

2-15-2023

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### Recommended Citation

Nantiya Ruan, *Racial Pay Equity in “White” Collar Workplaces*, 88 Brook. L. Rev. 519 (2023).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol88/iss2/3>

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# Racial Pay Equity in “White” Collar Workplaces

Nantiya Ruan<sup>†</sup>

## INTRODUCTION

The racial wealth gap in America is wide and persistent. Long-standing and substantial wealth disparities between households in different racial and ethnic groups are simply staggering. In 2019, “the typical White Family ha[d] *eight* times the wealth of the typical Black family and *five* times the wealth of the typical Hispanic family.”<sup>1</sup> Tellingly, the median Black family had \$3,600 in wealth, while the median white family had \$147,000, making the median Black family wealth just 2 percent of white family wealth.<sup>2</sup>

Such disparity between Black, Latinx, and white households reflects the compound negative effects of inequality, discrimination, and lack of opportunity experienced by Black, Indigenous, and People of Color (BIPOC) communities since the

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<sup>1</sup> Neil Bhutta et al., *Disparities in Wealth by Race & Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. (Sep. 28, 2020) (emphasis added), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/A2JY-V3FB>] (noting that Asian and Native American families are counted in “other” along with mixed race families, and, examined together, “have lower wealth than White families but higher wealth than Black and Hispanic [Latinx] families”). Although the Federal Reserve uses the term “Hispanic,” this article uses the term “Latinx” to be inclusive. Hispanic typically refers to people with Spanish-speaking origins, and some find the term problematic due to Spain’s colonial history. Latino/a historically refers to people from Latin America. Latinx acknowledges the gender-expansive term for people from this region, as inclusive of transgender and nonbinary individuals.

<sup>2</sup> CHUCK COLLINS ET AL., INST. POL’Y STUD., TEN SOLUTIONS TO BRIDGE THE RACIAL WEALTH DIVIDE 7 (2019), <https://ips-dc.org/wp-content/uploads/2019/04/Ten-Solutions-to-Bridge-the-Racial-Wealth-Divide-FINAL-.pdf> [<https://perma.cc/DNZ8-FARV>].

start of our nation.<sup>3</sup> The roots of the racial wealth gap for Black Americans began with centuries of slavery and grew with:

Congressional mismanagement of the Freedman's Savings Bank (which left 61,144 depositors with losses of nearly \$3 million in 1874), the violent massacre decimating Tulsa's Greenwood District in 1921 (a population of 10,000 that thrived as the epicenter of African American business and culture, commonly referred to as "Black Wall Street"), and discriminatory [governmental] policies throughout the 20th century, including the Jim Crow Era's "Black Codes" strictly limiting opportunity in many southern states, the GI bill, the New Deal's Fair Labor Standards Act's exemption of domestic agricultural and service occupations, and redlining. *Wealth was taken from these communities before it had the opportunity to grow.*<sup>4</sup>

Righting the wrongs of centuries of public and private racism and discrimination is the crucible this nation has yet to reckon with. Critical race theory (CRT) scholars and advocates examine and persuasively write about the myriad ways to redress racial inequity.<sup>5</sup> Their work is heavily influenced by the antistatutory theory that calls for "reform[ing] institutions and practices that enforce the secondary social status of historically oppressed groups."<sup>6</sup> Recently, as CRT scholarly work has seeped into public discourse, it has come under attack by state and local governments and other public leaders that disagree with efforts to achieve equality through race-conscious, as opposed to race-neutral, efforts.<sup>7</sup>

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<sup>3</sup> By using the term BIPOC in this article, I acknowledge the reality of American workplaces that too often allow for anti-Blackness, "Native invisibility," and white supremacy, and fails to advance racial justice. *See About Us: Our Mission*, BIPOC PROJECT, <https://www.thebipocproject.org/> [<https://perma.cc/NK2D-7FRG>]. When referring to experiences that impact particular persons of color more than others, I refer to these groups of persons specifically (e.g., "Black" for the experience of Black workers). *But see* Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 118 (2021) (criticizing the use of the term BIPOC). Acknowledging the dangers of overuse and misuse of this term, and the importance of language in antistatutory efforts, I use the term BIPOC intentionally and cautiously.

<sup>4</sup> Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020) (emphasis added), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/63B9-99ZL>].

<sup>5</sup> CRT is a legal and academic theory recognizing that racism pervades our institutions and systems apart from individual bias or prejudice. *See Critical Race Theory FAQs*, LEGAL DEF. FUND, NAACP, <https://www.naacpldf.org/critical-race-theory-faq/> [<https://perma.cc/P8LC-MVAV>]. Following the Civil Rights Movement, CRT scholars challenged the position that laws and policies can be "color blind" and called for recognition that systemic racism continues today. *See id.*

<sup>6</sup> Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9, 9 (2003); *see also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140, 167 (1989); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 1–3 (2006); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003, 1013–14 (1986).

<sup>7</sup> *See, e.g.*, Brandon Tensley, *The Engineered Conservative Panic Over Critical Race Theory, Explained*, CNN (July 8, 2021),

While this public debate rages on, another seemingly unrelated social justice issue has gained traction and garnered success in changing public policy and capturing the attention of public representatives and private business leaders: the gender pay gap. When one thinks of “pay equity”—paying equally for substantially similar work—one mostly thinks of the gender pay gap, not the racial one. Closing the gender pay gap (so that women are paid, not eighty-four cents on the dollar earned by men,<sup>8</sup> but equally) has received national attention and spurred several states and localities to legislate and regulate successfully in the pay equity space.<sup>9</sup>

It is time to think more seriously about the racial pay equity gap. Career paths are not equal. Some jobs are dead end, minimum wage, with little to no hope of a promotion or a salary increase that catapults an earner into the next socioeconomic class. Other jobs have growth potential, comfortable wages, and important employee benefits, like health care and retirement. The distinction matters, in part, because of how the racial pay gap operates.

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<https://www.cnn.com/2021/07/08/politics/critical-race-theory-panic-race-deconstructed-newsletter/index.html> [<https://perma.cc/83LL-D2WY>].

<sup>8</sup> Amanda Barroso & Anna Brown, *Gender Pay Gap in U.S. Held Steady in 2020*, PEW RSCH. CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/> [<https://perma.cc/JT2Q-GKMC>].

<sup>9</sup> For example, Colorado recently passed the “Equal Pay For Equal Work Act,” which requires that employers provide to their employees information about promotional opportunities and disclose in a job posting salary compensation or a range of compensation. S.B. 19-085, 74th Gen. Assemb., Reg. Sess. (Colo. 2021); COLO. REV. STAT. § 8-5-201(1)–(2) (West, Westlaw current through the 2d Reg. Sess., 73rd Gen. Assemb. (2022)). New York has made it substantially easier for plaintiffs to pursue gender based pay equity claims by amending its Equal Pay Act twice in recent years. *See* N.Y. LAB. LAW § 194 (McKinney, Westlaw current through L.2022, chapters 1 to 569). First, the Act was amended effective January 2016, by the Achieve Pay Equity Act, which narrowed the defenses available to employers facing a claim of gender based wage discrimination. Act of Oct. 21, 2015, Ch. 362 (S. 1), 2015 N.Y. Sess. Laws (amending subdivision 1(d) of section 194 of the New York Labor Law); *Pay Equity in New York*, GENDER EQUALITY L. CTR., <https://www.genderequalitylaw.org/equalpay-newyork> [<https://perma.cc/2ZBA-WMGQ>]. Then, effective October 2019, the Act was further amended to lessen the burden on female employees to prove wage discrimination by requiring employers to ensure equal pay for “substantially similar” work, and not only “equal” work.” Act of July 10, 2019, Ch. 93 (S. 5248-B), 2019 N.Y. Sess. Laws (amending subdivision 1 of section 194 of the New York Labor Law). Importantly, the damages available to each female employee suffering pay inequity has increased substantially as a result of the 2016 amendment. *See* N.Y. LAB. LAW § 198(1-a) (McKinney, Westlaw current through L.2022, chapters 1 to 841) (“[L]iquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation.”); *see also* *Rana v. Islam*, 887 F.3d 118, 122 (2d Cir. 2018) (“The New York State Legislature has amended the NYLL liquidated damages provision twice since 2009, making it easier for employees to claim liquidated damages.”). This means that successful plaintiffs recover *quadruple* the pay differential, which is significant given the six-years statute of limitations period for New York Labor Law claims.



There are two distinct components to racial pay equity: being paid the same for substantially similar work—equal pay—and getting hired and promoted for the best jobs—equal job opportunity. For example, with regard to racial equal pay, Black men make eighty-seven cents to every dollar earned by white men, while Black women make sixty-three cents to that same dollar earned by white men.<sup>10</sup> As to equal job opportunity, social science research has shown that the few “African Americans in mid- to upper-level corporate positions tend to be channeled into jobs dealing with minority concerns and constituencies with limited opportunities for further advancement.”<sup>11</sup> Racial pay equity captures the need to ensure equal pay for all workers regardless of race, as well as access and opportunity to work that is meaningful, lucrative, secure, and stable, with upward trajectory opportunity. Both the lack of equal pay and equal job opportunity contribute to the enormous racial wealth gap.

An important, but far less studied, way to address racial pay equity and the wealth gap is to examine how to expand the paths of high paying, stable careers for BIPOC. In the corporate sector, where the salaries are robust and the job numbers are growing, the doors to high paying careers and promotional paths to leadership for BIPOC are too often closed tight. This article argues that the corporate sector—especially the financial sector—must reexamine and realign their hiring, retention, and promotion practices to combat racial pay inequity, narrow the racial wealth gap, and ensure the success of BIPOC who work for them. Racial pay equity can only be achieved through the close examination and restructuring of these practices and the most obvious place to start is where the money is—the financial sector. While changing corporate practices is only one piece of the racial pay equity puzzle, given the ability of the financial industry to provide stable and well-paying jobs, the need for

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<sup>10</sup> Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SHRM (June 11, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx> [https://perma.cc/KFF5-QMHY] (citing Brandie Temple & Jasmine Tucker, *Equal Pay for Black Women*, NAT'L WOMEN'S L. CTR. (July 27, 2017), <https://nwlc.org/resources/equal-pay-for-black-women/> [https://perma.cc/Z6RA-GLA2]).

<sup>11</sup> William T. Bielby, *Minority Vulnerability in Privilege Occupations: Why Do African American Financial Advisors Earn Less than Whites in a Large Financial Services Firm?*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 14 (2012) (first citing SHARON M. COLLINS, *BLACK CORPORATE EXECUTIVES: THE MAKING AND BREAKING OF A BLACK MIDDLE CLASS* (1997); then citing Sharon M. Collins, *Occupational Mobility Among African-Americans: Assimilation or Resegregation*, in HANDBOOK OF EMPIRICAL DISCRIMINATION RESEARCH: RIGHTS & REALITIES 189, 189–98 (Laura Beth Nielsen & Robert L. Nelson eds., 2005); then citing Roberta Spalter-Roth & Cynthia Deitch, “*I Don't Feel Right Sized; I Feel Out-of-Work Sized*”: Gender, Race, Ethnicity, and the Unequal Costs of Displacement, 26 WORK & OCCUPATIONS 446 (1999)).

equal employment opportunity, and the importance that firms have in setting standards for employers, it is a critical piece worth considering.

Part I outlines the many ways that corporate employers fail in racial equity efforts and the barriers that have been put into place to keep BIPOC workers from succeeding. Drawing from industrial organizational psychology and sociology, I identify six distinct challenges that must be remedied or ameliorated in order for BIPOC to achieve pay equity in the corporate climate. Part II identifies and analyzes the decades of litigation and class action settlements that have tried and failed to address the persistent lack of BIPOC representation in the financial industry. I categorize these cases into three waves of litigation intended to fix the barriers BIPOC face and then analyze why these class wide settlements and resulting consent decrees failed to move the needle on racial pay equity.

Finally, Part III provides a path forward by identifying interventions, adopted from the most recent social science research, that financial sector employers can implement to align themselves with racial pay equity goals. It provides a blueprint that can go a long way in making financial sector workplaces more equitable for their BIPOC workers.

## I. RACE AND PAY INEQUITY IN THE FINANCIAL INDUSTRY

In the financial sector, compliance is often the name of the game. The financial sector is heavily regulated and has been the target of workplace reform efforts. However, these reforms have had little success. In particular, many well-known financial institutions entered into employment discrimination class settlements and agreed to consent decrees with the goal of increasing diversity and affording meaningful and equitable pay and promotion opportunities in their workplaces. The failure of such efforts, despite heavy resources and investment, is worthy of examination.

The financial industry is a growth sector in the American labor economy that provides lucrative, long term career tracks. One million jobs were added to the financial services sector between 2011 and 2021, and that number is expected to increase over the next decade.<sup>12</sup> These financial industry jobs include areas in lending, financial compliance, and financial

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<sup>12</sup> Table 2.1 *Employment by Major Industry Sector*, U.S. BUREAU LAB. STATS. (last modified Sept. 8, 2022) [hereinafter *BLS Employment by Major Industry Table*], <https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm> [https://perma.cc/R8HF-AXFS].

management.<sup>13</sup> High level financial sector “positions requiring higher education and experience in the financial sector, such as financial advisor, mortgage loan officer, and investment professional, are expected to grow” even more.<sup>14</sup> These careers pay well and offer attractive promotion tracks for successful job applicants. For example, financial analysts’ median pay in 2020 was \$95,570,<sup>15</sup> while financial advisors’ median pay was \$94,170.<sup>16</sup> Further, from 2011 to 2021, the number of financial analysts and financial advisor jobs grew from roughly 770,000 to 877,000.<sup>17</sup> However, Black Americans comprised only 2 percent of that growth.<sup>18</sup>

Advocacy and research organizations, including the National Association for the Advancement of Colored People (NAACP),<sup>19</sup> the Communication Workers of America,<sup>20</sup> and the McKinsey and Kellogg Foundations,<sup>21</sup> have identified the equitable distribution of financial industry jobs as a priority for

<sup>13</sup> *Finance and Insurance: NAICS 52*, U.S. BUREAU LAB. STATS. (data extracted on Oct. 21, 2022), <https://www.bls.gov/iag/tgs/iag52.htm> [<https://perma.cc/9CGY-3XPX>].

<sup>14</sup> NAACP, NAACP OPPORTUNITY & DIVERSITY REPORT CARD: THE CONSUMER BANKING INDUSTRY 6 (2014) [hereinafter NAACP REPORT], <https://www.naacp-losangeles.org/Documents/NAACPDiversityReportCard.pdf> [<https://perma.cc/5XVG-U4Y4>] (citing U.S. BUREAU LAB. STATS., <https://www.bls.gov> [<https://perma.cc/T9DK-3XB5>]).

<sup>15</sup> *Financial Analysts*, U.S. BUREAU LAB. STATS. (last updated Sept. 8, 2022), <https://www.bls.gov/ooh/business-and-financial/financial-analysts.htm> [<https://perma.cc/BL8J-RBUS>]. Financial analysts are responsible for financial planning, analysis and projection for companies and corporations. They forecast future revenues and expenditures to establish cost structures and determine capital budgeting for projects. See *Financial Analyst Job Description*, LHH, <https://www.lhh.com/us/en/insights/job-descriptions/financial-analyst/> [<https://perma.cc/6JRV-L7N7>].

<sup>16</sup> *Personal Financial Advisors*, U.S. BUREAU LAB. STATS. (last modified Sept. 8, 2022), <https://www.bls.gov/ooh/business-and-financial/personal-financial-advisors.htm> [<https://perma.cc/5M82-7Q3X>]. “Personal financial advisors provide advice to help individuals manage their money and plan for their financial future.” *Id.*

<sup>17</sup> *BLS Employment by Major Industry Table*, *supra* note 12.

<sup>18</sup> See *Business & Finance Analysts Demographics and Statistics in the U.S.*, ZIPPIA, <https://www.zippia.com/business-finance-analyst-jobs/demographics/> [<https://perma.cc/6J37-U3M4>] (noting that the Bureau of Labor Statistics reported that 7.39 percent of business and finance analysts identified as Black or African American); *Household Data: Annual Averages 11. Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STATS. (last modified Jan. 22, 2022), <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/6XRN-3QQQ>] (reporting that 9.2 percent of employees in management, business, and financial operations occupations identified as Black or African American in 2021).

<sup>19</sup> NAACP REPORT, *supra* note 14.

<sup>20</sup> NICHOLAS WEINER & HUDSON MUÑOZ, COMM. FOR BETTER BANKS, ADVANCING RACIAL JUSTICE FOR FRONTLINE BANK WORKERS (2021) [hereinafter CBB REPORT], [https://bankaccountability.org/sites/default/files/2022-09/cbb\\_di\\_analysis\\_april\\_23\\_update.pdf](https://bankaccountability.org/sites/default/files/2022-09/cbb_di_analysis_april_23_update.pdf) [<https://perma.cc/D4J7-6KPS>].

<sup>21</sup> ARELIS DIAZ ET AL., MCKINSEY & CO. & W.K. KELLOGG FOUND., RACIAL EQUITY IN FINANCIAL SERVICES (2020) [hereinafter MCKINSEY REPORT], <https://www.mckinsey.com/industries/financial-services/our-insights/racial-equity-in-financial-services> [<https://perma.cc/3FFH-7F5X>].

diversity and equity goals.<sup>22</sup> Currently, financial institutions are failing in diversity, equity, and inclusion (DEI) efforts. “Although African Americans comprise over 13% of the national population, and Latin[x] [people] 18%, executive banking positions are only 3% Black and 4% Latin[x].”<sup>23</sup> Troublingly, “Black and Latin[x] bank workers are concentrated in entry-level, low wage and semi-skilled positions [such as bank tellers] instead of management or executive positions, which are not sufficient wealth generating opportunities of employment.”<sup>24</sup> This stagnation of BIPOC workers at the bottom of the labor pool has been a part of the systemic racism at work in the banking industry.<sup>25</sup> As Professor Mehrsa Baradaran revealed in her recent book, *The Color of Money: Black Banks and the Racial Wealth Gap*, the history of American capitalism and banking is deeply racialized.<sup>26</sup> As part of her study, Professor Baradaran provides a historical account of how financial institutions, from the Freedman’s Bank to today’s payday lenders, locked out Black Americans from creating wealth in America and debunks the myth that Black communities could overcome the racial wealth gap simply through investment in community banking.<sup>27</sup>

Today, the lack of racial diversity in the financial industry is a continuation of this discriminatory history. Although the federal government initially led efforts to address the lack of racial diversity in the financial industry, that interest has waned in recent years. The latest Equal Employment Opportunity Commission (EEOC) report on “Diversity in the Finance Industry” is from 2006.<sup>28</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created Offices of

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<sup>22</sup> See also Judith Hellerstein & David Neumark, *Workplace Segregation in the United States: Race, Ethnicity, and Skill* (Nat’l Bureau of Econ. Rsch., Working Paper No. 11599, 2005), <https://www.nber.org/papers/w11599> [<https://www.nber.org/papers/w11599>]; ARIANE HEGEWISCH ET AL., INST. WOMEN’S POL’Y RSCH., ENDING SEX AND RACE DISCRIMINATION IN THE WORKPLACE: LEGAL INTERVENTIONS THAT PUSH THE ENVELOPE (2011) [hereinafter ENDING DISCRIMINATION], <https://iwpr.org/wp-content/uploads/2020/09/C379.pdf> [<https://perma.cc/27M6-CMCR>]; EQUAL EMP. OPPORTUNITY COMM’N, DIVERSITY IN THE FINANCE INDUSTRY (2006) [hereinafter EEOC DIVERSITY IN FINANCE REPORT], <https://www.eeoc.gov/special-report/diversity-finance-industry> [<https://perma.cc/9QQN-JKEA>].

<sup>23</sup> NAT’L CMTY. REINVESTMENT COAL. (NCRC), RACIAL AND ETHNIC REPRESENTATION AND INVESTMENT FRAMEWORK FOR THE BANKING INDUSTRY: A RESEARCH REPORT AND RECOMMENDATIONS FOR BENEFICIAL STATE FOUNDATION 4 (2020), <https://ncrc.org/reri/> [<https://perma.cc/VM5F-6CPQ>].

<sup>24</sup> *Id.*; see also *id.* at 29–30 (reporting statistics of industry averages of racial and ethnic representation).

<sup>25</sup> MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 1–2 (2019).

<sup>26</sup> See generally *id.*

<sup>27</sup> *Id.* at 243–46.

<sup>28</sup> EEOC DIVERSITY IN FINANCE REPORT, *supra* note 22.

Minority and Women Inclusion at each federal regulatory regime, including the Securities and Exchange Commission (SEC), to boost diversity and analyze hiring practices.<sup>29</sup> When the SEC proposed that banks conduct self-assessments based on best practice guidelines, the banks, represented by the Chamber of Commerce, argued against such moves based on worries over reverse discrimination claims and mandated affirmative action programs.<sup>30</sup> Accordingly, reporting on pay equity is voluntary under the regulation, and for the most recent cycle, only half of large banks reported pay equity data.<sup>31</sup>

With new SEC leadership recently appointed, and the Biden administration in place, the future of these government-led diversity efforts might receive more attention. But in previous years, attempts to create equal pay opportunities have been relegated to voluntary efforts and suits by “private attorney[s] general”—employment discrimination class action attorneys.<sup>32</sup> Given the lack of public oversight and private enforcement, it is no wonder that BIPOC representation at large banks in positions with true equal job opportunity and pay equity is so abysmal. Researchers, in both the legal and social science fields, have recognized these trends and begun identifying the many barriers and challenges facing BIPOC workers in this financial industry space. The following Section synthesizes and catalogues these findings to better understand these challenges.

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<sup>29</sup> 12 U.S.C. § 5452; SECS. & EXCH. COMM’N, STANDARDS FOR ASSESSING THE DIVERSITY AND PRACTICES OF ENTITIES REGULATED BY THE SECURITIES AND EXCHANGE COMMISSION—FREQUENTLY ASKED QUESTIONS 1 (2018), <https://www.sec.gov/files/DAR-FAQ.pdf> [<https://perma.cc/3UEN-B59K>].

<sup>30</sup> Luis A. Aguilar, *Failing to Advance Diversity and Inclusion*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2015), <https://corpgov.law.harvard.edu/2015/06/11/failing-to-advance-diversity-and-inclusion/> [<https://perma.cc/Z2AC-7ZV4>]; Patrick Caldwell, *The Financial Industry Doesn’t Want You to Know About Its Lack of Diversity*, MOTHER JONES (Mar. 11, 2014), <https://www.motherjones.com/politics/2014/03/financial-firm-diversity-jobs/> [<https://perma.cc/ST5H-8MT7>].

<sup>31</sup> H.R. MAJORITY STAFF OF COMM. ON FIN. SERVS., 116TH CONG., DIVERSITY AND INCLUSION: HOLDING AMERICA’S LARGE BANKS ACCOUNTABLE 26–27 (2020) [hereinafter HOLDING BANKS ACCOUNTABLE], <https://financialservices.house.gov/issues/diversity-and-inclusion-holding-america-s-large-banks-accountable.htm> [<https://perma.cc/N3AC-24SA>].

<sup>32</sup> *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980) (recognizing that fee awards serve the dual purposes of encouraging “private attorney[s] general” to seek redress for violations and discouraging future misconduct); see *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (noting that an attorneys’ fees provision was enacted to encourage the pursuit of judicial relief).

A. *Perception of a Lack of Diverse Talent Pool*

One challenge to correcting racial bias in the financial industry is the pervasive misunderstanding that there are too few qualified BIPOC workers interested in financial service jobs. “[T]he unfortunate reality is that there is a very limited pool of Black talent to recruit from with this specific experience as our industry does not have enough diversity in most senior roles.”<sup>33</sup> This comment from Wells Fargo CEO Charlie Scharf in a June 2020 memorandum reveals how deep racial bias runs in the financial industry. Racial justice advocates were quick to respond to Mr. Scharf’s ill-informed comments, reporting that there is plenty of diverse talent—they are just stagnating in lower-level jobs.<sup>34</sup> The truth is that the financial industry is a bifurcated workforce: BIPOC are disproportionately represented in lower-level positions compared to their white counterparts, as well as generally underrepresented in the field.<sup>35</sup>

In the consumer banking sector of the financial industry, banks have stepped up their recruiting efforts to increase diversity and inclusion programs.<sup>36</sup> While entry-level banking jobs, such as branch teller and call center positions, have provided opportunities for BIPOC to gain entry into “white” collar positions within the financial sector, these jobs are routinely low paying,<sup>37</sup> without significant promotion potential, and recently, have been subject to deep cuts with the advent of online and digital banking.<sup>38</sup> In contrast, senior management in the banking sector has long been dominated by white men, who held 64 percent of these positions in 2008.<sup>39</sup> More generally in financial services, the proportion of BIPOC drops by 75 percent

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<sup>33</sup> Hannah Levitt, *Wells Fargo CEO Apologizes for ‘Limited’ Black Talent Remark*, BLOOMBERG (Sept. 23, 2020), <https://www.bloomberg.com/news/articles/2020-09-23/wells-fargo-ceo-draws-fire-for-limited-black-talent-comment> [<https://perma.cc/L6G3-MSR4>].

<sup>34</sup> CBB REPORT, *supra* note 20, at 2.

<sup>35</sup> *Id.* at 4–5.

<sup>36</sup> *See id.*

<sup>37</sup> Many teller positions are hourly, not salaried, and pay roughly \$14/hour. *See How Much Do Bank Teller Jobs Pay per Hour?*, ZIPRECRUITER, <https://www.ziprecruiter.com/Salaries/Bank-Teller-Salary-per-Hour> [<https://perma.cc/3J88-JCJ7>].

<sup>38</sup> CBB REPORT, *supra* note 20, at 5.

<sup>39</sup> NAACP REPORT, *supra* note 14, at 6–7 (first citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-238, DIVERSITY MANAGEMENT: TRENDS AND PRACTICES IN THE FINANCIAL SERVICES INDUSTRY AND AGENCIES AFTER THE RECENT FINANCIAL CRISIS 87 (2013); then citing ORICE WILLIAMS BROWN, U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-736T, FINANCIAL SERVICES INDUSTRY: OVERALL TRENDS IN MANAGEMENT-LEVEL DIVERSITY AND DIVERSITY INITIATIVES, 1993–2008 (2013)).

from entry level to the C-suite, where nine out of ten C-suite executives are white men.<sup>40</sup>

The perception of lack of talent in diverse candidate pools was once explained by the disparate college attainment amongst different racial and ethnic groups. Objectively, higher paying management jobs will often require a minimum of a bachelor's degree. Still, recent advancements in higher education underscore this misconception. Between 1993 and 2008, Black and Latinx college attainment levels increased over 35 percent in those fifteen years.<sup>41</sup> In terms of raw numbers, in 2008, nearly as many Black Americans had a bachelor's degree as whites had in 1993, yet without any meaningful increase in Black or Latinx managers.<sup>42</sup> Similarly, "[n]o group has increased its share of MBA recipients more than African Americans and no groups has seen its share of MBA holders fall as much as whites without any measurable shift in employment diversity."<sup>43</sup> Yet the misperception that there is a shortage of diverse talent because of a lack of higher education remains a popular social view.

Today, racial gaps remain prevalent; in the most lucrative and advanced positions, there has been little or no parity. In 2005, a National Bureau of Economic Research study found that workplace racial segregation is not attributable to skill differences, as measured by education or occupation differences between Blacks and whites.<sup>44</sup> Since educational differences do not explain racial workplace segregation, other reasons for the exclusion—namely, discrimination, residential segregation, and labor market networks—are likely at work.

### *B. Failure to Widen the Promotion Pipeline*

Although recent efforts to hire diverse applicants into entry-level positions have gained traction in the financial industry, the lack of racial diversity in the most lucrative and senior positions reflects the limited growth BIPOC have experienced in the best positions in corporate America. The McKinsey Institute studied racial equity in financial services in 2020, and found that the proportion of BIPOC in financial services dropped by 75 percent from entry-level positions to the C-suite.<sup>45</sup> Another study found that Black employees are roughly

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<sup>40</sup> MCKINSEY REPORT, *supra* note 21, at 3.

<sup>41</sup> NAACP REPORT, *supra* note 14, at 8.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 11.

<sup>44</sup> Hellerstein & Neumark, *supra* note 19, at 33.

<sup>45</sup> MCKINSEY REPORT, *supra* note 21, at 3.

half as likely to be promoted to manager, senior manager, or senior vice president.<sup>46</sup> For example, at Bank of America, "Black employees have a 23 percent chance of being an executive compared to white colleagues [and] Latin[x] employees have a 16 percent chance of being an executive compared to white colleagues."<sup>47</sup> Further, "Black and Latin[x] employees are respectively 3.75 and 5.05 times more likely to hold entry level positions."<sup>48</sup> What accounts for the drop off in representation at higher levels is the study of inclusion efforts. Two interrelated issues make up this effort: the rate at which BIPOC leave finance jobs, attrition; and the rate of advancement, promotion.

With regard to attrition, the rate at which Blacks, Latinx, and Asians are leaving their jobs is "higher . . . than for white people, with the most pronounced losses occurring early in the pipeline."<sup>49</sup> With regard to promotion:

Promotion rates are higher for white employees, with Black people about half as likely to be promoted to manager, senior manager, or senior vice president. Asian people fare better in that they are more likely to be promoted to manager than white people, but the likelihood of further promotion drops steeply thereafter. At entry levels, Latinx employees are only slightly less likely to be promoted than their white peers and are more likely to be promoted to senior vice president than white colleagues. However, their promotion rate drops at the C-suite level, where they are 40 percent as likely to be promoted as white employees.<sup>50</sup>

Part of the problem lies in financial institutions' promotion policies and practices. Promotion standards are often opaque and unreliable.<sup>51</sup> The number of employment discrimination class action lawsuits point to the discriminatory promotion policies that result in unequal representation in top jobs.<sup>52</sup> For example, some firms, rather than systematically posting advancement opportunities, promote employees by "tapping them on the shoulder,"<sup>53</sup> which advantages white

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<sup>46</sup> *Id.* at 6.

<sup>47</sup> CBB REPORT, *supra* note 20, at 1.

<sup>48</sup> *Id.*

<sup>49</sup> MCKINSEY REPORT, *supra* note 21, at 6.

<sup>50</sup> *Id.* at 6–7.

<sup>51</sup> See, e.g., Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 377, 427–28 (2008).

<sup>52</sup> See, e.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488–90 (7th Cir. 2012) (finding Merrill's policies were appropriate issues for certification of a class of African-American FAs); *Jaffe v. Morgan Stanley & Co.*, No. 06 Civ. 3903, 2008 WL 346417 (N.D. Cal. Feb. 7, 2008) (approving programmatic and monetary relief for African American and Latino financial advisors and financial advisor trainees at Morgan Stanley).

<sup>53</sup> *Systemic Enforcement at the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/systemic-enforcement-eeoc> [https://perma.cc/NH5U-



employees.<sup>54</sup> Additionally, as Industrial Organization Psychologists who study these workplace behavior have found, finance firms too often use unreliable and invalid evaluation tools that disparately impact BIPOC workers.<sup>55</sup>

Diversity at the top management level is also made more difficult because firms hire for higher-level positions from inside the organization and require extended tenure at the firm. Such practices disadvantage diverse employees who are underrepresented or stagnate in entry-level positions. One study by the nonprofit Committee for Better Banks found “that Black and Latin[x] employees face huge disparities in the likelihood of internal advancement compared to white peers at each employment level.”<sup>56</sup> This and other studies reflect the difficulty BIPOC workers face when trying to climb the corporate ladder given the multiple invisible barriers they must confront.

C. *Work Climate and the Experience of “Onlys” Impacts Attrition*

To understand the steep drop off of BIPOC employment in the financial services pipeline, academics and advocates have looked to the workplace environment. One identifiable problem is the workplace culture of financial institutions. Too often in corporate offices, “[t]o be a [B]lack professional is often to be alone.”<sup>57</sup> At large banks, the lack of other employees who look like them—being the only person of their racial or ethnic group identity—is often keenly felt. These “[o]nlys consistently report higher levels of perceived discrimination than those who are not” alone.<sup>58</sup> The McKinsey Report on racial equity in financial services found that 75 percent of Black employees above entry-level are “onlys,” compared to 40 percent Latinx, 31 percent Asian, and 4 percent of white employees. One 2019 report from the Center for Talent Innovation think tank, titled *Being Black in Corporate America: An Intersectional Exploration*, found that

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SXWN] (listing “[t]ap-on-the-shoulder promotion policies” as an example of “practices and policies that may involve systemic discrimination”).

<sup>54</sup> “Tapping on the shoulder” could mean promoting only employees that are known to the hiring manager without posting for the position. *See, e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, 325 F.R.D. 55, 84 (S.D.N.Y. 2018) (certifying a class of female bank employees alleging that Goldman Sachs discriminated against them in pay and promotions because of their gender).

<sup>55</sup> Bielby, *supra* note 11, at 15.

<sup>56</sup> CBB REPORT, *supra* note 20, at 12.

<sup>57</sup> Adia Harvey Wingfield, *Being Black—but Not Too Black—in the Workplace*, ATLANTIC (Oct. 14, 2015), <https://www.theatlantic.com/business/archive/2015/10/being-black-work/409990/> [<https://perma.cc/58B6-B3GS>].

<sup>58</sup> MCKINSEY REPORT, *supra* note 21, at 7.

Black professionals are more likely to encounter prejudice and microaggressions than any other racial or ethnic group.<sup>59</sup> The study also found they are less likely than their white counterparts to have access to senior leaders or support from their managers.<sup>60</sup>

Being an “only” relates to experiences of career exclusion; professionals isolated in such circumstances consistently report experiencing racial microaggressions in the workplace.<sup>61</sup> Career exclusion can be overt—who gets which accounts or teaming opportunities—or implicit—who gets invited to after-hours get-togethers. Being excluded from professional and social activities and subjected to recurrent racial microaggressions creates a toxic workplace culture where employees feel a lack of support from their managers, especially when they are the only person of a particular race or ethnic group.<sup>62</sup> Feeling isolated and unsupported makes being successful at a workplace an uphill battle and can lead to increased attrition.<sup>63</sup>

*D. The Effects of Social Closure, Homophily, and “Minority Vulnerability”*

Being excluded from opportunities because one is an “only” can be the result of social closure in the workplace. This exclusionary practice “is a fundamental sociological concept explaining how society produces and maintains inequality.”<sup>64</sup> Proposed by Max Weber, a German sociologist and political economist, to explain legal, social, and economic status privilege, “social closure ‘refers to processes of drawing boundaries, constructing identities, and building communities in order to monopolize scarce resources for one’s own group, thereby excluding others from using them.’”<sup>65</sup>

<sup>59</sup> COQUAL (formerly CTR. FOR TALENT INNOVATION), BEING BLACK IN CORPORATE AMERICA: AN INTERSECTIONAL EXPLORATION 5 (2019) [hereinafter BEING BLACK IN CORPORATE AMERICA], <https://coqual.org/wp-content/uploads/2020/09/CoqualBeingBlackinCorporateAmerica090720-1.pdf> [<https://perma.cc/N9UZ-965J>].

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.*; Derald Wing Sue, *Preface to DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* (2010).

<sup>62</sup> BEING BLACK IN CORPORATE AMERICA, *supra* note 59, at 5.

<sup>63</sup> Leslie Hunter-Gadsden, *Why People of Color Feel the Loneliest at Work*, FORBES (May 19, 2020, 11:50 AM), <https://www.forbes.com/sites/nextavenue/2020/05/19/why-people-of-color-feel-the-loneliest-at-work/?sh=7422c5641ad8> [<https://perma.cc/9WE9-A7CW>].

<sup>64</sup> Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 4 (2018) (citing MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 341–44 (1978)).

<sup>65</sup> *Id.* at 4–5 (quoting Jurgen Mackert, *Social Closure*, OXFORD BIBLIOGRAPHIES (Aug. 29, 2012)).

More recently, legal scholars have applied social closure theory as a factor into how race discrimination operates in modern workplaces. Professors Catherine Albiston and Tristin Green theorized that “[u]nderstanding [s]ocial [c]losure [theory] [r]eveals mechanisms of discrimination” that assist our understanding of how discrimination works in today’s workplaces.<sup>66</sup> Understanding how discrimination works subsequently allows workplace experts to update and adapt laws and policies to these new understandings. “[S]ocial closure moves the focus away from individual bias toward a more process-based theory of discrimination that takes into account organizational culture and structure.”<sup>67</sup>

Social closure dynamics are seen in the financial industry’s hiring and promotion practices. This includes “restrict[ing] geographic locations . . . limit[ing] outreach to certain educational or training institutions, nepotism, cronyism, and recruiting through word-of-mouth.”<sup>68</sup> These practices allow white “employees to reach out to those who are most like themselves to provide [resources] and insider details” about how to succeed, as well information about upcoming job openings, which leads to “in-group favoritism.”<sup>69</sup>

Similarly, social closure theory can be seen as a motivating factor in recent race discrimination class claims in the financial industry. In *McReynolds v. Merrill Lynch*, a Title VII race discrimination class action in federal court, the plaintiffs’ case included evidence that Merrill Lynch confined Black financial advisors (FAs) to efforts focused on penetrating minority markets. The plaintiffs then linked the racialized marketing effort to Merrill Lynch’s company wide diversity policy, which led to racialized jobs and constrained opportunities for Black FAs that were set up for failure.<sup>70</sup> This case supports the view that, in line with social closure theory, promotion and evaluation practices should not be viewed in isolation. Rather, these practices are intersected with white brokers’ in-group-oriented biases within the organization. The goal should not be to simply “eliminate a specific, identified practice but rather to alter the culture [and] other mechanisms of social closure that are interacting with that practice.”<sup>71</sup>

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<sup>66</sup> *Id.* at 22–23.

<sup>67</sup> *Id.* at 23.

<sup>68</sup> *Id.* at 20.

<sup>69</sup> *Id.* at 20–21; CBB REPORT, *supra* note 20, at 12–13.

<sup>70</sup> Bielby, *supra* note 11, at 13–14; *see also* *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489–90 (7th Cir. 2012).

<sup>71</sup> Albiston & Green, *supra* note 64 at 33.

Related to social closure theory, homophily is a sociological theory that posits that people are more likely to form supportive social connections with others like them based on similar characteristics such as race and ethnicity.<sup>72</sup> One recent study on homophily and social networks found that the way you connect to other people within a social network influences your ranking or importance within that network, such as a workplace.<sup>73</sup> In the workplace, research shows that supportive peer relations, including friendships and helping networks, correlate to positive performance outcomes and increased job satisfaction. These “supportive peer relationships enhance the likelihood of career success, enhance self-esteem and professional identity, and may reduce occupational stress and promote employee health.”<sup>74</sup>

The challenge of racially diverse workplaces is to “encourage demographically dissimilar peers to consider one another’s perspectives and to seek assistance from, and transfer knowledge to, one another.”<sup>75</sup> This can be especially challenging when one considers how individuals act generally in society. One national study found that only “[eight] percent of adults with networks of two or more others mentioned having a person of another race with whom they ‘discussed important matters[,] [which] represents less than one seventh of the heterogeneity that one would observe were people to choose randomly.’”<sup>76</sup>

Homophily—again, which is essentially seeking others like yourself—reflects a particular challenge to racial pay equity in corporate America. Financial industry firms propagate the narrative that affluent white clients are more comfortable with white brokers, advisors, or managers to justify giving certain clients, accounts, and opportunities to white employees.<sup>77</sup> Firms often justify not hiring or promoting BIPOC because of a perceived need for a high level of trust between brokers and clients.<sup>78</sup> This, combined with racially segregated social networks, (such as firms limiting Black FAs to positions that deal primarily with minority concerns and constituents) exacerbates the headwinds BIPOC workers consistently face. The obvious disadvantage to BIPOC can go beyond lack of

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<sup>72</sup> Samuel B. Bacharach et al., *Diversity and Homophily at Work: Supportive Relations Among White and African-American Peers*, 48 ACAD. MGMT. J. 619, 619 (2005).

<sup>73</sup> Fariba Karimi et al., *Homophily Influences Ranking of Minorities in Social Networks*, NATURE SCI. REPS. 1 (2018).

<sup>74</sup> Bacharach et al., *supra* note 72, at 620 (citations omitted).

<sup>75</sup> *Id.* at 621.

<sup>76</sup> *Id.*

<sup>77</sup> Bielby, *supra* note 11, at 15.

<sup>78</sup> *Id.*

opportunity to unfair termination when one fails to meet the required benchmarks or performance evaluations to be retained.

Social closure and homophily combine with unconscious or cognitive bias in ways that help us understand racial disparities in the corporate workplace for professional and mid-to upper-level executive and management positions. Sociologists Debra McBrier and George Wilson synthesized these theories and statistical evidence of discrimination to develop a “minority vulnerability thesis,” recognizing that employers make termination and promotion decisions that reinforce patterns of racial exclusion:

[R]ace-based patterns of layoffs are a manifestation of “modern racial prejudice,” which is characterized as situational, ostensibly nonracial, and institutional in nature. In general, the minority vulnerability thesis posits that dynamics ranging from perceived need to conform to existing norms of racial exclusion in order to maintain a stable workforce and steady customer/client base to cognitive distortions inherent in “self-serving attribution bias” and “statistical discrimination” arising from stereotypes result in layoffs that are not discriminatory in intent but serve to disproportionately exclude racial minorities from top-level positions.<sup>79</sup>

In essence, BIPOC are placed in “racially delineated jobs” that constrain their ability to demonstrate “the ‘right stuff’” for promotion, retention, pay bonuses, and merit increases.<sup>80</sup>

For BIPOC in corporate America, sociologist William Bielby applied these theories to assess racial pay inequity at large financial institutions, specifically within roles such as stockbrokers, financial consultants, and financial advisers.<sup>81</sup> Dr. Bielby recognized that, for these roles, a client relationship involves “a high level of trust . . . which can reinforce homophily in client preferences.”<sup>82</sup> Because white communities have substantially more wealth than BIPOC communities and there are high levels of racial segregation in social networks, BIPOC financial workers who must “build their book” by tapping into these networks face significant resistance compared to their white counterparts.<sup>83</sup> Further, in the finance sector, the culture is one where power and opportunity reside with senior-level brokers, consultants, or advisors, rather than management who occupy the formal positions of authority in the institutional

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<sup>79</sup> George Wilson & Debra Branch McBrier, *Race and Loss of Privilege: African American/White Differences in the Determinants of Job Layoffs from Upper-Tier Occupations*, 20 SOCIO. F. 301, 303 (2005) (internal citations omitted).

<sup>80</sup> *Id.* at 304.

<sup>81</sup> Bielby, *supra* note 11, at 13, 15.

<sup>82</sup> *Id.* at 15.

<sup>83</sup> *Id.* at 16.

hierarchy.<sup>84</sup> Accordingly, in these workplaces, social closure and homophily operate through “coworkers of formally equal status” and therefore, disruption requires innovative solutions that do not rely on policies and practices that come from the top.<sup>85</sup>

### E. *Myth of Meritocracy*

A significant barrier to equitable workplaces in the corporate space is the “meritocracy myth”: the “cultural assumption[] about employment opportunity . . . that employment discrimination is an anomaly [and] . . . merit alone determines . . . success.”<sup>86</sup> According to meritocracy ideology, you get out of the system what you put into it.<sup>87</sup> Success is based on individual merit, including innate abilities, hard work, the right attitude, and high moral character and integrity.

In the financial industry, where formal hiring, evaluation, and promotion policies and procedures are often in place,<sup>88</sup> managers are more apt to believe that the structure is unbiased and that unequal outcomes reflect differences in merit. This “[s]ystem []egitimation” ignores systemic discrimination.<sup>89</sup> Believing that merit determines success allows companies to simply look at output metrics without questioning whether the outputs are the result of disparate inputs. “[R]acialized practices become embedded in a performance pay system [with] cumulative advantage and social closure processes [that] generate . . . the ‘paradox of meritocracy effect.’”<sup>90</sup>

Financial firms contend that their employees’ compensation is set by seemingly objective standards.<sup>91</sup> Firms

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590 (2000); see also Note, “Trading Action for Access”: *The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156, 1256 (2008) [hereinafter *Trading Action for Access*] (“Half of the white respondents to a 2001 national survey believed that blacks enjoyed comparable or superior access to jobs.”).

<sup>87</sup> See, e.g., SONIA OSPINA, ILLUSIONS OF OPPORTUNITY: EMPLOYEE EXPECTATIONS AND WORKPLACE INEQUALITY 13–14 (1996) (describing meritocracy beliefs as unequal economic rewards stemming from differences in individual motivation and action, not lack of systemic opportunity); Clifton Mark, *A Belief in Meritocracy is Not Only False: It's Bad for You*, PRINCETON U. PRESS (June 2020) <https://press.princeton.edu/ideas/a-belief-in-meritocracy-is-not-only-false-its-bad-for-you> [https://perma.cc/W8MS-XAMU].

<sup>88</sup> See, e.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488–90 (7th Cir. 2012) (evaluating Merrill’s written promotion and retention policies).

<sup>89</sup> *Trading Action for Access*, *supra* note 86, at 2163.

<sup>90</sup> Bielby, *supra* note 11, at 28.

<sup>91</sup> See, e.g., Brief for Defendant-Appellee at 11, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012) (No. 11-3639), 2011 WL 9165433.

use “fixed mathematical formula[s]” with “output-based-pay-for-performance” metric systems, which they argue are free from subjective evaluations and therefore, are fairer and less susceptible to racial bias.<sup>92</sup> However, more recently, this has been shown to be the type “of meritocratic evaluation system” most vulnerable to racial and gender bias.<sup>93</sup> To that end, “[m]eritocracy as a cultural value can serve as an ‘environmental trigger’ or be part of a ‘tool kit’ of habits that unleashes individual cognitive biases.”<sup>94</sup>

Flipping this orthodoxy—that a company is an unbiased meritocracy—would open the door to conversations that could potentially challenge the unstated assumption that all workers are given equal opportunities and that metrics are applied objectively. Bringing to light these fallacies may ameliorate or help remedy toxic workplace environments for BIPOC workers.

#### F. *Lack of Accountability at the Top*

In 2020, with the increased public awareness of racially motivated police brutality, interest in structural racism and economic justice came to the forefront of public scrutiny. Diversity, equity, and inclusion became buzzwords parroted by corporations across the nation.<sup>95</sup> Many corporations rushed to issue statements of support for racial justice, and some went beyond that to study more intently the effects of systemic racial discrimination in their workplaces.<sup>96</sup> For example, Deloitte published an extensive report in early 2021, entitled *The Equity Imperative*, that outlined how it can be a leader in the fight against systemic racism.<sup>97</sup>

Moving beyond talk and toward action requires leaders, managers, and executives to embrace these efforts and be accountable for their initiatives’ success. Too often, the financial

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(C.A.7) (“Merrill Lynch allocates the right to pursue a departing FA’s accounts under a national policy that ranks FAs using published objective criteria.”).

<sup>92</sup> Bielby, *supra* note 11, at 15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (quoting Emilio J. Castilla & Stephan Bernard, *The Paradox of Meritocracy in Organizations*, 55 ADMIN. SCI. Q. 543, 544 (2010)) (internal quotations omitted).

<sup>95</sup> Sonali Shah, *Diversity and Inclusion: Moving Beyond Buzzwords*, FORBES (Dec. 28, 2021, 9:45 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/12/28/diversity-and-inclusion-moving-beyond-buzzwords/> [<https://perma.cc/EZH6-83AF>].

<sup>96</sup> See, e.g., *Advancing Racial Equality and Economic Opportunity*, BANK OF AM. (2022), <https://about.bankofamerica.com/en/making-an-impact/helping-advance-racial-equality-and-economic-opportunity> [<https://perma.cc/R7SA-N47V>]; DELOITTE, *THE EQUITY IMPERATIVE: THE NEED FOR BUSINESS TO TAKE BOLD ACTION NOW 1* (2021) [hereinafter DELOITTE REPORT], <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/the-equity-imperative.html> [<https://perma.cc/5B37-9Z3Z>].

<sup>97</sup> DELOITTE REPORT, *supra* note 96.

industry's programs and initiatives are implemented in a context of unspecified and diffuse structures of responsibility and authority. For example, in *McReynolds*, in Merrill Lynch's affirmative action plan, the CEO had overall responsibility for affirmative action results, while accountability at the corporate level was delegated to the senior vice president of human resources (HR). Yet, in her deposition, the HR head "testified that she had never seen an affirmative action plan, had never viewed an underutilization report, and had no responsibility for doing so."<sup>98</sup> Dr. Bielby, an expert in the case, wrote that Merrill Lynch "was still grappling with the issue of whether 'ownership' for diversity programs should be 'nested down in the business' or be centralized within the multicultural marketing function (or elsewhere)."<sup>99</sup> At that firm,

it is [still] impossible to know whether accountability structures could have . . . been implemented in a way that overcame the ambiguous, diffuse, and decoupled lines of responsibility and authority for diversity and equal employment opportunity that have characterized the company's brokerage division for more than a decade and whether those interventions would have any measurable impact on the cumulative advantage system that created racial disparities in earnings between African American and white brokers.<sup>100</sup>

As the Deloitte study found, racial equity will only be realized when corporate leaders "activate the full breadth of their control and influence across all parts of their organizations."<sup>101</sup> Scholars agree. Professor Nancy Levit cited socio-legal researchers who study and theorize "that the implementation of specific practices that make people accountable for change is more effective in increasing diversity than educating employees about stereotypes and biases."<sup>102</sup>

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<sup>98</sup> Bielby, *supra* note 11, at 26.

<sup>99</sup> *Id.* at 27.

<sup>100</sup> *Id.*

<sup>101</sup> DELOITTE REPORT, *supra* note 96, at 38.

<sup>102</sup> Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 372 (2008) (citing Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589, 611 (2006)); see Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RSCH. 143, 148 (2004); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995); Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXPERIMENTAL SOC. PSYCH. 75, 79–81 (2003); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 514 (2003); Deborah L. Kidder et al., *Backlash Toward Diversity Initiatives: Examining the Impact of Diversity Program Justification, Personal and Group Outcomes*, 15 INT'L J. CONFLICT MGMT. 77, 79 (2004); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41



Firms are resistant to change without proper motivation, such as the Black Lives Matter Movement and the protests in the wake of police killings of Black Americans. Still, the main motivation for corporate change and the redress of racial pay inequity has come from structural reform litigation efforts—namely, employment race discrimination class actions and resulting class settlements with consent decrees that mandate and monitor reform efforts.

## II. SETTLEMENTS AND INJUNCTIVE RELIEF MEASURES IN EMPLOYMENT DISCRIMINATION CLASS ACTIONS IN THE CORPORATE SECTOR

Looking to litigation to make racial pay equity a reality has not yet been an effective strategy despite the significant number of class actions settlements over the last several decades. One of the challenges in remedying racial pay inequity in the financial industry is the legal doctrine's focus on individual acts of animus or bias instead of examining corporate cultures and company practices that benefit privileged groups. Seemingly neutral practices should not be considered or litigated in isolation; instead, they should be placed in context.

Courts fail to consider the history of the workplace practices and cultures that are challenged. Individuals in companies make judgments and decisions about others on a day-to-day basis within the larger organizational context. Such context includes corporate culture and institutionalized practices and systems, which combine to provide a complex backdrop to individual decision making.<sup>103</sup> If a practice is a product of or means for social closure, then employers should not be able to retain the practice on a mere showing of job relatedness and business necessity, as is the requirement to avoid disparate impact liability under Title VII.<sup>104</sup> Too often, when faced with complex business practices, judges defer to

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AM. BEHAV. SCIENTIST 960, 963 (1998); HELEN HEMPHILL & RAY HAINES, DISCRIMINATION, HARASSMENT, AND THE FAILURE OF DIVERSITY TRAINING: WHAT TO DO NOW (1997); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1299–1301 (2005); Earnest Friday & Shawnta S. Friday, *Managing Diversity Using a Strategic Planned Change Approach*, 22 J. MGMT. DEV. 863, 864 (2003); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 27–28 (2001).

<sup>103</sup> Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 668 (2003).

<sup>104</sup> See 42 U.S.C. § 2000e-2(k).

corporate decisions on their own industry practices rather than mandating change in the name of antidiscrimination efforts.<sup>105</sup>

Consequently, scholars have criticized litigation as the tool for addressing discrimination in financial corporate workplaces. Professor Levit theorized that threats of negative publicity and economic losses are catalysts for settlement but are not sufficient to prompt a significant restructuring of the workplace.<sup>106</sup> As a result, class settlements might benefit parties, but they do not result in long-lasting change or equity. Professor Green also criticized litigation as a remedial tool because financial institutions are unable to reimagine a path forward after class settlements.<sup>107</sup> Financial firms are unwilling to change their compensation structures, which reward success based on access to accounts and clients, prop up “superstar[]” employees, and reinforce stereotypes about who can be successful in the business.<sup>108</sup> Dr. Bielby agreed, asserting that in finance firms, highly competitive rainmakers too often close the door behind them and hoard opportunities.<sup>109</sup> Changing that environment requires complex, contextual, and innovative solutions that firms will not implement without increased outside incentive to do so. As currently structured, litigation and consent decrees too often fail to provide this motivation.

Given the relative power of actors in financial firms, public expressions of change—whether from settlements of class litigation or from public consumption during a time of intense social pressure—are too often merely symbolic. Settlement can result in changes to formal organizational structures that signal compliance but too often fail to effectuate long-term improvements for BIPOC in the workplace.<sup>110</sup> Moreover, over time, changes in written policies can become institutionalized and lead to legal definitions of compliance that incorporate the symbolic changes into formal legal doctrine.<sup>111</sup>

Despite the lack of evidence that racial pay equity results from judicial oversight, race discrimination class actions against financial industry employers are big business. This Part provides a comprehensive review of publicly available settlements in race and gender discrimination class actions in

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<sup>105</sup> Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIO. 888, 901 (2011).

<sup>106</sup> Levit, *supra* note 102, at 372.

<sup>107</sup> Green, *supra* note 103, at 688–89.

<sup>108</sup> *Id.*

<sup>109</sup> Bielby, *supra* note 11, at 16.

<sup>110</sup> Green, *supra* note 103, at 706.

<sup>111</sup> *Id.*

financial industry cases. From that review, it then identifies three waves of class settlements in this area and analyzes their efficacy in achieving pay equity.

A. *First Wave: Early Corporate Employment Discrimination Class Settlements*

The first wave of large-scale, expansive employment discrimination class settlements in the corporate setting began in earnest in the 1990s. Example cases include *Roberts v. Texaco*,<sup>112</sup> *Kosen v. American Express*,<sup>113</sup> and *Abdallah v. Coca-Cola*.<sup>114</sup> These litigations and resulting settlements were focused on access and promotion to well-paying jobs—opening the door wider for women and BIPOC to important and lucrative jobs in corporate America. The class settlements made major headlines for their large sums of monetary damages and settlement funds set aside for programmatic relief.<sup>115</sup>

For example, in *Abdallah*, the plaintiffs were Black salaried employees who alleged that Coca-Cola violated Title VII<sup>116</sup> and Section 1981<sup>117</sup> by “engag[ing] in a pattern and practice of race discrimination in promotions, compensation and performance evaluations [which] . . . had a disparate impact on African-American employees.”<sup>118</sup> Coca-Cola’s performance evaluation system and word-of-mouth promotion recommendation system permitted undue discretion that led to biased decisions by white managers.<sup>119</sup> During the early stages of litigation, the parties engaged in court-ordered mediation and agreed to settle.<sup>120</sup> The resulting consent decree provided for a settlement fund of \$113 million with an additional \$20.7 million to be paid to class counsel.<sup>121</sup> After class mediation, the parties

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<sup>112</sup> *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 193–94 (S.D.N.Y. 1997) (settling for \$115 million, where full value of the class recovery exceeded \$172 million over the five-year period of monitoring, including the costs attendant to the creation and maintenance of the Task Force and the value of the Salary Increase package).

<sup>113</sup> *Kosen v. Am. Express Fin. Advisors, Inc.*, No. 1:02-cv-0082 (D.D.C. June 16, 2002) (Westlaw, D.C. Fed. Case Law) (settling for \$31 million).

<sup>114</sup> *Abdallah v. Coca-Cola Co.*, 133 F. Supp. 2d 1364 (N.D. Ga. 2001).

<sup>115</sup> See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1290, 1309–10 (2003) (citing class settlements and resulting media attention).

<sup>116</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

<sup>117</sup> *Id.* § 1981.

<sup>118</sup> *Abdallah*, 133 F. Supp. 2d at 1366.

<sup>119</sup> See *id.* at 1366, 1370; see Plaintiff’s Motion for Settlement and Brief in Support at 7, *Abdallah v. Coca-Cola Co.*, No. 1-98-CV-3679, 2001 WL 36041527 (N.D. Ga. May 22, 2001) (“Coca-Cola failed to provide oversight of individual managerial discretion that operated to the detriment of African-American employees.”); see also *id.* at 35.

<sup>120</sup> *Id.* at 1367.

<sup>121</sup> *Id.* at 1371.

settled for \$113 million for compensatory and back-pay damages, as well as an additional \$79.5 million for programmatic and injunctive relief.<sup>122</sup> At the time, this represented one of the largest race employment discrimination class settlements in history.<sup>123</sup>

The *Abdallah* class settlement, like others in this group, included accountability and oversight functions in their programmatic and injunctive relief efforts with the goal of being a more fair and equitable company moving forward.<sup>124</sup> These class settlements were characterized by formal compliance with the creation of benchmarks, written policies, compliance offices, and multiyear oversight. First, the settlements required companies to overhaul their formal policies regarding hiring, promotion, and evaluation so that BIPOC and women have fairer and more equitable opportunities to get their foot in the door, be successful, and climb the corporate ladder.<sup>125</sup> Second, benchmarks were put into place to establish measurable, company-wide goals to enhance representation of BIPOC and women at all levels and areas of the company where underrepresentation existed.<sup>126</sup> Third, oversight and accountability in the form of third-party supervision, such as Task Forces, Compliance Officers, or Special Masters, were instituted to provide independent monitoring of diversity efforts and compliance with the settlement agreement consent decrees.<sup>127</sup> Lastly, companies were required to bolster their internal discrimination complaint processes and investigations by increasing capacity for ombudsmen, more robust EEO offices, and anonymous hotlines.<sup>128</sup>

Unfortunately, these efforts did not result in the kind of racial equity the suits were aiming for. Upon completion of the consent decree term, the Coca-Cola Task Force publicized significant success, including an increase in the number of Black

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<sup>122</sup> *Id.* (“Under the Settlement Agreement, Coca-Cola has agreed to a total cash settlement of approximately \$113 million. This figure *excludes* the cost of the programmatic relief, which Class Counsel estimates to be \$36 million over the four-year term of the Task Force, and the pay equity adjustments, which Class Counsel’s expert estimates at approximately \$43.5 million over ten years.”).

<sup>123</sup> *Coca-Cola Lawsuit (re Racial Discrimination in the USA)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/latest-news/coca-cola-lawsuit-re-racial-discrimination-in-usa/> [<https://perma.cc/7FNS-S4CZ>].

<sup>124</sup> *Id.* at 1368–69; *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 192 (S.D.N.Y. 1997); *Kosen v. Am. Express Fin. Advisors, Inc.*, No. 1:02-cv-0082, slip op. at 6 (D.D.C. June 16, 2002).

<sup>125</sup> *Abdallah*, 133 F. Supp. 2d at 1368–70.

<sup>126</sup> *Id.* at 1369–71.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1370–71.

Americans in executive roles to 15 percent, “up from 1.5 [percent] in 1998, shortly before the lawsuit was filed.”<sup>129</sup> Yet, roughly twenty years after the filing of the lawsuit, in 2020, the progress was reversed. The number of Black Americans in executive roles was “back down to 8 [percent],” and Black salaried employees were down to 15 percent of all salaried employees, a 5 percent decrease from the year 2000.<sup>130</sup>

*B. Second Wave: Prioritizing Individualized Claims Processes to Remedy Backpay*

The second wave of major employment discrimination class settlements in the corporate sector began in earnest in the late 1990s and early 2000s. Example cases include *Cremin v. Merrill Lynch* and *Martens v. Smith Barney*,<sup>131</sup> with the earliest being *Kraszewski v. State Farm Insurance*.<sup>132</sup> This wave of class settlements is characterized by a recognition of class-wide liability, either judicially or through settlement. These damages were not calculated through a class-wide formula, but instead, through individualized claim hearings.<sup>133</sup> The individualized hearings relied upon class-wide statistical evidence of disparate impact shown through the class litigation, but still required claimants to put forth evidence of their own experience of discrimination or pay inequity.<sup>134</sup>

For instance, in 1996, in *Cremin v. Merrill Lynch*, the plaintiffs were female financial consultants, alleging gender discrimination class claims.<sup>135</sup> Plaintiff Marybeth Cremin alleged that her supervisor made disparaging remarks about her status as a working mother, including criticizing the number of children she had, stating that women could not combine family and career, hinting that she would do “better” at work if she divorced her husband, and asserting that she was too busy

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<sup>129</sup> Jennifer Maloney & Lauren Weber, *Coke’s Elusive Goal: Boosting Its Black Employees*, WALL ST. J. (Dec. 16, 2020), <https://www.wsj.com/articles/coke-resets-goal-of-boosting-black-employees-after-20-year-effort-loses-ground-11608139999>.

<sup>130</sup> *Id.*

<sup>131</sup> *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460 (N.D. Ill. 1997); *Martens v. Smith Barney, Inc.*, 238 F. Supp. 2d 596 (S.D.N.Y. 2002).

<sup>132</sup> *Kraszewski v. State Farm Gen. Ins. Co.*, No. C-70-1261 TEH, 1986 WL 11746 (N.D. Cal. 1986).

<sup>133</sup> *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 434 F. Supp. 2d 554, 558 (N.D. Ill. 2006); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 261 (S.D.N.Y. 1998); *Kraszewski*, 1986 WL 11746, at \* 1.

<sup>134</sup> See *Cremin*, 434 F. Supp. 2d at 558; *Martens*, 181 F.R.D. at 261; *Kraszewski*, 1986 WL 11746, at \*1.

<sup>135</sup> *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 328 F. Supp. 2d 865, 866 (N.D. Ill. 2004).

having children to develop her customer accounts.<sup>136</sup> Plaintiff Cremin alleged that Merrill Lynch took adverse action against her because she was a woman and a mother, and that she was denied the same career opportunities that were offered to her male colleagues.<sup>137</sup> Further, she alleged that she worked under less favorable conditions, was pressured to transfer clients to other brokers when she became pregnant, and was denied proper maternity leave benefits.<sup>138</sup>

The parties settled two years into the litigation. This impacted nine hundred Merrill Lynch former and current female employees by creating a dispute resolution process to bring individual claims of pay discrimination to neutral mediators and arbitrators for a claims resolution process.<sup>139</sup> After approving the settlement process, federal district Judge Ruben Castillo noted that "[t]his lawsuit is a good example of the benefits of class action litigation."<sup>140</sup>

More than "ninety-six percent of all claims [were] resolved" by 2004.<sup>141</sup> In one case, a San Antonio arbitration panel considered statistical evidence of the alleged gender discrimination at Merrill Lynch and found the firm guilty of sex discrimination, awarding the plaintiff \$2.2 million in damages.<sup>142</sup> But many others did not fare as well.<sup>143</sup>

In *Martens v. Smith Barney*, the settlement established a similar mediation procedure to negotiate and settle individual disputes.<sup>144</sup> Several women who participated in mediation were reportedly disappointed with the process.<sup>145</sup> Only a handful of *Martens* plaintiffs' claims went to arbitration, but those that did "faced stiff opposition" and too often failed as a result. In one publicized case, a "panel of [National Association of Securities

<sup>136</sup> *Cremin*, 957 F. Supp. at 1464.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Cremin*, 328 F. Supp. 2d at 866.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 867.

<sup>142</sup> Christine Sgarlata Chung, *From Lily Bart to the Boom-Boom Room: How Wall Street's Social and Cultural Response to Women Has Shaped Securities Regulation*, 33 HARV. J.L. & GENDER 175, 232–33 (2010) (citing John Churchill, *Merrill and Hydie Sumner, Still Can't Work It Out*, REGISTERED REP. (Aug. 24, 2006), <http://registeredrep.com/news/sumner-merrill-saga> [now available at John Churchill, *Merrill and Hydie Sumner, Still Can't Work It Out*, WEALTH MGMT., <https://www.wealthmanagement.com/news/merrill-and-hydie-sumner-still-can-t-work-it-out> [<https://perma.cc/RR92-B29J>]]).

<sup>143</sup> *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 434 F. Supp. 2d 554, 558 (N.D. Ill. 2006) (denying plaintiff's motion to overturn arbitrator's decision denying her relief).

<sup>144</sup> *Martens v. Smith Barney, Inc.*, No. 96 Civ. 3779 (CBM), 1998 WL 1661385 (S.D.N.Y. July 28, 1998).

<sup>145</sup> Chung, *supra* note 142, at 231–32.

Dealers] arbitrators issued a decision awarding one former Smith Barney broker zero dollars.”<sup>146</sup> The named plaintiffs “challenged the terms of the settlement and fought mandatory arbitration of their claims[] their efforts to reform the settlement agreement and obtain a jury trial ultimately were rebuffed.”<sup>147</sup>

This second wave of class settlements took advantage of the creative engineering by plaintiffs’ lawyers who sought success in stages; first through class-wide liability, then individualized damages determinations. Given the success of defendants’ arguments that individualized damages preclude class actions, in part because those without actual harm or damages were swept in with some number of worthy claimants,<sup>148</sup> this two-step process addressing class liability first made good sense. If successful, the class members could rely upon the class-wide liability finding and then focus on the damages phase. However, as seen above, the individualized claims hearings were expensive and time consuming, led to disparate outcomes, and were mostly unappealable. These (and other) shortcomings resulted in criticism by those engaged in the process and commentators alike.<sup>149</sup>

C. *Third Wave: Recent Financial Industry Employment Class Settlements*

The third wave of class settlements in the financial services industry commenced against firms for another round of systemic race and gender employment discrimination claims, which were not substantively different from the last two waves of complaints. Similarly, these suits claimed that financial firms failed to promote and evaluate fairly based on employees’ race or gender, despite the previous decades of settlements and programmatic and injunctive relief that spent millions of dollars to fix equity problems at the targeted firms.

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 800 (2013).

<sup>149</sup> See, e.g., Chung, *supra* note 142, at 231–32.

From *Schieffelin v. Morgan Stanley*,<sup>150</sup> to *Calibuso v. Bank of America*,<sup>151</sup> to *McReynolds v. Merrill Lynch*,<sup>152</sup> these new settlements of gender and race claims are characterized by the following injunctive relief measures. First, experts in industrial organizational psychology (IOP) were hired to analyze the validity and reliability of companies' hiring, promotion, and compensation processes during the liability phase, and then retained for the settlement consent decree period to study and overhaul the offending processes and practices. Second, another revision of employment practices was instituted, including the revamping of account distribution, promotion, and retention benchmark standards. Third, funds for robust professional development of women and BIPOC were established to support them in being successful in relationship and skill building. Fourth, transparency in job postings, evaluation criteria, and forms of compensation became an explicit requirement so that all employees would know about opportunities and comparator information. Fifth, information gathering and data analysis became a more explicit goal, so that exiting employees were interviewed and experts studied data around practices and policies, such as account distribution and promotion criteria. Lastly, while diversity monitors and robust equal employment human resource functioning remained a main ingredient for settlements, management accountability remained lax—few consent decrees or settlement agreements made explicit mandates tying management compensation to diversity and inclusivity efforts.

For example, in *McReynolds v. Merrill Lynch*, the plaintiffs were Black FAs in the retail brokerage unit of Merrill Lynch.<sup>153</sup> Pursuant to the court's view of the facts, FAs operated their "own business within a business."<sup>154</sup> "FA[s] [were] responsible for building a book of business by soliciting clients in the community, although some accounts are distributed by management."<sup>155</sup> "FA[s] [were] paid based on an objective grid"

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<sup>150</sup> EEOC v. Morgan Stanley & Co., No. 01CIV8421(RMB)(RLE), 2002 WL 31108179 (S.D.N.Y. 2001).

<sup>151</sup> *Calibuso v. Bank of America Corp.*, No. 10–CV–1413, 2013 WL 5532631 (E.D.N.Y. 2013). Others include: *Jaffe v. Morgan Stanley & Co.*, No. 06 Civ. 3903, 2008 WL 346417 (N.D. Cal. Feb. 7, 2008); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488–90 (7th Cir. 2012).

<sup>152</sup> *McReynolds v. Merrill Lynch & Co.*, No. 08 C 6105, 2011 WL 1196859 (N.D. Ill. Mar. 29, 2011).

<sup>153</sup> *McReynolds v. Lynch*, No. 05 C 6583, 2010 WL 3184179, at \*1 (N.D. Ill. Aug. 9, 2010), *rev'd sub nom.* *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*



and “[c]ompensation . . . increased based on increased production.”<sup>156</sup> Accordingly, the plaintiffs alleged that Merrill Lynch engaged in a pattern or practice of race discrimination and its policies and practices resulted in a disparate impact on Black employees. The plaintiffs alleged that Merrill Lynch knew of “systemic discrimination [that] result[ed] from a hostile corporate culture, as well as policies and practices that steer[ed] business opportunities away from [Black] FAs.”<sup>157</sup>

The case settled after roughly seven years of litigation in 2013 for \$160 million, which included three years of injunctive and programmatic relief. The programmatic relief included (1) a prohibition against forming partnerships or teams for succession purposes; (2) management oversight for exceptions from the equity policies on account distribution; (3) the creation of a Leadership Council (consisting of two Class Reps, a Monitor or Coach, and Black Complex Directors) to share best practices, review settlement programmatic relief efforts, and meet with and report to the firm’s Leadership Executive Board; (4) the creation of a Diversity Fund for the professional development of Black FAs; (5) the requirement of a Team Study and Attrition Study; and (6) the prohibition of mandatory arbitration of discrimination claims.

Given the many millions of dollars devoted to programmatic and injunctive relief in these consent decrees, which involved a significant number of major financial institutions during this wave, one would expect to see progress reflected in the most recent pay data for these employers. Yet, current data do not leave much hope. As described above, the most recent studies from 2020 and 2021 are not promising. BIPOC financial workers continue to lag way behind their white peers in pay and promotion for professional, management, and executive positions with the best earning potentials. Instead of gaining traction, successfully climbing the corporate ladder, and being well represented in the upper tiers of Corporate America, BIPOC financial employees are overrepresented in hourly positions, underrepresented in the most lucrative and stable jobs, and shut out of the C-suite.<sup>158</sup> Financial firms continue to receive very poor marks on all racial equity markers.<sup>159</sup> Had the promise of programmatic changes from this third wave of class

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at \*4.

<sup>158</sup> *See infra* Part III.

<sup>159</sup> *See generally* CBB REPORT, *supra* note 20 (showing the rating that financial firms have received based on their racial equity practices).

settlements come to fruition, racial pay equity for BIPOC financial workers would be very different.

*D. Fourth Wave?: Lessons to Learn in Financial Industry Class Settlements*

The three waves of employment discrimination class action settlements reflect a particular pattern. The first wave shows a commitment by a handful of corporations to invest significant funds into structural reform efforts by way of oversight and some accountability measures within the firms to meet specific benchmarks for the term period of the consent decrees. Current research suggests that those gains were mostly lost after the term period ended.<sup>160</sup> The second wave shows a retreat from structural reform to more individualized processes without much injunctive relief and with varied outcomes for individual workers and poor outcomes for diversity as a whole. The third wave, on the heels of the *Wal-Mart v. Dukes* Supreme Court decision (which limited the scope of employment discrimination class actions),<sup>161</sup> focuses on retaining outside experts in workplace fairness and revamping corporate policies that have a disparate impact on BIPOC workers and women.

Through the process of researching and cataloging these waves of employment discrimination class settlements—and based on my own experience as a class action litigator in this space—several noteworthy lessons became apparent to me. First, the most robust settlements and consent decrees only come after exhaustive, hard-fought years of discovery, sometimes at the very eve of trial. Educating and persuading a firm to invest in robust injunctive and programmatic relief takes time and extensive evidence of discriminatory impact of its policies. Even in a prelitigation settlement posture, extensive negotiations are necessary to convince financial institutions to make the commitment to change the culture of their firms. To make that investment of time and resources worth it, parties and litigators must closely examine the outcomes and effects of past settlements to inform their current practices.

Moreover, the increased reliance on workplace experts, such as IOPs and labor economists, to study and rehaul firms' hiring and evaluation processes grew as the discipline became more established. Retaining experts for this type of intervention is also an investment in time and resources. Firms must be

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<sup>160</sup> Maloney & Weber, *supra* note 129.

<sup>161</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367–68 (2011).

persuaded that the structural reforms are necessary because of the disparate outcomes affecting BIPOC workers that result from facially neutral policies. These disciplines need to stay attuned to antiracism scholarship and research to grow their expertise in areas that are most pressing: ensuring a diverse and inclusive workplace.

Third, as to advocacy, the plaintiffs' class action firms' reputation, as repeat players and successful litigants in this area, seemingly impacted the ability to get extensive programmatic changes. Other repeat players include mediators and experts, such as labor economists and sociologists, as well as IOPs. While there is value in recognizable players, it can also become an echo chamber if diverse voices and new viewpoints are not included.

Lastly, these repeat players must stay abreast of the key strategies that scholars and researchers believe have the best chance of changing corporate culture and closing the racial pay gap. One missing piece may be a lack of accountability from firm leadership to implement, take responsibility for, and invest in racial equity efforts. "[S]tructures that embed accountability, authority, and expertise (affirmative action plans, diversity committees and task forces, diversity managers and departments) are the most effective means of increasing the proportions of white women, black women, and black men in private sector management."<sup>162</sup> Such accountability includes directly tying diversity goals to leaders' compensation: "[o]f the top [fifty] best companies for minorities, [thirty-eight] tied managers' bonuses to diversity goals."<sup>163</sup>

But, if accountability is the key to closing the racial pay gap, what accounts for the lack of long-term success of the first wave of class settlements, which included these kinds of measures? The answer may be that one intervention is not enough and one term period for those changes will not provide a long-term solution. Perhaps, it is only through employing a full complement of strategies and reformed policies and practices over a sustained period that racial pay equity will have a chance to succeed.

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<sup>162</sup> Levit, *supra* note 102, at 420 (quoting Kalev et al., *supra* note 102, at 611).

<sup>163</sup> *Id.* (quoting INSTITUTIONAL SHAREHOLDER SERVS., U.S. PROXY VOTING MANUAL (2005), <https://www.issgovernance.com/file/policy/latest/americas/US-Voting-Guidelines.pdf> [<https://perma.cc/WM85-SVPR>]).

### III. HOW TO ACHIEVE RACIAL PAY EQUITY IN CORPORATE AMERICA

Racial pay equity in the corporate sector can only be a reality if corporations adopt the cause.<sup>164</sup> Beyond lip service and simple legal compliance with judicially approved class settlement, companies need to follow their own initiative on how to make racial pay equity real. The road to that destination can have many avenues. Litigation and class settlement can still provide incentive for Corporate America to finally get it right. However, given the lack of success of the three previous waves of class action lawsuits, a new fourth wave is necessary to reinvent the settlement playbook to persuade companies to adopt a game plan to achieve racial pay equity. Additionally, companies themselves can go beyond advertising racial justice support statements to engaging in meaningful change.

To understand how financial firms can move forward and succeed in ameliorating the discrimination affecting BIPOC in their workplaces, this article synthesizes the most recent authority from scholars, advocates, and litigation efforts to inform innovative solutions. Three themes emerge: (1) accountability, (2) transparency, and (3) redesign. Below is a summary of best practices, reform strategies, and interventions to make real the promise of racial pay equity.

#### A. *Foster Belonging and Sponsorship*

The most recent data suggest that firms have improved their efforts to hire diverse candidates. The McKinsey Group found that

[a]t the entry-level of US financial [institutions], the proportion of people of color is in line with their representation in society—around 40 percent. However, this share falls steadily along the corporate pipeline until, by the C-suite, it has dropped by 75 percent. Nine out of ten people at this level are white.<sup>165</sup>

As an example, the NAACP Report gave both Bank of America and Wells Fargo an “A” grade for new hires but gave Bank of America a “D” for diversity in top management, and Wells Fargo a “C.”<sup>166</sup> Retention of financial industry BIPOC

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<sup>164</sup> Levit, *supra* note 102, at 404. In an interview after the end of the consent decree term in the Coca-Cola settlement, Judge Richard Story stated that “the ‘settlement stopped being a way to end litigation’ and became something more.” *Id.* (quoting Telephone Interview with Hon. Richard Story (July 19, 2006)).

<sup>165</sup> MCKINSEY REPORT, *supra* note 21, at 3.

<sup>166</sup> NAACP REPORT, *supra* note 14, at 19, 27.

employees at firms requires multiple strategies. To start, firms must foster a sense of belonging. Like all employees, BIPOC workers should feel embraced and enabled to make meaningful contributions. At competitive finance firms, more overt and intentional acts by firm management are needed to help BIPOC workers feel a sense of connection and build meaningful relationships. Because the financial industry is often a relationship-driven environment, firms must ensure that those relationships are built intentionally and inclusively.

Being an “only” in the office should be extraordinarily rare, and offices should include employee resource groups, safe reporting mechanisms, and event promoting conversations about their experiences.<sup>167</sup> The McKinsey Report highlighted that individual leaders play an important part in fostering a sense of belonging and that beyond diversity metrics, “managers [should] be held accountable for the experience of their teams.”<sup>168</sup> Instruments such as employee surveys and focus groups can provide necessary data and a consistent feedback loop. One 2021 meta-analysis of diversity initiatives outlined the best advice for leadership priorities. These included (1) “mak[ing] strategic, identity-focused investments as necessary (for example, employee resource groups, leadership pipeline programs, etc.);” (2) affirm[ing] all their employees’ important social identities[;] (3) respond[ing] to identity threat occurrences appropriately[;] (4) increas[ing] their own and their employees’ cultural competencies/humility[;] [and] (5) creat[ing] psychologically safe work environments.”<sup>169</sup>

Relatedly, authorities speak to a “diversity climate,” where employees view the organization as utilizing fair personnel practices and socially integrating all personnel in the work environment.<sup>170</sup> Importantly, this climate must match the one advertised during the recruitment process; employees’ unmet expectations on this front exacerbate a sense of not belonging and disenfranchisement. Follow through by companies requires diversity audits that assess the extent of diversity in key organization positions and existing diversity climate in the firm.<sup>171</sup>

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<sup>167</sup> MCKINSEY REPORT, *supra* note 21, at 10–11.

<sup>168</sup> *Id.* at 11.

<sup>169</sup> Oscar Holmes et al., *A Meta-Analysis Integrating 25 Years of Diversity Climate Research*, 47 J. MGMT. 1357, 1375 (2021) [hereinafter *Meta-Analysis Report*] (numbering added).

<sup>170</sup> Patrick F. McKay & Derek R. Avery, *Diversity Climate in Organizations: Current Wisdom and Domains of Uncertainty*, 33 RSCH. PERS. & HUM. RES. MGMT. 191 (2015).

<sup>171</sup> *Meta-Analysis Report*, *supra* note 169, at 19.

On firm resource investment, a researcher conducted a study of critical success factors for Black FAs and found that among the most important factors was “organization structure and support.”<sup>172</sup> Her study results indicate that success as a Black FA is dependent upon the resources and support provided by the worker’s firm in the “areas [of] management, clerical, training, funding, and product availability.”<sup>173</sup>

Another related intervention is to transform how companies mentor BIPOC workers in their corporate environments. The buzzword on diversity fronts for many years was “mentoring.” The new literature identifies an evolved concept of “sponsorship.” The McKinsey Report defines sponsorship as “connect[ing] early- and mid-tenure professionals to critical opportunities in order to showcase their skills and potential.”<sup>174</sup> Intentional sponsorship programs help ensure BIPOC get access to the opportunities and relationships they need to advance. Sponsors can translate feedback and help sponsorees fill development gaps.<sup>175</sup>

In the competitive environment of financial services, sponsorship of BIPOC FAs by high producers would need to be specifically incentivized. Figuring out how to incentivize these high producers will require targeted interviewing of these employees, as well as industrial-organizational experts, for their ideas. In essence, in contrast to mentoring, sponsorship for FAs would put the onus on sponsors to ensure the success of their sponsoree—sponsors succeed when sponsorees succeed. In workplaces where relationships and contacts in social groups are the key to success in building business, incorporating a sponsorship program is one way to disrupt homophily and social closure experienced by BIPOC in this type of work environment.

For future injunctive relief measures and programmatic changes outlined in class settlement consent decrees, interventions in this area should include (1) conducting regular inclusive surveys of BIPOC workers to gather data on workplace culture, (2) funding the professional development of BIPOC and mandating support services, (3) including a policy against “onlys” in an office, and (4) creating a sponsorship program for high producers, which would require specific incentives and changing the nature of compensation structures.

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<sup>172</sup> See Lillie M. Hibbler-Britt, *Critical Success Factors of Black Financial Advisors in the Brokerage Industry*, 10 GLOB. J. BUS. RSCH. 57, 63 (2016).

<sup>173</sup> *Id.*

<sup>174</sup> MCKINSEY REPORT, *supra* note 21, at 11.

<sup>175</sup> *Id.*

*B. Overhaul Hiring and Promotion Practices and Standards*

One important piece of the puzzle when trying to change workplace culture and practices is to change firm policies around hiring and promotion of its workers to be fair and equitable. The field of IOP is dedicated to designing and validating employment systems.<sup>176</sup> If observed racial differences arising from performance evaluation systems are not justified by reliable measures, they are based on practices that are unsupported in the field of IOP.<sup>177</sup> IO psychologists explain how performance evaluations and compensation-setting procedures used by firms that are rooted in seemingly objective criteria can be unreliable and invalid.

Two professional standards provide the measuring stick for whether employer practices are within the best practices recognized by experts in the field. First, the “Principles for the Validation and Use of Personnel Selection Procedures” (SIOP Principles) is a policy statement of the Society for IOP.<sup>178</sup> The SIOP Principles apply to both performance evaluation and compensation-setting processes. Second, the EEOC Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) set standards for compliance with federal antidiscrimination law, including a framework for the proper use of selection procedures.<sup>179</sup> The Uniform Guidelines “are designed to aid in the achievement of our nation’s goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin.”<sup>180</sup> Both the SIOP Principles and the Uniform Guidelines must be considered when validating employment compensation practices.

The function of IOP (including the SIOP Principles) and the Uniform Guidelines is to ensure the use of appropriate

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<sup>176</sup> See *Occupational Employment & Wages, May 2021: 19-3032 Industrial-Organizational Psychologists*, U.S. BUREAU LAB. STATS. (last updated Mar. 31, 2022), <https://www.bls.gov/oes/current/oes193032.htm> [<https://perma.cc/9CCL-8JUY>].

<sup>177</sup> See *I/O Psychology Provides Workplace Solutions*, AM. PSYCH. ASS’N, <https://www.apa.org/education-career/guide/subfields/organizational> [<https://perma.cc/3XFQ-CMAN>].

<sup>178</sup> See AM. PSYCH. ASS’N, PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES 8 (2018), <https://www.apa.org/ed/accreditation/about/policies/personnel-selection-procedures.pdf> [<https://perma.cc/NRA2-KF6E>].

<sup>179</sup> See 29 C.F.R. pt. 1607 (2022).

<sup>180</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, QUESTIONS AND ANSWERS TO CLARIFY AND PROVIDE COMMON INTERPRETATION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES 6 (1979), <https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines> [<https://perma.cc/5XPR-Q3R4>].

employment practices and make clear that adverse impacts experienced by BIPOC must be identified, examined, and addressed.<sup>181</sup> IOP emphasizes the concepts of reliability (consistent outcomes) and validity (accurate outcomes) in workplace decisions.<sup>182</sup>

Financial institutions' compensation and promotion processes must be overhauled to reduce racial bias. To do so, firms must employ the hallmarks of reliable and valid performance evaluation decisions. Pursuant to IOP principles and guidelines, there is little evidence to suggest that firms provide decision makers with sufficient guidance on how to make pay and promotion decisions. Financial institutions' compensation and promotion systems are too often decentralized, nontransparent, and lack validity and reliability—in violation of the best practices of the field. For instance, in the *McReynolds v. Merrill Lynch* class litigation, Judge Richard Posner of the Seventh Circuit recognized that the firm's teaming policies, though neutral on its face, operated in a racially discriminatory way:

The teams, they say, are little fraternities (our term but their meaning), and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers.

. . . .

There is no indication that the corporate level of Merrill Lynch (or its parent, Bank of America) *wants* to discriminate against [B]lack brokers. Probably it just wants to maximize profits. But in a disparate impact case the presence or absence of discriminatory intent is irrelevant; and permitting brokers to form their own teams and prescribing criteria for account distributions that favor the already successful—those who may owe their success to having been invited to join a successful or promising team—are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim.<sup>183</sup>

Regarding promotions and career advancement, firms should also overhaul their recruitment efforts, as well as accelerate promotional opportunities to advance top

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<sup>181</sup> See Gabrielle Blackman, *3 Ways I/O Psychology Helps Today's Workplaces*, PURDUE GLOB. (Oct. 9, 2020), <https://www.purdueglobal.edu/blog/psychology/i-o-psychology-workplace-trends/> [https://perma.cc/5QMC-4EHA]; 29 C.F.R. 1607.1 (2022).

<sup>182</sup> See generally AM. PSYCH. ASS'N, *supra* note 178, at 1–2 (emphasizing reliability of data and accuracy of inferences in the “validation and use of personnel selection procedures”).

<sup>183</sup> *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489, 490 (7th Cir. 2012).



management diversity. Advocates recommend the “Rooney Rule” to expand management diversity—for mid- to upper management positions—by seeking out and “interview[ing] at least two” qualified BIPOC for every position.<sup>184</sup> The “Rooney Rule” comes from the US National Football League policy requiring teams to interview ethnic “minority candidates for head coaching” positions and senior football operation jobs.<sup>185</sup> Other advocates go further and propose the “Mansfield Rule,” which requires a diverse candidate slate for every position: “at least 30% of candidates interviewed for any open role [should be] from underrepresented groups.”<sup>186</sup> Of course, “performative diversity efforts” or “box ticking” that does nothing to move the needle of increasing workforce diversity can only hide systemic organizational biases and will not fix the problem.<sup>187</sup> Instead, a constellation of strategies need to be employed with experts to guide the way.

The function of IO psychologists working with firms would be to follow professional guidelines to improve their employment practices and address the identified adverse impact their current practices have on BIPOC. To ensure reliability and validity, injunctive and programmatic relief should include retaining IO psychologists to (1) perform a job analysis and create a competency model; (2) develop validated criteria used to

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<sup>184</sup> Kevin Patra, *NFL Instituting Changes to Rooney Rule*, NFL (May 18, 2020, 4:36 PM), <https://www.nfl.com/news/nfl-instituting-changes-to-rooney-rule> [<https://perma.cc/THB4-NM4M>]; Cynthia DuBois, *The Impact of “Soft” Affirmative Action Policies on Minority Hiring in Executive Leadership: The Case of the NFL’s Rooney Rule*, 18 AM. L. & ECON. REV. 208, 209 (2015); Ian Cook, *How HR Can Tackle Diversity Using the Rooney Rule*, VISIER, <https://www.visier.com/clarity/how-hr-can-tackle-diversity-using-the-rooney-rule> [<https://perma.cc/2FEC-R9MY>]; Cynthia DuBois, *What the NFL Can Teach Congress About Hiring More Diverse Staffs*, FIVETHIRTYEIGHT (Mar. 15, 2017, 10:30 AM), <https://fivethirtyeight.com/features/what-the-nfl-can-teach-congress-about-hiring-more-diverse-staffs> [<https://perma.cc/XYX4-8YWM>].

<sup>185</sup> See Kevin Patra, *NFL Instituting Changes to Rooney Rule*, NFL (May 18, 2020, 4:36 PM), <https://www.nfl.com/news/nfl-instituting-changes-to-rooney-rule> [<https://perma.cc/THB4-NM4M>]. The effectiveness of this rule has recently come into question based on the discrimination lawsuit of Coach Brian Flores, who alleged that certain NFL teams interview minority candidates as a merely performative act. See Class Action Complaint at 4–5, *Flores v. Nat’l Football League*, No. 1:22-cv-00871 (S.D.N.Y. Feb. 1, 2022), <https://www.wigdorlaw.com/wp-content/uploads/2022/02/Complaint-against-National-Football-League-et-al-Filed.pdf> [<https://perma.cc/DKB7-98L6>].

<sup>186</sup> CATALYZE TECH WORKING GRP., *THE ACT REPORT: ACTION TO CATALYZE TECH, A PARADIGM SHIFT FOR DEI* 43, 63–64 (2021) [hereinafter *ACT REPORT*] <https://actreport.com/wp-content/uploads/2021/11/The-ACT-Report.pdf> [<https://perma.cc/E83P-T4Y2>] (citing *An Open Letter from the 2020-2021 Mansfield Law Firms; Chairs & Managing Partners*, DIVERSITY LAB, <https://www.diversitylab.com/mansfield-rule-4-0> [<https://perma.cc/Z3Q6-6EVX>]).

<sup>187</sup> See Paola Cecchi-Dimeglio, *Rooney Rules Don’t Increase Diversity. Here’s What Does*, BLOOMBERG (May 19, 2022), <https://www.bloomberg.com/opinion/articles/2022-05-19/rooney-rules-don-t-increase-diversity-here-s-what-does> [<https://perma.cc/A9PZ-34ZV>].

assess performance, including behavioral anchors; (3) develop rater training and calibration processes across departments; (4) audit the results with feedback to the raters; and (5) create an internal appeal process.

*C. Build DEI Data Infrastructure with Regular Pay Audits and Climate Surveys*

You cannot fix what you do not know. And today, collecting data on employees is both easier and more complicated. Tech companies, like Google and Facebook, have used their considerable resources and influence to study how to best collect data with the goal of increasing DEI efforts.<sup>188</sup> In order to make informed decisions and track progress, financial firms should invest in building better internal data infrastructures using the best practices for such efforts, as outlined by tech companies.

The ACT Report, sponsored by Google, advises companies to build an internal data infrastructure that “includes a consistent mechanism for collecting and sharing demographic data at the pipeline, interview, hiring, promotion, and attrition stages. Human Resources Information Systems (HRIS) have tools to support data collection and sharing.”<sup>189</sup> Firms should ensure that the data is current by going beyond annual snapshots to a more regularized, frequently scheduled auditing in order to more effectively identify issues and areas of improvement.<sup>190</sup>

To understand the contours of racial pay equity problems, regular pay audits are necessary to close gaps. “Conducting [regular] audit[s] to identify disparities in pay is essential and requires collecting the right data, which can be resource-intensive.”<sup>191</sup> In the past, firms have conducted pay audits inadequately because they typically failed to capture disparities created by racial bias in performance evaluation and promotion standards. As referenced above, BIPOC are simply missing from C-suite, executive, and senior management positions.<sup>192</sup> So, while comparing compensation within certain title groups is relevant, it is also incomplete when evaluating racial pay equity at firms.

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<sup>188</sup> See *id.*; Maxine Williams, *Facebook Diversity Update: Increasing Representation in Our Workforce and Supporting Minority-Owned Businesses*, ABOUT FACEBOOK (July 15, 2021), <https://about.fb.com/news/2021/07/facebook-diversity-report-2021/> [https://perma.cc/ZG6Y-Y282].

<sup>189</sup> ACT REPORT, *supra* note 186, at 53.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 56.

<sup>192</sup> See *supra* notes 39–40 and accompanying text.

Instead of traditional pay audits, firms should “[l]ook at representation within each compensation level, including management, rather than relying on average compensation data, which can be skewed by outliers.”<sup>193</sup> Firms should also “[a]nalyze intersectional data where possible.”<sup>194</sup> Moreover, “jobs in different . . . departments may be comparable,” so firms should “[c]onsider the [overall picture of workers’] skills [and] responsibilities, [along with differing] working conditions[,] [and] not just job title.”<sup>195</sup>

An important piece of this data collection includes the need for firms to regularly conduct diversity and inclusivity audits and formal evaluations of the firms’ diversity to enable them to set benchmarks for hiring, compensating, and retaining BIPOC employees. Organizational change can require years to take place. Experts in IOP and labor economics who are skilled in DEI efforts should be retained to build and conduct formal surveys and evaluations of the workplace climate, as well as the impact of formal pay, promotion standards, and policies for BIPOC workers.

While it would be nice to think that tech firms like Google and Facebook are studying and promising implementation of these efforts for altruistic reasons, the truth is that both companies have been defendants in large-scale, employment discrimination class actions, which likely led to these studies and promises to change.<sup>196</sup> Structural reform litigation can be a catalyst for change. For future injunctive relief measures and programmatic changes outlined in class settlement consent decrees, interventions in this area include hiring and building data infrastructures that regularly capture demographic information of its applicants, current employees, and promoted workers, as well as implementing regular pay audits with representation data as well as compensation and titles.

#### *D. Set Internal DEI Goals with Timelines*

Once financial institutions engage in robust diversity and inclusivity audits and know their existing baselines, financial firms should set “a goal[-]based timeline for achieving” fair and

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<sup>193</sup> ACT REPORT, *supra* note 186, at 56.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See, e.g., Redacted Order Granting Plaintiff’s Motion for Class Certification, *Ellis v. Google, LLC*, No. CGC-17-561299, 2021 WL 4169813, at \*1–2 (Cal. Super. Ct. 2021); First Amended Complaint, *Mobley v. Facebook, Inc.*, No. 16-cv-06440-EJD, 2017 WL 10560600, at \*2, \*4–5 (N.D. Cal. 2017).

equitable hiring, compensation, and promotion with empirical results.<sup>197</sup> Firms should retain the help of workplace experts to analyze their DEI data to identify discrepancies and gaps.

After evaluating data collection efforts, financial firms should prioritize and set internal goals and track the implementation of strategies and interventions. Setting benchmarks for increased representation and inclusion is key to ensuring accountability and assessing success in these efforts. DEI goals should be specific, and challenging, but realistic, and include benchmarks for individual leaders, offices, groups, and the firm as a whole.

Experts agree that DEI “[g]oals should be ambitious but attainable” in order to inspire change; “challenging goals spur more behavioral change than easy ones.”<sup>198</sup> “Setting goals that are Specific, Measurable, Attainable/Achievable, Realistic, and Time-bound[,] (SMART) provides a useful guide to ensure the greatest chance of success.”<sup>199</sup> Getting buy-in from current leadership, management, and workers is also key. Firms should consult these groups on goal creation and DEI objectives to achieve buy-in. Research suggests that engaging managers directly on diversity-related programs increases ownership of DEI goals.<sup>200</sup>

While internal support is key, the appointment of experts, such as IO psychologists, external to the organization and knowledgeable in the fields of organizational change and discrimination dynamics is necessary to oversee and monitor the implementation of reform measures. This encourages knowledge-based reform measures and minimizes the risk of organizational co-option in implementation. Importantly, labor economists conduct adverse impact analyses around promotion and performance metrics and can help firms ensure that their policies and practices, while neutral on their face, are not adversely impacting BIPOC workers.

Workplace experts specifically trained in recent scholarship and engagement in DEI are key. While experts that firms have worked with in the past may have identified

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<sup>197</sup> NAACP REPORT, *supra* note 14, at 15.

<sup>198</sup> ACT REPORT, *supra* note 186, at 104.

<sup>199</sup> *Id.* at 105; IRIS BOHNET & SIRI CHILAZI, GOALS AND TARGETS FOR DIVERSITY, EQUITY, AND INCLUSION: A HIGH LEVERAGE POINT TO ADVANCE GENDER EQUALITY IN THE U.S. TECH INDUSTRY 17 (2020), [https://wapp.hks.harvard.edu/files/wapp/files/dei\\_goals\\_in\\_us\\_tech\\_bohnet\\_chilazi.pdf](https://wapp.hks.harvard.edu/files/wapp/files/dei_goals_in_us_tech_bohnet_chilazi.pdf) [<https://perma.cc/UG7M-YP22>].

<sup>200</sup> Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail and What Works Better*, HARV. BUS. REV. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/WZ7W-W9JZ>].

shortcomings, they have not solved the problem. Firms need a new battalion of workplace experts with specific experience in the field of DEI work.

When facing employment discrimination class litigation, firms should take the opportunity to incorporate these goals into the class settlement. Advocates support consent decrees with multiyear time frames to ensure that organizational change has taken root.<sup>201</sup> While internal support is key, advocates compound that principle with the appointment of panels of individuals external to the organization and knowledgeable in the fields of organizational change and discrimination dynamics to oversee and monitor the implementation of reform measures. This encourages knowledge-based reform measures and minimizes the risk of organizational co-option in implementation. Setting benchmarks, much like the first wave of settlements addressed above, should be differentiated from quotas (which have negative connotations for simple “box ticking” without internal support or corresponding policy changes) with the advantage of simplicity and quantifiable metrics.<sup>202</sup> Special masters and task forces can be retained to oversee benchmarks, policy changes, and program evaluation.

*E. Require Public Disclosure and Transparency*

To advance racial pay equity, financial firms need robust, mandatory disclosure; they must publicly release the demographic data of their workforce. Yet, as referred to above, reporting on pay equity is currently voluntary under the controlling regulation, and most recently, only half of the large banks reported pay equity data.<sup>203</sup> The Committee on Financial Services for the US House of Representatives, the governmental group tasked with requesting, gathering, and analyzing pay equity data for large banks, acknowledged that for financial institutions, “without data, they will be unable to evaluate and effectively implement their diversity and inclusion goals.”<sup>204</sup> “Organizations must track talent acquisition, promotions, pay,

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<sup>201</sup> ENDING DISCRIMINATION, *supra* note 22, at 121.

<sup>202</sup> Benchmarks are targets that are incentivized and normalized within a culture, while quotas are mandated metric outcomes mandated by external pressures. *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 516 (2001); Eric Cantor, *Quotas Are a Diversity Quick-Fix, But Companies Must Dig Deeper*, WORLD ECON. F. (Jan. 19, 2020), <https://www.weforum.org/agenda/2020/01/quotas-talent-pipeline-gender-diversity/> [https://perma.cc/LM3R-V2UG].

<sup>203</sup> *See* HOLDING BANKS ACCOUNTABLE, *supra* note 31, at 4, 37.

<sup>204</sup> *Id.* at 8.

and employee perceptions to understand the impact of their diversity initiatives.”<sup>205</sup> To correct this lack of compliance, a bill introduced by Representative Al Green, “Promoting and Inclusion Banking Act of 2021,” would “amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to require Federal banking regulators to include a diversity and inclusion component in the Uniform Financial Institutions Rating System.”<sup>206</sup> The CBB Report calls on policymakers as well as bank regulators to pass the “Promoting and Inclusion Banking Act,” as well as “incorporate mandatory diversity and inclusion measures into the bank examination manuals” and into bank ratings.<sup>207</sup>

The case for pay transparency in combating pay discrimination generally in workplaces has been made by legal scholars for years.<sup>208</sup> As Professor Ramachandran observed, pay transparency “is rare outside public employment and” has great potential for identifying and correcting pay discrimination.<sup>209</sup> It “has [a] radical potential to spur change” but it takes moving cultural norms to begin talking about one’s income without fear of employer retribution or other forms of societal disapproval.<sup>210</sup>

More recently, scholars such as Professor Stephanie Bornstein, have called for “[a] more comprehensive public disclosure requirement [that] can lead to greater accountability across employers and industries as well as beyond individual actors.”<sup>211</sup> In the context of corporate workplaces, public pay transparency in particular has the potential to spur racial pay equity efforts. As the Deloitte study found, change in this area will only be successful through “collective action—organizations uniting to challenge each other, learn from one another, change outdated rules, and mend broken systems.”<sup>212</sup> In order for financial institutions to come together on this issue, transparency is a prerequisite.

For future injunctive relief measures and programmatic changes outlined in class settlement consent decrees,

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<sup>205</sup> *Id.*

<sup>206</sup> H.R. 2516, 117th Cong. (2022).

<sup>207</sup> CBB REPORT, *supra* note 20, at 14, 14 n.31 (“The acronym ‘CAMELS’ refers to the six components of a bank’s condition that are assessed: Capital adequacy, Asset quality, Management, Earnings, and Liquidity. A sixth component, a bank’s Sensitivity to market risk, was added in 1997.”).

<sup>208</sup> See, e.g., Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043 (2012); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355 (2011); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 799 (2014).

<sup>209</sup> Ramachandran, *supra* note 208, at 1043.

<sup>210</sup> *Id.* at 1044–46.

<sup>211</sup> Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 312 (2021).

<sup>212</sup> DELOITTE REPORT, *supra* note 96, at 16.

interventions in this area include (1) drafting provisions that commit financial institutions to publicly release demographic information, (2) including in agreements the goal of making partnerships in the industry to collectively work toward common racial equity goals, and (3) releasing pay data for all workers so that applicants and employees can effectively negotiate fair salary and compensation.

*F. Make Leadership Accountable for Diversity Goals Within Firms*

While past settlements have relied upon leadership councils, task forces, and diversity officers,<sup>213</sup> advocates and scholars are now focusing on the need to make specific people at the top and middle levels of management accountable for delivering diversity.<sup>214</sup> Siloing the diversity efforts is not working. As Professor Levit has studied, corporate “acceptance of the desirability of creating a diverse workplace” is key.<sup>215</sup> People in management positions need to be held responsible for ensuring that diversity and inclusivity goals are met. They will lead the charge in making sure corporate culture is inclusive and engage in the narrative that change requires a dedication of resources and a long-time span. Managers ensure the creation of progress benchmarks or goals. As Dr. Bielby notes, “effective interventions will require addressing head-on sources of resistance that are embedded in racially segregated social relations and power differences among professionals.”<sup>216</sup>

Firms should create incentives for C-suite leaders, executives, and managers to achieve the DEI goals set by the firm. One way for managers to take ownership of DEI goals is to get involved in tracking progress and make that progress a specific and intentional part of their performance review. Likewise, progress toward DEI goals should be directly linked to compensation for C-suite and senior leaders.<sup>217</sup> Each C-suite leader should create their own DEI objectives and key results and be held “accountable through a formal quarterly DEI business review process.”<sup>218</sup> Advocates also recommend

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<sup>213</sup> See *supra* Sections II.A., B., C.

<sup>214</sup> See, e.g., Levit, *supra* note 102, at 367 (arguing that “the defendant’s acceptance of the desirability of creating a diverse workplace, coupled with making specific people accountable for delivering diversity, is a key component to a successful consent decree”).

<sup>215</sup> *Id.*

<sup>216</sup> Bielby, *supra* note 11, at 30.

<sup>217</sup> ACT REPORT, *supra* note 186, at 56.

<sup>218</sup> *Id.*

providing nonfinancial rewards, such as “awards; celebrat[ing] best practices of teams, managers, and individuals; and reward[ing] small wins and progress toward larger goals.”<sup>219</sup>

This intervention is likely to be the most difficult, uphill challenge for financial firms. Financial institutions have been operating a certain way for centuries, with top producers being accountable only for revenue growth. To change the conversation, encouraging buy-in and incentivizing change are the keys to success. For firms facing employment discrimination class litigation, firms should take the opportunity to incorporate these accountability measures into the class settlement. Interventions in consent decrees include (1) relying on scholarship to support incorporating more specific management accountability tied to compensation and promotion; (2) using recent data and research to create C-suite, executive, and management incentive programs that tie compensation to diversity goals; and (3) creating innovative incentive programs beyond monetary gain.

In sum, these six interventions provide a comprehensive blueprint for financial sector employers to adopt in order to align themselves with racial pay equity goals. Conceived from the most recent social science research, the path to racial pay equity includes (1) fostering belonging and sponsorship, (2) overhauling hiring and promotion practices and standards, (3) building DEI data infrastructure with regular pay audits and climate surveys, (4) setting internal DEI goals with timelines, (5) requiring public disclosure and transparency, and (6) making leadership accountable for diversity within firms. These interventions can go a long way in making financial sector workplaces more equitable for their BIPOC workers.

## CONCLUSION

The New York Times ran a story in 2019 about a Black bank customer and a Black FA at JPMorgan Chase.<sup>220</sup> Mr. Jimmy Kennedy, a former NFL football player, was getting the runaround when he tried to enroll at the bank as a “private client,” in order to receive certain exclusive incentives.<sup>221</sup> When he came in person to one of its retail office branches in Arizona, he recorded a conversation with one of the bank employees, who

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<sup>219</sup> *Id.*

<sup>220</sup> Emily Flitter, *This Is What Racism Sounds Like in the Banking Industry*, N.Y. TIMES (Dec. 11, 2019), <https://nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html> [<https://perma.cc/B9TW-KPT9>].

<sup>221</sup> *Id.*



by way of explanation, stated, “[y]ou’re bigger than the average person, period. And you’re also an African-American.”<sup>222</sup> His financial advisor had been Mr. Ricardo Peters, but JPMorgan Chase fired Mr. Peters soon after his complaints of race discrimination.<sup>223</sup> This happened the same year the bank settled a \$24 million class suit brought by other Black employees who alleged they were given less lucrative account opportunities and placed in poorer branches.<sup>224</sup>

The experiences of Mr. Kennedy and Mr. Peters are just one story that reflects the bigger systemic problem in financial institutions outlined in this article. Racial pay equity has to begin somewhere, and the financial industry has an outsized presence among private employers. Advocates for racial pay equity are paying attention to how these employers contribute to racial pay inequity. Structural reform litigation brought by plaintiffs’ class action attorneys has endeavored to get firms to make changes to their pay and promotion practices for the betterment of their BIPOC workers. By relying upon socio-legal research and scholarship on the barriers facing BIPOC workers in financial firms, analyzing the waves of structural reform efforts of employment discrimination class litigations, and providing a blueprint for how financial firms can disrupt bias and remedy racism and discrimination in their workplaces, racial pay equity can be reached. Given our nation’s persistent and deepening racial wealth gap, it is a goal worth striving for.

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<sup>222</sup> *Id.* (internal quotation marks omitted).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*