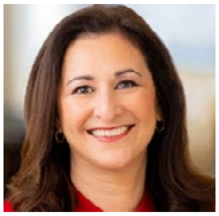
# LIFE, LIBERTY AND THE PURSUIT OF EQUITY—DIVERSITY, EQUITY, AND INCLUSION IN THE BOARDROOM AND BEYOND



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In the wake of George Floyd's murder in 2020, calls for social justice reform and equity reverberated throughout the United States. This momentum for positive change continues today as many organizations start to resume normal operations following the pandemic. Boards have a duty—legally, ethically, and morally—to take the lead on implementing equitable work policies that ensure diversity, equity, and inclusion (DEI) measures are being integrated and addressed within their organizations.

DEI as a collective term is used to describe policies and programs that promote the representation and participation of different groups of individuals, including groups underrepresented or marginalized due to race, ethnicity, religion, gender, sexual orientation, and disabilities. The term DEI runs the risk of becoming a cliché if organizations lose sight of the meaning behind each of the individual words, which are defined as:

- Diversity: The state of having people who are different races or who have different cultures in a group or organization.
- Equity: Fairness or justice in the way people are treated.
- Inclusion: The act or practice of including and accommodating people who have historically been excluded (because of their race, gender, sexuality, or ability).

As Verna Myers, a leading diversity and inclusion expert, famously said, "Diversity is being invited to the party. Inclusion is being asked to dance." Taking this illustration one step further, equity means that everyone has the opportunity to dance.

There are many benefits to a truly diverse work force. Diverse cultural perspectives inspire creativity and drive innovation. Cultural sensitivity and insight can lead to more successful marketing and customer relationships. But simply hiring more diverse individuals does not fix the problem; it is merely the beginning of the solution.

## DEI IN THE BOARDROOM

At both the federal and the state levels, diversity in the boardroom is being encouraged in some instances, and mandated in others. At the federal level, in November 2019, the US House of Representatives passed HR 5084, the Improving Corporate Governance Through Diversity Act of 2019. This bill requires issuers of securities to disclose the racial, ethnic, and gender composition of their boards of directors and executive officers, as well as the status of any of those directors and officers as a veteran, and to disclose any plan to promote racial, ethnic, and gender diversity among these groups. The SEC was also required to establish a Diversity Advisory Group to report on strategies to increase gender, racial, and ethnic diversity among board members.

Under SEC guidance, NASDAQ is also focused on improving diversity on corporate boards. On August 6, 2021, the SEC approved NASDAQ's board diversity rules. The rules include "diversity objectives" that require NASDAQ-listed companies to either have, or explain why they do not have, at least two diverse directors. Under the rules, companies are also now required to annually disclose their board diversity statistics using a prescriptive matrix, referred to as the "board diversity matrix." A company's repeated failure to comply with the rules would subject the company to delisting.

Spurred by the loud calls to action following George Floyd's murder, state legislatures have also begun enacting or proposing legislation aimed at accelerating boards of directors' DEI efforts.[1] Perhaps unsurprisingly, California was the first state to pass a law legislating board diversity, requiring publicly traded domestic and foreign corporations with headquarters in California to have at least one female on their boards. By the end of 2021, companies must have three females for boards with six or more directors, two for boards with five directors, and one female with boards of four or fewer directors.

In September 2020, California enacted a law that requires board representation from underrepresented communities: Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or those who self-identify as gay, lesbian, bisexual or transgender. By the end of 2022, the minimum number of directors from under-represented communities must be three if the board has nine or more directors, two if the board has five to eight directors, and one if the board has four or fewer directors. Other states have followed suit in some way or another including Colorado, Illinois, Maryland, New York, Washington, Massachusetts, Michigan, and Pennsylvania.

Legislation and rules aren't the only way to inspire change, though. Several companies have been caught in the crosshairs of shareholder derivative lawsuits for their failure to have any racially diverse directors. "The allegations are largely the same: the boards of directors of these public companies allegedly breached their fiduciary duties by failing to include diverse directors on their boards, despite statements of commitment to diversity, equality, and inclusion."[2] The plaintiffs in these actions are seeking a variety of remedies including board reform, removal of existing board members, return of board compensation, investments in DEI recruiting and training, transparency in annual reports surrounding DEI, as well as attorneys' fees. While such lawsuits face an uphill battle, their primary motive is to spur social change.

There are inherent risks with failing to develop and maintain a diverse and inclusive board. These include reputational risks, legal risks, supply chain risks, employee risks, and fiduciary risks. However, board diversity is not something that can be changed overnight. Few board seats turn over in a given year, making meaningful change incremental at best. Even when new positions become available there is excessive reliance on existing director networks and connections which often lack diversity.

The clear long-term solution is to address the root cause of the problem: lack of diversity in the succession pipeline all the way up to CEO and CFO. Building a more diverse pipeline, however, can take years or even decades of cultivation. In the meantime, here are six actionable steps that any board can use to progress toward becoming more diverse and inclusive:

1. Create and promote an inclusive culture in the boardroom by updating boardroom policies and procedures, or create an onboarding program for new directors.
2. Use the annual assessment process to evaluate the board's contribution, drive refreshment, raise performance, and monitor progress toward DEI goals. Consider whether the board is optimized for the strategic direction in which the organization is headed.
3. Elect board leadership who want to drive director diversity and inclusion — and who know how to do so.
4. Hold leadership accountable for diversity. Boards should voluntarily and fully disclose diversity metrics to investors. Consider ways for the board to oversee DEI metrics throughout the organization.
5. Reassess search approach and criteria. Recognize potential weaknesses in traditional networking as a recruiting strategy. Be open to candidates who don't have C-Suite roles. Allow more time for board searches and create a long-term plan for adding diverse voices.
6. Avoid defining seats as "diverse." Don't view diversity as a check-the-box response to external pressure. Embrace a mindset that views every director search as an opportunity to enhance boardroom diversity.[3]

## DEI IN MANAGEMENT AND THE ORGANIZATION

One of the greatest challenges for the board is ensuring that DEI initiatives permeate throughout the organization from top management down to every employee. This involves creating effective systems and programming—and regularly monitoring, evaluating, and updating those programs—to ensure that real, positive, sustainable change is taking place within the organization. One way to accomplish this is by designating a DEI committee on the Board to oversee DEI efforts. The following five best practices are a good starting point for supporting DEI growth.

### Start at the top

Top management needs to make an authentic and visible commitment to diversity in order for DEI initiatives to be ingrained within the organization. Leaders need to communicate internally and externally the importance the company places on DEI. Internally, this can be as simple as circulating emails celebrating and/or providing paid time off for major holidays of marginalized religions and cultures. Another example is taking a stance on significant traumatic events affecting minority communities like the murder of George Floyd or the anti-Asian hate crimes that spiked following the pandemic. Communications supporting, and providing resources for, the affected communities increase the feeling of safety within the organization. Externally, organizations should incorporate information about their commitment to DEI on their websites, in recruitment materials, and in other external communications to consumers and clients.

In order for DEI initiatives to be taken seriously and to be effective within the organization, management needs to hold others accountable. It cannot excuse offensive behavior. Management must work closely with human resources to ensure that bias is addressed and eradicated. Conversations with insensitive employees are difficult, particularly when the offensive behavior is subtle and the employee is in a position of power or well-liked within the organization. Under these circumstances, it is not uncommon to excuse the behavior as unintended—a careless or accidental mistake. But good intentions are no excuse for harmful impacts. Further, each of those harmful impacts opens up the organization to potential liability.

Ultimately, each member of management and the board has to make DEI a personal priority. Implementing DEI priorities and initiatives makes good business sense and is good for the organization's bottom line and its long-term value because the company becomes more attractive to consumers and can often flourish with a variety of perspectives. But DEI change cannot be driven only by dollars and cents. As DEI expert Aiko Bethea explains, as a black person it is insulting to have someone explain that they should be nice to you because that behavior is worth more money. This is dehumanizing. The organization should do DEI work because it wants to be equitable, because it does not want its employees coming to work feeling "less than" others. Bethea adamantly believes that in order for DEI work to be transformative, it must be relational, not transactional. This can be done by shutting down valuation conversations and encouraging management to convey to others why DEI work is personally important to them and respected within the organization.[4] In 2021, a number of law firms have offered young lawyers hours of billable equivalent credit for working on DEI initiatives to advance diversity and inclusion.

To be done right, DEI work takes time, intentionality, and a lot of effort. Sustainable DEI change cannot be reactive and will not happen overnight. Management and the board need to take the time to listen and learn from their diverse constituents, and then to take action.

### Have dedicated DEI personnel and committees

Organizations need to designate a team of personnel dedicated to DEI. Regardless of the exact titles, ideally this should include some combination of a Chief DEI Officer, Chair of the DEI Committee, and DEI Mangers or Directors. These positions should be valued because they are doing important work within the organization. That valuation can take the form of additional compensation, bonuses, or allotting a particular percentage of time during the workday to dedicate to DEI. If it is simply a volunteer position that individuals are expected to do in addition to their full-time jobs at the organization, the DEI initiatives will suffer from lack of commitment.

In addition to leadership positions, organizations should have a DEI committee and Employee Resource Groups (ERGs). DEI committees are most effective when they are comprised of a cross-section of employees representing views from different offices, backgrounds, and positions within the company. ERGs are affinity groups which serve to foster community and mentorship within marginalized communities. Some examples include ERGs for employees who are black, Asian, LGBTQIA+, Hispanic, and those with disabilities. ERGs are a great way to build communities and support within the organization. Budgets should be provided to diversity committees and ERGs to be used to create educational and supportive programming, as well as to connect with one another for fun. ERGs should be empowered to help the organization identify strategies that support inclusion efforts. While committees and ERGs are helpful, management cannot simply delegate all DEI work to them. Value-driven leaders ask how they can best support their committees and ERGs. Their role, however, should be a supporting one. Management should listen, assist, support, and allow the leaders of these groups to speak and lead as well.

### Recruit and develop diverse talent

Recruiting and developing diverse talent is crucial to creating lasting DEI change within an organization. Attention must be paid to each step of the experience: sourcing and recruiting, hiring, onboarding, culture, and feedback. The board should have a thorough understanding of what is being done to diversify recruiting and hiring practices to construct an equitable pipeline. Some questions a board member may want to consider include:

- Is the organization sourcing from predominantly minority schools?
- Does hiring personnel have appropriate DEI training to combat implicit bias?
- Are there recruitment goals?
- Have advertisements been placed in minority publications?

- Would an executive search firm specializing in the placement of minorities be helpful?

Another way organizations can improve recruitment is to be proactive. Minority internship or fellowship programs provide excellent training and recruitment opportunities for potential future talent. Organizations should also consider how they can become involved in programs, such as job fairs or academic competitions, within predominantly minority high schools and colleges.

Once diverse employees are hired, the DEI focus shifts to development, retention, and promotion. During the onboarding process, individuals should be provided with information about ERGs. Formal and informal mentorship is also crucial when onboarding. Diverse employees coming into a predominantly white organization may require more specialized training, coaching, or mentorship than their counterparts. Underprivileged minorities, in particular, often have to overcome a variety of obstacles, including unequal education, lower self-confidence, distrust, and stereotypes, simply to level the playing field when onboarding into organizations.

### Train, train, train

In addition to providing support and, when necessary, targeted substantive training to diverse employees, all employees need to be provided with training that strengthens DEI awareness and communication skills. To inspire meaningful change within an organization, companies should avoid "parachute training" where someone comes to speak once on the subject and then is never heard from again. DEI training needs to be conducted intentionally, interactively, and often. Because people learn differently, encourage the use of a variety of educational formats, speakers, and topics. Try implementing training courses to different audiences. For example, one training session may involve everyone in a particular office, while another training session may be limited to just upper level management, and yet another to a department or committee.

Organizations should also cultivate a community of practice. Progress can only be made when individuals feel psychologically safe in their environment, allowing them to be vulnerable. But people who are trying to do better will get things wrong, too. Bethea suggests that for constructive conversations to happen, we have to call others in rather than calling them out. Calling them out immediately puts people on the defensive and often hampers growth. Instead, adopt a teaching mindset to call others in. True change does not happen by memorizing facts, but by absorbing the teachable moments and incorporating them into practice. For example, if an individual says something insensitive, help teach them simply by asking, "What did you mean when you said that?" After the intention is understood, communicate the impact of the insensitive language. Then turn the conversation back to them by asking, "Now that you know the impact, how would you reframe it?"[5]

### Track the metrics

Finally, boards need to monitor how their organizations are faring with their DEI goals by ensuring that the correct metrics are collected and analyzed through the right lens. Identify what metrics are most meaningful in relation to your goals. Is it turnover rates? Hiring rates? Promotion rates? Compensation? Be specific on what the board and the organization want to achieve and what is deemed a key milestone. Establish a timeline for when you expect those milestones to be reached.

It is helpful to collect and analyze metrics for specific subgroups. The organization may be successful with integrating and supporting some subgroups, but not others. In this respect, it helps to look at the context behind the numbers for maximum impact as numbers can be easily manipulated if there is a revolving door of diverse employees. Why are people leaving? Why are diverse candidates being passed over for promotion? Find the common themes where they exist.

## CONCLUSION

In order to survive and thrive in today's world, companies must become leaders in the DEI space. Directors can no longer abdicate their responsibilities in moving the needle forward, blindly relying on management and the company to act appropriately. Directors must supervise the progress of their organization so that DEI does not become a meaningless catch phrase, but rather a tool to achieve authentic goals and transformation.

Notes

1 Kathy Jaffari and Paul Hallgren, Roundup of Boardroom Diversity Legislation, Today's General Counsel (Apr. 28, 2021), https://www.todaysgeneralcounsel.com/roundup-of-boardroom-diversity-legislation/.

2 Samantha, Burdick, Bianca DiBelle, Pamela Palmer, Alexandra Peurach, Howard Privette, A New Wave of Board Diversity Derivative Litigation, Troutman Pepper (Oct. 21, 2020), https://jdsupra.com/legalnews/a-new-wave-of-board-diversity-89301/.

3 2021 S&P 500 Board Diversity Snapshot, Spencer Stuart (Jul. 2021), https://www.spencerstuart.com/research-and-insight/2021-sp-500-board-diversity-snapshot.

4 Creating Transformative Cultures with Aiko Bethea, Dare to Lead Podcast with Brené Brown (Feb. 8, 2021), https://brenebrown.com/podcast/brene-with-aiko-bethea-on-creating-transformative-cultures/.

5 Spencer Stuart, supra note 3.