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Diversity culture clashes: the desire for and backlash to DEI audits and interventions

By Valecia McDowell, Esq., Chassity Bobbitt, Esq., and Jonathan D. Gilmartin, Esq., Moore & Van Allen PLLC

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2022 saw a notable spike in demand for companies to conduct diversity, equity, and inclusion ("DEI") audits. From the increased shareholder demands for non-privileged, public DEI audits, to the companies themselves choosing to undertake an internal, privileged audit conducted by counsel, the appetite to conduct DEI audits is surging.

Yet, this demand for DEI audits is colliding with opposition from conservative judges, employees, and investors who actively seek to curtail or eliminate DEI audits and related interventions.

The 2022 proxy season saw a significant increase in DEI shareholder proposals for civil rights and racial equity audits.

By way of background, a DEI audit (sometimes referred to as a civil rights or racial equity audit) is a formal analysis of a company's policies, practices, and initiatives as they relate to defined diverse and/or non-white stakeholders, such as employees and consumers.

Such DEI audits typically consider whether a company's policies, practices, and initiatives are non-discriminatory and equitable; whether the company has sufficient mechanisms in place to monitor the effectiveness of its DEI policies, statements, practices, and programs; and what important changes could help a company produce more equitable outcomes and better its inclusivity.

DEI audits are frequently conducted at the behest of large shareholder pension funds, including Services Employees International Union ("SEIU") and SOC Investment Group (formerly CtW Investment Group). As key market influencers, these shareholder funds are pushing companies to engage in self-critical analysis, in part, as a risk management exercise contributing to long-term shareholder value. Many companies and individual investors agree with this logic.

In the 2021 proxy season, at least 12 public companies received shareholder proposals to conduct a racial equity audit from pension funds and other shareholder proponents with varying results: some companies unsuccessfully sought "no action" relief from the Securities and Exchange Commission; others who brought the issue to a vote but the demand for an audit failed to receive majority support; and Blackrock and CoreCivic Inc. voluntarily agreed to conduct DEI audits.[1] (Our firm conducted CoreCivic's audit, and the full report was posted to CoreCivic's website in March 2022.)[2]

The 2022 proxy season saw a significant increase in DEI shareholder proposals for civil rights and racial equity audits. Specifically, at least 38 such audits were put forth in this proxy season, 24 of those proposals were voted on, and 8 of them passed.[3]

For example, McDonald's initially opposed the shareholders' request for an audit but agreed to conduct an audit after support came from Black franchisees and significant shareholders, including Norges Bank[4] and the State Board of Administration of Florida.[5]

Likewise, following recent allegations that Apple's diversity initiatives have not produced meaningful change within the company, Apple's shareholders voted in favor of an audit demand lodged by SOC Investment Group, SEIU, and Trillium Asset Management, with the CEO of SOC Investment Group stating "[t]his is a great victory for shareholders who clearly stated that Apple needs to be more forthcoming" and "[a] company shouldn't just say what it's doing", "it needs to show it."[6]

This sentiment appears to be increasingly prevalent across all company shareholders presented with proposals for DEI audits. Across all of such proposals put to a vote in the 2022 proxy season, the average level of voter support was 43%, suggesting increasingly broad-based support for DEI assessments and interventions.[7]

Many companies will likely want to continue conducting public and/or internal DEI audits and investing in DEI interventions. A 2021 XpertHR's Diversity, Equity, and Inclusion Employer Trends Survey found that more than 40% of surveyed companies have either conducted a DEI survey or audit or are looking to do so "in the near future."[8]

And why is that the case? First and foremost, DEI audits and interventions are designed, in part, to prevent workplace discrimination and address the toll of prior inaction. Therefore, as long as discrimination against women, racial and ethnic minorities, and members of the LGBTQ community remains pervasive in our workplace, DEI audits and interventions may be necessary risk mitigation measures in the modern, pluralistic workplace.

A Gallup poll published in 2021 indicated that 24% of Black and Hispanic workers reported feeling discriminated against in the workplace during the preceding 12 months, with little discrepancies for Black and Hispanic employees regardless of income.[9]

Additionally, in a study of Asian-American professionals, the IBM Institute for Business Value found that 80% of the respondents have personally experienced discrimination based on race or ethnicity.[10] Similarly, approximately 40% of women report experiencing gender discrimination at work.[11]

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And an analysis conducted by the UCLA School of Law-Williams Institute indicates over 45.5% of LGBTQ employees surveyed reported experiencing unfair treatment at work, including being fired, not hired, or harassed because of their sexual orientation or gender identity at some point in their lives, and 31.1% of LGBT respondents reported that they experienced discrimination or harassment within the past five years.[12]

While many companies have recognized these realities and increased DEI trainings, there is clearly more work to be done on this front, and companies understand that there is an economic imperative to get this right.

Against this backdrop of increasing support for DEI interventions, public audits, and privileged analyses, there is some resistance — both to increasing focus on diversity and specifically on DEI interventions. Claims of reverse racism are on the rise in the workplace and academic settings.

This fall, in the context of examining race-based college admissions policies, Supreme Court Justice Clarence Thomas mused from the highest Court in the land: "… I've heard the word 'diversity' quite a few times, and I don't have a clue what it means. It seems to mean everything for everyone."[13] Some conservative activists and investors share Justice Thomas's skepticism of diversity in general and DEI audits in particular.

In the 2022 proxy season, at least 12 companies including AT&T, Meta, Johnson & Johnson, Twitter, and Walmart received ***anti-DEI*** related shareholder demands.[14] These shareholder demands seek to examine companies' DEI efforts on behalf of majority employees and stakeholders that they contend are negatively impacted by such efforts.

Coca-Cola, Starbucks, and others have faced threatened or pending litigation in the form of "retraction" letters from conservative public policy groups to end what they perceive to be illegal DEI policies that discriminate against white workers and stop so-called "woke" mentality.[15]

Further, on January 17, 2023, 21 Republican Attorneys General authored a letter to two proxy advisory firms alleging the firms violated legal, contractual, and fiduciary obligations by, among other things, pledging to support proposals requiring companies to perform racial equity audits.[16]

And, importantly, some employees share these concerns. According to Gartner, as companies have expanded their DEI efforts, 44% percent of employees agree a growing number of their colleagues feel alienated by their organization's DEI efforts, 42% of employees report their peers view their organizations' DEI efforts as divisive, and another 42% say their peers resent DEI efforts.[17]

Despite this pushback, as long as key corporate stakeholders support DEI interventions and desire to be informed on progress in this arena, DEI audits, whether they are public or internal, will continue to be a valuable tool in gauging and advancing progress in a manner that is fair to all employees. And we anticipate many companies continue to support these audits, as well as thoughtfully crafted DEI interventions.

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As companies compete for the best workers — demographics matter. The Census Bureau estimates that the United States will be majority-minority by 2044.[18] People of color and urban residents are driving American population growth and at present there are more than 8 million American employees that identify as LGBTQ.[19] When these diverse employees (and others) are deciding where to invest their time, talent, and skills as employees and leaders, DEI matters.

In addition, demographic shifts are radically changing consumer spending patterns:

> "The buying power of [Hispanic Americans] rose by an astounding 87%, from 2010 to 2020, outpacing the 51% increase in non-Hispanic purchasing power growth over the same time. On the strength of its expanding younger generation, Hispanics have over $2 trillion of disposable income all told."[20]
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> Likewise, according to McKinsey, spending by Black households has "outpaced the growth rate of combined spending by White households (3 percent), driven mostly by faster population growth" and notably Black Americans are "nearly three times more likely than White Americans to expect the brands they use to align with their values and support social causes.[21] DEI audits and reporting allow consumers to determine whether such alignment exists.
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> In closing, it has never been more critical for companies to be thoughtful and intentional when it comes to diversity. The war for talent demands outreach and support for all employees.

Moreover, informed consumers and the shareholders who have catalyzed the utilization of DEI audits and interventions can, and will, express their views through their spending. The core challenge for the companies that are caught in the middle of this culture clash is to pursue these DEI audits and related interventions with thoughtfulness and intentionality, keeping equity and fundamental fairness for all stakeholders at the center of the work.

Notes

[1] Ron S. Berenblat & Elizabeth R. Gonzalez-Susman, Olshan Frome Wolosky LLP, *Racial Equity Audits: A New ESG Initiative* (Oct. 30, 2021), http://bit.ly/3HMRkI3.

[2] CoreCivic, 2021 DEI Annual Report (2021), https://bit.ly/3JWHyGl.

[3] Brigid Rosati, Kilian Moote, Rajeev Kumar & Michael Maiolo, Georgeson LLC, *A Look Back at the 2022 Proxy Season* (Oct. 23, 2022), http://bit.ly/3x87QxA.

[4] https://bloom.bg/3XgZajd

[5] Leslie Patton & Scott Deveau, *McDonald's Investors Demand Civil Rights Audit in Close Vote, Bloomberg: Equality* (May 26, 2022), http://bit.ly/3RQJult (the non-binding measure passed with 52% of votes cast in favor of the proposal)..

[6] Levi Sumagaysay, *'Shareholders really want Apple to be accountable for the image it portrays': Apple investors pass two proposals after worker controversy*, MarketWatch (Updated Mar. 7, 2022), http://bit.ly/3JNcrNf.

[7] Rosati, *supra* note 8.

[8] See XpertHR, *Diversity, Equity, and Inclusion Employer Trends 2021: XpertHR Survey Report* (2021), http://bit.ly/3Yh220z; Robby Brumberg, *Survey: Who's responsible for DE&I programs and progress* (July 28, 2021), http://bit.ly/40JgSyv.

[9] See Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, Gallup, (Jan. 12, 2021), https://bit.ly/3RKPPiv ("Experiences of workplace discrimination are similar between Black men (27%) and Black women (23%), as well as between Black employees in households earning less than $90,000 annually (24%) and those in households earning $90,000 or more (25%).").

[10] Tom Starner, *Hostility to Asian Americans: an urgent workplace problem*, HRExecutive, (June 7, 2021), http://bit.ly/3JSv4j0.

[11] Pew Research Center, *Gender Discrimination Comes in Many Forms for Today's Working Women* (Dec. 13, 2017), http://bit.ly/3DPrcuY.

[12] Brad Sears, Christy Mallory, Andrew Flores & Kerith Conron, *LGBT People's Experiences of Workplace Discrimination and Harassment* (2021), http://bit.ly/3JSxi1M.

[13] Transcript of Oral Argument at 71, *Students for Fair Admissions, Inc. v. University of North Carolina, et al*, ___ S. Ct. ___ (2022) (No. 21-707).

[14] See Rosati, *supra* note 8; see also AT&T, Proxy Statement, Item No. 7 — Stockholder Proposal — Civil Rights and Non-Discrimination Audit (2022), http://bit.ly/3YCbnzl; META, Proxy Statement, Proposal Twelve: Shareholder Proposal Regarding Civil Rights and NonDiscrimination Audit (2022), https://bit.ly/3RQKFBp; Johnson & Johnson, Proxy Statement, Item 6: Shareholder Proposal — Civil Rights, Equity, Diversity & Inclusion Audit Proposal (2022), http://bit.ly/3RHDFGO; Twitter, Proxy Statement, Proposal No. 7 Stockholder Proposal Regarding An Audit Analyzing the Company's Impacts on Civil Rights and Non-Discrimination (2022), https://bit.ly/3Ydvwg3; Walmart, Proxy Statement, Proposal No. 8 Civil Rights and Non-Discrimination Audit (2022), http://bit.ly/3jKVmJd.

[15] See Michael Delikat, J.T. Ho & Hong Tran, Orrick Herrington & Sutcliff LLP, *DEI Initiatives under Attack by Activists*, (Oct. 7, 2022), http://bit.ly/3xdfeYl.

[16] Letter from Sean Reyes, Utah Attorney General, and Ken Paxton, Texas Attorney General, et al. to Gary Retelny, President and CEO of Institutional Shareholder Services, Inc. and Kevin Cameron, Executive Chairman of Glass, Lewis & Co. (Jan. 17, 2023), https://bit.ly/3DQ61Jr.

[17] Trisha Rai & Caitlin Dutkiewicz, *How to Navigate Pushback to Diversity, Equity and Inclusion Efforts* (May 10, 2022), http://bit.ly/3Ia9pBe.

[18] Justin Gest, *What the 'Majority Minority' Shift Really Means for America*, The New York Times (Aug. 24, 2021), http://bit.ly/3Xh8L9E.

[19] Sears, *supra* note 28. See generally Avi Dan, *As America is Changing Into a 'Majority-Minority' Country, Advertising Starts Changing As Well*, Forbes (Apr. 13, 2022), http://bit.ly/3RL7GWl.

[20] Dan, *supra* note 34.

[21] McKinsey Quarterly, *A $300 billion opportunity: Serving the emerging Black Consumer* (Aug. 6, 2021), http://bit.ly/40JiEQb.

About the authors



Valecia McDowell (L) is a partner in the litigation group at **Moore & Van Allen PLLC** and head of its civil rights and racial equity assessments practice. She is a national thought leader in the areas of governmental and internal investigations, conduct risk management, and civil rights and racial equity assessments. McDowell has experience conducting internal and governmental investigations across the United States, Europe, Asia, and South America, with specific knowledge and experience in the areas of consumer finance and employee conduct risk, including practice and companywide reviews and racial equity assessments. She can be reached at valeciamcdowell@mvalaw.com. **Chassity Bobbitt** (C) is an associate in the firm's litigation group who focuses on complex litigation matters, including commercial litigation, class actions, and real estate disputes. Bobbitt has also represented clients in internal and government investigations involving financial regulatory compliance and antitrust issues and has assisted in representing large corporations and financial institutions, as well as family-run and operated businesses. She can be reached at chassitybobbitt@mvalaw.com. **Jonathan D. Gilmartin** (R) is an associate in the firm's litigation group. He focuses on complex commercial litigation and regulatory matters, including financial regulatory compliance issues and internal investigations. He has assisted in representing large financial institutions responding to inquiries and enforcement actions from federal agencies and with conducting internal investigations and companywide reviews and racial equity assessments. He can be reached at jongilmartin@mvalaw.com. The authors are all located in the firm's Charlotte, North Carolina, office.

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