

## Human Capital Disclosures after the Supreme Court's Recent Affirmative Action Decision

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In August 2020, the U.S. Securities and Exchange Commission (SEC) approved an amendment to Item 101 of Regulation S-K, requiring public companies to include in their annual reports and registration statements a discussion of their human capital resources to the extent that such measures are material to an investor's understanding of the company (Human Capital Disclosure). Under Item 101, public companies are required to describe their human capital resources, including the number of persons employed by the company, and any human capital measures or objectives that the company focuses on in managing the business (such as, "depending on the nature of the company's business and workforce, measures or objectives that address the development, attraction and retention of personnel").

The rule does not define "human capital," allowing companies to decide what is material to each company's business within its industry and geographic region, among other considerations. Since the disclosure requirement came into effect, it has become common for companies to include diversity, equity, and inclusion (DEI) initiatives and goals in their Human Capital Disclosure.

On June 29, 2023, the U.S. Supreme Court held that university admissions policies that consider race, even as one of many factors, violated the Equal Protection Clause<sup>1</sup>. The Supreme Court acknowledged that universities may still consider students' experiences with race, how those experiences shaped who they are, and how, through those experiences, those students can contribute to the university.

In response to the Supreme Court's decision, Charlotte A. Burrows, the chair of the U.S. Equal Employment Opportunity Commission, noted that "the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. 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."

In light of these developments, companies should reevaluate their Human Capital Disclosure for their upcoming 10-Ks and should consider not only whether their employment practices are lawful under applicable antidiscrimination laws but also what risks specific practices and disclosures regarding DEI initiatives and goals may pose.

For example, disclosure related to specific diversity goals, including goals that are not based on appropriate reference statistics of potentially qualified persons working in the industry have drawn increased attention from activist groups arguing that these goals may be functionally equivalent to quotas or may otherwise indicate discriminatory practices that favor individuals with certain characteristics in the hiring or promotion process.

Companies should ensure their Human Capital Disclosure makes clear that decisions on whom to hire and promote are based purely on merit and made without consideration of race, gender, or other protected characteristics.

Disclosure related to programs that are designed to increase outreach to and the diversity of applicant pools and employee resource groups that help foster development of underrepresented groups are less likely to draw scrutiny.

Companies should carefully review their Human Capital Disclosures and related employment practices in light of the recent Supreme Court decision and developments thereafter to ensure that their disclosures and practices are lawful and compliant with SEC rules and mitigate the risk of activist scrutiny.

Winston & Strawn's lawyers are available to assist with any questions you may have regarding these issues. To learn more about these issues, please contact the Winston lawyer with whom you usually work, or any of the attorneys who helped prepare this update.

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<sup>11</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 at 213-26 (2023).

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