



Civil rights and racial equity audits

Considerations for boards

KPMG Board insights podcast



Announcer: This is the KPMG Board Insights podcast, and this episode is about the rise of civil rights and racial equity audits.

Hello, everyone, and thanks for joining us. This series is brought to you by the KPMG Board Leadership Center. The KPMG Board Insights podcast features conversations with directors, luminaries, and business leaders exploring the emerging issues and pressing challenges facing boards today.

In this episode, BLC Senior Advisor Stephen Brown speaks with former U.S. Attorney General Loretta E. Lynch, leader of Civil Rights and Racial Equity Audits at Paul Weiss, about board considerations related to racial equity audits and other civil rights audits.

Stephen Brown: The practice of conducting civil rights or racial equity audits has grown rapidly very recently. [There has been] a fair amount of stakeholder pressure, including very active shareholder campaigns over the last two years to implement this review for companies via shareholder proposals. In fact, we saw about 19 proposals in 2021, and then more than double that in 2022.

Further, we've seen significant shareholder support for these, even when they don't win 50.1 percent [of shareholder votes], or when they've actually won more than 50.1 percent. Suffice it to say, this emerging trend is significant enough for *The Wall Street Journal* to pen an article in early September about the nation's largest law firms assisting major companies with this work. Suffice it to say, our audience who are board members and those who work with board members should take heed.

Thus, we are delighted to have someone eminently qualified to help us understand. It's my pleasure to introduce former U. S. Attorney General Loretta E. Lynch, partner at the law firm of Paul, Weiss, Rifkind, Wharton, & Garrison.

She brought her gravitas and experience along with her outstanding colleagues of Paul Weiss to be one of those lawyers and law firms at the forefront of this practice. In addition to advising clients on complex government and internal investigations and high-stakes litigation matters, she chairs Paul Weiss's Civil Rights and Racial Equity Audit practice.

Welcome to the podcast, Madam Attorney General.

Loretta Lynch: Thank you so much, Stephen. It's great to be with you.

Stephen: I should say, before coming to Paul Weiss, you've had extensive governmental service, culminating, of course, with being our eighty-third Attorney General of the United States. So, sincerely thank you for your service.

Loretta: Thank you so much.

Stephen: So, let's jump right in and talk about what actually this is. Now, the term audit is used. I like to think of them as more of assessments or reviews, but certainly the proponents, shareholder proponents, are using that term "audit." Can you give us a good summation of exactly what is meant by civil rights or racial equity audit?

Loretta: Sure, and thanks so much for the question, because that is really the starting point of all of this.

As you noted, shareholders are intensely focused on this issue. And what they are looking to see is, how does this particular company's policies and practices line up with their values along the issues of racial equity?

So, a racial equity audit, as we have been doing them, is really an independent examination of those racial equity issues. We tailor them to our specific clients. We focus on the particular industry which they find themselves in, and we give them that independent assessment of, essentially, do they have the policies and practices in place to have a positive impact consistent with their values on issues of systemic bias [and] racial equity as they reflect within the context of their own industry?

Stephen: Understood. And we at the Board Leadership Center have been privy to some of these, or a portion of the conversations that have happened in the boardroom when they're considering one of these reviews or audits. And so, and we've seen the gamut. They run [from] board members being fully supportive to having some uneasiness and a number of questions to just not on board.

So, if you'll allow me to role play a little bit as a hypothetical board member here ... I have you in front of me as the head of Paul Weiss's Civil Rights and Racial Equity Audit [practice] and we're considering this. Why should we do this as a board? And what's the end goal of this audit?

Loretta: Sure. One of the main reasons to do this as a board, particularly if you are the recipient of a serious shareholder proponent, is at the outset to show that you are responsive to your shareholders on an issue of importance to them, whatever that issue may be.

That's fully consistent with so many things that the board operates through in their daily ... board life. So, at the outset you want to be responsive to your shareholders. And they are telling so many companies that they really want to know, what is the impact of this particular company's operations on issues of racial equity? So, that's one of the first reasons to do it—to be responsive to those shareholders.

Another important reason to do a racial equity audit is because, frankly, many companies today really do have very strong internal DE&I programs—diversity, equity, and inclusion programs. Many of them also have very strong externally facing programs, designed to lift up disadvantaged communities, to open up their industries to groups that might have been

systemically excluded in the past. And frankly, it's a good thing to do, even without shareholder pressure, to assess if what you are doing is actually impactful.

Companies spend a lot of money, and are putting a lot of resources into efforts to have inclusive workplaces and an inclusive environment in which they operate. And you really want to know, are we putting our money where we should? Is this an effective program? Are we having the impact that we want to have?

In that sense, it's really no different from other assessments that boards would have their companies do over the lifespan of a board. A new program has been rolled out; we've invested a lot of money in it. Is it effective? What do our stakeholders say?

And then, so the third reason to think about the importance of a racial equity audit and the reason to do it is, you have stakeholders on this issue beyond just shareholders. You have internal stakeholders. You have your employees. Employees today also want a very diverse and inclusive workforce. Everyone wants to be able to bring their whole selves to work.

And frankly, this isn't just necessarily ethnic minorities, women, men. I think one of the things that the emphasis on diversity over the past years has shown all of us is that no matter where we come from or where we are, yes, we have a lot in common, but we all have differences. We all have things that set us apart, and we all want those things that set us apart to be valued.

We want to use our differences to bring different perspectives and voices to the workforce. So, you also have internal stakeholders, and you have external stakeholders beyond just shareholders. Depending upon the nature of the company and the industry in which they operate, you may have communities in which you are physically located. You may have communities that your policies and practices directly touch on. Financial services is an excellent example of this. We're talking about an industry that touches almost everyone's life as they try and move through the daily living of transportation, getting to and from work ... a car loan, for example, mortgage lending, small business lending.

Do you really have the policies and practices in place, as so many companies really seriously want to, to make sure that you are as fair and even-handed in your external policies as well. So, those are the three main reasons to do one.

Stephen: I'm going to keep in character as a board member. I want to be responsive to my shareholders. I want to be responsive to our employees. It's extremely important. I agree with that, but won't this open us up to a whole host of liability and potential litigation issues?

Loretta: That's actually not a bad question at all. You really are channeling the exact things that people should be asking about with any new review that you do.

Of course you want to look at the ... potential collateral consequences of that. And so, what we say is, "What we're looking to do is to see where are there opportunities for you to do better? Where are there some spots and issues you may have missed? And where are areas of softness in your policies that are already likely exposing you to risk—legal risk, reputational risk, again stakeholder risk?" And so we're looking for those areas. And I'll back up a little bit. You mentioned at the beginning of our conversation that most of this debate has been driven by shareholder proposals. That's absolutely true.

This whole practice area really began with companies who were struggling to manage some fairly high-profile incidents of racial discrimination, usually in their customer base of some sort. And so, sometimes you may already have a situation that is giving you some legal risk, and you want to make sure that, as you manage the legal case, you are looking at the rest of your organization to figure out what may have gone wrong here if anything did, what fell through the cracks? And how do you essentially manage that risk going forward? How do you prevent similar negative interactions going forward? And if you haven't had that kind of situation, then, great, that's wonderful.

But I think many companies are finding that, particularly as they operate all over the country, it's difficult to avoid the kind of misunderstandings that can sometimes lead to action. Those are going to exist regardless of whether you do an audit or not. So, an audit will frankly, arm you with a sense of what you have in place, a sense of how you can prevent future incidents, or prevent incidents overall, and frankly, by showing that you are responsive to stakeholders and to your internal employees.

You know, it's very similar to what we've seen in areas of transparency involving, for example, police-community relations. The more transparency there is, the number of complaints actually goes down because people feel heard, and they feel validated, and they have an avenue to address their concerns

before they swell up into larger ones.

Stephen: I'm going to move to being in the character of just a prudent board member. So, I agree with everything that you've said but I have this question. I have a well-regarded HR director ... a chief diversity officer we just hired who's fantastic, a very good internal audit chief. Can't we do this internally? Why must I have a third party?

Loretta: Sure, you know. Most companies, in fact, do have a very strong internal DEI team. They have a strong internal audit team that handles a number of issues for them. All of those tend to operate in very separate and siloed functions. The benefit of having us come in, or any independent examiner come in and do a racial equity audit is ... we look across the board at your organization, and we look at the interaction of your DEI with other issues that may not be under the DEI bailiwick—for example, procurement, vendors, supplier diversity, and the like.

Sometimes those are pulled under that bailiwick, and sometimes they're actually not. Are there ways for those systems to communicate? And so, you also have people who are very involved in implementing your policies and programs. You need the objective eye who can say, "This is wonderful. What you have set up is designed to work well. But the issue is, is it? Is it actually giving you the value that you need?" And having that objective third-party eye to do that can be tremendously helpful, and frankly, can give you the credibility that you need when you are dealing with some of the stakeholders that we've mentioned.

Stephen: And do I have to use a law firm for this?

Loretta: We recommend using a law firm primarily because you want to cloak this in as much privilege as possible. An analogy is, we do internal investigations. We are also coming in often as an independent third-party reviewer of sorts to look at a specific factual scenario. Here, we're focused more on policies and procedures in an implementation scenario but it's directed by counsel. We work directly through the in-house legal department to communicate with employees, so that we cloak it in as much privilege as possible.

Now, of course, privilege can always be challenged. This is what we as lawyers always know, and it's the bane of every board's experience as well. But we try and start from the beginning, so that any consultants that we may have to use to do any kind of analysis, any kind of review of numbers, if we don't do it in-house, would be hired ... through the law firm

and be retained through your law firm to cloak it in as much privilege as possible. And of course, those are important issues as we talk about what kind of reports we'll ultimately provide to the board and to management.

Stephen: And you mentioned earlier on about where we are in corporate America is the issue of authenticity and transparency, and I understand that. It scares me a little bit. And so, when I think about those issues—authenticity and transparency related to this process—is there some kind of end result where there is public disclosure of this, and how much of it? And how should we think about that? Because that really has my fellow board members really thinking. Let's just put it that way.

Loretta: Yes. Well, if you look at the reports that are currently out there—there's about three or four reports that are public now. And those generally arose from situations where there was some sort of catalytic incident that led to a racial equity audit. We're going to be rolling out the first series of reports, probably in the first quarter of next year, in a number of the ones that are percolating now. And again, similar to an internal investigation, what we are doing with many clients is essentially, we're being responsive to their needs.

Sometimes they may want to have a public report. And again, facts are not privileged, but opinions and conclusions are. So, we work with them to provide something that's factual in terms of findings, and really focusing more on recommendations that we might make that the company could then indicate whether they're going to adopt or not.

And the recommendations are really the roadmap for change that provides accountability to people who want to see you taking these issues seriously, and you're actually taking action based on these issues, even more importantly. And it also can provide transparency because people can see the universe of recommendations that you're going to adopt as a little bit of a roadmap to the universe of issues that you covered without having to get into the issues of who specifically was interviewed and what did they say, and where are all these materials and the like?

So, that's an issue that we work with companies on. And I think companies have got to start viewing their DEI programs ... internal facing as well as external-facing—as assets. An asset should be deployed in a way that really maximizes its value to the company ... even to the extent that it may be an uncomfortable

issue for many.

We certainly have seen far right organizations try and use strong diversity programs against companies. That's increasing again but it's not something that a company should shy away from. You really do want to show that you live your values. Your values are very important to you, particularly for international companies, and I don't know of a company that doesn't have an international component in some way. In this day and age, the world truly is flat. So, you really want to use your awareness of the issue and your willingness to look inward and to do better as something that is a positive for the company. And frankly, I think it will be perceived that way by all of the stakeholders that we've mentioned.

Stephen: What should we be looking for in choosing a law firm? Because as we understand it, in anything that we've seen in the last few years in the ESG space, just about everyone says they're an expert ... So, what should we be looking for as a board when we're looking at law firms for this?

Loretta: Well, I think you want experience, and you want a depth of knowledge, and a depth of bench in terms of resources to bring to bear to these exercises.

So, you want a firm that frankly has experience in looking holistically at problems because a racial equity audit is going to be that kind of holistic examination of issues, not necessarily problems, but issues. You also want a depth of bench in terms of people who have experience doing both civil litigation and civil rights work, investigative work, and frankly, counseling boards in very sensitive high-stakes and delicate matters, it's something that we frankly enjoy doing. We enjoy working with our clients. As I said before, you know, every company really wants to do the right thing. We've been privileged to work with companies who really want to make a difference, both in their employees' lives and in the lives of their customers and other stakeholders. And so, it's really been a privilege for us to join them as they try and continue using this as a tool to really live their values.

Stephen: Indeed. And in my fictional board, we certainly want to do the right thing. I have one final question while I'm in this character mode as a board member. And that is, good boards look at both risk and rewards of processes, including managing and anticipating backlash. And as we think about these audits and as they gain momentum, and as other DEI programs or other ESG-related corporate initiatives

gain momentum, we know that there are hurdles—the hurdle from outright rejection to the concept or process by employees, to claims of reverse discrimination to just a simple fear and trepidation of speaking with lawyers [or other consultants] as you come in to do this evaluation, not to mention that what we're talking about is certainly sticky or tricky situations dealing with human capital management for the most part. So, how should our board members deal with that and manage those hurdles?

Loretta: Sure. You point out some really excellent issues there as you outline the hurdles and those are certainly the ones that we have seen as well.

I would say at the outset, those are the hurdles that you are going to have regardless as you move forward with a strong DEI program. Internally and externally, those hurdles exist, and an audit can help you implement ways to manage them. It can help you see the root of those concerns. It can help you understand why some employees don't want to participate in, not necessarily your audit interviews, but even the DEI programs. You know some of the things that we have seen and been privileged to work on are companies that have had strong processes for handling employee issues. And yet, employees for some reason didn't feel connected to those systems. They either weren't clear, they weren't accessible, they weren't trusted—which meant that they were going unused. So, an audit can help you identify those missed opportunities. I think in terms of people who may reject the idea of an audit, a lot of it is unfamiliarity with it.

And again, we work with the legal departments and the HR departments of our clients, and they are often our bridge to employees. We make ourselves as open as possible to employees, but it isn't always a matter of trying to interview every single person who works for a multinational company.

Sometimes we utilize surveys. Some people feel more comfortable answering an anonymous survey than sitting down with lawyers. We are aware that we're not always the most popular people in the room. That is still the case. And that's okay with us.

Stephen: I slip in and out of that category, so I understand. I feel your pain.

Loretta: That's okay. That's okay. I've had many a witness, both in my private and public lives, say to me, "You know, this really wasn't as bad as I thought it was going to be. I still never want to see you again." And that's okay. That's okay. We understand that.

I think, in terms of the one of the biggest hurdles you mentioned was people's concern about a backlash to these programs. Is it going to engender claims of reverse discrimination? And what I would say is, frankly, those are already out there. There is, unfortunately, a movement in this country that is utilizing the legal system, which I find, frankly, personally insulting and challenging in many ways. Again, courthouses are open for all. But they're using the legal system to try and push back on the efforts of a number of companies to level the playing field, to have an inclusive environment, to bring out the best in everyone who works there, and to interact in an even and fair way with their communities, because those aren't their values. So, those attacks were already out there.

You can use an audit to review your programs and make sure that they are legally bulletproof and that they do stand up to legal scrutiny. But we can't guarantee that those challenges won't come your way.

But I do think that when you are defending against those challenges—and people do look to not just the defense, but how you defend against them—that again, having done an audit, and having had the courage to say, "We're willing to look at ourselves, we're willing to look hard at what we say, what we promise, but also more importantly what we do, and we're always willing to work towards being better. And we can do it in a way that is perfectly lawful and consistent with public policy, the law, but also our values." So, I think people should view a racial equity audit as a positive for all of those reasons.

Stephen: Thank you for that. And I'm out of character now. This is just Steve Brown. And certainly, at the Board Leadership Center, when we've talked to those who have gone through this, they take it as a very positive step.

And that's why I think you have a tremendous amount of uptake and a growing uptake in the shareholder community. So, on this podcast, we try to provide actual insights to board members that they can use and I think you've certainly helped us do that with this subject. I'm going to let you, former Attorney General, have the last word here, and so the floor is yours.

Loretta: Well, thank you, Stephen. And thank you to all your listeners for caring enough about this issue to focus on this important issue of racial equity audits—not just as a trend, not just as a box to check, but as an opportunity—an opportunity to advance the cause of diversity, equity, and inclusion for all your employees, for all the relevant stakeholders. And thank you for viewing this as an opportunity to truly live your values. And frankly, my colleagues across the law firms who are working on this see this in that way as well.

It's really been a pleasure and a privilege to spend time with you today, Stephen, and to also connect with your audience who are so committed to this important cause.

Stephen: Well, thank you very much. Thank you for joining us, former Attorney General Loretta E. Lynch,

chair of Paul Weiss's Civil Rights and Racial Equity Audits. Thank you so much.

Loretta: Thank you, Stephen.

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