comprehensive information and to dedicate time and attention to emerging and potential risks.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 a failure to act—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 required by proper fiduciary governance. By treating DEI as a temporary political or compliance problem, some corporate leaders have failed to assess the full spectrum of risks associated with the choice to either act or refrain from acting. The core claim developed in this Article is that risks associated with DEI efforts must be integrated into enterprise risk management. Firms must account simultaneously for concerns like legal liability, regulatory uncertainty, workforce stability, reputational capital, and long-term firm value. The apparent ease with which many firms have reversed course on DEI efforts since 2020 does not reflect a cautionary approach. It reflects a failure by firms to take risk seriously when it is politically uncomfortable to do so.

Part I situates corporate firms' 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.

⁷ See Hami Amiraslani, Carolyn Deller, Christopher Ittner & Thomas Keusch, *The Importance of Directors' Information Access: Evidence from Board Risk Reporting* 1 (INSEAD Working Paper No. 2024/20/ACC, 2024), <https://www.insead.edu/faculty-research/publications/working-papers/importance-directors-information-access-evidence-board> [<https://perma.cc/7RV9-MCD5>] (“[A] prerequisite for effective board risk oversight is timely and comprehensive board risk reporting.”).

⁸ See WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5, at 2 (“[E]very board’s oversight role should include active engagement in monitoring key corporate risk factors . . .”).

⁹ See *id.* at 3 (highlighting DEI, discrimination, and workplace culture as material risks requiring active board oversight).

I. CORPORATE DEI EFFORTS: REFORMATION & RETRENCHMENT

This Part situates contemporary corporate DEI retrenchment within a longer cycle of reform and backlash within public companies. It traces how firms' DEI efforts moved, in the wake of 2020, from largely symbolic rhetoric to a more meaningful focus of governance initiatives, disclosure priorities, and board oversight. That integration both enabled meaningful reform at corporate firms and rendered DEI initiatives vulnerable to reversal when political and regulatory conditions shifted.¹⁰

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 shift in corporate purpose that had already begun to take shape in the years immediately preceding the 2020 protests. Most notably, in August 2019, the Business Roundtable issued its revised Statement on the Purpose of the Corporation, deemphasizing shareholder primacy in favor of a stakeholder-oriented conception of corporate responsibility that emphasized commitments to employees, communities, and society alongside shareholders.¹¹ Although the legal force of the Statement was nonexistent, its symbolic and normative significance was substantial. It reframed the corporation's role in American political economy and created a justification for firms to treat workforce equity and inclusion, as well as firms' social impact, as matters of legitimate corporate concern.¹²

¹⁰ We intentionally do not adopt a comprehensive definition of “diversity, equity, and inclusion” (DEI) in this Article. There is no single, uniform set of practices that constitutes DEI, and firms vary considerably in how they define, implement, and institutionalize diversity-related initiatives. Because DEI efforts are firm-specific, so too are the legal, regulatory, operational, reputational, and governance risks associated with it. The central point of this Article is not that boards should adopt any particular conception of DEI, but that boards must understand how management has defined and implemented the firm's DEI initiatives and then engage in a deliberate process of evaluating the risks and benefits associated with those initiatives in light of the firm's strategy, legal obligations, and risk tolerance. Determining the firm's approach to DEI, and the level of risk the corporation is willing to assume with respect to that approach, is itself a core governance function.

¹¹ See *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/FG3P-6EGU] (“Each of our stakeholders is essential.”).

¹² See Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1171-86 (2022) (discussing the effects of corporations, managers, and investors adopting the stakeholder model); see also Veronica Root Martinez, *A More Equitable Corporate Purpose*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 47, 49 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (explaining that corporate commitments to equity, justice, and inclusion reflect a broader and evolving conception of corporate purpose).

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.¹³ 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.¹⁴ 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 ideas like sustainable value creation through investment in employees and communities.¹⁵

Crucially, post-2020 corporate DEI reforms were not mere rhetoric. Boards of directors increasingly treated racial equity as a governance issue subject to fiduciary oversight.¹⁶ 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

¹³ See Fairfax, *Racial Rhetoric*, *supra* note 1, at 137-40 (“The overwhelming majority of corporate statements go beyond mere expressions of support. Collectively, such statements express a commitment to challenge their own practices and behaviors”); Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 375-77, 382-85 (2022) [hereinafter Fairfax, *Board Committee Charters*] (discussing incorporation of board oversight of diversity and inclusion into board charters).

¹⁴ See Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/X22P-8XYN>] (“To date, America’s 50 biggest public companies and their foundations collectively committed at least \$49.5 billion since Floyd’s murder last May to addressing racial inequality—an amount that appears unequalled in sheer scale.”).

¹⁵ See Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309-11 (2021) (“The debate over corporate purpose is part of a broader effort to reorient corporate decision-making away from economic value maximization in favor of broader societal objectives”); Martin Lipton, *The New Paradigm for Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 3, 2016), <https://corpgov.law.harvard.edu/2016/02/03/the-new-paradigm-for-corporate-governance/> [<https://perma.cc/VU43-JEHL>] (summarizing features of the stakeholder model).

¹⁶ See Fairfax, *Board Committee Charters*, *supra* note 13, at 382-85 (discussing the prevalence of diversity in board committee charters); Margot Brandenburg, Benjamin Colton, Holly Fetter, PJ Neal, Rusty O’Kelley, Laura Sanderson & Robert Walker, *The Board’s Oversight of Racial & Ethnic Diversity, Equity, and Inclusion*, CORP. GOVERNANCE ADVISOR, Sep.-Oct. 2021, at 1, 1-2 (discussing board oversight of diversity); see also Benjamin Colton, Jack “Rusty” O’Kelley & Holly Fetter, *Board’s Oversight of Racial DEI*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 22, 2021), <https://corpgov.law.harvard.edu/2021/07/22/boards-oversight-of-racial-dei/> [<https://perma.cc/TGV8-EX6T>] (noting most boards oversee diversity through both an explicit charge to a committee and full-board discussions that also consider strategy and corporate culture).

considerations into leadership development and talent pipelines.¹⁷ In many cases, boards went further, tying executive compensation to measurable diversity outcomes.¹⁸ 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.¹⁹ Once embedded in executive compensation, DEI commitments were elevated in a manner that heightened the need for increased board oversight and disclosure accuracy.

Shareholders and institutional investors played a central role in reinforcing DEI-related reforms. Investors filed dozens of shareholder proposals demanding workforce demographic disclosures, racial equity audits, and greater board diversity. Investors often framed these demands as important to a firm's reputational risk or long-term performance.²⁰ Various activities undertaken by firms suggest that DEI was no longer being treated by investors as a matter of managerial discretion. For example, BlackRock agreed to conduct an independent racial audit of its policies and practices following shareholder pressure, while Citigroup committed to a third-party racial equity audit focused on the firm's business practices and impacts.²¹ These developments illustrate that post-2020 DEI reforms were driven, in

¹⁷ See Fairfax, *Board Committee Charters*, *supra* note 13, at 382-85 (describing board activities monitoring diversity); Brandenburg et al., *supra* note 16, at 2 (same).

¹⁸ See Matteo Tonello, Paul Hodgson & Andrew Jones, *ESG Performance Metrics in Executive Compensation Strategies*, 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> [<https://perma.cc/Q3JT-KWE7>] ("According to 2024 disclosures, 77.4% of companies in the S&P 500 incorporate ESG performance into executive compensation design . . .").

¹⁹ See Emily Glazer & Theo Francis, *CEO Pay Increasingly Tied to Diversity Goals*, WALL ST. J. (June 2, 2021), <https://www.wsj.com/business/ceos-pledged-to-increase-diversity-now-boards-are-holding-them-to-it-11622626380> [<https://perma.cc/4PVM-S36C>] (listing companies).

²⁰ See SULLIVAN & CROMWELL LLP, 2023 PROXY SEASON REVIEW: PART 1, at 10-11, 13 (2023), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2023-proxy-season-review-part-1.pdf [<https://perma.cc/M5ZG-7FJA>] (cataloging shareholder proposals); *Shareholders Push Companies on Racial Justice*, CATH. SUN (Mar. 22, 2021), <https://www.catholicsun.org/2021/03/22/shareholders-push-companies-on-racial-justice-equity-in-vaccine-access> [<https://perma.cc/VB8H-9PJ3>] (same); SULLIVAN & CROMWELL LLP, 2022 PROXY SEASON REVIEW: PART 1, at 9-12, 21 (2022), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-2022-proxy-season-part-1-rule-14a-8.pdf [<https://perma.cc/RM4U-MTEW>] (same). See generally Angela N. Anciros, *The Unlikely Pressure for Accountability: The Insurance Industry's Role in Social Change*, 27 TEX. J. ON C.L. & C.R. 139 (2022) (describing the emergence of shareholder derivative suits alleging that directors failed to oversee or fulfill publicly stated DEI commitments).

²¹ Saijel Kishan, *BlackRock Breaks From Wall Street Ranks With Planned Racial Audit*, BLOOMBERG (Apr. 5, 2021, at 13:50 ET), <https://www.bloomberg.com/news/articles/2021-04-05/blackrock-breaks-ranks-with-wall-street-in-performing-race-audit> [<https://perma.cc/KCV8-GB8J>]; Jennifer Surane & Saijel Kishan, *Citi Becomes First Wall Street Bank to Agree to Racial Audit*, BLOOMBERG (Oct. 22, 2021, at 15:20 ET), <https://www.bloomberg.com/news/articles/2021-10-22/citi-becomes-first-wall-street-bank-to-agree-to-racial-audit> [<https://perma.cc/L9YR-4RWJ>].

significant part, by investors and market actors who were operating through established corporate law mechanisms.

Regulatory and quasi-regulatory developments further entrenched DEI reforms within public companies 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.²² Some firms voluntarily disclosed workforce demographics or EEO-1 data, while others provided narrative descriptions of their DEI initiatives and progress toward certain goals. Federal regulators at the time appeared to endorse these activities. 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 the prioritization of DEI by corporate firms reflected sound governance decision-making.²³ 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 certain DEI metrics within the corporate disclosure regime.²⁴

Scholarly responses to the post-2020 moment sought to translate these developments into durable reforms. For example, one of us argued that institutional investors should require firms to adopt standardized, measurable, and regularly disclosed metrics for racial equity—analogueous to financial performance indicators—so that boards and investors could assess progress over time.²⁵ Later work on corporate racial responsibility emphasized that voluntary reforms by firms remained contingent on sustained investor pressure.²⁶ Empirical evidence suggests that these reforms were not merely symbolic gestures. Studies of corporate responses to the

²² See Modernization of Regulation S-K Items 101, 103, and 105, 84 Fed. Reg. 44358, 44360 (proposed Aug. 23, 2019) (revising Item 101(c) to require disclosure of human capital resources).

²³ See U.S. SEC. & EXCH. COMM'N, OFF. MINORITY & WOMEN INCLUSION, 2020 DIVERSITY ASSESSMENT REPORT 2 (2020), https://www.sec.gov/files/2020_OMWI_Diversity_Assessment_Report.pdf [<https://perma.cc/8VAW-JN6U>] (“98 percent of the entities include diversity and inclusion considerations as part of strategic plans for recruiting, hiring, retaining, and promoting employees . . .”).

²⁴ See Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, Exchange Act Release No. 92590, 86 Fed. Reg. 44424 (Aug. 6, 2021) (approving Nasdaq's board diversity rule). This was ultimately vacated by the Fifth Circuit. *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 185 (5th Cir. 2024) (en banc); see also *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> [<https://perma.cc/T7QW-7UA5>] (providing context for the case).

²⁵ See Martinez & Fletcher, *supra* note 1, at 875 (proposing “equality metrics”).

²⁶ See Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361, 365, 374-75 (2024) (noting corporate retrenchment on social commitments).

Black Lives Matter movement suggest that many firms followed public commitments with concrete governance changes, particularly in board composition.²⁷ 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.²⁸ To be sure, by then, only 24% of directors in S&P 500 companies self-identified as underrepresented minorities, while the number of new such directors had fallen to levels of a decade ago after an all-time high in 2021.²⁹

Taken together, these developments in the post-2020 period represent a genuine—if fragile—moment of corporate DEI reformation. Grounded in an already evolving conception of corporate purpose and reinforced by the preferences of investors, regulators, and boards, firms treated racial equity as a legitimate priority for public companies. Yet as the next Part shows, the very features that elevated the importance of DEI initiatives for corporate firms 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 important priorities for their companies to pursue 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 proportion of new directors of color steadily declined; and DEI offices were downsized, rebranded, or shuttered altogether.³⁰ What had once been framed as a long-term

²⁷ See Fairfax, *Racial Rhetoric*, *supra* note 1, at 166 (“The vast majority of companies that issued corporate statements appointed at least one Black or diverse director.”).

²⁸ See Jeff Green, *White Men in the Minority as U.S. Boardrooms Enter New Era*, BLOOMBERG (May 8, 2025, at 08:48 ET), <https://www.bloomberg.com/news/articles/2025-05-08/s-p-500-board-seats-see-demographic-shift-as-white-men-lose-majority> [<https://perma.cc/P6PS-JJLK>].

²⁹ See SPENCER STUART, 2025 US BOARD INDEX 32, 34-35 (2025), <https://www.spencerstuart.com/-/media/2025/10/ssbi2025/2025-us-board-index.pdf> [<https://perma.cc/VX9E-MSMQ>] (“Appointments of first-time directors who self-identify as underrepresented minorities declined sharply to 21% from 34% in 2024. This continues the downward trend from a peak in 2021, when underrepresented minorities comprised 65% of first-time director appointments.”).

³⁰ See Drew Hutchinson, *Boardroom Diversity Commitments Fade Amid Broad DEI Retreat*, BLOOMBERG L. (Oct. 1, 2025, at 06:30 ET), <https://news.bloomberglaw.com/esg/boardroom-diversity-commitments-fade-amid-broad-dei-retreat> [<https://perma.cc/82HG-J9QG>] (reporting on the retrenchment of board composition); SPENCER STUART, *supra* note 29, at 29 (same). See generally Emilie Aguirre & Veronica Root Martinez, *Converging on Disclosure*, DUKE L.J. ONLINE (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6702820

commitment to equity increasingly came to be treated by some firms as a political risk that was untenable to pursue.

This reversal by corporate firms was not an anomaly. As scholars of race and reform have long observed, moments of apparent racial progress are often followed by retrenchment once a moment of reform threatens to harden into a durable redistribution of power.³¹ The corporate retreat from DEI thus fits squarely within this broader historical pattern.³² What distinguishes the current corporate DEI retrenchment, however, is the speed and coordination with which it unfolded—and the extent to which it was triggered 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 firm 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, increased regulatory scrutiny, or consumer backlash.³³ Although many of these proposals failed at the proverbial ballot box, their presence appeared to alter boardroom discourse and priorities by recasting corporate DEI efforts as a liability.³⁴ In some cases, firms responded by scaling back their public commitments or by reframing diversity initiatives in race-neutral terms designed to minimize potential controversy.

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 called for the elimination of DEI programs, personnel, and language throughout the federal government and among federal contractors.³⁵ Within days of taking office, President Trump issued executive orders (i) declaring DEI initiatives presumptively unlawful, (ii) revoking long-

[<https://perma.cc/9S4P-Z46T>] (documenting contraction in corporate diversity-related disclosures and the removal of DEI references from public filings in response to shifting legal and political pressures).

³¹ See, e.g., Crenshaw, *supra* note 6, at 1349 (discussing retrenchment after the civil rights movement).

³² See generally ATINUKE O. ADEDIRAN, DISCLOSURELAND: HOW CORPORATE WORDS CONSTRAIN RACIAL PROGRESS (2026) (arguing that corporate race-conscious disclosures and subsequent retraction shape and often constrain racial progress).

³³ See Atinuke O. Adediran, *Risky Business*, 106 B.U. L. REV. 117, 180-81 (2026) [hereinafter Adediran, *Risky Business*] (listing anti-DEI shareholder proposals in 2025).

³⁴ See *id.* at 131 ("From shareholder proposals, corporations receive information about what their shareholders are concerned about, both financially and socially.").

³⁵ See PROJECT 2025, *supra* note 3, at 4-5 (demanding that the next conservative President delete "DEI" from "every federal rule, agency regulation, contract, grant, regulation, and piece of legislation that exists").

standing affirmative-action obligations for federal contractors, and (iii) directing agencies to treat DEI as a form of impermissible discrimination.³⁶ These actions sent a clear signal to corporate America that a commitment to DEI was a potential trigger for federal scrutiny and enforcement activity.

Federal agencies acted on 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 to target firms that maintained diversity initiatives while receiving federal funds.³⁷ The Equal Employment Opportunity Commission (EEOC), 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.³⁸ And federal agencies curtailed traditional civil rights enforcement, dissolved consent decrees, and redirected institutional resources away from addressing systemic discrimination within organizations and toward policing DEI commitments and initiatives.³⁹

The federal government's actions chilled DEI priorities. Firms that had once advertised their commitment to racial equity now faced a reality where DEI commitments carried significant risk. Public commitments to DEI could result in regulatory scrutiny or litigation, while quiet retrenchment promised at least temporary protection from unwanted attention. Unsurprisingly, many companies chose the latter path. 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.⁴⁰ This shift away from DEI was not merely symbolic. In high-profile cases, the period of retrenchment

³⁶ See Exec. Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, 90 Fed. Reg. 8339 (Jan. 29, 2025); Exec. Order No. 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 31, 2025).

³⁷ See Hayes Brown, *How the Justice Department Could Recruit Anti-DEI Bounty Hunters*, MS NOW (Dec. 30, 2025, at 06:00 ET), <https://www.ms.now/opinion/doj-dei-corporations-probe-fraud> [<https://perma.cc/E7VC-88NX>].

³⁸ See Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Chair Issues Reminder Letter to the Fortune 500 Regarding Title VII Compliance Related to DEI Initiatives* (Feb. 26, 2026), <https://www.eeoc.gov/newsroom/eeoc-chair-issues-reminder-letter-fortune-500-regarding-title-vii-compliance-related-dei> [<https://perma.cc/46TX-GNPE>] (advising company leaders against programs "labeled as 'DEI' or other euphemisms").

³⁹ See Sarah N. Lynch, *Ex-Employees of U.S. Justice Department Blast 'Destruction' of Civil Rights Unit*, REUTERS (Dec. 9, 2025, at 15:50 ET), <https://www.reuters.com/legal/government/ex-employees-us-justice-department-blast-destruction-civil-rights-unit-2025-12-09> [<https://perma.cc/SS9W-NCJD>].

⁴⁰ See Hutchison, *supra* note 30 (noting a "corporate slowdown" in board diversity); Matteo Tonello, *DEI in Transition: 2025 Corporate Diversity Disclosure Trends*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 20, 2025), <https://corpgov.law.harvard.edu/2025/08/20/dei-in-transition-2025-corporate-diversity-disclosure-trends> [<https://perma.cc/73NX-G2JJ>] ("Corporate public DEI messaging and communications are undergoing a legal- and risk-driven reframing in 2025 ...").

was accompanied by workforce reductions, DEI program eliminations, and public disavowals of diversity initiatives that had been central to firms' post-2020 identities.⁴¹

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 abrupt reversal by some corporate firms signaled a deeper failure. Firms were not treating DEI as an ordinary risk that necessitates purposeful and sustained board oversight.

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 factors such as legal uncertainty, compliance exposure, workforce stability, and organizational culture. This framework makes clear that DEI is not an exceptional category of risk, but part of the ordinary risk landscape boards are charged with overseeing.

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 information systems that enable board oversight. Risk oversight 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.⁴²

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 that require attention.⁴³ While *Caremark* claims remain notoriously difficult to prove, boards may not abdicate risk oversight by remaining passive or uninformed.⁴⁴ Recent decisions have underscored that this obligation is

⁴¹ See, e.g., Adediran, *Risky Business*, *supra* note 33, at 120-21 (providing Target's abandonment of diversity goals as an example of a larger trend).

⁴² See WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5, 4-5 (describing a board's duty to monitor risk, particularly under Delaware law).

⁴³ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (“[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists . . .”).

⁴⁴ See, e.g., *Stone ex rel. AmSouth Bancorp v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (holding that directors may be liable for a conscious failure to oversee company operations).

especially salient where risks are “mission critical” to the company’s business, operations, or legal compliance.⁴⁵ Importantly, the board’s oversight duty is procedural and substantive—it requires boards to ask for, receive, and evaluate information about evolving risks, even where those risks are complex, uncertain, or politically contested.⁴⁶

Governance best practices reflect this understanding. Regulators, stock exchanges, institutional investors, and proxy advisors consistently emphasize that boards must engage in ongoing risk assessment rather than reactive crisis management.⁴⁷ Enterprise risk management frameworks, including those promulgated by the Committee of Sponsoring Organizations (COSO),⁴⁸ conceptualize risk assessment as a continuous process: identifying emerging risks, evaluating their likelihood and impact, integrating them into strategy, and revisiting assumptions as conditions change.⁴⁹ Boards are expected to approve risk appetite statements and review management’s risk assessments. Additionally, boards must ensure that internal reporting systems surface both quantitative metrics and qualitative data, including information related to organizational culture, workforce dynamics, and compliance programs.⁵⁰

Crucially, contemporary risk oversight is not limited to financial considerations or potential operational vulnerabilities. Boards are routinely advised that risks associated with corporate culture, human capital, and compliance failures can be as consequential as traditional balance-sheet risks.⁵¹ 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, because such

⁴⁵ *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019).

⁴⁶ See Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187, 1189 (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).

⁴⁷ See, e.g., WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5, at 1 (advising companies to “continually reassess risk”). Risk also affects the integrity of the financial markets more generally. See Cary Martin Shelby, *Racism as a Threat to Financial Stability*, 118 NW. U. L. REV. 755, 776-82 (2023) (explaining how racialized practices generate systemic risk through cascading spillover effects from negative externalities that destabilize markets).

⁴⁸ COSO develops thought leadership on internal control and risk management practices. About Us, COMM. SPONSORING ORGS., <https://www.coso.org/about-us> [<https://perma.cc/HAL9-BFRF>] (last visited Mar. 14, 2026). Five national organizations, including the American Institute of CPAs, started COSO as a joint initiative to develop standards to combat fraudulent financial reporting. COMM. SPONSORING ORGS., COSO AT 30 YEARS 1-3 (2015), https://www.coso.org/_files/ugd/3059fc_481f3245a18e44b5a16600ecec64bf324.pdf [<https://perma.cc/5CTP-8GEG>].

⁴⁹ See, e.g., COMM. SPONSORING ORGS., ENTERPRISE RISK MANAGEMENT—INTEGRATED FRAMEWORK iii (2017).

⁵⁰ See Gary Roboff, *The Tone at the Top: Assessing the Board’s Effectiveness*, ISACA J., Nov. 28, 2016, at 7 (listing board actions for reviewing risk).

⁵¹ See Elise Bernlohr Maizel, *Illegal Corporate Cultures*, 75 DUKE L.J. 1, 38-40 (2025) (arguing for “a reconception of *Caremark* duties as encompassing cultural risk as a form of legal risk”).

reporting enables directors to anticipate problems proactively rather than retroactively responding after harm has occurred.⁵² The “tone at the top,” often invoked in compliance guidance, is crucial, because it reflects the board’s role in shaping organizational culture and signaling which risks matter.⁵³

Within this framework, risks associated with diversity, equity, and inclusion are not novel or special. 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.⁵⁴ Indeed, guidance for boards routinely identifies discrimination, workplace culture, and human capital management as areas requiring active oversight because failures in these domains can trigger significant legal and economic consequences.⁵⁵ Boards are therefore not free to ignore or retreat from DEI-related risks because they are politically contested. To the contrary, significant controversy may be a signal that heightened board attention and risk assessment is required.⁵⁶

Importantly, engaging in ordinary risk oversight does not require that boards reach any particular substantive conclusion about DEI. It does not mandate expansion of or retreat from specific initiatives. But it does require that boards engage in a reasoned process to identify and evaluate the risks associated with engagement or disengagement with DEI. That process necessarily includes assessing how DEI decisions interact with the firm’s compliance obligations, disclosure practices, workforce stability, and stated corporate values.⁵⁷ In short, DEI risk is not a special category of risk demanding exceptional treatment; it is one of many ordinary risks that boards are charged with overseeing.

The problem, as the next Section explains, is that boards at many firms appear to have failed to treat DEI as a subject worthy of sustained, holistic risk assessment. Instead, it appears that some corporate firms made abrupt

⁵² See Amiraslani et al., *supra* note 7, at 1-2 (finding increased board effectiveness associated with risk reporting).

⁵³ Roboff, *supra* note 50, at 1-3.

⁵⁴ See Geoffrey P. Miller, *The Compliance Function: An Overview*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981, 981 (Jeffrey Gordon & Wolf-Georg Ringe eds., 2018) (describing the board’s compliance functions).

⁵⁵ See, e.g., WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5, at 3 (“Discrimination and harassment can have a devastating impact not just on directly affected employees, but also on broader corporate culture, employee morale and retention, consumer preferences, and the reputation of the company . . .”).

⁵⁶ See *Marchand v. Barnhill*, 212 A.3d 805, 822-23 (Del. 2019) (finding that FDA food safety regulations emphasize, rather than negate, the importance of board oversight of food safety).

⁵⁷ See Veronica Root Martinez, *The Diversity Risk Paradox*, 75 VAND. L. REV. EN BANC 115, 122-24 (2022) (discussing how corporate diversity initiatives create overlapping legal, reputational, and governance risks); Veronica Root Martinez, *Purpose-Driven Compliance*, 13 TEX. A&M L. REV. 1349, 1357-58 (2026) (noting the size of contemporary compliance programs).

internal governance changes that were motivated by shifting political priorities and pressures rather than ordinary oversight mechanisms.

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 and pursued their prior commitments to DEI efforts. Companies that publicly embraced DEI after 2020 did more than make aspirational or vague statements. Many firms embedded their commitments in SEC filings, proxy statements, executive compensation plans, board oversight responsibilities, and human capital disclosures.⁵⁸ When firms later reversed course—by quietly abandoning programs, ceasing DEI disclosures, or recharacterizing DEI as a legal liability—they exposed themselves to potential claims of misrepresentation or breach of fiduciary duty.⁵⁹ In other words, corporate retrenchment did not eliminate DEI-related risk, as firms hoped it would. It transformed it.

The Wells Fargo “sham interview” litigation illustrates this reality.⁶⁰ Shareholder plaintiffs alleged that the company publicly touted diversity commitments while privately undermining them through practices designed to create the appearance of meeting those commitments without actually implementing substantive changes.⁶¹ The resulting settlements and reputational fallout from the litigation demonstrate that firms may face litigation risk for (i) allegedly discriminatory DEI practices and (ii) overstating, mischaracterizing, or abandoning DEI commitments that had been presented to investors as meaningful components of firms’ internal governance and risk management programs.⁶² This type of exposure is not limited to Wells Fargo. In the years following George Floyd’s murder, dozens of lawsuits were filed against major corporations alleging that DEI pledges were misleading, inadequately implemented, or strategically reversed once political priorities shifted.⁶³

Retrenchment by firms has also heightened regulatory and federal enforcement risk. Under the second Trump Administration, DEI initiatives

⁵⁸ See Martinez & Fletcher, *supra* note 1, at 875 (advocating for concrete corporate action through use of “equality metrics”); Fairfax, *Board Committee Charters*, *supra* note 13, at 382-85 (outlining use of diversity metrics).

⁵⁹ See David Hood, *Lawsuits Challenge Corporate Diversity Pledges After Floyd*, BLOOMBERG L. (Apr. 7, 2023, at 05:00 ET), <https://news.bloomberglaw.com/esg/host-of-companies-sued-alleging-unmet-diversity-equity-pledges> [<https://perma.cc/BTP7-7J2K>] (describing lawsuits against companies for misleading diversity commitments).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Adediran, *Risky Business*, *supra* note 33, at 125-26 (discussing how social and environmental issues can impact reputation, litigation risk, and financials.).

⁶³ Hood, *supra* note 59.

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.⁶⁴ This enforcement posture created a complicated reality for companies. Firms that rapidly dismantle DEI efforts may still face scrutiny for past representations. And firms that retain DEI initiatives may face ongoing investigatory risk from the government. As commentators have noted, the mere threat of FCA enforcement—coupled with the possibility of whistleblower bounties—has had a significant chilling effect on corporate firms.⁶⁵ From a risk-management perspective, these competing concerns require careful, board-level oversight. Yet, it appears many firms responded instead with abrupt retrenchment efforts without a fulsome reassessment of DEI-related enterprise risk.

Investor and market reactions further complicate the picture. Some activist shareholders have framed DEI as a source of legal exposure, while other shareholders and proxy advisors have continued to emphasize a range of governance and performance risks associated with abandoning diversity and inclusion efforts.⁶⁶ In fact, one of the 2025 diversity-related shareholder proposals asks for disclosure around the process boards used to consider their decision to retreat from DEI commitments.⁶⁷ Again, empirical evidence suggests that boards' access to timely and comprehensive risk information improves firm performance and reduces future risk. Yet DEI retrenchment appeared to occur without transparent discussions of tradeoffs, scenario planning, or consideration of revised risk assessments.⁶⁸ Importantly, in several high-profile cases, companies that rolled back DEI initiatives experienced consumer backlash, employee attrition, and declines in brand value—risks that were meaningful and appeared foreseeable.⁶⁹

When one takes the above into account, corporate retrenchment efforts do not appear to be a rational response by firms to the changing risks regarding DEI. By responding reflexively to political pressure, firms treated DEI as a transient concern—something to be minimized or erased—rather

⁶⁴ Brown, *supra* note 37.

⁶⁵ *Id.*

⁶⁶ SULLIVAN & CROMWELL LLP, 2025 PROXY SEASON REVIEW: PART 1, at 10-12 (2025), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/2025-Proxy-Season-Review-Part-1.pdf [<https://perma.cc/ZQ54-VD5M>] [hereinafter SULLIVAN & CROMWELL 2025] (noting polarized shareholder reactions); *see also infra* Section III.B (discussing activists that targeted Costco).

⁶⁷ SULLIVAN & CROMWELL 2025, *supra* note 66, at 12.

⁶⁸ *See* Amiraslani et al., *supra* note 7, at 1, 8 (supporting efficacy of information and risk reporting).

⁶⁹ *See, e.g.,* Adediran, *Risky Business*, *supra* note 33, at 120-21 (tracing the effects of Target's DEI retrenchment); *see also infra* Section III.C (discussing the consequences of DEI retrenchment).

than as a multidimensional issue with significant implications.⁷⁰ This narrow framing ignored the reality that how a firm retreats matters as much as whether it does so. The upshot is that sudden reversals by corporate firms can amplify a range of risks, undermine employee trust, and create precisely the kind of cultural and compliance failures that modern oversight doctrine is designed to prevent.⁷¹

The experience of Target Corporation also illustrates how retrenchment, undertaken without holistic risk assessment, can generate harm to a firm.⁷² After publicly embedding DEI commitments into its disclosures and governance practices, Target rapidly dismantled those initiatives in response to political pressure.⁷³ The result was meaningful reputational backlash, consumer boycotts, workforce disruption, and significant market-value loss.⁷⁴ Whatever the ultimate legality of Target's DEI programs, it appears that the firm's decision to retreat from its DEI commitments was driven by short-term political considerations rather than by a board-level evaluation of how that retreat would impact reputational and operational risk.

In sum, corporate retrenchment efforts do not appear to reflect a purposeful judgment about the importance of DEI. Firms swung from reform to retrenchment, mirroring earlier cycles of racial progress and backlash—but this time the cycle occurred within publicly traded companies whose boards are required to anticipate and manage risk confronting the firm.⁷⁵ That rapid back-and-forth suggests that DEI risk is not being appropriately considered and managed by corporate officers and directors.

⁷⁰ Daniel Fisher, *The Board's DEI Dilemma*, CORP. BD. MEMBER (Oct. 15, 2025), <https://boardmember.com/the-boards-dei-dilemma> [https://perma.cc/7WGW-JNFL] (discussing the abstract nature of the Trump Administration's DEI policing); 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, 344-46 (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, 9 (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, 617-18 (2018) (critiquing "diversity doublespeak" and arguing that superficial diversity compliance obscures persistent discrimination and undermines effective governance and risk management).

⁷¹ See Maizel, *supra* note 51, at 48-50 (discussing the incorporation of culture into the duty of care); see also Carliss Chatman, *DEI Rollbacks Create Legal, Governance Risks Under Section 1981*, BLOOMBERG L. (May 22, 2025, at 04:30 ET), <https://news.bloomberglaw.com/us-law-week/dei-rollbacks-create-legal-governance-risks-under-section-1981> [https://perma.cc/F6JP-PSHR] (arguing retrenchment may trigger liability for contract breaches under Section 1981's guarantee of an equal right to all citizens to make contracts).

⁷² Adediran, *Risky Business*, *supra* note 33, at 121 (noting the effects of retrenchment to Target); see also *infra* Section III.C (discussing cases of corporate retrenchment).

⁷³ Adediran, *Risky Business*, *supra* note 33, at 120.

⁷⁴ *Id.* at 121.

⁷⁵ See generally Crenshaw, *supra* note 6 (illustrating the retrenchment of racism in response to antidiscrimination reforms). To be clear, we are not arguing that this sort of reformation and

III. CORPORATE RESPONSES TO DEI UNCERTAINTY

Parts I and II of this Article show that contemporary corporate DEI retrenchment (i) emerged from a predictable cycle of reform and backlash and (ii) unfolded within a governance framework that obligates boards to engage in oversight of material risk. Part III examines how firms responded to these intense moments of legal and political uncertainty. It reveals a deeply fragmented set of corporate strategies. Rather than reflecting a uniform assessment of risk, these responses illustrate how uncertainty has been managed unevenly across firms, investors, and intermediaries. When considered together, these divergent responses set the stage for an evaluation of whether corporate decision-making in this period reflects prudent risk management or a failure of internal governance practices.

A. *The Murky Legal Terrain*

The legal landscape surrounding DEI is murky, making it difficult to chart a clear, straightforward path forward. This murkiness stems from the fact that DEI programs are not inherently illegal and that many are aimed at addressing illegal discrimination, and thus, such programs may be critical to satisfy companies' legal compliance obligations. In this regard, there is a real legal conundrum in distinguishing 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 Trump Administration is careful to frame its orders as targeting "illegal" DEI programs.⁷⁶ This framing makes clear that there is a distinction between legal and illegal DEI programs, and thus that the categorical rejection of all DEI as legally impermissible is inappropriate.⁷⁷ Even as the Trump Administration seeks to repudiate DEI, it recognizes a distinction between legal and illegal DEI programs, thereby rejecting any claim that all DEI programs are illegal.

DEI programs may also 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.⁷⁸ These studies indicate

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, 1133-34 (2019) (discussing Greyhound's actions of maintaining racial segregation on its buses even when federal law mandated integration); Jill E. Fisch, *Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113, 126 (2022) (noting "growing institutional support" of board diversity); *see also* LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY 83 (2011) (discussing prevalence of proposals related to diversity and nondiscrimination).

⁷⁶ SULLIVAN & CROMWELL 2025, *supra* note 66, at 10-11 (describing the executive orders).

⁷⁷ *Id.* at 11 n.14 (pinpointing letter from state attorneys characterizing financial institutions' diversity programs as unlawful).

⁷⁸ *See* CITI GPS: GLOBAL PERSPECTIVES & SOLUTIONS, CLOSING THE RACIAL INEQUALITY GAPS 19 (Sep. 2020), <https://eacny.com/wp-content/uploads/2020/11/Citi-Closing-Racial->

that racial bias and illegal discrimination lead to observed racial inequity and racial gaps related to hiring, promotion, and income.⁷⁹ Such studies further indicate that these inequities will remain if individuals and institutions fail to directly address bias and inequities.⁸⁰ 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.⁸¹ Hence, the absence of effective DEI programs increases the likelihood that illegal discrimination will persist and flourish. Indeed, research suggests that the negative

Inequality-Gaps-AX2QY.pdf [https://perma.cc/F8KD-J933] [hereinafter CITI GPS] (“Bias, whether conscious or unconscious, plays a central role in economic and social outcomes for Black Americans.”); *see also* David F. Larcker, Charles McClure, Shawn X. Shi & Edward M. Watts, *The Limited Corporate Response to DEI Controversies* 1-5 (Chi. Booth, Working Paper No. 25-07, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5313744 [https://perma.cc/U47L-AGN2] (noting that firms with identified diversity and equity problems respond with DEI initiatives); Lisa M. Fairfax, *Racial Reckoning with Economic Inequalities*, 106 CORN. L. REV. ONLINE 68, 73-74 (2021) [hereinafter Fairfax, *Racial Reckoning*] (describing unequal representation of Black employees in leadership roles); Laura Roberts & 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> [https://perma.cc/Q9XV-RUY8] (discussing how DEI efforts do not necessarily achieve their intended benefit); *Racial Bias in Hiring*, CHI. BOOTH REV. (Mar. 1, 2003), <https://www.chicagobooth.edu/review/racial-bias-hiring> [https://perma.cc/WFK2-VJYN] (finding that minorities receive fewer responses to job 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. (Oct. 11, 2017), <https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years> [https://perma.cc/Y8D6-MWPV] (analyzing continued pervasiveness of discrimination of Black job applicants); Eva Zschirnt & Didier Ruedin, *Ethnic Discrimination in Hiring Decisions: A Meta-Analysis of Correspondence Tests 1990-2015*, 42 J. ETHNIC & MIGRATION STUD. 1115, 1128 (2016) (explaining high rates of discrimination against minority applicants in OECD countries); Dina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARV. BUS. REV. (May 17, 2017), <https://www.library.hbs.edu/working-knowledge/minorities-who-whiten-job-resumes-get-more-interviews> [https://perma.cc/U2L3-RPEP] (“[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, 469-70 (2016) (finding persistent race discrimination in resume auditing).

⁷⁹ *See* CITI GPS, *supra* note 78, at 19 (outlining pervasive impact of biases); *see also* Fairfax, *Racial Reckoning*, *supra* note 78, at 73-74 (noting disparities in Black representation in leadership positions).

⁸⁰ *See* CITI GPS, *supra* note 78 at 19 (“Without addressing bias directly, the challenge of equality will remain profound.”).

⁸¹ *See, e.g.*, Seb Murray, *After DEI Controversies, Companies Talk Up Diversity. Hiring Tells Another Story*, STAN. GRADUATE SCH. BUS. (Aug. 29, 2025), <https://www.gsb.stanford.edu/insights/after-dei-controversies-companies-talk-diversity-hiring-tells-another-story> [https://perma.cc/X23L-YWV4] (discussing lack of real diversity-promoting results in hiring); Larcker et al., *supra* note 78, at 1 (studying the DEI initiatives of firms with recent past DEI controversies); 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, 803-10 [hereinafter Fairfax, *The Bottom Line*] (discussing the reactionary nature and impact of some reforms).

consequences associated with illegal discrimination and bias are mitigated when companies strategically address DEI.⁸²

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 prevent workplace discrimination and harassment.⁸³ In this regard, legal DEI programs may be viewed as necessary for fulfilling companies' legal compliance responsibilities.

Unfortunately, efforts to distinguish between legal and illegal DEI programs have 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 Pam Bondi issued a memorandum (the "Bondi Memo") seeking to give guidance aimed at clarifying this confusion.⁸⁴ The Bondi Memo 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.⁸⁵ However, the Bondi Memo 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.⁸⁶ Second, while the Bondi Memo 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.⁸⁷ Thus, the Bondi Memo uses phrases like "may" violate the law, or otherwise indicates that certain

⁸² See Larcker et al., *supra* note 78, at 29 (showing that negative market responses to DEI controversies are mitigated by the adoption of strategic diversity initiatives and "real hiring actions"). But see Jamillah Bowman Williams, *Beyond the Business Case: Moving from Transactional to Transformational Inclusion*, 46 SEATTLE L. REV. 299, 300 (2023) (indicating that DEI is not as helpful as antidiscrimination law in improving workplace inequities). See generally Jamillah Bowman Williams & Jonathan Cox, *The New Principle-Practice Gap: The Disconnect Between Diversity Beliefs and Action in the Workplace*, 8 SOCIO. RACE & ETHNICITY 301 (2022) (discussing gaps in DEI programs); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REVIEW, July-Aug. 2016, <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/2RS3-MDNW>] (noting the importance of ensuring that diversity programs are effective).

⁸³ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 11 n.14 (citing letter from 15 state attorneys general).

⁸⁴ See Memorandum from Pam Bondi, U.S. Att'y Gen., for 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 [<https://perma.cc/HVL2-B2Q3>].

⁸⁵ *Id.* at 1. The subject line for the memo was guidance for "unlawful" discrimination. *Id.* Moreover, its heading and examples focused on "unlawful" discriminatory policies and practices. See *id.* at 4.

⁸⁶ See *id.* at 2-4.

⁸⁷ *Id.* at 4.

practices violate the law unless they are narrowly tailored, a phrase that is consistent with the current law and may be subject to interpretation.⁸⁸ Third, other areas of the Bondi Memo may be viewed as over-broad or too subjective, thereby including behaviors that have not been declared illegal.⁸⁹

Many state attorneys general have expressed serious concern about the legal uncertainty, overreach and confusion created by the executive orders and related guidance. To be sure, some state attorneys general have used the executive orders as a springboard to target corporate DEI programs without any clear effort to distinguish between legal and illegal programs.⁹⁰ In sharp contrast, other state attorneys general have expressed deep concern. Thus, a group of 16 state attorneys general 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.⁹¹ 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.”⁹² Similarly, a group of 12 state attorneys general 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.⁹³ “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.”⁹⁴

The legal murkiness surrounding DEI initiatives is confirmed by the fact that individuals and organizations have successfully challenged these executive orders. Federal judges have blocked the Administration’s efforts to

⁸⁸ 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.” *Id.*

⁸⁹ For example, the letter notes: “Unlawful 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.” *Id.* at 7.

⁹⁰ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 11 n.14 (discussing letter from state attorneys general characterizing financial institutions’ diversity programs as unlawful).

⁹¹ See Memorandum from Andrea Joy Campbell, Mass. Att’y Gen., & Kwame Raoul, Ill. Att’y Gen., *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> [<https://perma.cc/N6C8-H8R9>].

⁹² *Id.*

⁹³ See Press Release, Letitia James, N.Y. Att’y Gen., *Joint Statement from 12 Attorneys General: President Trump is Misleading the American People on Purpose of Diversity, Equity, Inclusion* (Jan. 31, 2025), <https://ag.ny.gov/press-release/2025/joint-statement-12-attorneys-general-president-trump-misleading-american-people> [<https://perma.cc/3NF2-M3UG>].

⁹⁴ *Id.*

terminate federal programs that consider diversity and equity, suggesting that the executive orders may be unconstitutional and a violation of the First Amendment.⁹⁵

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.

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.⁹⁶ 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.⁹⁷ 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.⁹⁸ Indeed, the overwhelming

⁹⁵ See Lea Skene & Lindsay Whitehurst, *Judge Largely Blocks Trump’s Executive Orders Ending Federal Support for DEI Programs*, ASSOCIATED PRESS (Feb. 21, 2025, at 20:41 ET) <https://apnews.com/article/dei-diversity-equity-inclusion-trump-federal-judge-5b04fbc742bd32adf98ca108b4b12b37> [https://perma.cc/E29V-MRVC] (reporting on a federal judge’s preliminary injunction against an executive order targeting contracts with diversity goals).

⁹⁶ See Alex Halverson, *When an Anti-DEI Activist Took a Swing at Costco, the Board Hit Back*, SEATTLE TIMES (Dec. 27, 2024, at 17:33 PT), <https://www.seattletimes.com/business/when-an-anti-dei-activist-took-a-swing-at-costco-the-board-hit-back> [https://perma.cc/RS96-EP4M]; see also COSTCO WHOLESALE CORP., PROXY STATEMENT 31-32 (2025), https://s201.q4cdn.com/287523651/files/doc_financials/2024/ar/FY24-Proxy-Statement.pdf [https://perma.cc/V7BY-DUVH] (describing a shareholder proposal seeking a report on the risks of maintaining Costco’s DEI policies and the board’s recommendation that shareholders reject the proposal).

⁹⁷ See Halverson, *supra* note 96 (“[T]he board cast the proposal’s concerns as dubious as the company already regularly evaluates its practices, and made the case that Costco’s success depends on establishing a racially diverse, inclusive workplace.”); COSTCO WHOLESALE CORP., *supra* note 96, at 33 (“Consistent with our commitment to ‘obey the law,’ we regularly evaluate our practices concerning compliance with law, including evolving Supreme Court decisions.”).

⁹⁸ See Miranda Jeyaretnam, *These U.S. Companies Are Not Ditching DEI Amid Trump’s Crackdown*, TIME (Feb. 26, 2025, at 04:00 ET), <https://time.com/7261857/us-companies-keep-dei-initiatives-list-trump-diversity-order-crackdown> [https://perma.cc/NR5A-D6AR] (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*, BUS. INSIDER (Jan. 25, 2025, at 04:33 ET), <https://www.businessinsider.com/jpmorgan-costco-keeping-dei-despite-trump-executive-orders>

majority of *Fortune* 500 companies 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.⁹⁹ To be sure, several well-known companies have publicly announced plans to dismantle or otherwise reshape their DEI programs.¹⁰⁰ 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, the example of Costco and other companies suggests that DEI programs continue to be a prominent feature of the business environment 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.¹⁰¹ Similarly, more than 98% of shareholders rejected proposals to abandon DEI plans at Deere & Co.¹⁰² 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 proposals has overtaken that of pro-DEI proposals.¹⁰³ This volume stems exclusively from two groups with a self-proclaimed agenda of dismantling diversity programming.¹⁰⁴ However, despite this clear pushback, the broader shareholder class has

2025-1 [https://perma.cc/L8RT-NBPT] (reporting that companies such as JPMorgan and Costco have maintained DEI initiatives despite political pressure).

⁹⁹ See Ronnie Dungan, *DEI Not Dead as 485 of Fortune 500 Companies Continue Back Diversity Goals*, HR GRAPEVINE (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>

[https://perma.cc/ABM4-ZHRX] (reporting that most Fortune 500 companies continue to maintain and promote DEI programs despite significant political and legal pushback).

¹⁰⁰ See *infra* Section III.C.

¹⁰¹ See Jeyaretnam, *supra* note 98 (describing Apple's commitment to DEI).

¹⁰² See Bill Peters, *Deere Shareholders Reject Anti-DEI Proposal, as Trump Pressures Apple to Abandon Diversity Plans*, MARKETWATCH (Feb. 26, 2025, at 15:29 ET), <https://www.marketwatch.com/story/deere-shareholders-reject-anti-dei-proposal-as-trump-pressures-apple-to-abandon-diversity-plans-789b1ff8?> [https://perma.cc/Q6HS-YEMZ] (reporting that more than 98% of Deere shareholders rejected an anti-DEI proposal).

¹⁰³ See David A. Bell & Wendy Grasso, *How DEI Shareholder Proposals Are Faring in 2025*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 22, 2025), <https://corpgov.law.harvard.edu/2025/03/22/how-dei-shareholder-proposals-are-faring-in-2025> [https://perma.cc/2S78-RLTZ] (analyzing 2025 proxy season data showing that anti-DEI shareholder proposals outnumber pro-DEI proposals); Shirley Westcott, *2025 U.S. Proxy Season Review*, ALL. ADVISORS (July 29, 2025), <https://allianceadvisors.com/2025-u-s-proxy-season-review> [https://perma.cc/2FTK-PNXH] (reporting that anti-DEI shareholder proposals exceeded pro-DEI proposals during the 2025 proxy season).

¹⁰⁴ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 3, 3 n.4 (listing the “National Center for Public Policy Research” and “National Legal and Policy Center” as anti-ESG proponents based on their websites asking companies to reconsider “a ‘woke/liberal’ agenda”); Westcott, *supra* note 103 (noting the surge in proposals from “conservative” proponents).

overwhelmingly rejected these efforts. On average, such proposals receive less than 3% of the shareholder vote.¹⁰⁵ Indeed, anti-DEI proposals have historically fared far worse than pro-DEI proposals, reflecting the reality that shareholders support—rather than condemn—these efforts.¹⁰⁶ During the 2025 proxy season, proposals asking for a reassessment of affirmative action programs received an average of 1.6% support.¹⁰⁷ Overall, anti-diversity proposals received an average of 1.4% shareholder support.¹⁰⁸

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.¹⁰⁹ Shareholder support for disclosure of EEO1 reports actually rose from 2024 to 2025, with average support at 11.7% in 2024 and 28% in 2025.¹¹⁰ Moreover, as companies pulled back from their DEI programs and commitments, 2025 saw an increase in requests around disclosure and effectiveness of programs.¹¹¹

Importantly, when companies are confronted with voting on competing DEI proposals, the pro-DEI proposal always receives more support than the anti-DEI proposals.¹¹² In 2025, while average shareholder support for anti-DEI proposals was less than 2%, pro-DEI proposals received an average of 14%.¹¹³

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

¹⁰⁵ See Bell & Grasso, *supra* note 103 (showing shareholder support for anti-DEI proposals ranged from 1.3% to 2.57%).

¹⁰⁶ See *id.* (showing higher shareholder support for pro-DEI proposals).

¹⁰⁷ See Westcott, *supra* note 103 (reporting on support for anti-DEI or diversity initiative report proposals).

¹⁰⁸ See GIBSON, DUNN & CRUTCHER LLP, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2025 PROXY SEASON 6 (2025), <https://www.gibsondunn.com/wp-content/uploads/2025/08/DC-Shareholder-Proposal-Developments-Proxy-Season-080625.pdf> [<https://perma.cc/V29V-XGHG>] [hereinafter GIBSON DUNN 2025] (reporting that anti-ESG shareholder proposals received average support of 1.4%).

¹⁰⁹ See Westcott, *supra* note 103 (reporting that racial equity or civil rights audit proposals received 13.9% average shareholder support in 2025, compared with 12.6% in 2024).

¹¹⁰ *Id.*

¹¹¹ See GIBSON DUNN 2025, *supra* note 108, at 16 (reporting that proposals requesting disclosure of DEI data or reporting on the effectiveness of DEI programs increased from 28 in 2024 to 33 in 2025).

¹¹² See Westcott, *supra* note 103 (reporting vote totals for competing pro-DEI and anti-DEI shareholder proposals at several companies); Bell & Grasso, *supra* note 103 (“Pro-DEI proposals continue to fare better than anti-DEI proposals in terms of shareholder approval.”).

¹¹³ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 10 (noting support declined from 22% in 2024).

Target.¹¹⁴ However, other companies also have walked back their DEI commitments.¹¹⁵ One *Forbes* article lists close to forty companies that have rolled back DEI programs.¹¹⁶ This rollback includes removing webpages dedicated to DEI, renaming DEI teams, shifting away from diversity goals with respect to suppliers and employees, and halting the practice of linking executive compensation to diversity goals.¹¹⁷ Many companies also announced plans to cease participating in external surveys designed to track progress related to diversity and equity.¹¹⁸

Companies also have dramatically reduced DEI disclosure. This includes “scrubbing” mentions of DEI from websites, corporate reports, and federal filings.¹¹⁹ 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, and talent management.¹²⁰ Expansion of such disclosure is critical 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.¹²¹ By the mid-2020s, firms’ human capital disclosures reflected a selective reduction of the information provided, as firms narrowed what they chose to disclose.¹²²

¹¹⁴ See *supra* notes 72–74 and accompanying text.

¹¹⁵ 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, at 11:27 ET), <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> [<https://perma.cc/B4ME-K4L8>] (noting that several major companies, including Target and IBM, have scaled back DEI programs); Westcott, *supra* note 103 (detailing DEI rollbacks, and noting that many have centered around changes to hiring and representation goals).

¹¹⁶ Murray & Bohannon, *supra* note 115.

¹¹⁷ See *id.* (listing methods of retrenchment).

¹¹⁸ See *id.*

¹¹⁹ See Westcott, *supra* note 103 (“Companies have also scrubbed mentions of DEI from corporate reports, regulatory filings and websites.”); SULLIVAN & CROMWELL 2025, *supra* note 66, at 12 (noting companies removed “diversity-related disclosures” from public filing and proxy statements); Murray & Bohannon, *supra* note 115 (providing examples).

¹²⁰ See GIBSON, DUNN & CRUTCHER LLP, FORM 10-K HUMAN CAPITAL DISCLOSURES CONTINUE TO EVOLVE 1-2 (2023), <https://www.gibsondunn.com/form-10-k-human-capital-disclosures-continue-to-evolve> [<https://perma.cc/T47L-W6MX>] (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).

¹²¹ See *id.* at 1 (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).

¹²² See *id.* (concluding that disclosure practices have shifted toward selective tailoring and contraction rather than continued expansion).

Institutional shareholders and their advisors, once some of the strongest advocates of DEI,¹²³ have similarly pulled back on DEI.¹²⁴ State Street, which led the way on diversity initiatives with its “Fearless Girl” campaign, has dropped guidance around linking its voting recommendations to diversity while erasing references to DEI in its annual report.¹²⁵ BlackRock also cut references to DEI in its annual report, three years after the company’s CEO said that BlackRock planned to embed DEI in “everything we do.”¹²⁶ Institutional Shareholder Services (ISS), the largest proxy advisory firm in the world, has also pulled back on its DEI initiatives.¹²⁷ 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 voting recommendations for director elections.¹²⁸

Corporate DEI programs are in flux. Legal uncertainty, coupled with targeted campaigns to dismantle DEI, has caused some companies to halt their DEI initiatives entirely. 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 programs, it is not clear whether such actions (i) reflect an effort to remain committed to DEI while avoiding backlash, (ii) address shortcomings in existing DEI programs, or (iii) are a serious retreat from lawful diversity, equity, and inclusion practices.¹²⁹

Taken together, these divergent corporate responses underscore the need for firms to take a more disciplined approach to DEI risk. Whether firms chose to double down, retreat, or remain strategically silent, many corporate firms failed to treat DEI as an ordinary and routine risk requiring normal risk assessments and oversight. DEI-related risks are not categorically different

¹²³ See Lisa M. Fairfax, *The Perils and Promise of Shareholders as Stakeholder Advocates*, in BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 214, 214-41 (Luca Enriques & Giovanni Strampelli eds., 2024) (detailing the Big Three’s leadership around setting disclosure and other expectations related to DEI).

¹²⁴ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 11-12 (describing major institutional investors reversing or limiting diversity-related voting policies and proxy guidelines).

¹²⁵ See *id.* (describing State Street’s retrenchment); Murray & Bohannon, *supra* note 115 (noting the “Fearless Girl” campaign).

¹²⁶ Murray & Bohannon, *supra* note 115.

¹²⁷ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 11-12 (describing ISS’s revision of proxy voting guidelines to eliminate consideration of certain diversity factors).

¹²⁸ See Matthew Scott, *Boards Reset as ISS Ends Consideration of DEI in Director Elections*, CORP. BD. MEMBER (Feb. 13, 2025), <https://boardmember.com/boards-reset-as-iss-ends-consideration-of-dei-in-director-elections> [<https://perma.cc/D229-ATG6>] (reporting on ISS’s changes).

¹²⁹ See Clara Hudson, Isabel Gottlieb & Andrew Ramonas, *Companies Parse What Makes a DEI Program Illegal Under Trump*, BLOOMBERG L. (Jan. 23, 2025, at 13:26 ET), <https://news.bloomberglaw.com/esg/companies-parse-what-makes-a-dei-program-illegal-under-trump> [<https://perma.cc/XS3Y-QAX6>] (noting multiple ways companies are responding to DEI scrutiny).

from the risks boards routinely assess in other politically contested areas. Treating DEI as any other material risk requires sustained, board-level evaluation of both the costs of remaining committed to DEI and the costs of backing away from those commitments. As explained more fully in the next Section, whether a firm undertakes that full risk assessment is what ultimately distinguishes prudent decision-making from unnecessary miscalculation.

IV. THE MISCALCULATION OF CORPORATE DEI RISK

When it comes to initiatives designed to promote 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.¹³⁰

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.¹³¹ The business judgment rule is premised on the importance of protecting risk-taking.¹³² The relevant question is not whether DEI entails risk, but whether the risks of 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 significant. Under the second Trump Administration, the federal government has prioritized efforts to terminate DEI programs both within the federal government and in the private

¹³⁰ See *Introduction to Risk Management*, CFA INST., <https://www.cfainstitute.org/en/membership/professional-development/refreshers-readings/introduction-risk-management> [https://perma.cc/J3JP-PF78] (last visited Mar. 3, 2026) (“All businesses and investors manage risk . . .”).

¹³¹ See *id.* (noting that all businesses engage in risky activities).

¹³² See *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) (noting that courts imposing liability for a “wrong” business decision would impede directors’ ability to “earn returns for investors by taking business risks”).

sphere.¹³³ This is made apparent by the fact that the executive order related to “[e]nding [r]adical and [w]asteful [g]overnment DEI [p]rograms and [p]referencing” was one of the Trump Administration’s very first executive orders, issued in his first week in office.¹³⁴ The Administration’s efforts include using the resources of the Justice Department and other agencies to probe private companies’ DEI programs and encouraging companies to dismantle their programs lest they be subject to legal actions and sanctions.¹³⁵ In addition, several state attorneys general have singled out companies with DEI programs, characterizing them as racial discrimination and reminding companies of the “serious legal consequences” that would flow from maintaining such programs.¹³⁶ Individuals and conservative groups have also emerged, with the primary, if not exclusive, objective of challenging DEI programs as illegal.¹³⁷ Hence, companies that maintain DEI programs risk becoming targets of legal actions by the federal government, state governments, and highly motivated individuals and consumer groups.¹³⁸ 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.

Companies with DEI programs may also face 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 conservative individuals buy, choose, or avoid brands based on politics.¹³⁹ There are

¹³³ See, e.g., *Costco Shareholders Reject an Anti-DEI Measure, After Walmart and Others End Diversity Programs*, CBS NEWS: MONEYWATCH (Jan. 24, 2025, at 12:45 ET), <https://www.cbsnews.com/news/costco-dei-policy-board-statement-shareholder-meeting-vote> [<https://perma.cc/7RD2-L7XJ>] [hereinafter *Costco Shareholders Reject*] (documenting elimination and retention of DEI programs in major companies).

¹³⁴ See *All the Executive Orders Trump has Signed After 1 Week in Office*, NPR (Jan. 28, 2025, at 08:27 ET), <https://www.npr.org/2025/01/28/nx-s1-5276293/trump-executive-orders> [<https://perma.cc/TGG5-D3WK>] (listing the executive orders).

¹³⁵ See *Costco Shareholders Reject*, *supra* note 133 (“The Trump administration’s plan includes leveraging the Justice Department and other agencies to probe private companies . . .”). *But see* COSTCO WHOLESALE CORP., *supra* note 96, at 32-33 (noting diversity initiatives continue to “obey the law”).

¹³⁶ Letter from Att’y’s Gen. of Thirteen States to Fortune 100 CEOs (July 13, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf> [<https://perma.cc/YNF9-CJKV>].

¹³⁷ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 3 (listing anti-ESG groups).

¹³⁸ See Fisher, *supra* note 70 (noting the board’s “DEI Dilemma”).

¹³⁹ See EDELMAN TR. INST., 2024 EDELMAN TRUST BAROMETER SPECIAL REPORT: BRANDS AND POLITICS 6 (2024), <https://www.edelman.com/sites/g/files/aatuss191/files/2024-06/2024%20Edelman%20Trust%20Barometer%20Special%20Report%20Brands%20and%20Politics%20Final.pdf> [<https://perma.cc/8QE9-F5YQ>] [hereinafter EDELMAN TRUST BAROMETER 2024] (showing 56% of individuals on the right choose a brand “based on my politics” compared to 60% on the left and 52% in the center).

investors who invest with an eye towards dismantling DEI.¹⁴⁰ In the shareholder proposal arena, institutions have used the shareholder proposal process to pressure companies to rollback their DEI programs and commitments.¹⁴¹ As a result, the number of anti-DEI proposal submissions has overtaken the number of pro-DEI proposals. While the anemic shareholder support for these proposals suggests 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 in 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

The cost 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 risk. The first is the risk of 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 risk failing to detect and prevent illegal workplace discrimination. Second, companies that pull back on DEI policies risk fostering or maintaining hostile work environments. Decades of research reveal that workplaces are replete with illegal bias and discrimination that create hostile work environments. One study found that over one-third of Black employees faced unfair treatment at work based on race and ethnicity in the past year.¹⁴² DEI policies represent a

¹⁴⁰ See COSTCO WHOLESALE CORP., *supra* note 96, at 31-32 (documenting a shareholder proposal meant to dismantle DEI initiatives).

¹⁴¹ See SULLIVAN & CROMWELL 2025, *supra* note 66, at 3 (noting the increase in anti-ESG shareholder proposals).

¹⁴² See SHRM Report: *Racial Inequity Persists, Costs American Workplaces Billions Annually*, SOC'Y FOR HUM. RES. MGMT. (May 24, 2021), <https://www.shrm.org/about/press-room/shrm-report-racial-inequity-persists-costs-american-workplaces-billions-annually> [<https://perma.cc/7X4A->

response to these illegal environments.¹⁴³ Without such policies, companies might revert back to the workplace 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.¹⁴⁴ 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.¹⁴⁵ Importantly, many of the diversity and inclusion programs we see today are the direct result of corporate efforts to address workplace discrimination.¹⁴⁶

Importantly, research reveals that involvement in diversity controversies entails meaningful financial risks beyond those associated with litigation. A comprehensive study of market reactions to companies accused of illegal racial discrimination found that such allegations led to both short-term and long-term drops in stock price that are economically meaningful.¹⁴⁷ Hence, the failure to maintain robust DEI programming has negative capital market consequences.

2. Wasted Resources

Pulling back from DEI programs exposes companies to the risks of wasted time and resources. Companies have already spent billions of dollars on various DEI programs.¹⁴⁸ However, an important aspect of these programs is accountability measures and tracking to ensure that DEI programs are effective and yield their desired results.¹⁴⁹ Without reviewing the effectiveness of such programs, companies run the risk that their DEI programs will fail to achieve their goals, thereby generating more, rather than less, risk.¹⁵⁰ There is evidence of a significant pullback on disclosure around the effectiveness of DEI programs.¹⁵¹ This pullback creates risks for

L3T9] (“Over 2 in 5 Black workers (42 percent) feel they faced race- or ethnicity-based unfair treatment at work in the past five years.”).

¹⁴³ See Larcker et al., *supra* note 78, at 1-2 (noting DEI policies often respond to “DEI controversies”).

¹⁴⁴ *The Legal Risks of Scaling Back Inclusion Programs: What Employers Should Know in 2025*, DIVERSITY.COM (Jan. 27, 2025), <https://diversity.com/post/legal-risks-scaling-back-inclusion-programs-2025> [https://perma.cc/74GG-MH9R].

¹⁴⁵ See Fairfax, *The Bottom Line*, *supra* note 81, at 825 (describing settlements at Texaco and Coca-Cola).

¹⁴⁶ See Larcker et al., *supra* note 78, at 4 (noting “sizable increases” in diversity-related disclosures after “DEI controversies”).

¹⁴⁷ See *id.* at 4, 25 (noting negative stock price reactions to DEI controversies).

¹⁴⁸ See Dobbin & Kalev, *supra* note 82 (noting costs of discrimination lawsuits and cataloguing different diversity initiatives at firms).

¹⁴⁹ See Martinez & Fletcher, *supra* note 1, at 875 (discussing “equality metrics”).

¹⁵⁰ See Dobbin & Kalev, *supra* note 82 (noting the costs of discrimination lawsuits).

¹⁵¹ See Westcott, *supra* note 103 (noting pro-DEI proponents requested “racial equity/civil rights audits”); Murray & Bohannon, *supra* note 115 (noting companies no longer publishing

companies not only that they may be wasting time and resources, but also that they may be inappropriately addressing important diversity-related issues.¹⁵² 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 risk losing out on the ability to attract the full range of talent in the workforce.¹⁵³ Corporations need to attract new employees for their growth and continued success. Thus, ensuring an ability to attract and retain employees is critical.¹⁵⁴ Ignoring diverse segments of the population, particularly given changing demographics, is risky, putting companies at a competitive disadvantage in the war for talent and undermining their ability to be innovative. A corporation that is not inclusive runs the risks of minimizing, rather than maximizing, its ability to attract and retain new employees.¹⁵⁵ Importantly, job seekers consider whether companies have inclusive work environments when searching for jobs. 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.”¹⁵⁶

Companies without robust diversity and inclusion programs also risk being unable to retain talent, which comes at a cost.¹⁵⁷ Corporations that do not have inclusive work environments risk losing important employees or otherwise undermining their productivity, which has serious financial repercussions. One study found that failure to maintain effective DEI programs negatively impacted a company’s ability to retain talent, especially at companies where discrimination had occurred, because employees were

diversity data); GIBSON DUNN 2025, *supra* note 108, at 16 (noting an increase in shareholder proposals requesting disclosure of DEI data).

¹⁵² See EDELMAN TR. INST., 2025 EDELMAN TRUST BAROMETER: BRAND TRUST, FROM WE TO ME 15 (2025), [https://www.edelman.com/sites/g/files/aatuss191/files/2025-06/2025%20Edelman%20Trust%20Barometer%20Special%20Report%20Brand%20Trust,%20From%20We%20to%20Me%20\(1\).pdf](https://www.edelman.com/sites/g/files/aatuss191/files/2025-06/2025%20Edelman%20Trust%20Barometer%20Special%20Report%20Brand%20Trust,%20From%20We%20to%20Me%20(1).pdf) [<https://perma.cc/XXP3-7U6P>] [hereinafter EDELMAN TRUST BAROMETER 2025] (finding that, in 2025, 64% of people indicated that they choose brands that align with their beliefs).

¹⁵³ See Fairfax, *The Bottom Line*, *supra* note 81, at 811 (“[T]alent is not race specific.”).

¹⁵⁴ See *id.* at 813 (explaining the “financial implications” of attracting and retaining talented employees).

¹⁵⁵ See *id.* at 813-14.

¹⁵⁶ COSTCO WHOLESALE CORP., *supra* note 96, at 32.

¹⁵⁷ See Fairfax, *The Bottom Line*, *supra* note 81, at 813 (“[C]orporations that overlook portions of the nation’s talent pool may be at a competitive disadvantage . . .”).

significantly more likely to leave companies without strong DEI programs.¹⁵⁸ 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.¹⁵⁹ Such companies also risk low productivity and other related costs stemming from failing to promote and maintain inclusive work environments.¹⁶⁰ 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 2020.¹⁶¹ Lost productivity during that time was even more costly, totaling nearly \$59 billion.¹⁶² Inequitable work environments impact all workers, not just those who are the subject of illegal bias and discrimination. In fact, Costco insisted that its DEI programs were necessary for fostering a racially diverse and inclusive workforce, and that diversity and inclusion within its workforce were critical to its success and the “well-being of people whose lives we influence.”¹⁶³

The lack of effective DEI programming involves significant risks for a company’s labor and business objectives. The push for DEI programming stems from concern surrounding the risks of bias and discrimination on talent recruitment, advancement, and retention.¹⁶⁴

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, thereby increasing their consumer base and profitability.¹⁶⁵ A focus on diversity increases the likelihood that a company can more effectively market its 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.¹⁶⁶ Indeed, companies have learned that diverse advertising and marketing boost sales.¹⁶⁷ The lack of such diversity undermines a company’s

¹⁵⁸ See Larcker et al., *supra* note 78, at 3-4 (noting employee attrition after DEI controversies).

¹⁵⁹ See *SHRM Report*, *supra* note 142 (reporting a cost estimate for “turnover due to racial inequity”).

¹⁶⁰ See *id.* (discussing costs of unfair treatment in the workplace).

¹⁶¹ *Id.*

¹⁶² See *id.* (further reporting on costs).

¹⁶³ See *COSTCO WHOLESALE CORP.*, *supra* note 96, at 33.

¹⁶⁴ See Bell & Grasso, *supra* note 103 (noting pro-DEI shareholder proposals call for analysis of bias and discrimination risks on “talent recruitment, advancement and retention”).

¹⁶⁵ See Fairfax, *The Bottom Line*, *supra* note 81, at 821-22 (providing examples of the benefits of diversity to attract customers).

¹⁶⁶ See *id.* at 813, 821-22 (citing research demonstrating that Spanish advertisements attract more diverse consumers).

¹⁶⁷ See *id.* at 821-22 (outlining marketing campaigns that have successfully attracted Black and Latino communities).

ability to tap into consumer markets.¹⁶⁸ The push for DEI programming stemmed from concern that bias and discrimination were impacting the ability to reach a broader consumer base, which impacted revenue growth and other business objectives.¹⁶⁹

A lack of perceived DEI commitment also could have serious negative consequences. 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.¹⁷⁰ Of note, 64% of Democrats are more likely to buy brands that commit to ending racism.¹⁷¹ Importantly, among consumers who identified as Democrats, there is strong consensus that brands should do more related to diversity.¹⁷² Then too, many consumers have switched brands or boycotted brands based on their beliefs.¹⁷³ A recent study found that most people in the U.S. boycott businesses based on social, political views.¹⁷⁴ Another study found that nearly 25% have stopped shopping at their favorite stores because of politics.¹⁷⁵ The most glaring example of this is Target whose decision to abandon DEI efforts led to a 3.1% sales decline and \$12.4 billion in lost market value.¹⁷⁶

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 choose or reject brands based on their alignment with their beliefs.¹⁷⁷

¹⁶⁸ See COSTCO WHOLESALE CORP., *supra* note 96, at 32 (citing diversity of employees and suppliers as a source of creative merchandise offerings that customers value).

¹⁶⁹ See Bell & Grasso, *supra* note 103, at 3 (noting pro-DEI shareholder proposals ask for analysis of discrimination risks on "customer and revenue growth, and other business objectives").

¹⁷⁰ See EDELMAN TRUST BAROMETER 2025, *supra* note 152, at 15 (showing that 64% of consumers choose brands "based on my beliefs," which represents a 4 percentage point increase since 2024).

¹⁷¹ See EDELMAN TRUST BAROMETER 2024, *supra* note 139, at 4.

¹⁷² See *id.* at 23.

¹⁷³ See *id.* at 6 (finding 60% of survey respondents have "switched brands over politics").

¹⁷⁴ See Rich Exner, *Most People in the U.S. Boycott Businesses Based on Social, Political Views, Multi-Country Study Finds*, CLEVELAND.COM (Mar. 10, 2020, at 07:39 ET), <https://www.cleveland.com/datacentral/2020/03/most-people-in-the-us-boycott-businesses-based-on-social-political-views-multi-country-study-finds.html> [<https://perma.cc/SC7U-8BK6>] (reporting that 55% of U.S. consumers had boycotted a company in the previous 12 months).

¹⁷⁵ See Lauren Aratani, *A Quarter of US Shoppers Have Dumped Favorite Stores Over Political Stances*, THE GUARDIAN (Feb. 18, 2025, 07:00 ET), <https://www.theguardian.com/us-news/2025/feb/18/shoppers-political-boycotts-spending-patterns-poll> [<https://perma.cc/5PKN-488S>] ("A quarter (24%) of respondents have even stopped shopping at their favorite stores because of their politics . . .").

¹⁷⁶ See *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> [<https://perma.cc/YP8K-CF5P>] (reporting on Target's financial fallout after retrenchment).

¹⁷⁷ See EDELMAN TRUST BAROMETER 2024, *supra* note 139, at 6 (reporting 60% of consumers choose brands "based on [their] politics").

Moreover, conservative consumers have been willing to boycott brands based on their embrace of DEI.¹⁷⁸

While this polarization may suggest that a company's best option is to be silent, and thus pull back from its DEI commitments, this conclusion 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 who believe a brand is obligated to address social issues would be less likely to buy from it, while 55% of people from that group would lose trust in it.¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹ 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.¹⁸² These responses increase the likelihood that 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, which could have negative financial repercussions. Research reveals that shareholders are concerned about their company's diversity efforts and its impact. Nondiscrimination and diversity proposals were the most popular shareholder proposal submitted in 2025 and the second most popular submitted in 2024.¹⁸³ In fact, nondiscrimination and diversity proposals accounted for 45% of all social shareholder proposals in 2025, an increase from 31% in 2024.¹⁸⁴ The uptick around diversity proposals in the shareholder proposal arena reveals that

¹⁷⁸ 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-dylan-mulvaney.html> [https://perma.cc/8BV3-6MHG] (reporting on conservative commentators who called for a boycott of Bud Light beer).

¹⁷⁹ See EDELMAN TRUST BAROMETER 2025, *supra* note 152, at 19.

¹⁸⁰ See *id.* at 18.

¹⁸¹ See EDELMAN TRUST BAROMETER 2024, *supra* note 139, at 10.

¹⁸² See *id.* at 21.

¹⁸³ See GIBSON DUNN 2025, *supra* note 108, at 4 (listing most popular shareholder proposals in 2025 and 2024).

¹⁸⁴ *Id.* at 16.

companies that failed to effectively manage DEI risks face shareholder backlash.

To be sure, weighing how best to respond to potential shareholder dissatisfaction is important. Indeed, there has been an increase in anti-DEI proposals, revealing that maintaining DEI is also risky with respect to some shareholders.¹⁸⁵ 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 attempts to respond to current political priorities rather than by genuine risk assessments. In moments of reform, firms sometimes overstated their DEI efforts without fully accounting for legal and operational realities. In moments of retrenchment, some of those same firms disproportionately prioritized short-term political and enforcement threats while discounting the legal, reputational, and operational costs of abandoning DEI commitments. Both reactions treat DEI as an exceptional risk or temporary political concern rather than as a recurring, enterprise-wide risk that demands ordinary board oversight.

A more defensible path forward does not require firms to 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 areas of risk. Corporate law does not ask directors to eliminate risk.¹⁸⁶ It asks them to engage in reasoned, good-faith assessment of tradeoffs based on the firm's purpose, risk profile, and long-term strategy. 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 political issue. As one of us has previously explained, firms face material exposure both when they act and when they fail to act on DEI.¹⁸⁷ Retrenchment can increase discrimination risk, undermine internal controls related to culture and compliance, trigger disclosure and misrepresentation claims, and erode

¹⁸⁵ See *id.* at 3 (showing a 14% percentage point increase in anti-ESG proposals from 2024 to 2025).

¹⁸⁶ See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (noting that no reporting system can fully eliminate risk); *Marchand v. Barnhill*, 212 A.3d 805, 821-24 (Del. 2019) (noting that a director's responsibility to monitor rather than insure against risk).

¹⁸⁷ See Martinez, *The Diversity Risk Paradox*, *supra* note 57, at 121-27.

employee trust in ways that impair long-term performance.¹⁸⁸ These risks are not speculative; they are well documented in litigation, enforcement actions, and market responses following both DEI failures and DEI reversals.¹⁸⁹

Accordingly, boards should resist framing DEI primarily as a response to external political pressure. Political volatility is relevant, but it is not dispositive. Overprioritizing the political risk of DEI—particularly when enforcement priorities are unsettled or contested—can distort decision-making and cause firms to underestimate the full range of costs associated with retreat.¹⁹⁰ As with other areas of legal uncertainty, such as emerging technology regulation or evolving disclosure standards, the appropriate response for firms is to engage in a structured evaluation of potential downside risk across multiple dimensions.¹⁹¹

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.¹⁹² At a minimum, this assessment should account for:

- (1) Legal risk, including discrimination liability, litigation exposure due to past disclosures, 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 shareholder backlash and loss of consumer trust;
- (4) Workforce and human-capital risk, including recruitment, retention, and morale; and

¹⁸⁸ See *id.* at 122-25 (describing risks resulting from a firm's failure to implement diversity initiatives); see generally Martinez & Fletcher, *supra* note 1.

¹⁸⁹ See Hood, *supra* note 59 (cataloging lawsuits); Fairfax, *Racial Rhetoric*, *supra* note 1, at 150-52 (noting criticism of company diversity statements as hypocritical).

¹⁹⁰ Cf. Martinez, *Purpose-Driven Compliance*, *supra* note 57, at 21 (noting corporations can calculate the expected monetary penalties for engaging in misconduct and incorporate these fines into their budgets).

¹⁹¹ See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) ("The essence of the business judgment of managers and directors is deciding how the company will evaluate the trade-off between risk and return."); Akshay Ralhi, *Beyond Enforcement: The SEC's Shifting Playbook Around Crypto Regulation*, GEO. L. CTR. ON TRANSNAT'L BUS. & L. (May 9, 2025), <https://www.law.georgetown.edu/ctbl/blog/beyond-enforcement-the-secs-shifting-playbook-on-crypto-regulation> [https://perma.cc/9UXZ-29V6] ("[T]he SEC may pursue a regulatory balance that supports innovation while managing risk.").

¹⁹² See generally WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5 (discussing the board's responsibility for risk management).

(5) Strategic and operational risk, including the costs of abandoning investments already made and the difficulty of rebuilding institutional credibility once lost.¹⁹³

This approach mirrors what one of us has urged in other, related contexts: firms should not allow enforcement priorities alone to dictate internal governance, particularly when those priorities are subject to unpredictable (or predictable) reversal.¹⁹⁴ Instead, firms should ground their compliance and risk decisions in the firm's own purposes, values, and long-term risk exposure.¹⁹⁵ 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.¹⁹⁶

3. Aligning DEI Decisions with Corporate Purpose and Stated Values

Third, boards must confront the governance and operational consequences of abandoning publicly stated commitments. As this Article has shown, many firms embedded DEI into their public disclosures and internal incentive structures after 2020. Having done so, retreating from those commitments is not a neutral or apolitical action. Instead, retrenchment creates its own risk by raising questions about credibility and candor on the part of the firm.¹⁹⁷ Behavioral ethics research demonstrates that when decisions are presented as business or legal decisions, individuals are less likely to account for the ethical and institutional consequences.¹⁹⁸ Reframing DEI decisions as questions of integrity and ethics—rather than political positioning—helps counteract that blind spot.¹⁹⁹

This Article is not suggesting that firms must maintain DEI programs that never change in meaningful ways. Instead, it argues that the normal evolution of DEI initiatives should be deliberate and justifiable. Importantly, boards that treat DEI commitments as expendable when politically inconvenient risk signaling that other firm values are similarly negotiable—a

¹⁹³ See Martinez, *The Diversity Risk Paradox*, *supra* note 57, at 125 (“[W]hen firms engage in policies and practices beyond what they are legally required to do, it increases their zone of legal liability.”); Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307, 340-48 (2023) (noting the number and diversity of existing corporate ESG policies).

¹⁹⁴ See Martinez, *Purpose-Driven Compliance*, *supra* note 57, at 32-39.

¹⁹⁵ See *id.* at 33-35.

¹⁹⁶ See *id.* at 20-24.

¹⁹⁷ See Martinez, *The Diversity Risk Paradox*, *supra* note 57, at 122-24 (noting firms have made multiple statements indicating diversity efforts are central to their compliance risks); Fairfax, *Racial Rhetoric*, *supra* note 1, at 152-56 (discussing corporate diversity statements).

¹⁹⁸ See Veronica Root Martinez, *Reframing the DEI Case*, 46 SEATTLE U. L. REV. 399, 408-13 (2023) (discussing how behavioral ethics impacts decision making on diversity).

¹⁹⁹ See *id.* at 411-13 (arguing companies should consider behavioral ethics research in their decision-making processes); 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) (describing ethical decision making).

message that can undermine the creation of a positive organizational culture with strong underlying values.²⁰⁰

4. Developing Risk Mitigation Strategies

Boards should consider developing a plan that addresses known and potential DEI risks. Boards should discuss and assess appropriate risk mitigation strategies aimed at reducing the likelihood of harmful events and limiting their consequences. Boards might also consider adopting policies and procedures aimed at improving the corporation's ability to manage or contain risks.²⁰¹ 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 potential for harm associated with certain behaviors are revisited and updated where appropriate.²⁰² The idea is not that boards must eliminate all potential risks. Instead, boards should be prepared to identify and respond to risks effectively.

* * *

Ultimately, treating DEI as an ordinary business risk, rather than as a question that is too politically sensitive to address, aligns with traditional corporate governance principles. Firms routinely operate in areas with legal or regulatory uncertainty or contested social norms. They do so by evaluating a range of tradeoffs, documenting their decision-making processes, and continuously revisiting their assumptions over time. DEI belongs in that category of ordinary risks. The greatest danger is not that firms will choose the wrong substantive outcome as it relates to their DEI efforts. Instead, it is that they will continue to be swayed by politics instead of the firm's actual risks. A board that conducts a fulsome and good-faith assessment of DEI risk will be better positioned to defend its decisions, whatever course it chooses. That, ultimately, is what corporate law demands: good faith business judgment.

CONCLUSION

This Article explains how the recent corporate swing from robust DEI commitments to rapid retrenchment is not merely a story about politics or a public-relations misstep. It is, instead, a governance failure. Firms have

²⁰⁰ See Maizel, *supra* note 51, at 38-45 (describing how corporate culture affects legal compliance); WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5, at 2-3 (noting the importance of the board setting the "tone at the top").

²⁰¹ See WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 5, at 3 ("[T]he board should work with management to consider developing a crisis response plan . . .").

²⁰² See Robert S. Kaplan & Anette Mikes, *Managing Risks: A New Framework*, HARV. BUS. REV., June 2012, at 48, 50 (noting that risk mitigation is an ongoing process).

repeatedly failed to treat DEI as a recurring, enterprise-level, ordinary risk that boards are obliged to identify and oversee. Because many DEI reforms were memorialized in disclosures, embedded in compensation frameworks, and operationalized into governance processes after 2020, the abrupt withdrawal of or quiet retreat from those commitments produced a range of potential harms for firms. This Article's central claim is relatively simple: many firms' responses to the contemporary anti-DEI turn reflect a fundamental miscalculation of risk. Firms were mistaken when they failed to subject DEI to the same sustained, process-driven risk oversight that corporate law requires for other contested or uncertain issues.

This Article makes three contributions to legal scholarship. First, it explains how the move by public companies from DEI reform to retrenchment systematically increased their exposure to a range of risks. Second, it shows how contemporary fiduciary law and oversight doctrine require boards to treat DEI as part of ordinary risk governance, rather than as a matter outside of the board's oversight responsibilities. Third, it offers a practical framework for boards to consider adopting. Specifically, the proposed framework includes a documented DEI risk-assessment process that (i) situates DEI within enterprise risk management, (ii) weighs the costs of maintaining or scaling back DEI initiatives across a range of legal and strategic dimensions, and (iii) aligns any decision to change course with the firm's purpose, risks, and values. This approach will allow directors to make deliberate decisions rather than simply react to political pressure.

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