

February 16, 2024

Via email, banderson@doc.gov¹

Brandee Anderson
Senior Advisor for Diversity, Equity, Inclusion, and Accessibility
U.S. Department of Commerce
1401 Constitution Ave. NW
Washington, D.C. 20230

Re: Comments on DOC-2023-0003: Business Diversity Principles

Dear Sr. Advisor Anderson:

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this comment in response to the Department of Commerce's request for public input on its draft Business Diversity Principles ("BDP").²

The Lawyers' Committee is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. For more than 60 years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving racial discrimination and civil rights. Based on this experience, we know that efforts designed to achieve diversity, equity, inclusion, and accessibility (DEIA) are critical tools that help companies prevent and correct intentional discrimination and unconscious bias, identify and break down systemic barriers, integrate occupations, and increase access to opportunity.

The Lawyers' Committee commends the Department of Commerce for developing the BDP, which strongly encourage the private sector to make voluntary, holistic efforts to ameliorate racial disparities across all business operations—from the board room to the work floor, suppliers and communities. This comment explains the vital need for such efforts, their lawfulness under long-standing civil rights law, and the Department's authority to promulgate the Principles. In addition to providing support, we urge the Department to:

¹ Lawyers' Committee submitted a comment on February 2, 2024, via <https://www.regulations.gov>. We request that the Commerce Department accept this amended comment, in lieu of the one previously submitted.

² This comment also includes insights from PolicyLink, a national research and action institute committed to ensuring all people in America - particularly those who face the burdens of structural racism - participate in a just society, live in a healthy community of opportunity, and prosper in an equitable economy. We thank PolicyLink for their contributions to and endorsement of the suggestions outlined in this comment.

- Move forward with adopting the BDP to support the private sector’s efforts to advance the goals of DEIA; and
- Include the following additional measures to the BDP:
 - Under the Workforce Development Principle, add mentorship, DEIA training, performance recognition, and performance review evaluations to the list of recommended practices.
 - Under the Human Resources Principle, add pay equity and employment benefits to the list of suggested HR policies.
 - Under the Community Investment Principle, add impact investing and using fund managers from diverse backgrounds as measures that companies can take to advance racial equity.

I. DEIA Measures Are Critical Tools for Expanding Opportunity

When the private sector pursues racial equity and DEIA goals, we all prosper. The broad set of voluntary measures outlined in the Department’s BDP, if implemented by companies, would help to overcome the persistent effects of historic and ongoing discrimination. DEIA measures create safer workplaces for Black workers and other workers of color, who continue to face overt discrimination³ and unconscious bias in the workplace today.⁴ Moreover, the widespread effects of ongoing discrimination contribute to the problem of occupational segregation, in which Black workers are overrepresented in lower paying and higher risk industries.⁵ On average, Black workers “are not being hired, promoted or paid according to what would signal their level of productivity based on their experience or their education.”⁶ Our country is increasingly becoming more diverse and workers of color, a growing population in this country, deserve the same opportunities to be as productive and prosperous as possible.

DEIA programs help employers avoid leaving talent at the door and have wide-ranging positive effects for businesses. As the overwhelming majority of Americans recognize, diversity

³ See, e.g., Press Release, EEOC, *EEOC Sues Tesla for Racial Harassment and Retaliation* (Sept. 28, 2023), <https://www.eeoc.gov/newsroom/eeoc-sues-tesla-racial-harassment-and-retaliation> (EEOC alleges that Black workers at Tesla’s Fremont, California production facility faced open and pervasive harassment, including epithets such as variations of the N-word, “monkey,” “boy,” and “black b*tch,” graffiti, including variations of the N-word, swastikas, threats, and nooses, on desks and other equipment, in bathroom stalls, within elevators, and even on new vehicles rolling off the production line); Ronald D. White, *Tesla sued for ‘widespread and ongoing’ racial harassment at California plant*, Los Angeles Times (Sept. 28, 2023), <https://www.latimes.com/business/story/2023-09-28/tesla-eeoc-lawsuit>; Press Release, EEOC, *Pensac Settlement EEOC Race Discrimination Claim* (Feb. 28, 2022) <https://tinyurl.com/bp7capv3> (announcing the settlement of a lawsuit in Milwaukee in which the EEOC alleged a McDonald’s franchise refused to hire Black applicants because of their race including that the store manager told unsuccessful Black applicants, “Don’t like n-----s” and that the store needed “Spanish people.”).

⁴ In 2020, the Gallup Center on Black Voices found that one in four Black workers reported experiencing workplace discrimination in the past year, and that 75% of them indicated that they felt they were discriminated against based on their race or ethnicity (compared to 61% of Hispanic workers and 42% of white workers). Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, GALLUP (Jan. 12, 2021), <https://tinyurl.com/38hek456>.

⁵ See *infra*, section IV(D)(1).

⁶ Quote from Valerie Wilson, director of the Economic Policy Institute’s program on race, ethnicity and the economy. Courtney Connley, *Why Black workers still face a promotion and wage gap that’s costing the economy trillions*, CNBC (Apr. 16, 2021), <https://tinyurl.com/3jux5phm>.

initiatives in the workplace make companies more profitable and innovative.⁷ And the data bears this out. A recent study reported striking findings that gender and ethnic diversity on executive teams and boards strongly correlate with outperformance.⁸

Addressing racial inequality also benefits communities where workers and their families live and work, where companies invest, and has substantial benefits to the economy as a whole. A recent study found that closing the Black wage gap could have added \$2.7 trillion in income available for consumption or investment over the past 20 years.⁹ In an increasingly competitive global economy, geographical openness, cultural diversity, and tolerance have been identified as “key drivers of economic progress.”¹⁰

As other commenters have shown,¹¹ companies have recognized the moral, business, and economic case for advancing DEIA goals.

II. The Current Opposition to DEIA

In the wake of the horrific murder of George Floyd at the hands of a white police officer, many private employers committed to increasing racial diversity within their ranks.¹² Research shows that those commitments resulted in significant progress. Among 88 companies in the S&P

⁷ See Black Econ. All. Found., *New Poll by the Black Economic Alliance Foundation/The Harris Poll: Corporate Diversity Initiatives Overwhelmingly Supported Across Racial, Ideological, and Generational Lines* (Aug. 28, 2023) <https://foundation.blackeconomicalliance.org/press-release/new-poll-by-the-black-economic-alliance-foundation-the-harris-poll-corporate-diversity-initiatives-overwhelmingly-supported-across-racial-ideological-and-generational-lines/>.

⁸ McKinsey & Co., *Diversity Matters Even More: The case for holistic impact*, 11-13 (Dec. 5, 2023), available at <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-matters-even-more-the-case-for-holistic-impact>

⁹ Citi GPS, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.* Citigroup, 4 (Sept. 2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMi%3D.

¹⁰ Angela G. Blackwell & Neera Tanden, *All-In Nation: An America that Works for All*. Center for American Progress & PolicyLink (2013), <https://missioninvestors.org/sites/default/files/resources/All-In-Nation.pdf>.

¹¹ See, e.g., Salesforce, Comment letter on DOC-2023-0003: Business Diversity Principles (Jan. 10, 2024), <https://www.regulations.gov/comment/DOC-2023-0003-0006>; Thirty Percent Coalition, Comment letter on DOC-2023-0003: Business Diversity Principles (Jan. 4, 2024), <https://www.regulations.gov/comment/DOC-2023-0003-0015>; JP Morgan Chase, Comment letter on DOC-2023-0003: Business Diversity Principles (Jan. 19, 2024), <https://www.regulations.gov/docket/DOC-2023-0003/comments>.

¹² Dexter Tilo, *Did the aftermath of George Floyd's murder lead to positive change in the workplace?*, Human Resources Director (June 20, 2023), <https://www.hcamag.com/ca/specialization/diversity-inclusion/did-the-aftermath-of-george-floyds-murder-lead-to-positive-change-in-the-workplace/449912>.

500, 94% of the increase in headcount in 2021 went to people of color.¹³ Companies also became more intentional about maximizing their impact in communities within which they do business.

Since then, however, a handful of ideological groups and politicians have sought to revert to the prior status quo that benefited some and shut out many.¹⁴ In cynical irony, they have sought to vilify DEIA as discriminatory,¹⁵ anti-racism as racism, and now are manipulating and weaponizing civil rights laws to roll back hard-fought progress toward equality. These groups have, *inter alia*, filed lawsuits to try and force companies to rescind DEIA goals and programs,¹⁶ end corporate charitable grantmaking designed to remedy discrimination,¹⁷ forbid efforts to require the disclosure of diverse representation on boards of directors,¹⁸ and demanded investigations of companies for their publicly stated DEIA goals.¹⁹

Though attacks on racial progress and intimidation tactics are not new, government and private sector efforts to advance racial equity are more critical than ever. Confronted by these challenges, some companies have scaled back or, in some instances, eliminated programs designed to achieve the goals of DEIA. We urge companies to not retreat from these efforts and to pursue all that is possible under the law to increase access and opportunity.

To be sure, the DEIA measures outlined in the BDP are lawful and help ensure companies meet existing civil rights obligations. Moreover, research shows that such initiatives have a measurable impact on improving equal economic opportunity. The final section of the comment explains the benefits of lawful implementation of the BDP, beyond those to individuals and businesses, that improve our economy, democracy, and nation. For all of these reasons, we fully support the Department's BDP as a matter of racial and economic justice, a practical guide for

¹³ Jeff Green et al., *Corporate America Promised to Hire a Lot More People of Color. It Actually Did*, Bloomberg (Sept. 25, 2023), <https://www.bloomberg.com/graphics/2023-black-lives-matter-equal-opportunity-corporate-diversity/>

¹⁴ For example, on July 13, 2023, the attorneys general from 13 states sent a letter to CEOs of Fortune 100 companies threatening “serious legal consequences” if they continue to advocate for DEIA policies within their organizations. *See* Letter from Attorneys General of 13 States, to Fortune 100 CEOs (July 13, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf>. Four days later, United States Senator Tom Cotton sent a letter to 51 law firms threatening them with future investigations and possible litigation while citing Title VI and Title VII of the Civil Rights Act of 1964 in order to erroneously suggest that they and their clients could be in violation of those statutes by advising on and maintaining DEIA programs. *See* Letter from Senator Tom Cotton to Nimesh M. Patel, et al. (July 17, 2023), <https://www.cotton.senate.gov/imo/media/doc/Senator%20Cotton%20Letters%20to%20Law%20Firms%20re%20DEI.pdf>.

¹⁵ *See, e.g.*, Letter from State Attorneys General, to Brandee Anderson, Senior Advisor to the Deputy Sec'y, U.S. Dep't of Com. (Jan. 5, 2023), <https://dojmt.gov/wp-content/uploads/Comment-on-Dept-of-Commerce-DEI-Principles-MT-KS-TN-1.5.24-To-File.pdf>

¹⁶ *See, e.g.*, *Nat'l. Ctr. for Pub. Pol'y Rsch. v. Schultz*, No 2:22-CV-00267-SAB, 2023 WL 2587482 (E.D. Wash., dismissed Sept. 11, 2023).

¹⁷ *See, e.g.*, *Roberts, et al. v. Progressive Preferred Ins. Co.*, No. 23-cv-01597 (N.D. Ohio, filed Aug. 16, 2023).

¹⁸ *See, e.g.*, *All. for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2023 WL 6862856 (5th Cir. Oct. 18, 2023).

¹⁹ The group America First Legal, which opposes DEIA, has sent numerous letters to the U.S. Equal Employment Opportunity Commission (EEOC) demanding that the EEOC issue Commissioner's charges and investigate various companies' practices. *See generally*, Press Releases, Am. First Legal, <https://aflegal.org/category/press/>.

lawful business practices, and as necessary support for private sector DEIA efforts in light of the current backlash against racial equity and DEIA.

III. DEIA Initiatives Remain Lawful in the Workplace and Beyond

Under federal law, employers have a duty to provide employees with a safe work environment free from discrimination, harassment, and intimidation. DEI efforts are a necessary tool to help employers fulfill this legal obligation by identifying and remedying harassment, discrimination, and other systemic barriers to opportunity that negatively affect certain groups. This more practical understanding of DEIA under the proper legal standard was reflected in the statement issued by the Chair of the U.S. Equal Employment Opportunity Commission in response to the Supreme Court's decision in *Students for Fair Admissions (SFFA) v. University of North Carolina (UNC)/Harvard College*²⁰ when she made clear that "it remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."²¹

In their letter, the 19 state attorneys general make a tortured attempt to argue that the Supreme Court's ruling in *SFFA v. UNC* and *SFFA v. Harvard College* which they grossly misconstrue, somehow prohibits the Department's issuance of the BDP, which they inaccurately contend promote "illegal racial measures."²² In those cases, the Court held that UNC's and Harvard College's affirmative action programs, which considered race as one factor of many as part of a holistic admissions process, violated the Constitution's Equal Protection Clause.²³ The Court had long held that such admissions plans were a racial classification because the policies on their face considered race²⁴ but in some cases satisfied strict scrutiny.²⁵ In *SFFA v. UNC/Harvard*, the court pared back the circumstances under which an admissions policy that considered race would satisfy the strict scrutiny standard. The ruling most certainly did not affect DEIA under the laws governing the private employment context,²⁶ which have prohibited employers from basing employment decisions on the race of employees or job applicants since 1964.²⁷ The ruling in *SFFA v. UNC/Harvard* does not implicate the BDP at all because nothing in the BDP requires or suggests that employers should treat people differently because of their race.

²⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

²¹ Press Release, U.S. Equal Emp. Opportunity Comm'n, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (June 29, 2023), <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>

²² Letter from State Attorneys General to Brandee Anderson, Senior Advisor to the Deputy Secretary, U.S. Dep't of Com. (Jan. 5, 2023), <https://dojmt.gov/wp-content/uploads/Comment-on-Dept-of-Commerce-DEI-Principles-MT-KS-TN-1.5.24-To-File.pdf>.

²³ While the Court's holding significantly pared back the circumstances in which race can be used in higher education admissions, it did not, as the nineteen states attorneys general suggest, invalidate the use of race in all educational affirmative-action programs. See supra n. 20.

²⁴ *Regents of Univ. of Cal v. Bakke*, 438 U.S. 265 (1978).

²⁵ *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013).

²⁶ See supra n. 20, at *2175.

²⁷ Employers can, in certain limited instances, create voluntary affirmative action plans, allowing the employer to engage in certain preferential treatment based on a protected class if the program satisfies the requirements set forth in a pair of Supreme Court decisions. See *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616 (1987).

The BDP are consistent with longstanding DEIA practices which have not employed racial classifications. Federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, prohibit covered employers from discriminating against employees because of certain protected categories including age, citizenship, color, disability, genetic information, national origin, race, religion, and sex (including pregnancy, gender identity, and sexual orientation).²⁸ It is illegal for all private employers to base employment decisions on race or national origin.²⁹

The BDP are also supported by decades of Title VII and civil rights jurisprudence. Absent evidence tying DEIA policies to decision-making, courts have refused to find discrimination based on employers' DEIA policies alone.³⁰ This suggests that companies can generally engage in DEIA efforts when such initiatives do not direct decision-makers to base employment decisions on race or any other protected category. Indeed, should employers overcompensate due to threats by DEIA opponents, by eliminating programs designed to break down systemic barriers and advance equal opportunity, they may create an even greater risk of exposure to claims of employment discrimination.

IV. Feedback on Draft Business Diversity Principles (Questions 1-3)

We applaud the Department's Business Diversity Initiative as it recognizes the importance of voluntary DEIA efforts by the private sector and its role, by implementing such measures, in bolstering a thriving economy, reaching our fullest potential as a globally competitive nation, and achieving the democracy we deserve. The BDP should clarify that the lists of measures under each Principle are not exhaustive, but rather examples of actions companies can take to achieve their DEIA goals. As explained in more detail below, in addition to the practices listed under each Principle, we urge the Department to include the following measures to the BDP:

- Under the **Workforce Development** Principle, add mentorships, DEIA training, performance recognition, and performance review evaluations to the list of recommended practices.
- Under the **Human Resources** Principle, add pay equity and employment benefits to the list of suggested HR policies.
- Under the **Community Investment** Principle, add impact investing and using fund managers from diverse backgrounds as measures that companies can take to advance racial equity.

²⁸ See 42 U.S.C. §§ 2000e-2(a)(1), 12112; 29 U.S.C. § 623. The federal laws prohibiting employment discrimination apply to private employers with at least fifteen employees (in the case of age discrimination, a minimum of 20 employees). See 42 U.S.C. §§ 2000e(b), 12111(5); 29 U.S.C. 630(b).

²⁹ 42 U.S.C. § 1981.

³⁰ See, e.g., *Bissett v. Beau Rivage Resorts Inc.*, 442 F. App'x 148, 152–53 (5th Cir. 2011) (affirming summary judgment of discrimination claim predicated on employee's "own unsubstantiated belief that the diversity policy led to her discharge" where there was no evidence that HR "investigated the complaints against [plaintiff] differently because she is Caucasian or considered her race when deciding to terminate her" or any other evidence "to support her contention that she was actually terminated to increase diversity."); see also *Roy v. Soar Corp.*, 2014 WL 4209549 (E.D. Pa. Aug. 25, 2014) (absent any evidence that decision to terminate employee based on her race, diversity initiatives did not support claim for discrimination); *Jones v. Bernanke*, 493 F. Supp. 2d 18, 29 (D.D.C. 2007), *aff'd on other grounds*, 557 F.3d 670 (D.C. Cir. 2009) ("[T]he mere existence of a diversity policy, without more, is insufficient to make out a prima facie case of reverse discrimination.").

A. Executive Leadership

The “Executive Leadership” Principle provides examples of voluntary measures companies can take to equip their leadership to improve equity and economic growth. We agree with the Department that all of the practices listed, if implemented effectively, can further a company’s DEIA efforts. Below, we provide support for three of the practices listed in the BDP that are important to include: diversifying corporate governance, eliminating barriers to executive leadership, and developing accountability measures to which executives can be held.³¹

Diverse leadership with experience addressing frustrations with inadequate responses to discrimination in the workplace can minimize the risk that their organizations will continue the same pattern of failing to adequately address discrimination complaints.³² Moreover, DEIA policies “reviewed, and implemented by individuals with diverse personal backgrounds and expertise in Diversity ... are more likely to be effective from the standpoints of both firm culture and liability-reducing mechanisms.”³³

A recent study by Russell Reynolds Associates reviewed the hiring patterns for the C-suite and those involved in key decision-making discussions. The study showed a “lack of equity at the top of organizations is not due to a lack of diverse talent entering the workforce but a lack of equity” in assessing qualified candidates and developing and promoting internal employees.³⁴ Among other issues, the insulated nature of most board rooms creates a circular filter as executives search for new candidates in homogeneous applicant pools.³⁵ Achieving diversity at the highest levels requires “broadening professional circles” and using external parties to reach qualified candidates outside the reach of the current board members.³⁶ Studies show that companies with more diversity in their C-suite and managerial positions outperform the market averages in financial returns,³⁷ employee satisfaction, and promotion from within a company.³⁸ Such efforts designed to improve the diversity of executive leadership are lawful. *See e.g., Weaver v. Ohio Farmers Ins. Co.*, 2022-Ohio-2716, ¶¶ 14, 29 (affirming summary judgment for employer and declining to find the fact that employer maintained a DEI policy with the “goal of increasing the

³¹ Our focus on specific measures listed in the BDP is in no way an exhaustive list of DEIA measures we support, whether such additional measures are listed in the BDP or not.

³² *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 Vand. L. Rev. 1, 38 (2022).

³³ *Id.*

³⁴ Tina Shah Paikeday et al., *How To Fix The C-suite Diversity Problem*, Russell Reynolds Associates (Jan. 11, 2023), <https://www.russellreynolds.com/en/insights/articles/how-to-fix-the-c-suite-diversity-problem> (referencing data in *Divides and Dividends, Leadership Actions for a More Sustainable Future | 2021 Report*).

³⁵ Simran J. Singh, *Boards Need Real Diversity, Not Tokenism*, Harv. Bus. Rev. (Aug. 31, 2021), <https://hbr.org/2021/08/boards-need-real-diversity-not-tokenism>

³⁶ *Id.*

³⁷ Sundiatu Dixon-Fyle et al., *Diversity Wins: How Inclusion Matters*, McKinsey & Co. (May 19, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>

³⁸ Tina Shah Paikeday et al., *How To Fix The C-suite Diversity Problem*, Russell Reynolds Associates (Jan. 11, 2023), <https://www.russellreynolds.com/en/insights/articles/how-to-fix-the-c-suite-diversity-problem> (A lack of diverse role models who can inspire others creates recruitment and retention challenges. At the same time, bias in the assessment and development of underrepresented groups limits the progression opportunities for high-potential talent.)

number of women and [people of color] in leadership positions” and “track[ed] its progress towards its diversity goals by measuring headcount” was evidence of gender discrimination).

1. Promotion pipelines are key to eliminating barriers in access to leadership.

One of the primary reported obstacles to improving racial representation and overall diversity at senior levels is a shortage of diverse candidates in the leadership pipeline. For example, in a 2021 survey of board members, “[t]he top reason directors say their boards are not able to diversify more quickly is the lack of qualified candidates.”³⁹ However, it is critical to note that this reflects an access problem, not a talent shortage. Accordingly, improving representation throughout the promotion pipeline is critically important to improving representations at the highest levels of leadership because “[d]iversifying the talent pipeline lays the foundation for the future of company culture and leadership.”⁴⁰

Diversifying promotion pipelines to advance representation of marginalized communities in leadership requires much more than recruiting and hiring employees from racially underrepresented groups. In order to fill leadership positions with diverse talent, organizations should “map” where their diverse talent is within the organization and “identify underleveraged pools of talent.”⁴¹ It also requires an understanding of what skills employees in each position possess to identify potential areas of further development.⁴² Work-based experience programs are another effective tool to improve racial representation in organizations’ pipelines.⁴³ The bottom line is that companies must provide equal opportunities for growth to diverse workers.⁴⁴ Having transparent promotion processes is critical to ensuring equal opportunities for advancement and to counter bias, implicit or otherwise, among decision-makers.⁴⁵

2. Holding leadership accountable for their actions to promote DEIA leads to more effective implementation of goals.

There are a number of steps organizations can and should take to measure efforts to advance an organization’s stated DEIA goals and hold its leadership accountable for those goals.⁴⁶ Meaningful evaluation of performance by managers and executives in advancing DEI

³⁹ PricewaterhouseCoopers, *PwC’s 2021 Annual Corporate Directors Survey* (2021), <https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2021-annual-corporate-directors-survey.pdf>.

⁴⁰ Lindsay Singleton & Dr. Tessa Recendes, *A 4-point strategy to grow your company’s diverse talent pipeline*, Fast Co. (Feb. 1, 2022), <https://www.fastcompany.com/90715693/a-4-point-strategy-to-grow-your-companys-diverse-talent-pipeline>.

⁴¹ Matt Sigelman & Johnny C. Taylor, Jr., *To Build a Diverse Company for the Long Term, Develop Junior Talent*, Harv. Bus. Rev. (Apr. 12, 2021), <https://hbr.org/2021/04/to-build-a-diverse-company-for-the-long-term-develop-junior-talent>.

⁴² *Id.* “Understanding not only the demographics of each pool of workers but also their skills highlights opportunities to bridge between talent reservoirs and talent deserts with the specific learning and promotion pathways to advance workers to where they will be of greatest value.”

⁴³ Julie Coffman et. al, *Diversify Your Talent Pipeline through Work-Based Experiences*, Bain & Co. (Aug. 11, 2021), <https://www.bain.com/insights/diversify-your-talent-pipeline-through-work-based-experiences/>.

⁴⁴ Naia Toke, *Talent pipeline: Fostering a Continuous Supply of Professionals*, Diversity for Social Impact (Apr. 5, 2023), <https://diversity.social/talent-pipeline/#>.

⁴⁵ *See id.*

⁴⁶ Stefanie McNamara, *Four Ways to Drive Accountability for DEI in Your Organization*, Seramount (Mar. 7, 2022), <https://seramount.com/articles/four-ways-to-drive-accountability-for-dei-in-your-organization/>

goals should be a core component of performance evaluations to ensure that organizations are living up to their stated DEIA positions and not merely paying lip service to the concept.⁴⁷ Accountability begins by clearly defining what DEI means for the organization and establishing metrics for measuring DEI engagement.⁴⁸ Measurement of DEI efforts can include, for example, tracking hiring, promotion, and turnover of employees from underrepresented racial groups to identify and remedy potential barriers to equal equity;⁴⁹ “[m]onitoring the diversity of hired employees against their applicant pool,” which helps organizations identify areas where their representation may be considerably lower than their availability in the talent pool and “assess whether their recruitment practices are effectively attracting candidates from diverse backgrounds;” “[e]xamining salary data [to] ensure that employees are compensated fairly for their roles and responsibilities, regardless of gender, race, or other characteristics;” and monitoring engagement of employees from underrepresented groups.⁵⁰

Accountability measures for executives tied to DEIA goals are, in most cases, permissible where they are not linked to decision-making that negatively affects individuals of a certain group. For example, in *Mangold v. PECO Energy*, the court rejected the attempt by a white former employee to rely on the employer’s DEI policy as evidence of discrimination where the termination was not “even remotely connected to this initiative.”⁵¹ While the DEI initiative was “integrated into performance evaluations for all executives,” the court noted that there was no penalty “either financially or in [] performance evaluations for not meeting this goal.”⁵² As this case illustrates, companies can carefully structure accountability measures in such a way that they do not influence decisions about hiring, firing, promotion, or other employment actions.

B. Organizational Strategy

The “Organizational Strategy” Principle focuses on evaluating business diversity within an organization. The BDP’s list of voluntary practices under this Principle are all lawful measures that can be impactful tools for advancing DEIA goals. Below, we highlight three of the listed measures that are particularly important to Black and other historically underrepresented communities: data collection, data transparency, and hiring Diversity Executives.

1. Robust data collection improves policies and leads to greater success of DEIA objectives.

Reliable data collection and analysis is central to identifying potential organizational barriers to equal opportunity, measuring progress in remedying these barriers, and achieving an

⁴⁷ Anna George, *6 Best Practices for Building Successful Diversity Pipelines With Early Career Programs*, Symba (Apr. 7, 2023), <https://symba.io/blog/dei/6-best-practices-for-building-successful-diversity-pipelines/>

⁴⁸ Theresa Carik, Ph.D., *How to Measure Diversity, Equity, & Inclusion: KPIs & Metrics for Success*, Keystone Partners (Aug. 31, 2023), <https://www.keystonepartners.com/insights/blog/measuring-deib/>.

⁴⁹ See George, *supra* note 47.

⁵⁰ Carik, *supra* note 48.

⁵¹ *Mangold v. PECO Energy*, No. CV 19-5912, 2021 WL 6072818 (E.D. Pa. Dec. 23, 2021), *appeal dismissed*, 2022 WL 2914733 (3d Cir. July 12, 2022) (collecting cases).

⁵² *Id.* at *4 (E.D. Pa. Dec. 23, 2021).

organization's DEIA goals. Without ongoing data collection and analysis, discriminatory systems and practices in the workplace may continue to thrive unabated.

Employers subject to Title VII of the Civil Rights Act or Executive Order 11246 are already required to maintain records to help them determine whether discrimination has occurred or is occurring. Employers with 100 or more employees are required to submit the annual EEO-1 report to EEOC, which collects data on the sex and race/ethnicity composition of the workforce by occupation.⁵³ An employer's EEO data provides a snapshot of its demographics by job category, helping to provide a birds'-eye view of potential occupational segregation of workers of color clustered in lower job classifications or "glass ceiling"⁵⁴ issues where workers of color are underrepresented in managerial or executive job classifications.⁵⁵

Certain employers subject to Executive Order 11246 are also required to prepare annual programs to assess their workforce demographics, establish aspirational placement goals where necessary, and to analyze their personnel selections, promotions, and terminations as well as their compensation practices to identify potential barriers to equal employment opportunity.⁵⁶

In order to conduct meaningful analysis, it is critical that employers have good systems in place to effectively collect and maintain the requisite data and that the workforce data have integrity. It is also important for organizations to identify teams responsible for reviewing and analyzing the data, and communicating those results to the teams responsible for developing and tracking progress towards an organization's DEIA priorities. Finally, companies should aim to disaggregate demographic data to better understand how particular racial/ethnic groups are being impacted by particular employment policies, and analyze any trends impacting employees with multiple or intersectional identities (e.g., Black women). Below are more specific recommendations related to data collection practices.

Recruitment and Hiring . In order to properly assess potential barriers along the lines of race and ethnicity in hiring and other personnel and compensation decisions, employers should voluntarily solicit demographic data from all applicants and employees. Regularly analyzing applicant and hire data will help companies identify whether neutral company policies or requirements are disproportionately disqualifying employees from a particular racial or ethnic group. If so, companies should investigate whether these policies are actually assessing qualifications that are job-related or if they are serving as artificial barriers to employment opportunities. Demographic data from applicants also helps employers assess the effectiveness of their outreach and recruitment efforts.

Companies should also analyze the demographic makeup of their workforce, disaggregated by department, position, supervisory roles, and job groups, while identifying areas wherein certain groups are underrepresented as compared to the available talent pool. Employers should then make

⁵³ See U.S. Equal Emp. Opportunity Comm'n, *What You Should Know about the Publication of EEO-1 30-Day Notice*, <https://www.eeoc.gov/wysk/what-you-should-know-about-publication-eeo-1-30-day-notice>, (Last accessed Feb. 16, 2024).

⁵⁴ See *infra* note 59.

⁵⁵ See U.S. Dep't of Lab., *Employment Law Guide – Federal Contracts-Equal Opportunity in Employment: Employment Nondiscrimination and Equal Opportunity in Supply & Service Contracts* (Dec. 2016).

⁵⁶ *Id.*

a concerted effort to address these areas, whether by removing barriers to internal advancement or affirmative recruitment efforts. Companies should track these numbers over time to mark progress and adjust their aspirational goals accordingly.

Employee Promotion and Retention. Measuring employee turnover can show how well a company is retaining employees and help identify potential issues related to employee engagement and job satisfaction. Companies should review the number of employees who leave voluntarily and involuntarily over a period of time and break the data out by each metric to assess whether there are potential trends resulting in employees of color leaving the company at higher rates than other employees. When tracking promotion rates, companies should review the number of promotions, time between promotions, and performance assessments for each employee. Companies should also review the data by race/ethnicity and within each department. The time between promotions is often an overlooked statistic that can be useful to understand where diverse talent gets stuck within a company.⁵⁷ These “glass ceilings”⁵⁸ can be due to a multitude of factors, including unconscious biases in review or senior management, unequal distribution of notable work or recognition, or over-emphasis on company norms.⁵⁹ By effectively tracking this information, companies can work with executives and managers “to address the diversity gaps in leadership pipelines before they become entrenched.”⁶⁰

Employee Engagement and Satisfaction. Companies should review each employee’s allocation of work and attendance at company events as these factors are often linked to employee engagement, promotion probability, and retention rate. Companies should periodically circulate comprehensive surveys to employees so they can evaluate company culture and employee satisfaction. This data will be useful to better understand the needs of their employees and how to continue to build an inclusive and productive work environment.

Companies should also consider using interviews, focus groups, and other forms of qualitative inquiry to highlight how employees potentially feel underrepresented or excluded.⁶¹ While it is important to use statistical data to identify problems, establish baselines, and measure progress, there is often a tendency to weigh quantitative datasets over qualitative data.⁶² A common mistake companies make is to discount an “accumulation of anecdotes about lived experiences”

⁵⁷ Tina Shah Paikeday et. al, *How To Fix The C-suite Diversity Problem*, Russell Reynolds Associates (Jan. 11, 2023), <https://www.russellreynolds.com/en/insights/articles/how-to-fix-the-c-suite-diversity-problem>

⁵⁸ The “glass ceiling” is a term coined by Marilyn Loden in 1978 to refer to the invisible barrier that prevents women and other underrepresented people from being promoted to leadership and executive positions, despite having the requisite qualifications and skills. The Glass Ceiling Commission was created by Title II of the Civil Rights Act of 1991 to investigate the “artificial barriers” that prevent qualified women and people of color from moving into more senior positions. The commission works to identify and quantify bias in order to propose solutions for its eventual eradication. The U.S. Department of Labor Timeline – Alternate version, U.S. Department of Labor (Jan. 20, 1948), <https://www.dol.gov/general/history/100/timeline>.

⁵⁹ U.S. Dep’t of Lab., *Federal Glass Ceiling Commission. Good for Business: Making Full Use of the Nation’s Human Capital*, at 26–36 (Mar. 1995).

⁶⁰ Paikeday, *supra* note 58.

⁶¹ Laura M. Roberts & Melissa Thomas-Hunt, *Data-Driven Approaches to Diversity, Equity and Inclusion*, 47 *Society for Human Resource Management, People + Strategy Journal* (2024), <https://www.shrm.org/executive-network/insights/people-strategy/data-driven-approaches-to-diversity-equity-inclusion>.

⁶² *Id.*

for the information supported by large datasets.⁶³ Qualitative data provides contextualized accounts of lived experiences that cannot be pulled through datasets. However, companies should also be mindful to not let the results of qualitative data lead to retaliation against employees.

Legality of Data Collection. In their comment, the 19 state attorneys general point to companies' public disclosure of demographic data as somehow proof of the use of racial quotas. Aspirational diversity goals not tied to employment decisions are not quotas. To the contrary, demographic data collection, analysis, and aspirational goals allow companies to operate with the benefit of information which could reveal discriminatory employment practices. Not having this data would seriously handcuff companies' ability to comply with anti-discrimination laws.

Where a company does not treat people differently based on a protected characteristic such as race or sex, the collection of data alone does not implicate Title VII or other civil rights. Title VII would only come into play if demographic data were misused. And the legality of any particular use of any piece of demographic classification necessitates a fact-dependent legal analysis.⁶⁴ To conclude that the collection of demographic data, on its own, necessarily means that companies are using the data to discriminate would fly in the face of Title VII and case law, which require proof of disparate treatment and causation. There is no authority precluding companies from either collecting employee demographic data or using it in ways that do not result in people being treated differently on account of race or any other protected category.⁶⁵ Moreover, the Supreme Court's decision in *SFFA v. UNC/Harvard* decision certainly does not disturb longstanding legal support for robust data collection.

Courts have reached the same result where they correctly applied Title VII in cases in which an employee has attempted to rely on an employer's setting of aspirational goals through analysis of demographic data to support a claim of discrimination. In *Andersen v. Mack Trucks, Inc.*, a former employee failed to establish that he was fired because of his gender by relying on the employer's diversity initiative.⁶⁶ The diversity initiative "sought to increase diversity opportunity by twenty-five percent and to increase the number of female managers in Defendants' workforce by twenty-five percent" measured by "examining the percentage of women in the workforce at a given point and comparing that number to a subsequent point in time to see if there was an increase."⁶⁷ Granting summary judgment for the employer, the court noted there was "no evidence of any directive, or any conduct, wherein Defendants took less qualified candidates over more qualified candidates because of their gender."⁶⁸

⁶³ *Id.*

⁶⁴ M. Geron Gadd & Mara K. Youdelman, *Constitutionality of Demographic Data Collection*, Nat'l Health L. Program, 4 (June 2023), [Constitutionality-of-Data-Collection-Issue-Brief-FINAL-6.14.-2023_for-Publication.pdf](#) (last accessed Feb. 1, 2024).

⁶⁵ *Id.*, 1-2.

⁶⁶ *Andersen v. Mack Trucks*, 118 F. Supp. 3d 723 (E.D. Pa. 2015), *aff'd*, 647 F. App'x 130 (3d Cir. 2016).

⁶⁷ *Id.* at 735.

⁶⁸ *Id.* at 748; *see also*, *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 185 (D. Del. 2001) (concluding that unless the plaintiff can demonstrate that the defendant's diversity policy, which included maintaining statistical awareness of the diversity in its workforce, "had some negative impact upon *his* individual employment situation, the mere existence of a policy promoting diversity awareness is not evidence of discrimination").

2. Companies should share their progress toward DEIA goals through data transparency.

Internal transparency regarding demographic data and diversity objectives are fundamental to establishing trust and a productive work environment.⁶⁹ Employees are more likely to be accepting and trusting of DEI initiatives when demographic information is shared within the company and DEI initiatives are grounded in statistical data.⁷⁰ If a company shares the demographic data internally, it must be cognizant of the initiatives it chooses to release. Failing to incorporate the concerns of particular groups due to a focus on larger issues can lead to individuals feeling as though their “experiences are obscured and rendered unworthy of note.”⁷¹ This is further reason for a company to disaggregate the demographic data by gender, race/ethnicity, and age across the company’s different departments to ensure a significant concern held by a small group is not being overlooked.

3. Hiring a Diversity Executive can facilitate the successful implementation of a DEIA program.

As noted above, there was an increase in the number of DEIA-centric positions, including Chief Diversity and Inclusion Officer positions in 2020 due to the increased demand for social equity of underrepresented communities in the workforce.⁷² However, there has been a decrease in DEIA-related postings in the last two years and DEIA professionals lost their jobs one-third more often than market averages.⁷³ This scaling back may have different causes, including a company’s financial condition. Undoubtedly one of the causes for some of the loss in DEIA-related positions is due to the backlash to racial equity and the widescale campaign against DEIA by ideological groups and allied politicians.

A successful Diversity Executive increases employees’ trust in the fairness, transparency, and equity of management and the genuineness of its commitment to delivering a company culture that protects and promotes everyone’s wellness.⁷⁴ In addition, a DEIA officer or team is beneficial because they can bring a DEIA competency to management decisions without making immediate changes to the company’s executive team. Changes to the executive team require substantial due diligence and vetting; therefore, a DEIA team allows for the company to have immediate diversity

⁶⁹ Ajuolachi Nwoga, *Breaking the Invisible Wall: Barriers to DEI Program Implementation*, 11 Open J. of Bus. & Mgmt., 1787-1815 (July 2023).

⁷⁰ *Id.*

⁷¹ Roberts & Thomas-Hunt, *supra* note 62.

⁷² Green, *supra* note 13 (noting that 94% of the newest jobs were filled by people of color; however, “higher-level positions” (including executives, managers, and professionals) were primarily filled by white men).

⁷³ Reyhan Ayas et al., *Cutting Costs at the Expense of Diversity*, RevelioLabs (Feb. 7, 2023) <https://www.reveliolabs.com/news/social/cutting-costs-at-the-expense-of-diversity/> (noting one in three DEI professionals lost their roles over a one-year period ending in December 2022. Over that period, the study added, non-DEI workers experienced a relatively lower attrition rate of 21%.)

⁷⁴ Forbes, *15 Key Benefits Of DEI To Communicate With Team Members* (May 19, 2021), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2021/05/19/15-key-benefits-of-dei-to-communicate-with-team-members/?sh=2ca314a8195c>.

in perspectives in DEIA decisions which can lead to improvements in decision-making, productivity, and innovation.

C. Workforce Development

With respect to the “Workforce Development” Principle, which lists measures companies can take to diversify and develop their workforces, we provide support for equitable and inclusive recruitment efforts as well as post-recruitment workforce development initiatives.

1. Equitable recruitment measures help to ensure the best talent is retained for the job.

Recruiting and hiring practices are a fundamental part of building a diverse pipeline, but only part of the equation. Equity in workforce development starts at the ground floor—recruitment. This begins before individuals from diverse backgrounds even enter the workforce. Businesses should be committed to investing in long-term talent procurement strategies, including recruitment and support of diverse talent from K-12 schools, universities, and colleges. In practice, this may include strategic relationships with Historically Black Colleges and Universities (“HBCUs”), Hispanic Serving Institutions (“HSIs”), and other organizations.⁷⁵ Building a racially diverse talent pool can include targeted recruiting through attendance at events likely to attract racially diverse talent and partnerships with diverse professional organizations. Enactment of similar strategies can support equity in the ultimate recruitment of these diverse students.

Targeted recruitment to diversify the candidate pool and the removal of barriers to entry are examples of DEIA measures that are lawful. Such measures function only to bring more candidates into consideration and do not result in worse treatment for other candidates. Courts that have been asked to weigh in on the legality of expanded recruitment efforts have found that such measures are lawful. For example, in *White v. Oakland Cnty. Coll.*, a white former paraprofessional sued a community college for discrimination under Title VII.⁷⁶ The plaintiff attempted to support her claim with a report that was submitted to the school’s board which stated an aim of “working to remove barriers and recruit a diverse applicant pool for positions; [and] maintain a commitment to diversity and inclusion through staff hiring and retention.”⁷⁷ The district court granted summary judgment for the defendant, finding the report did not evince discriminatory animus because “[t]he report on its face did not contain any action items or directives concerning [] hiring practices,” and there was no evidence that the employment decision makers knew about the report or “actually considered race” in selecting a different candidate over the plaintiff.⁷⁸

Additionally, in *McCormick v. Gasper*, the Sixth Circuit affirmed summary judgment for the employer where the plaintiff, a white former employee, had claimed discrimination based on the employer’s diversity initiative, which had “recruiting targets” of 25% minority employment

⁷⁵ Rod Adams, *Building a diverse workforce starts with mentorship and sponsorship*, Fortune (July 12, 2021), <https://fortune.com/2021/07/12/workplace-diversity-black-latinx-mentorship-sponsorship-pwc/>.

⁷⁶ *White v. Oakland Cnty. Coll.*, 2020 WL 5908319 (E.D. Mich. Oct. 6, 2020).

⁷⁷ *Id.* at *5.

⁷⁸ *Id.*

and 20% female employment.⁷⁹ The Sixth Circuit rejected the plaintiff’s argument that the initiative was facially discriminatory or direct evidence of discrimination where it “merely indicates a desire to increase the diversity of the applicant pool, and does not commit to or require the hiring of more diverse applicants.”⁸⁰ Thus, recruitment initiatives do not run afoul of antidiscrimination protections if they simply assist employers in considering a broader range of diverse candidates.

Once at the hiring stage, businesses must recognize the importance of accurate job selection criteria and descriptions that reflect essential job functions through the use of inclusive language. Employees tasked with drafting and publishing job descriptions should be trained and educated about removing biased language. In the same vein, businesses should consider explicitly stating the organization’s commitment to diversity and inclusion within job descriptions.⁸¹ Similarly, employees charged with the review of job application materials should be trained in the impact that unconscious biases can have in the evaluation of resumes. For example, studies have shown that “hiring officials are significantly less likely to call back applicants with Black, Hispanic and Asian-sounding names than applicants with white-sounding names—even when they have comparable resumes.”⁸²

The selection and training of interviewers used in the hiring process is also a crucial component of ensuring equity in recruitment. Businesses should be aware of interviewers’ tendency to rely on the “soft stuff,” meaning their tendency to view more favorably a candidate who looks, talks, or acts like them.⁸³ Training for interviewers should include building awareness of why workplace diversity benefits the business and how to counteract personal biases in the interview process. Businesses can further support equity in the interviewing process by using standardized interview questions and ensuring that there are multiple interviewers used in the process so that a candidate’s potential success is evaluated from different perspectives.

2. Lawful, post-recruitment DEIA activities are effective measures for improving diverse employee retention and advancement.

While equity in the recruitment process has proven essential to promoting business diversity, equity in post-recruitment activities has proven to be just as valuable. As written, the only mention of post-recruitment activities within the workforce development Principle comes from the last line, which fails to provide clear examples of *how* businesses can equip workers from underserved communities with the necessary skills for advancement. The Department should add

⁷⁹ *McCormick v. Gasper*, 2022 WL 16586621 (6th Cir. Nov. 1, 2022).

⁸⁰ *Id.* at *4.

⁸¹ Becca Carnahan, *6 Best Practices for Creating an Inclusive and Equitable Interview Process*, Harv. Bus. Sch. (May 25, 2023), <https://www.hbs.edu/recruiting/insights-and-advice/blog/post/6-best-practices-to-creating-inclusive-and-equitable-interview-processes>; D.C. Office of Human Rights, *OHR/ORE Guide to Inclusive Language: Race and Ethnicity* (Apr. 2022), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/page_content/attachments/OHR_ILG_RaceEthnicity_FINAL%20%281%29.pdf

⁸² U.S. Equal Emp. Opportunity Comm’n, *Hiring Initiative to Reimagine Equity (HIRE) Fact Sheet*, <https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire-fact-sheet>.

⁸³ Carnahan, *supra* n. 83.

mentorship, performance recognition, trainings, and performance review evaluations as strategies for businesses seeking practical ways to implement diversity in the post-recruitment phase.

Training. DEIA training plays a crucial role in raising awareness of DEIA issues and fostering respect and collaboration within workplaces. While these trainings often concentrate on assisting business leaders in cultivating greater equity and healing in themselves and their surroundings, it is essential to recognize the valuable skills that DEIA training can instill in all employees. A study in 2016 discovered that interventions aimed at reducing implicit racial preferences⁸⁴ yielded immediate positive results but lost efficacy within hours or days.⁸⁵ Similarly, a study conducted in 2023 observed that, on the whole, DEI antiracism trainings resulted in significant short-term shifts in awareness toward cultural differences and the perceived importance of acknowledging biases. Some of the study’s findings indicated that participants exhibited more open attitudes toward racial issues, privilege, and acquired skills for collaborating in culturally and racially diverse teams.⁸⁶

Based on this research, one can infer that a brief, one-time approach to DEI training may diminish its long-term effectiveness in the workplace.⁸⁷ This underscores the idea that the success of DEIA trainings depends on a business’s sustained commitment to the very values outlined in the Workplace Development Principle. Suggestions to address this short-term efficacy challenge include implementing a tailored and multifaceted approach to trainings, combining DEIA trainings with a mentorship program, and using long-term impact surveys to assess a company’s DEIA initiatives.⁸⁸

Mentorship. Formal workplace mentorship is a key, and lawful, strategy for businesses to ensure the retention and promotion of individuals from diverse backgrounds. Members of diverse groups, such as people of color and women, are often the first to seek out mentorship programs,

⁸⁴ Implicit bias—entrenched attitudes or stereotypes that affect an individual’s understanding, actions, and decisions in an unconscious manner—is the product of decades of social conditioning. See Kirwan Inst., *Understanding Implicit Bias*, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>, (last visited Jan. 30, 2024). In the workplace, implicit bias among managers and leaders contributes to negative work environments and employment outcomes for underrepresented groups. Implicit biases will cause leaders to be less likely to hire, promote, and retain employees from diverse backgrounds which diminishes the quality of the workplace and the work organizations engage in beyond the workplace. See Shaan Madhavji, *Leadership Bias: The Hidden Enemy of Successful Leaders*, EHL Insights (Sept. 27, 2023), <https://hospitalityinsights.ehl.edu/leadership-bias>. This often shows up as “gatekeeper bias.” See Brenda M. Bauges & Tenielle Fordyce-Ruff, *Avoiding Gatekeeper Bias in Hiring Decisions*, 62 *Advoc.* 39 (2019) (“Gatekeeper bias—allowing the perceived bias of co-workers to influence employment decisions—may occur even when the gatekeeper herself believes in the importance of diversity. In fact, gatekeepers may not even be aware that these considerations are factoring into the hiring, or other employment, decision.”).

⁸⁵ Calvin Lai et al., *Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time*, 145 *J. of Experimental Psych.: General* 1001–1016 (2016), <https://psycnet.apa.org/record/2016-29854-001>.

⁸⁶ Monica L Wang et al., *A Systematic Review of Diversity, Equity, and Inclusion and Antiracism Training Studies: Findings and Future Directions*, *Translational Behav. Med.* (Oct. 19, 2023), <https://academic.oup.com/tbm/advance-article/doi/10.1093/tbm/ibad061/7324745>.

⁸⁷ *Id.*

⁸⁸ Janice Gassam Asare, *Have We Been Wrongfully Vilifying DEI Training?*, *Forbes* (Oct. 7, 2022), <https://www.forbes.com/sites/janicegassam/2022/10/07/have-we-been-wrongfully-vilifying-dei-training/?sh=3ca404de3b35>.

which underscores the need for these valuable structures.⁸⁹ The benefits to workplace culture that come from a sense of community cannot be overstated. Forging these connections between employees from diverse backgrounds and business leadership provides a two-way dialogue that not only contributes to a more inclusive workplace culture, but also increases talent, innovation, and revenue.⁹⁰ Companies across industries have successfully employed different methods to implement mentorship programs that have worked to foster the professional development of individuals from underrepresented backgrounds.

It is imperative to emphasize, however, the importance of *formal* and *intentional* mentorship programs. Reliance on informal mentorship methods or networks may actually operate as a disadvantage to individuals from diverse backgrounds.⁹¹ As a general matter, people are often drawn to engage others who mirror themselves in looks, backgrounds, and actions.⁹² In informal relationships, this can leave employees disengaged and excluded where they are not represented in business leadership. Instead, formal and intentional mentorship programs should be built with inclusion in mind and should involve employees with diverse identities in the design and launch of the program itself. This includes the formulation of goals for the program, training for mentors, and sharing of discussion topics and resources to mentor-mentee pairs in order to achieve objectives related to retention and promotion.

Performance Recognition and Reviews. DEIA efforts to mitigate harm in the evaluation process are critical to the retention of a diverse workforce. Recent studies show that workers leave jobs due to not feeling a sense of belonging at work and because they feel undervalued by their managers.⁹³ As a recent report by McKinsey & Co. put it, “[e]mployees are looking for jobs with better, stronger career trajectories. They desire both recognition and development.”⁹⁴ A recent study showed that equitable evaluation processes yield a 24% increase in workforce performance, a 50% increase in employee perceptions of fairness and accuracy, and a 14% increase in employee

⁸⁹ Matthew Reeves, *Four Ways Mentorship Programs Can Meaningfully Promote Workplace Diversity And Inclusion*, Forbes (Dec. 2, 2022), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2022/12/02/four-ways-mentorship-programs-can-meaningfully-promote-workplace-diversity-and-inclusion/?sh=65abee2598db..>

⁹⁰ See Ryan Carruthers, *Start a diversity and inclusion mentorship program: A guide*, Together Mentoring Software (Nov. 24, 2021), <https://www.togetherplatform.com/blog/diversity-mentoring-programs>; see also, Karen Jaw-Madson & JP Mangalindan, *Mentoring for a Diverse and Inclusive Workplace*, Chronus (2021), <https://get.chronus.com/rs/910-YDI-216/images/Chronus-Mentoring-for-Diverse-and-Inclusive-Workplace-whitepaper-FINAL.pdf>.

⁹¹ Frank Dobbin, *Why Diversity Programs Fail and What Works Better*, Harv. Bus. Rev. (July 1, 2016), <https://hbr.org/2016/07/why-diversity-programs-fail>.

⁹² Ruchika Tulshyan, *Mentoring Programs Won't Forward DEI Without Intention*, Ass'n for Talent Dev. (Mar. 29, 2021), <https://www.td.org/atd-blog/mentoring-programs-wont-forward-dei-without-intention>

⁹³ Rosanna Campbell, *How to Make Performance Appraisals More Equitable*, Lattice (May 17, 2022), <https://lattice.com/library/how-to-make-performance-appraisals-more-equitable>.

⁹⁴ Aaron De Smet et. al., *'Great Attrition' or 'Great Attraction'? The Choice is Yours*, McKinsey & Co. (Sept. 8, 2021), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/great-attrition-or-great-attraction-the-choice-is-yours>.

engagement.⁹⁵ Thus, employees desire and deserve constructive feedback without it being influenced by an evaluator's biases.

A study by Lattice shows that performance evaluations are most affected by gender, racial, and proximity biases.⁹⁶ As an example of each, “[r]esearchers at the Stanford VMware Women’s Leadership Lab found that women are far more likely than their male colleagues to receive performance appraisals that are shorter and contain ‘vague feedback,’ less praise and less actionable guidance.”⁹⁷ Studies show that non-white workers are more often subject to the “prove it again” mentality, have their personalities mentioned in their reviews, and have at least one mistake brought up in an evaluation compared to their white peers.⁹⁸

Companies are able to subvert these biases by improving their evaluation processes. First, they can improve the quality of the questions asked during the self-evaluation process that are values-based, specific, and focused on job performance. Second, they can train their managers regarding implicit biases such that they can identify and correct when biases show up in the evaluation process. Third, companies can provide regular, ongoing feedback to their workers instead of waiting to off-load months’ worth or a year’s worth of feedback into one evaluation.⁹⁹ This allows workers the opportunity to grow and demonstrate their growth over a period of time.

D. Human Resources

The Human Resources Principle focuses on measures to promote equitable promotion practices and policies to improve employee retention, including employee resource groups, flexible work scheduling and employee benefits. All the measures listed under this Principle are lawful because they do not treat employees differently and do not negatively affect certain employees based on their race or other protected characteristics. In addition to the listed human resources policies in the BDP, we strongly urge the Department to include pay equity and the provision of employee benefits as examples of lawful racial equity measures, for the reasons explained below.

1. Wage disparities, including lack of employee benefits, are a significant barrier to remedying the racial wealth gap.

In 2020, conversations of racial equity and equality were at the forefront of political debate; in response to the attention given to racial equity in the United States, the representation of marginalized communities in the workforce increased.¹⁰⁰ However, a majority of these workers

⁹⁵ Gartner, *Performance Management that Delivers* (2019), https://emt.gartnerweb.com/ngw/globalassets/en/human-resources/documents/trends/performance-management-exec-summary.pdf?_gl=1*_1pulpgg*_ga*NDM3NTU2NjIwLjE3MDQ0NDYyOTE.*_ga_R1W5CE5FEV*MTcwNjU3NjAwOC4zLjEuMTcwNjU3NjIwNi4xOC4wLjA.

⁹⁶ “Proximity bias is a mental shortcut that allows managers to make decisions about performance, promotions and hiring based on familiarity rather than objective criteria. The result is that decisions are based on biases rather than knowledge or data.” Arlene S. Hirsch, *Preventing Proximity Bias in a Hybrid Workplace*, SHRM (Mar. 22, 2022), <https://www.shrm.org/topics-tools/news/employee-relations/preventing-proximity-bias-hybrid-workplace>.

⁹⁷ Campbell, *supra* note 95.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Green, *supra* note 13.

filled non-managerial, service positions and were still subject to lower wages than their white counterparts.¹⁰¹ As a result, many occupations remain racially segregated, resulting in fewer opportunities and lower pay for Black workers and other workers of color.¹⁰² Black workers are almost twice as likely to be in service-worker or laborer jobs, and almost 25% less likely to be in managerial or professional jobs in the private sector.¹⁰³

To date, most service industry jobs pay at or marginally above the federal minimum wage of \$7.25 per hour.¹⁰⁴ However, the federal minimum wage, which has not been increased in nearly 15 years, was already insufficient to raise a family of two above the poverty line in 2013.¹⁰⁵ Some 47% of Black workers and 46% of Hispanic workers earn less than \$15 per hour compared to 26% of white workers.¹⁰⁶ While 24% of men earn less than \$15, and 40% of women do, half of working women of color earn less than \$15. As of 2022, in 25 states, at least 60% of working women of color earned under \$15 per hour.¹⁰⁷

Pay equity is a persistent, structural form of discrimination in pay that companies should be encouraged to address. “Pay equity” is a legal concept that requires employees completing similar work to receive equal pay regardless of their race, gender, ethnicity, age, or religion.¹⁰⁸ Despite being a legal requirement, research shows that organizations still pay women and people of color less than white men for the same work — and this earnings gap compounds over time. It’s

¹⁰¹ *Id.* (noting that 94% of the newest jobs were filled by people of color; however, “higher-level positions” (including executives, managers, and professionals) were primarily filled by white men).

¹⁰² Valerie Wilson, *Racism and the Economy*, Econ. Pol’y Inst.: Working Econ. Blog (Nov. 21, 2020, 8:25 AM), <https://www.epi.org/blog/racism-and-the-economy-fed/>.

¹⁰³ Bryan Hancock et al., *Race in the Workplace: The Black Experience in the US Private Sector*, McKinsey & Co. (Feb. 21, 2021), https://www.mckinsey.com/featuredinsights/diversity-and-inclusion/race-in-the-workplace-the-black-experience-in-the-us-private-sector#. For example, in the food service industry, Black workers are overrepresented in lower-paid positions (such as bussers, dishwashers, and porters) and underrepresented in higher-paying positions (such as supervisors, bartenders, and executive chefs). Rest. Opportunities Ctrs. United, *Ending Jim Crow in America’s Restaurants: Racial and Gender Occupational Segregation in the Restaurant Industry*, 1-3, 11 (2015).

¹⁰⁴ Bureau of Lab. Stat., *Characteristics of minimum wage workers, 2022* (Aug. 2023), <https://www.bls.gov/opub/reports/minimum-wage/2022/home.htm> (“Among major occupational groups, service occupations had the highest percentage of hourly paid workers earning at or below the federal minimum wage, at 4 percent. Nearly 3 out of 4 workers earning the minimum wage or less in 2022 were employed in service occupations, mostly in food preparation and serving-related jobs”).

¹⁰⁵ David Cooper, *The Minimum Wage Used to be Enough to Keep Workers Out of Poverty—It’s Not Anymore: Raising it to \$10.10 Would Lift a Family of Three Above the Poverty Line*, Econ. Pol’y Inst. (Dec. 4, 2013), <https://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising/>.

¹⁰⁶ Kaitlyn Henderson, *The crisis of low wages in the US*, Oxfam (Mar. 21, 2022), <https://www.oxfamamerica.org/explore/research-publications/the-crisis-of-low-wages-in-the-us/>.

¹⁰⁷ *Id.*

¹⁰⁸ See The Equal Pay Act of 1963, 29 U.S.C. Pub. L. 88-38 § 206 (d)(prohibits pay discrimination on the basis of sex); Title VII of the Civil Rights Act of 1964, 42 U.S.C. Pub. L. 88-352 § 2000e (prohibits pay discrimination on the basis of race, ethnicity, or religion); the Age Discrimination in Employment Act of 1967, 29 U.S.C. Pub. L. 90-202 § 621 (prohibits pay discrimination on the basis of age) and Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. Pub. L. 93-112 § 501 (prohibits pay discrimination on the basis of disability).

estimated that Black and Latina women experience lifetime earnings losses of up to \$1 million or more over a 40-year career due to discrimination in pay.¹⁰⁹

Beyond dismally low pay, Black and Brown workers are disproportionately not provided with basic employment benefits such as paid leave or more equitable scheduling. Access to paid leave is “highly skewed toward adults with higher incomes, with college degrees, and who work full time.”¹¹⁰ And Hispanic/Latinx and Black workers are less likely to have access to paid leave than white workers (58%, 67%, and 72%, respectively).¹¹¹ Without paid leave, Black workers are 83% more likely and Latino/Latina workers are 66% more likely than white workers to be unable to take leave when needed.¹¹² In addition, as reported in 2019, more than half of retail and food service workers, who are disproportionately Black and Brown workers of color, got less than a week’s notice of their schedule,¹¹³ causing havoc in the ability of many low-wage workers to manage the realities of daily life.

Institutional racism and discrimination, including lower pay and fewer employment benefits for people of color and discriminatory hiring and promotion decisions, have prevented families of color from building the generational wealth that white families have been able to build and pass on to their children. Examining household net worth by race, the remnants of generational discrimination and ongoing inequality can still be seen. In 2021, Asian households had a median net worth of \$320,900 and white households had a median net worth around of \$250,400.¹¹⁴ When compared to the median net worth of Black and Hispanic households, the difference is stunning, with net worths of \$27,100 and \$48,700, respectively.¹¹⁵ Today, about 7 million Black people in the U.S. live in poverty, or approximately 17%, more than double the rate of non-Hispanic white people.¹¹⁶

2. Ensuring pay equity and providing employment benefits is foundational to achieving racial equality.

One of the most effective ways to address racial and economic inequality and begin to reverse the generational racial wealth gap is to ensure that workers are paid appropriately without regard to their race or other protected characteristic and can rely on bedrock employment benefits

¹⁰⁹ Amii Barnard-Bahn, *How to Identify - and Fix - Pay Inequality at Your Company*, Har. Bus. Rev. (Nov. 3, 2020), <https://hbr.org/2020/11/how-to-identify-and-fix-pay-inequality-at-your-company>

¹¹⁰ Chantel Boyens et al., *Access to Paid Leave Is Lowest among Workers with the Greatest Needs*, Urb. Inst. (July 2022), <https://www.urban.org/sites/default/files/2022-07/Access%20to%20Paid%20Leave%20Is%20Lowest%20among%20Workers%20with%20the%20Greatest%20Needs.pdf>.

¹¹¹ *Id.*

¹¹² Jessica Mason, Ph.D., et al., *Called to Care: A Racially Just Recovery Demands Paid Family and Medical Leave*, Nat’l P’ship for Women and Families, 7 (Mar. 2021), <https://nationalpartnership.org/wp-content/uploads/2023/02/called-to-care-a-racially-just-recovery-demands-paid-family-and-medical-leave.pdf>.

¹¹³ Katie Bach & Zeynep Ton, *Why So Many CEOs Don’t Realize They’ve Got a Bad Jobs Problem*, HARV. BUS. REV. (Nov. 15, 2019), <https://hbr.org/2019/11/why-so-many-ceos-dont-realize-theyve-got-a-bad-jobs-problem>.

¹¹⁴ Pew Rsch. Ctr., *Wealth Surged in the Pandemic, but Debt Endures for Poorer Black and Hispanic Families* (Dec. 4, 2023), <https://www.pewresearch.org/race-ethnicity/2023/12/04/wealth-gaps-across-racial-and-ethnic-groups/>.

¹¹⁵ *Id.*

¹¹⁶ U.S. Census Bureau, *Poverty in the United States: 2022* (Sept. 12, 2023), <https://www.census.gov/library/publications/2023/demo/p60-280.html>

such as paid leave policies and health insurance. Paid leave helps to alleviate the economic strain that often accompanies unexpected medical events and pregnancy when families do not have accumulated wealth, such as savings, home equity, and liquid assets in checking accounts, to use during such times.

Companies can implement strategies to redesign their benefits programs, through careful planning and evaluating workplace data—by many of the metrics discussed above—through a racial and gender equity lens. This will help them ask better questions of their workforce in order to better understand their needs and meet them through a benefits package that will not only improve their quality of life outside of work but also improve their productivity at work. In addition, companies should conduct regular pay equity analyses to reduce inequities across race and gender.

Empirical evidence suggests that workers in America consider level of pay, company benefits, working conditions (including predictability of hours and job security), and company culture as the primary qualities of a good job.¹¹⁷ Some 63% of workers are willing to leave a job to take a new job with less pay but better benefits.¹¹⁸ Pay equity can also improve a company's financial health, as it ensures that employers are not subject to legal disputes and penalties, makes employees feel valued and more motivated to work, and reduces employee turnover.

E. Community Investment

Under the “Community Investment” Principle, the Department identifies measures businesses can take to improve economic vitality and increase opportunities in under-resourced and underserved communities. We agree that the measures listed in the BDP are important and effective tools for generating and expanding opportunity and wealth. We encourage the Department to add impact investing and diversifying asset managers as impactful and lawful tools to this Principle.

1. Companies advance racial equity through impact investing.

Companies led by people of color are underinvested compared to companies led by white people. For example, a 2021 press release from the Federal Reserve showed that Black-owned businesses are twice as likely to be turned down for loans as white-owned businesses.¹¹⁹ Moreover, only 25% of Latino firms with a low credit risk received all of the non-emergency loans they asked for while 48% of white-owned businesses received all of the non-emergency financing they sought.¹²⁰ Because very little venture capital is given to Black and Brown founders,¹²¹ and only

¹¹⁷ William J. Congdon et al., *Understanding Good Jobs: A Review of Definitions and Evidence*, Urb. Inst. (July 23, 2020), <https://www.urban.org/research/publication/understanding-good-jobs-review-definitions-and-evidence>.

¹¹⁸ Gage Stille et al., *Make Employee Benefits Part of Your DEI Strategy*, Segal (Aug. 31, 2022), <https://www.segalco.com/consulting-insights/make-employee-benefits-part-of-your-dei-strategy>.

¹¹⁹ Press Release, Fed. Rsr. Bank of N.Y., *Credit Survey Finds White-Owned Small Businesses Were Twice as Likely to be Fully Approved for Financing as Black- and Latino-Owned Firms* (Apr. 15, 2021), https://www.newyorkfed.org/newsevents/news/regional_outreach/2021/20210415.

¹²⁰ *Id.*

¹²¹ Dominic-Madori Davis, *Black founders still raised just 1% of all VC funds in 2022*, TechCrunch (Jan. 6, 2023) <https://techcrunch.com/2023/01/06/black-founders-still-raised-just-1-of-all-vc-funds-in-2022/>.

2% of \$330 billion in venture capital was raised by women, all communities are not equally benefiting from economic development.¹²² To put a finer point, Black founders are rejected for venture capital funding at a rate three times higher than white founders.¹²³ Black women founders, the fastest growing group of entrepreneurs,¹²⁴ receive less than 0.3% of all venture capital funding despite the fact that Black people comprise 14% of the U.S. population.¹²⁵

To help remedy this economic injustice, many companies' charitable arms along with other private philanthropic foundations are strategically investing in Black- and Brown-owned companies through funds specifically dedicated to advancing racial equity. Private philanthropy aimed at remedying discrimination is permissible where it is not contractual in nature.¹²⁶ While these efforts are creating meaningful change, to achieve the greatest impact, the Department should encourage the private sector to consider who is shaping strategy, who is receiving the capital, and who will be affected when making decisions about the investment of its assets in financial securities.

There are a few ways companies can invest in communities of color and diverse founders: (1) recruit and hire qualified diverse fund managers; (2) expand their pool of investment options by looking into other regions that track with higher populations of Black and Brown communities; and (3) invest in companies that are solving problems specific to these same communities.

a. Increasing the diversity of asset managers drives investments in BIPOC communities.

The investment industry plays a critical role in identifying and funding innovative startups that create jobs and economic value. Deloitte reported that 89% of firms do not have any Black investment partners (93% in 2020 and 2018).¹²⁷ Initiatives to diversify fund managers help to eliminate barriers to entry in investment management, while also creating opportunities for improved risk management and greater overall success.¹²⁸ Research has shown that funds managed

¹²² William Huston, *Funding Across the BIPOC Investment Community Whitepaper*, Bay Street Capital Holdings, <https://www.baystreetcapitalholdings.com/funding-across-the-bipoc-investment-community-whitepaper/> (Last accessed Feb. 2, 2024).

¹²³ J.P. Morgan, *Black women are the fastest growing group of entrepreneurs. But the job isn't easy* (Oct. 12, 2021), <https://www.jpmorgan.com/insights/business/business-planning/blackwomen-are-the-fastest-growing-group-of-entrepreneurs-but-the-job-isnt-easy>.

¹²⁴ *Id.*

¹²⁵ Forbes, *Investing in The Future: How Supporting Black Women-Owned Businesses and Entrepreneurs Benefits Us All* (Apr. 27, 2023), <https://www.forbes.com/sites/forbeseq/2023/04/27/investing-in-the-futurehow-supporting-black-women-owned-businesses-and-entrepreneurs-benefits-usall/?sh=57d757734ac2>.

¹²⁶ See *Doe v. Kamehameha Schs.*, 470 F.3d 827, 889 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) (noting absence of any "case where section 1981 has been applied to a charity").

¹²⁷ Press Release, Nat'l Venture Cap. Ass'n, *Diversity, Equity and Inclusion Efforts Experience Modest Gains Among Venture Capital Firms, According to VC Human Capital Survey* (Apr. 18, 2023), https://nvca.org/press_releases/diversity-equity-and-inclusion-efforts-experience-modest-gains-among-venture-capital-firms-according-to-vc-human-capital-survey/.

¹²⁸ Yan Lu et al., *Diverse Hedge Funds*, 37 The Rev. of Fin. Stud. 639 (Aug. 12, 2023), <https://academic.oup.com/rfs/article/37/2/639/7241702>.

by diverse fund managers are associated with stronger market performance.¹²⁹ This is because individuals from diverse backgrounds can identify potential deals that present an opportunity for a company to expand its market reach.¹³⁰

b. Regional expansion will diversify an asset management portfolio.

In the past 10 years, 75% of startup venture capital funding has been concentrated in three states: California (Silicon Valley), Massachusetts (Boston), and New York.¹³¹ That leaves only 25% of venture capital that is dispersed among the remaining 47 states. Regions like the Midwest are increasingly becoming popular for start-up companies,¹³² while at the same time, many cities in the Midwest, and throughout the country have thriving Black communities and communities of color.¹³³ But this goes beyond investing in individual companies or founders—this reallocation of funding could serve as a needed boon to rural communities that are overwhelmingly Black and are also being negatively impacted by over-industrialization.¹³⁴ In short, companies and philanthropic arms looking to invest in Black businesses and other POC-owned businesses should follow population trends.

c. Identifying solution-based products will identify diverse investment options.

Perhaps the easiest way to invest in Black communities and communities of color is by “allocating capital to funds that invest in companies providing solutions to alleviate social disparities and help disadvantaged communities. This includes identifying products and services creating positive outcomes for communities of color in sectors such as health care, education, energy, affordable housing, and more.”¹³⁵ By identifying pressing issues that affect those communities, companies won’t be too far behind pressure-testing ideas in order to find workable yet profitable solutions to those problems. That is where investment will meet social responsibility.

IV. Measuring the Impact of Business DEIA Efforts (Question No. 10)

¹²⁹ Bhakti Mirchandani, *The Power Of Diversity, Equity, And Inclusion To Improve Risk-Adjusted Returns In Private Equity*, Forbes (Apr. 28, 2022), <https://www.forbes.com/sites/bhaktimirchandani/2022/04/28/the-power-of-diversity-equity-and-inclusion-to-improve-risk-adjusted-returns-in-private-equity/?sh=6f99b1e83fb7>.

¹³⁰ AON, *Beyond Good Intentions: Why Diversity is Vital in Investment Decisions* (visited Feb. 2, 2024), <https://www.aon.com/unitedkingdom/insights/why-diversity-is-vital-in-investment-decisions.jsp>.

¹³¹ Steve Case, *Rise of the Rest: McKinsey Author Talks*, McKinsey & Co. (Sept. 22, 2022), <https://www.mckinsey.com/featured-insights/mckinsey-on-books/author-talks-steve-case-identifies-the-us-cities-driving-new-innovation-and-its-not-where-you-think>.

¹³² Ting Gootee, *Indianapolis Tops Global 15 VC Ecosystem by Growth*, Techpoint (Dec. 5, 2023), <https://techpoint.org/indianapolis-tops-global-15-vc-ecosystem-by-growth/>.

¹³³ Andre M. Perry & Manann Donoghoe, *Recognizing Black and Latino-majority cities is the first step to finding a real world Wakanda*, Brookings (Jan. 26, 2023), <https://www.brookings.edu/articles/recognizing-black-and-latino-majority-cities-is-the-first-step-to-finding-a-real-world-wakanda/>.

¹³⁴ Mike Kerlin et al., *Rural economic development strategies for local leaders*, McKinsey (Mar. 30, 2022), <https://www.mckinsey.com/industries/public-sector/our-insights/rural-rising-economic-development-strategies-for-americas-heartland>.

¹³⁵ Morgan Stanley, *Racial Equity Investing: Your Portfolio Guide* (Aug. 23, 2023), <https://www.morganstanley.com/articles/racial-equity-investing-guide>.

Companies can and should measure the impacts of their DEIA efforts. In addition to the recommendations discussed in the sections above, companies can track the resources being allocated to DEIA efforts; the number and types of affinity and employee resource groups (“ERGs”) open to employees; the number of discrimination complaints and how such complaints were resolved and on what timeline; the types of DEIA trainings available and information about who attends and for how long; accountability measures by senior leadership; DEIA achievements as measured by third-party consultants, award programs and the like; and the employee experience overall. Much of this information may need to be collected through focus groups, interviews, qualitative surveys, stay interviews, and exit interviews.

In addition, the International Organization for Standardization (“ISO”) has published a diversity and inclusion standard, the ISO 30415, outlining prerequisites, accountability, responsibilities, suggested actions, and potential outcomes for DEIA efforts.¹³⁶ Organizations can also record their DEIA benchmarks and goals in a scorecard catered to their own needs. Reviewing DEIA goals and metrics periodically and sharing the data across the organization and with external stakeholders will allow for better insight into whether an organization or industry is moving in the right direction.

However, it is important to emphasize that the purpose of this type of data gathering is not simply to assess the effectiveness of DEIA programs. Collection and analysis of data regarding company operations is essential to the fulfillment of a more fundamental, overarching legal and moral responsibility: the duty to prevent and correct race and gender discrimination in all aspects of company operations. This duty arises from a variety of laws and regulations, and it cannot be fulfilled without robust data gathering. Without data regarding the demographic effects of hiring practices, contracting practices, and other operational decisions, a business can neither identify possible instances of intentional discrimination nor identify facially-neutral actions that have a disparate impact. Without this data, business practices may continue to discriminate against protected classes.

V. The Role of Government in Advancing Business DEIA Efforts (Question No.11)

Government should promote Business Diversity in the private sector in many ways, including:

- (1) Clarifying the legality of DEIA efforts.** We hope that the Department’s BDP will be a strong step in this direction but call upon the Administration to take a comprehensive government-wide approach to supporting racial equity and DEIA initiatives across sectors.
- (2) Emphasizing the legal duty of private companies to avoid racial discrimination.** As noted above, private companies are under a legal duty to prohibit racial discrimination in their operations. Federal and state government

¹³⁶ See ISO 30415:2021(en) *Human resource management — Diversity and inclusion*, ISO, <https://www.iso.org/obp/ui/en/#iso:std:iso:30415:ed-1:v1:en> (last visited Feb. 2, 2023).

should continue to devote resources to enforcement of these laws, building on effective approaches to identify, challenge, and deter systemic racial discrimination in the private sector. Those approaches include proactive monitoring through robust data collection requirements such as the Equal Employment Opportunity Commission’s EEO-1 reporting requirements and the Department of Labor’s strong enforcement of Executive Order 11246.

- (3) **Providing tools and guidance.** Private companies would benefit from strategies to develop effective and legally sound DEIA programs and antidiscrimination efforts. In this area, we hope the BDP will make a major contribution to the field. The EEOC and the Department of Labor’s Office of Federal Contract Compliance Programs can enhance current efforts to assist private businesses in strengthening their antidiscrimination approaches in employment and other operations.
- (4) **Providing a model for strong antidiscrimination efforts.** Federal government operations, and oversight and control over federally funded projects, should reinforce similar efforts by large private companies that do not receive federal funding. The federal government is under an affirmative constitutional duty to avoid racial discrimination in its actions; this includes a duty to avoid “passive participation” in private discrimination on federally funded projects.¹³⁷

While the federal government has at many points fallen short of fulfilling this mandate, in many cases it has developed successful approaches that the federal government can expand, and that can serve as a reinforcing model for enhanced private efforts. These include explicit antidiscrimination requirements in all contracts (including robust data-gathering requirements);¹³⁸ evaluation for disparate impacts of race-neutral actions;¹³⁹ thorough, multi-pronged approaches toward diversifying the pool of federal contractors (including disadvantaged businesses); proactive efforts to direct economic opportunities to disadvantaged communities;¹⁴⁰ and designation of certain large, prominent, publicly-funded

¹³⁷ *Norwood v. Harrison*, 413 U.S. 455, 492 (1972); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989) (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”).

¹³⁸ For example, the Department’s Title VI regulations at 15 C.F.R. § 8.5 requires the Department’s funding agreements to include a nondiscrimination clause, and § 8.5(b)(4)(iii) requires its funding recipients “to obtain and to furnish to the responsible Department official such information as he may require for the supervision or securing” compliance with the nondiscrimination clause. Executive Order 11246 also requires the inclusion of an antidiscrimination clause in federal contracts, requiring contractors to avoid discriminating against employees and job applicants. Executive Order 11246, § 202(1), (2).

¹³⁹ *See, e.g.*, 15 C.F.R. § 8.4(b)(2) (prohibiting funding recipients from using criteria or methods of administration “which have the effect of subjecting persons to discrimination” (emphasis added)), (3) (prohibiting funding recipients from locating facilities in ways that would have the “effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination” (emphasis added)).

¹⁴⁰ For example, Justice40 aims to ensure that at least 40 percent of overall benefits of certain federal investments flow to disadvantaged communities. Executive Order 14008, President of the United States, Jan. 27, 2021.

projects as “mega-projects,” for enhanced antidiscrimination efforts.¹⁴¹ Many aspects of federal operations can be seen as model approaches, which private companies can adapt when enhancing their diversity and antidiscrimination efforts.

The BDP encourage and support businesses to tackle inequality and advance shared prosperity across the enterprise, which has cascading effects for communities, our economy, and society at large. By elevating the importance of DEIA goals and providing a shared framework for key priorities, the Department enables new pathways for impact across industry, US geography, and company size, which represents a significant step closer to reaching our nation’s potential.

VI. Conclusion

We support the Department of Commerce’s efforts to support private sector commitments and strategies to increase and improve DEIA in the workplace and across business operations.

Thank you for your attention and consideration of these comments. Please contact Kathryn Youker, kyouker@lawyerscommittee.org or Olivia Sedwick, osedwick@lawyerscommittee.org, should you have any questions.

Sincerely,

Lawyers’ Committee for Civil Rights Under Law

By: /s/ Kathryn Youker
Kathryn Youker
Director, Economic Justice Project

By: /s/ Olivia N. Sedwick
Olivia N. Sedwick
Counsel

¹⁴¹ The U.S. Department of Labor’s Office of Federal Contract Compliance Programs has established a “Mega Construction Project Program,” which helps mega-projects “remove hiring barriers and promote consideration of a diverse pool of qualified workers for jobs in the trades.” OFCCP Mega Construction Project Program Quick Reference Guide, available at <https://www.dol.gov/sites/dolgov/files/OFCCCP/Construction/MegaProgram/Files/OFCCP-Mega-Construction-Project-Quick-Reference-Guide.pdf>).