The Diversity Risk Paradox

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There is a growing body of literature discussing the proper role of diversity, equity, and inclusion efforts by and within public firms. A combination of forces brought renewed energy to this topic over the past few years. The #MeToo movement demonstrated a whole host of inequities faced by women within workplaces. Business Roundtable's 2019 Statement on the Purpose of a Corporation *rejected the view that the purpose of the corporation was solely to be focused on the maximization of shareholder wealth. And, in 2020, the murder of George Floyd ignited a racial reckoning within the United States, which prompted many firms to rethink and reaffirm their commitments to creating diverse, equitable, and inclusive workplaces. Chris Brummer and Leo E. Strine, Jr.'s* Duty and Diversity*, the subject of this Response piece, takes on the issue of diversity efforts within public firms directly. They argue that "the pursuit of Diversity, Equity, and Inclusion is solidly authorized by the operation of traditional corporate law principles and can even be easily squared with the views of those who embrace what has come to be known as 'shareholder primacy.' " Their piece is an excellent and comprehensive addition to the current literature.*

This Response focuses on how concerns about risk may influence firms as they evaluate how to best engage in more robust and meaningful diversity, equity, and inclusion efforts. It highlights the tension that can be created when members of a firm fail to take certain risks seriously enough while simultaneously allowing potential risks to block a subset of potentially impactful reforms. First, the failure by a firm to act in accordance with its public statements regarding diversity could create risks for the firm over the long term. Second, members of firms may sometimes be deterred, whether implicitly or explicitly, out of concerns that taking certain actions might create new zones of risk for the firm. These two realities can create a sort of risk paradox. This Response argues that for a firm to properly address the diversity risk paradox, it must consider what actions are likely to lead to the creation of

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a culture of equity and inclusion throughout the firm. By prioritizing equity and inclusion, firms can engage in more productive risk assessments about what diversity efforts to prioritize and pursue.

INTRODUCTION

In Chris Brummer and Leo E. Strine, Jr.'s Article, *Duty and Diversity*,[1] they persuasively argue that the decision of a firm to pursue diversity, equity, and inclusion ("DEI") policies and practices is consistent with the traditional fiduciary duties that firm directors and managers are required to adhere to today. Their account is breathtaking for its intellectual rigor, its comprehensive treatment of the issue, its persuasiveness, and, importantly, its willingness to wrestle with evidence that both supports and detracts from their argument. Indeed, when reading the piece, in many instances I began to think of a counterargument to what they presented only to find them address that argument in the very next paragraph. In short, the piece is a well done and important contribution to the growing body of work on the proper role and treatment of diversity efforts within public firms.

This Response will focus on the role of risk within firms' decisionmaking efforts related to diversity, equity, and inclusion initiatives.

First, while Brummer and Strine's *Duty and Diversity* Article tackles a variety of issues related to risk management, there is a related issue that might benefit from further analysis as scholars continue to discuss diversity within public firms. Under the *Marchand v. Barnhill*[2]

1. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022).
2. Marchand v. Barnhill, 212 A.3d. 805 (Del. 2019).

and *In re Boeing Co. Derivative Litigation*[3] cases, the Delaware Supreme Court has now allowed *Caremark*[4] claims to proceed when a board has failed to monitor "mission critical" corporate risks. When one pairs these developments in caselaw with firms' public statements regarding their commitment to diversity over the past two years, it suggests that an argument can be made that a failure by a public firm to address diversity concerns amounts to a failure to monitor mission critical risks. For example, Walgreens recently noted in its annual disclosures that it knows that its diversity, equity, and inclusion work is "critical to the overall success of our company."[5] Additionally, statements made by those in top management at a variety of public firms in the wake of the murder of George Floyd might make them susceptible to *Caremark*[6] claims should they fail to meet the diversity goals that they articulated and set out for themselves. In short, the diversity rhetoric of firms in 2020 and 2021 may lead to potential litigation if a firm's board fails to properly monitor the implementation of its diversity initiatives. Thus, under *Marchand* and *Boeing*, a proactive board must manage the risks created by the firm's own rhetoric and statements about the firm's need for and commitment to diversity.

Second, Brummer and Strine argue, correctly, that firms are legally permitted to—and should—engage in certain activities to promote better internal DEI initiatives.[7] Initiatives that are legally permitted, however, are often deemed to not be legally advisable out of fear that such activity may increase the firm's zone of legal liability. A focus on legal liability, while prudent, should not deter a firm from considering the full scope of risks, like reputational risks, that could occur as a result of not pursuing an effective DEI strategy. When a firm considers whether to engage in activity that is above what is legally required, it must understand that to not do so also carries with it its own set of risks and liabilities.

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3. *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 BL 337478 (Del. Ch. Sept. 7, 2021).

4. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). The phrase "*Caremark* claims" is understood as stockholder derivative claims for breach of directors' oversight duties. Under such claims, a court will conduct a two-part examination, looking first at whether the board completely failed to implement an adequate board-level reporting or control system; if a firm did implement such a system, the court then considers whether the board failed to properly monitor its system once putting it in place. *Id.*

5. Andrew Ramonas, *S&P 500 Opens Up on Diversity After Floyd as Investors Seek More*, BL (Feb. 11, 2022, 6:00 AM), https://news.bloomberglaw.com/securities-law/s-p-500-opens-up-on-diversity-after-floyd-as-investors-seek-more [https://perma.cc/WZ5E-UQMC].

6. *Caremark,* 698 A.2d at 959.

7. *See* Brummer & Strine, *supra* note 1, at 5.

The two points I have outlined, however, create a paradox. On the one hand, I am arguing that firms should be cautious about the potential risks created by their public commitment to engage in activity above the legally required floor when crafting their DEI initiatives. On the other hand, I am critiquing the reluctance of firms to move beyond the minimum conduct required by the law when thinking through the diversity initiatives they seek to implement, as failing to move beyond what is legally required could create its own set of risks. In short, many firms are confronting what this Response refers to as a "diversity risk paradox."

The diversity risk paradox sets up a variety of questions for firms to work through. Should they do more than what is legally required? Brummer and Strine's argument in *Duty and Diversity* makes a compelling case in favor of this perspective. Legal standards and rules in this area create a floor—but much can be built upon that floor to advance the cause of diversity within corporations today. If firms were to do more than what is legally required, however, they must ask an additional question: What should the guiding principle be when deciding when and how to act above what is legally required? This Response argues that to address the diversity risk paradox, firms must consider what actions are likely to lead to the creation of a culture of equity and inclusion throughout the firm. By elevating the concerns of equity and inclusion, firms can engage in more productive risk assessments about what diversity efforts to pursue.

This argument may seem a bit circular given that diversity initiatives are often labeled as "diversity, equity, and inclusion" initiatives. The reality, however, is that the "diversity" piece is often the primary focus of those working on new DEI initiatives within firms, and that when people say diversity, what they often mean is an effort to increase the representation of some mix of individuals whose demographic status (women, people of color, the disabled, etc.) is underrepresented within that firm. The pursuit of greater demographic diversity—something I have argued in favor of as a response to the current state of diversity within firms today[8]—is both laudable and necessary. But as is shown by the diversity risk paradox, different sets of diversity initiatives come with different sorts of risks. This Response argues that when making risk assessments related to what DEI initiatives a firm will adopt, the firm should prioritize those that it believes are likely to create more equitable and inclusive organizations.

8. Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869 (2021).

Part I of this Response piece examines the ways in which Brummer and Strine identified risks associated with DEI efforts. Part II presents the diversity risk paradox, which leaders within firms must address when determining what DEI initiatives to pursue. Part III argues that for a firm to properly address the diversity risk paradox, it must consider what actions are likely to lead to the creation of a culture of equity and inclusion throughout the firm.

I. DIVERSITY & RISK

An underlying theme within Brummer and Strine's *Duty and Diversity* is the way in which diversity efforts intersect with concerns about risk more generally within firms.[9] Their account highlights the complex ways in which a firm's risk assessments and risk management programs can impact the firm's decision to engage in certain DEI efforts. This Part will highlight some of the observations Brummer and Strine make regarding the role of risk and diversity.

A. Risks Diversity Mitigates

At the outset of their piece, Brummer and Strine note that one deterrent for firms to "commit their companies to Diversity, Equity, and Inclusion policies that go beyond the legal minimum of nondiscrimination" is the argument that firms that do so might face "possible legal risk for failing to focus solely on corporate profit."[10] In particular, those who advance this argument are often concerned that if firms pursue an objective other than profit maximization, it could result in shareholder suits and other forms of litigation. Brummer and Strine reject this premise, arguing "that corporate law presents no barrier to voluntary corporate efforts to increase equality and diversity" within firms.[11]

Brummer and Strine, however, go farther than just rejecting the premise of the above arguments. They go on to explain: "Substantial evidence exists [showing] that companies with good DEI practices will . . . be less likely to face adverse legal, regulatory, worker, community, and consumer backlash from their conduct[.]"[12] This is based, in part, on the findings of some researchers regarding the benefits of cognitive decisionmaking to combat groupthink.[13] The

9. Brummer & Strine, *supra* note 1, at 4.
10. *Id.*; *see also id.* at 24.
11. *Id.* at 4.
12. *Id.* at 4.
13. *Id.* at 35.

upshot is "that Diversity can lead to more communication on boards and even more accountability of management."[14] Less groupthink and better communication are both results that should help minimize a large range of risks for firms.

Strine and Brummer also posit that "[e]mployment discrimination may be less likely where there is a strong culture of inclusion and a highly Diverse workforce."[15] They explain that a diverse corporate staff could lead to better handling of complaints and concerns regarding discrimination, which in turn, could help minimize the sorts of frustrations by employees that lead to the risk of lawsuits or other undesirable outcomes.[16]

Additionally, Brummer and Strine note that having diversity within and throughout the ranks of a company could prevent it from encountering certain restrictions or penalties.[17] For example, in "February 2020, Goldman Sachs announced that it will only underwrite IPOs for U.S. and European private companies that have at least one Diverse board member."[18] As calls for more diverse boards and workplaces are increasingly being tied to certain formal and informal penalties,[19] having a demographically diverse organization may help mitigate new and emerging risks for firms.

B. Reputational Risks

Brummer and Strine—moving from their focus on ways in which a more diverse firm might be able to manage its risks more effectively—also persuasively detail the ways a lack of demographic diversity can lead to various types of reputational risk for firms.[20] For example, firms that lack certain types of demographic diversity within their ranks may have difficulty recruiting top talent.[21] Additionally, a range of industry surveys demonstrate that if consumers have a negative perception of a firm's diversity efforts, such perceptions can have a negative impact on

14. *Id.* at 36.

15. *Id.* at 38.

16. *Id.*

17. *Id.* at 56–60 (exploring various "market 'EESG' initiatives" that promote or require diversity within firms).

18. *Id.* at 60.

19. *See, e.g.*, David A. Bell, Dawn Belt & Jennifer J. Hitchcock, *New Law Requires Diversity on Boards of California-Based Companies*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Oct. 10, 2020), https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/ [https://perma.cc/TM9L-CQ68].

20. Brummer & Strine, *supra* note 1, at 41–48.

21. *Id.* at 43.

the firm's reputation.[22] Firms, therefore, must consider the ways in which their lack of diversity or DEI initiatives could impact the reputation of the firm over both the long- and short-term.

II. THE DIVERSITY RISK PARADOX

Brummer and Strine do an excellent job of recounting many different ways in which focusing on diversity efforts can either minimize or create risks for a firm. Their analysis is both expansive and thorough. There are, however, additional risks that might arise as a result of a firm's diversity efforts. This Response focuses on two distinct, yet related, risks that firms often confront when working on DEI initiatives and issues.

First, the failure of a firm to act in accordance with its own public statements regarding diversity could create risks for the firm over the long-term. As Brummer and Strine explain, "*Caremark* requires good faith efforts by directors to ensure their companies have policies designed to promote compliance."[23] Traditionally, as long as firms have engaged in those good faith efforts, they have been insulated from liability, even when their initiatives have failed. A few years ago, it likely would have been very difficult for a successful *Caremark* claim to have been brought by shareholders on the basis of the firm's failure to accomplish its DEI goals or initiatives.[24] There is reason, however, to believe that *Caremark* litigation based on DEI deficiencies might succeed today. Second, the firm's decision to not act—or their reluctance to act—above the legally required floor as it relates to DEI efforts may also create non-legal risks for firms, ranging from dissatisfaction by employees with the firm's complacency to consumer pushback and reputational harm to the firm.

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22. *Id.* at 43–44; *see, e.g.*, Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES (July 21, 2006), https://www.nytimes.com/2006/07/21/business/21legal.html [https://perma.cc/ETA3-K7X8] (noting that "Wal-Mart Stores ha[d] dropped two law firms—pulling active work from them—because of unhappiness with the firms' lack of diversity"); Taylor Mallory Holland, *Why the Lack of Diversity in Business Has Reached a Tipping Point*, HUFFINGTON POST: BLOG (May 7, 2017) https://www.huffpost.com/entry/why-the-lack-of-diversity_b_9857316 [https://perma.cc/6LY8-XGKZ] ("Now that consumers care more about diversity, businesses have to care more—and put themselves on the hook to actually do something about it. Lip service is no longer enough. In fact, hypocritical claims can get companies into even hotter water in terms of consumer trust.").

23. Brummer & Strine, *supra* note 1, at 83.

24. *See* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2031 (2019) (In examining the cases leading up to 2019, "approximately one hundred Delaware cases ha[d] cited the 1996 landmark *Caremark* opinion [but] . . . [o]versight liability after a trial on the merits [wa]s extremely rare . . . with few claims surviving motions [to dismiss]. Examining these cases reveals that oversight ha[d] evolved in application to require a showing that borders on, or includes, utter failure or disobedience").

A. Firms' Own Statements

Firms have engaged in a variety of statements that suggest diversity efforts and initiatives are in fact central to their compliance risks. For example, Walgreens recently explained that its diversity, equity, and inclusion work is "critical" to the success of the company.[25] Importantly, Walgreens is not an outlier. After the murder of George Floyd in the summer of 2020, dozens of firms issued statements explaining the importance of diversity within their firms.[26] Some firms even went so far as to identify specific goals and objectives for the firm to meet along a variety of dimensions.[27] Nike, for instance, has issued disclosures that have "included information about goals to increase the number of minority employees."[28] Additionally, in response to relatively new human capital disclosures required by the Securities and Exchange Commission ("SEC"),[29] it appears that the vast majority of firms responding to the disclosures in 2021 included "a qualitative discussion regarding the company's commitment to diversity, equity, and inclusion."[30] These statements varied in depth, "ranging from generic statements expressing the company's support of diversity in the workforce to detailed examples of actions taken to support underrepresented groups and increase the diversity of the company's workforce."[31] The combination of the statements made in 2020 in response to the death of George Floyd, as well as the 2021 human capital disclosures related to DEI concerns, suggests that firms understand that their diversity initiations are "intrinsically critical" to their firms' internal business operations.[32] Moreover, the arguments

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25. Ramonas, *supra* note 5.

26. Martinez & Fletcher, *supra* note 8, at 883–84.

27. *Id.* at 893 (discussing Blackrock Investment's goal to double its representation of Black senior leaders and increase its overall representation by thirty percent by year 2024); *id.* at 900 (noting PepsiCo's commitment to increase "its number of [B]lack managers by [thirty] percent by 2025 . . . and . . . add[] more than 250 [B]lack employees to its managerial positions, including a minimum of 100 [B]lack employees to the executive ranks") (internal citation omitted).

28. Ramonas, *supra* note 5.

29. 17 C.F.R. § 229.101 (2021).

30. *Discussing Human Capital: A Survey of the S&P 500's Compliance with the New SEC Disclosure Requirement One Year After Adoption*, GIBSON, DUNN & CRUTHER LLP 2 (Nov. 10, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/11/discussing-human-capital-survey-of-sp-500-compliance-with-new-sec-disclosure-requirement-one-year-after-adoption.pdf [https://perma.cc/ZA3M-DP27].

31. *Id.*

32. *See* Emily Steel, *Fox Establishes Workplace Culture Panel After Harassment Scandal*, N.Y. TIMES (Nov. 20, 2017), https://www.nytimes.com/2017/11/20/business/media/fox-news-sexual-harassment.html [https://perma.cc/3VV3-VAEK] (discussing how "[s]ome shareholders ha[d] expressed concern[s] that 21st Century Fox's management and its board failed to address the [sexual harassment] crisis and have risked the company's reputation, *operations and long-term value*") (emphasis added).

that Brummer and Strine make, which are detailed in Part I, also support the notion that diversity efforts are mission critical to firms. These statements are important for a variety of reasons, one of which is that they could be used in future litigation to demonstrate that diversity is of extreme importance for firms.

Delaware courts have issued recent opinions that have allowed *Caremark* claims to proceed when a board has failed to monitor "mission critical" corporate risks.[33] In *Marchand*, the court allowed shareholders to proceed against directors of the firm in a *Caremark*-based claim for allegedly failing to monitor "mission critical" risks that the firm faced at that time.[34] Specifically, the court explained that a board is required to "make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks."[35] Moreover, the court noted that if a board were to fail to take steps to ensure that "it is informed of a compliance issue intrinsically critical to the company's business operation" such failure would lend credence to the notion "that the board has not made the good faith effort that *Caremark* requires."[36]

The decision in *Marchand* was, however, unusual, leading many scholars to wonder what it would mean for future cases. In the recent *Boeing*[37] case, the importance of *Marchand* appears to have been confirmed. Specifically, *Boeing* established that firms must have structures in place to inform the board about "mission critical" issues.[38] One of the critiques levied against firms by myself and others is that

33. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

34. *Marchand*, 212 A.3d at 824.

35. *Id.* at 824.

36. *Id.* at 822.

37. In re *Boeing*, 2021 WL 4059934.

38. There have been a number of assessments done of this new line of cases that reflect the importance of this new "mission critical" standard. *See, e.g.*, Darryl Lew, Courtney Hague Andrews, Stephanie Silk Cunha & John Hannon, *In Re* Boeing *Decision Underscores Need for Risk-Based Corporate Governance by Directors*, WHITE & CASE LLP (Oct. 21, 2021), https://www.whitecase.com/publications/alert/re-boeing-decision-underscores-need-risk-based-corporate-governance-directors [https://perma.cc/5QHN-KBRW]; Lisa Stark & Sara M. Kirkpatrick, *Another "Well-Pled"* Caremark *Claim Survives A Motion To Dismiss: Lesson from Recent Cases on Risk Management, Compliance Systems, and Fiduciary Duties*, K&L GATES LLP (Nov. 19, 2019), https://www.klgates.com/Another-Well-Pled-Caremark-Claim-Survives-A-Motion-To-Dismiss-Lessons-From-Recent-Cases-On-Risk-Management-Compliance-Systems-And-Fiduciary-Duties-11-18-2019 [https://perma.cc/3LVL-BA6J]; Paul J. Lockwood & Veronica B. Bartholomew, *Delaware Supreme Court Reinforces Director Oversight Obligation*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Nov. 19, 2019), https://www.skadden.com/insights/publications/2019/11/insights-the-delaware-edition/delaware-supreme-court-reinforces [https://perma.cc/U7VJ-FECE].

they are failing to fully track and assess their DEI efforts.[39] As Brummer and Strine explain, "[f]iduciaries are . . . not excused from ignoring red flags indicating widespread discrimination; should they do so not only do companies risk liability accompanying such violations, but directors too face possible derivative suits and liability."[40] Without a system in place for robust board oversight of DEI initiatives, a plaintiff might be able to persuasively argue that the firm is ignoring important red flags. Consequently, if DEI is a mission critical endeavor for a firm—a conclusion that likely follows given the various firms' own statements over the past two years—the failure to proactively oversee DEI initiatives could therefore be a potentially significant risk for firms.

Thus, the upshot of viewing the voluntary statements that firms have made through the lens of the most recent Delaware case law is that firms' own statements regarding their stated diversity priorities have the potential to lead to shareholder litigation. Indeed, as Brummer and Strine note:

> Corporations have increasingly recognized that effective DEI compliance efforts are required by *Caremark* and are increasingly expected by all corporate stakeholders. This confluence has itself given rise to new legal theories by corporate plaintiffs' lawyers, arguing that fiduciaries have not only failed to comply with *Caremark* in their DEI policies, but have misled investors by overstating their adherence to their own state DEI goals.[41]

Accordingly, a proactive board should carefully manage the risks created by the firm's own rhetoric and statements regarding the importance of diversity.[42]

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39. *See, e.g.*, Martinez & Fletcher, *supra* note 8, at 903; Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 631–32 (2014); Deborah L. Rhode and Lucy Buford Rica, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483 (2015) (noting that many business "leaders appeared to see no necessity for formal assessments and . . . believed that the organization's 'culture and open door policy' made people feel that they could raise concerns").

40. Brummer & Strine, *supra* note 1, at 81.

41. *Id.* at 84.

42. One might levy a counterargument against diversity, equity, and inclusion as qualifying as a mission critical risk. For example, one could argue that *Boeing* was focused on the safety of planes and *Marchand* was focused on food safety. As such, one could read the cases as being limited to only those risks that are directly related to the product or service being provided to consumers. The reality, however, is that no one knows exactly how far the Delaware courts will take the concept of "mission critical." If firms self-identify diversity, equity, and inclusion as "critical" to their business—as firms have begun to do explicitly in public statements and disclosures since the death of George Floyd—they are opening themselves up to potential lawsuits on this issue going forward. Only time will tell whether these suits would in fact be successful. My own view is that if a firm identifies a risk as critical to its functioning or the core values of the firm, it is an issue that the board should focus on intently. The firm is in the best position to identify what is most important for its proper long-term functioning, and if it identifies a risk area, the courts should hold the board accountable if it fails to properly oversee that risk.

B. Firms' Reluctance to Act

Brummer and Strine suggest that firms are free to engage in diversity efforts above what the law requires. For example, they note that under *Caremark*,

> [t]he business judgment rule gives [firms] substantial room to create a corporate culture with higher standards of integrity, fairness, and ethics than the law demands if they believe that will increase the corporation's value, enhance its reputation, or otherwise rationally advance the best interests of the corporation and its stockholders.[43]

Additionally, they explain that:

> Corporate law also gives fiduciaries protection if they decide that the best way to avoid violations of law and negative reputational harm to the corporation, and achieve longer-term value, is for the corporation to embrace policies and goals that go beyond the legal minimum and to strive for the exemplary, even at the cost of short-term shareholder value.[44]

In doing so, Brummer and Strine make a full-throated argument in favor of firms going beyond what is legally required in an effort to finally make progress on diversity.

However, when firms engage in policies and practices beyond what they are legally required to do, it increases their zone of legal liability. Sanctions within the compliance space, for example, are not limited to technical violations of legal and regulatory mandates. Firms are also sanctioned or penalized when they fail to adhere to their own internal policies and procedures. For instance, Cheryl Wade has discussed how the Office of Minority & Women Inclusion Office created under Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[45] can recommend that agencies terminate contracts with regulated firms, contractors, and subcontractors if they believe that these firms have failed to make a "good faith effort" to include women and minorities in its workforce.[46] The upshot is that despite Brummer and Strine's accurate statements that firms are permitted to engage in diversity efforts beyond what is legally required, leaders at firms who attempt to pursue this strategy may actually encounter pushback from members of their own institution because of the types of risks identified above.

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43. *Id.* at 77.

44. *Id.* at 89.

45. 12 U.S.C. § 5452.

46. 12 U.S.C. § 5452(c)(3); Cheryl L. Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 LOY. U. CHI. L.J. 611, 619 (2018). However, as Wade points out, the risks posed by Section 342 to firms and business contracted with various agencies in the government have yet to truly come to fruition given the "corporate bar's dismissal and criticism of the provision, but also by the language its drafters used, which blunts its potential impact." *Id.* at 621.

Take, for example, the statements that firms made after the murder of George Floyd. The summer of 2020 was not the first opportunity that firms had to put forth proactive statements in support of the Black Lives Matter movement or to assert their commitment to reforming their firms' DEI initiatives.[47] Indeed, a small subset of firms had done so a few years earlier.[48] A number of reasons might explain why firms had been reluctant to do so before. They may have been worried about commenting on a social movement. They may have worried that supporting Black Lives Matter along with a more assertive endorsement of diversity efforts might be just as unappealing to one subset of consumers as it would be as appealing to another. But the reason that matters most for purposes of this Response piece is that it is entirely plausible that firms' legal departments advised them not to issue statements in the years prior to Mr. Floyd's death.

Whenever a firm engages in activity that is above what is legally required, it potentially increases its zone of legal risk. When a legal department perceives that an activity could result in an increase in the firm's zone of liability, it may deter the firm and board from taking that course of action. Over the years, I have had anecdotal conversations with individuals in compliance departments at public firms who recounted getting pushback from lawyers within their internal legal department when they attempted to create a standard of conduct or expectations above what was legally required. Strine and Brummer properly note that it is legally acceptable to engage in fulsome DEI efforts.[49] The reality, however, is that some firms' attempts to adopt diversity initiatives above what is legally mandated might be thwarted by their very own legal departments, or others, due to concerns that efforts above what is legally required could result in new zones of liability for the firm.

C. The Paradox

Firms committed to improving their DEI efforts today are encountering a bit of a paradox. On the one hand, they have issued sweeping public statements, and in some cases formal disclosures to the SEC, expressing their support for DEI initiatives. In doing so, they may have inadvertently increased their zone of risk under Delaware law. On

47. Martinez & Fletcher, *supra* note 8, at 874 n.22, 880–83.

48. Veronica Root Martinez, *A More Equitable Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 47–48 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (discussing Ben & Jerry's corporate statements and actions taken in support of the #BlackLivesMatter movement in 2016 and 2018).

49. *See* Brummer & Strine, *supra* note 1, at 77–81.

the other hand, when it comes time to implement policies and procedures to put initiatives in place, firms may face significant pushback from their legal departments due to concerns about an increase in the firm's legal liability as a result of these new initiatives. In other words, the various risks associated with diversity for firms have converged to create what this Response calls the "diversity risk paradox." If firms do too little, they could be opening themselves up to liability under Delaware law. If firms do more than what is legally required, they could increase their zone of legal liability. They are, quite literally, damned if they do and damned if they don't. And the realities of this paradox—which every firm has and continues to face—have crippled the ability of firms to adopt effective DEI initiatives that would transform their organizations in the ways that firms' leaders have promised for decades.

III. THE PROMISE OF EQUITY AND INCLUSION

Given the diversity risk paradox, the question confronting leaders within firms is how should they decide what diversity efforts to pursue? What decisionmaking framework will help guide them when determining how to structure their DEI initiatives? On the one hand, they have overwhelmingly indicated their support for improving their DEI efforts, yet doing so may result in additional risks for the firm. On the other hand, those attempting to engage in more robust DEI efforts might receive pushback from insiders, making it difficult to get anything of substance adopted by the firm.

The reality is that it is impossible to eliminate all of the risks presented in this Response, which can make it difficult to identify the right path forward. One could turn in an infinite number of circles attempting to determine which path forward would minimize risks for shareholders. Try though they might, firms cannot make all of their decisions through the lens of cost-benefit analysis and attempts to minimize risk. Thus, for some decisions, firms must look to the ends that they are attempting to achieve and use that as their guiding principle for how to order their decisionmaking. The ends of DEI programs, however, must not simply be to increase demographic diversity. The true goal must be to create an equitable and inclusive culture.[50]

This ultimate goal of achieving an organization with a culture that is both equitable and inclusive can be used as an analytical

50. Indeed, as Brummer and Strine explain, "Diversity can only be operationalized as an organizational feature if it is accompanied by an equitable and inclusive culture." *Id.* at 41.

framework by which a firm can assess which diversity efforts it should or should not prioritize. If the diversity initiative is likely to contribute to the creation of the culture that the firm is pursuing, it should receive strong consideration when determining whether it is worth implementing. Adoption of the initiative should be considered even if it could have the secondary effect of creating some sort of risk for the firm. However, if the potential initiative is not likely to contribute towards the firm's effort to create an equitable and inclusive culture, then it should be abandoned.

Some might wonder why firms would adopt diversity initiatives that are unlikely to result in the creation of an equitable and inclusive culture. There could be a variety of reasons. The firm might believe the initiative would be strong from a public relations standpoint and increase the firm's reputation with regards to diversity.[51] The firm might also believe that it needs to implement the initiative, even if it does not think it would be particularly effective, in an effort to stay in line with industry peers. Or the firm could believe it needs to do "something," and therefore feels like it must implement the first idea that sounds strong. The problem with adopting these more haphazard initiatives is that not only can they result in an increased risk for the firm, but they also will likely fail to produce any meaningful reward because the initiatives are not strategically aligned with the firm's true goal of creating an equitable and inclusive culture. Under this context, firms use diversity as a transactional lever[52] without actually attempting to engage in efforts that will meaningfully address the underlying DEI shortcomings within firms.

This Response argues that firms can make better decisions about what DEI initiatives to pursue by focusing on those initiatives that are likely to assist them with their ultimate goal of creating an equitable and inclusive culture within the firm. Using this framework for decisionmaking will not eliminate the risks associated with diversity within firms. Nothing will. But it will help to better align the diversity

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51. *See* Wade, *supra* note 46, at 634 (discussing calls for 21st Century Fox to increase the number of women serving on its board following Fox's multimillion dollar sexual harassment settlements); *see also* Steel, *supra* note 32 (noting how 21st Century Fox hired a new global head of human resources, a new head of human resources at Fox News, expanded training and created more ways for employees to report harassment or discrimination in the wake of reports of the company's settlements).

52. The transactional nature of many of today's diversity initiatives within firms and other organizations can be personally harmful to those who end up being pulled by the diversity lever. As Brummer and Strine note: "Whether we are respected and are treated as worthy of equal respect with each other during our time at work is critical to whether we have a life that is fulfilling." Brummer & Strine, *supra* note 1, at 65. The stakes for firms' DEI initiatives are high for the firms themselves, but in many ways, they are even higher for firms' employees.

risks that are taken with the ultimate reward—a more equitable and inclusive organization—that firms are attempting to achieve.

CONCLUSION

Every decision a firm makes has an element of risk. The goal cannot be to eliminate all risks. Instead, firms must implement frameworks to guide their decisionmaking. This Response provides a potential framework for helping firms make decisions about what DEI efforts to pursue. If firms consider what DEI efforts are likely to lead to the creation of a culture of equity and inclusion throughout the firm, it will provide a framework for the firm to address the diversity risk paradox head-on.