May 7, 2024

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chair Gensler:

As an organization with a commitment to all workers having the opportunity to live with economic dignity, we write to ask you to investigate Goldman Sachs for possible violations of the securities laws by telling the public that they were working to meet targets for a more diverse workforce while funding organizations that were trying to make it harder for companies to achieve such goals. Our request is spurred by examination of Goldman Sachs' 990 forms, which details the flow of money to such organizations.

DEI programs are critical to enforcing anti-discrimination laws, which is core to our mission. Employer programs that encourage the hiring of diverse candidates are an important means of overcoming the discrimination in hiring that is rampant among some employers but can be difficult to detect on an individual applicant level. In a recent study of the largest U.S. employers, the least discriminatory were those with the most centralized hiring processes, indicating the impact that effective human resources approaches can have in ensuring that diverse candidates are considered.[1]

Goldman Sachs has positioned itself as a leader in DEI.
Starting in 2018, when the Black Lives Matter movement was a subject of national attention, Goldman Sachs made commitments of $1 billion in direct investment capital into companies led by women and people of color and $100 million in philanthropic support "to advance economic progress for at least one million Black women in the U.S."[2] In 2019, the firm announced that among analysts and entry-level associates, it plans to increase the representation of Black professionals to 11% and Hispanic/Latinx professionals to 14% in the Americas and of Black professionals in the United Kingdom to 9%.[3] In January 2020, CEO David Solomon announced at the World Economic Forum in Davos that Goldman Sachs would only invest in companies with at least one diverse board member.[4]

In the wake of George Floyd's tragic death in May 2020 and the pandemic's disproportionate impact on people of color, Wall Street firms faced increased pressure to make commitments to further diversity, equity, and inclusion. A few weeks later, Goldman Sachs announced a new "Fund for Racial Equity," launched with $10 million from its employees' donor-advised fund, Goldman Sachs Gives, which it

[1] Patrick Kline, Evan K. Rose, and Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers*. 137 Journal of Quarterly Economics 4 (2022)
[2] Goldmansachs.com , last accessed May 6, 2024.
[3] Email to Goldman Sachs People from David Solomon, John Waldron and Stephen Scherr on Advancing Diversity and Inclusion at Goldman Sachs, March 18, 2019.
[4] Fortune, Claire Zillman, *The U.S. doesn't mandate diverse boardrooms but now Goldman Sachs does* (Jan 23, 2020), at https://fortune.com/2020/01/23/goldman-sachs-board-gender-quota-david-solomon/.

National Office • 1800 Sutter Street, Suite 210 • Concord, California 94520 • TEL 415.296.7629
Washington DC Office • C/O AFL-CIO 815 Black Lives Matter Plaza NW • Washington DC 20006 • TEL 202.898.2880
info@niwr.org • www.niwr.org

described as a donor-advised fund "that allows the firm and its current and retired senior employees to direct grants to support underserved communities around the world."[5]

On Juneteenth (June 19) 2020, in a message to employees that Goldman made public, Solomon called for "accelerating our journey" in attracting a diverse workforce. Two months after Floyd's death, Solomon spoke at the Economic Club of New York about the need to move faster in increasing diversity at both the senior leadership and junior levels, explaining "All of us as leaders have to use our platform to shine a light on things that we'd like to move faster."[6] In August 2020, Solomon announced additional hiring goals for its vice presidents in the Americas, 7% Black and 9% Latino by 2025, as well as a goal of doubling the number of analysts hired from historically black colleges and universities (HBCUs).[7] Between 2021 and 2023, Goldman Sachs received a variety of awards for its work on diversity, equity, and inclusion, touting these issues on its website as "top priorities at Goldman Sachs, where we strive to cultivate an environment in which all our people can reach their full potential and thrive as their authentic selves. It underpins the strength of our culture, the execution of our strategy, and our relevance to our clients."[8]

Goldman Sachs set specific diversity goals as a key and public part of their strategy.
Solomon made repeated statements about the "power of setting aspirational goals and holding ourselves accountable" in order to increase diversity and inclusion.[9] On May 13, 2022, Goldman Sachs announced that it had doubled its diversity recruiting team in order to better achieve its hiring goals.[10] In its 2022 People Strategy Report, the company referred back to its 2019 targets for diverse hiring and reported on progress.[11] In December 2022, Goldman's Chief Diversity Officer indicated that "[t]he leadership is very focused on making sure DEI is still a priority. Otherwise, we fall behind and lose our competitive advantage."[12] As recently as December 2023, Solomon testified before Congress that "[d]elivering on our diversity and inclusion commitments and aspirations…continues to be a top priority," and that "[i]ncreasing the diversity of our people is a business imperative and is essential to our ability to serve our clients, generate long-term value for our shareholders and contribute to our broader communities."[13]

But Goldman Sachs also funded anti-DEI efforts in 2022.
At the same time as they told investors and the public that they were trying to achieve these goals, they were quietly giving money to organizations that were making the goals harder to achieve. In 2022, the Goldman Sachs Charitable Gift Fund (Goldman Sachs Gives) provided a $100,000 grant to Edward Blum's Students for Fair Admissions (SFFA), along with $25,000 each to Stephen Miller's group America First Legal (AFL) and its affiliated organizations the Center for Renewing America and the American Accountability Foundation, according to Form 990s. Additionally, Goldman Sachs Gives

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[5] Goldman Sachs Establishes Fund for Racial Equity, June 3, 2020, https://www.goldmansachs.com/media-relations/press-releases/current/gs-fund-for-racial-equity.html.
[6] Reuters, Goldman Sachs CEO wants more diversity in bank leaders now, July 22, 2020.
[7] Update on Inclusion and Diversity at Goldman Sachs, including New Aspirational Goals, August 5, 2020.
[8] goldmansachs.com, last visited on May 6, 2024.
[9] Update on Inclusion and Diversity at Goldman Sachs, including New Aspirational Goals, August 5, 2020.
[10] Carolina Mendl, *Goldman Sachs boosts recruiting team in push to meet diversity goals*, Reuters, May 13, 2022.
[11] Goldman Sachs 2022 People Strategy Report, pp. 16-17.
[12] John Corrigan, *Goldman Sachs Doubles Down on DEI Commitment*, Human Resources Director, December 15, 2022.
[13] Testimony of David M. Solomon before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, December 5, 2023.

provided $155,000 in funding between 2020 and 2022 to the Conservative Partnership Institute, the nonprofits that helped incubate and launch America First Legal and the affiliated organizations.[14]

The choices facing donor-advised funds in funding controversial groups were clear in 2022. By 2022, there had been extensive publicity around the giving of donor-advised funds to groups that supported controversial causes. For example, in March 2019, a coalition of more than 70 donor networks, funds, and organizations led by the Amalgamated Foundation launched the "Hate is Not Charitable" campaign, an initiative calling for donor-advised fund "providers to exercise their legal discretion over grants recommended by their donors and adopt pro-active policies to ensure that funds do not flow to organizations that promote hatred." Later that year, Fidelity and Schwab stopped giving money to organizations affiliated with the National Rifle Association.[15]

Miller's anti-opportunity agenda for the workplace was also clear by 2022. Miller announced the launch of AFL in March 2021[16] and filed at least two major lawsuits in 2021 challenging the federal government's efforts to prioritize historically underserved groups in pandemic relief.[17] His position on promoting diversity was well-established, as he had sarcastically referred to diversity as a "national religion" in 2015.[18] Before the 2022 midterm elections, AFL ran radio ads in parts of Georgia – where there was a critical Senate race – that began "When did racism against white people become OK?" and included the line "Progressive corporations, airlines, universities all openly discriminate against white Americans."[19] They also sent out mailers that said "Biden and the Left Want to Decide Who Gets Hired – and Who Gets Fired – According To Their Skin Color," which included headlines of companies like United and Pfizer setting diversity hiring goals and an image of a mock job posting reading "Must be Black or Latinx. Whites and Asians Need Not Apply."

Besides intervening in politics and public opinion, AFL directly challenged private-sector attempts to increase opportunities for people from underrepresented backgrounds . In February 2022, they filed a cert petition with the U.S. Supreme Court in a case challenging NYU Law Review's use of racial preferences in choosing members and articles.[20] In July 2022, they publicly asked the EEOC to investigate Dick's Sporting Goods for using diversity targets for hiring and promotion and falsely told the company that such targets were illegal.[21] By late 2022, the group had already filed dozens of lawsuits including several "challenging efforts to remedy racial disparities."[22]

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[14]GS Gives 990s; https://www.cpi.org/about, last accessed May 6, 2024.
[15] Michael Theis, *Fidelity and Schwab Ban Gifts From Donor-Advised Funds to NRA-Affiliated Charities*, Chronicle of Philanthropy, December 4, 2019.
[16] Politico, March 26, 2021.
[17] New York Times, June 14, 2021; Washington Post, December 12, 2022; The New Republic, September 19, 2022.
[18] Miller email, November 23, 2015, at https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails.
[19] Politico, October 30, 2022.
[20] AFL press release, February 7, 2022, at https://aflegal.org/supreme-court-calls-for-response-in-afl-lawsuit-over-nyus-use-of-race-and-sex-prefences/.
[21] AFL press release, July 13, 2022, at https://aflegal.org/afl-files-federal-civil-rights-complaint-against-dicks-sporting-goods-for-discriminating-against-moms-using-illegal-employment-quotas-2/
[22] Beth Reinhard and Josh Dawsey, *How a Trump-allied group fighting 'anti-white bigotry' beats Biden in court*, Washington Post, December 12, 2022.

Blum's anti-opportunity agenda for education was also clear in 2022.
The mission of SFFA is to establish the principle that "a student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university."[23] Between 2015 and 2020, SFFA spent more than 90% of its money on three lawsuits against universities, one of which was considered by the Supreme Court in 2015 in *Fisher v. University of Texas*. On January 24, 2022, the Supreme Court granted cert to hear arguments in a case combining the other two of Blum's lawsuits, those against Harvard and the University of North Carolina.[24] Leading up to that case, many argued that the Supreme Court's ruling would be used to challenge the use of race or ethnicity in hiring and other workplace decision-making – which is precisely what Blum and Miller-affiliated groups did after the Supreme Court decision in *SFFA v. Harvard*.

Goldman Sachs should be investigated for securities fraud.
Goldman Sachs must be investigated for "misstatement liability" under section 17(a)(2) of the Securities Act of 1933 and section 10(b) of the Securities Act of 1934. Moreover, Goldman Sachs should be investigated for "scheme liability" under section 17(a)(3) of the Securities Act of 1933. Here, the company appears to have been engaging in a "practice" or "course of business" that operates "as a fraud or deceit upon the purchaser." Goldman Sachs told investors they were committed and working aggressively to increase the diversity of their workforce, but they were actually and quietly undermining their own ability to achieve those commitments by funding an anti-diversity, anti-opportunity agenda.

As you know, in an enforcement action for a violation of section 10(b), the SEC must show:

(1) Misstatement or omission by the defendant;
(2) Scienter, *i.e.*, intention to deceive, manipulate, or defraud;
(3) Materiality in the misstatement or omission.[25]

Misstatement or omission by the defendant: The SEC's investigation will reveal whether the fraud is better treated as a misstatement or omission, as it depends on the precise timing of Goldman Sachs' donations through their donor-advised fund. If the donations to SFFA or AFL were made or in the review process by the time of Goldman Sachs' public recommitment to its diversity targets in May 2022, then Goldman Sachs made a misstatement when it said it was working towards those goals. After all, it was giving money to groups that were making it harder to achieve those goals. If, on the other hand, the donation requests were made after May 2022's announcement, then it would be an omission for Goldman Sachs to not correct the impression left on the market that it was working aggressively towards those diversity goals.

Scienter: Under either theory, there is reason to believe that Goldman Sachs was reckless in deceiving the purchasers of its stock. Goldman executives were well aware that they were trying to position themselves as a leader in attracting a diverse workforce. But they should have known – and investigation may reveal they did know – that those statements were misleading because they were giving money to organizations that were trying to make it harder to achieve their diversity goals.

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[23] studentsforfairadmissions.org, last accessed May 6, 2024.
[24] https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf.
[25] See *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976); *SEC v. Lemelson*, 57 F.4th 17, 28-29 (1st Cir. 2023).

Goldman Sachs controls the donations from donor-advised funds.
Though Goldman Sachs allows donors to recommend where they would like their money to go, Goldman Sachs, like other financial firms, has control over the money and donations. The "advised" in "donor-advised funds" is no misnomer – indeed, Goldman Sachs Gives states that it "owns the assets" in the fund and had "final authority with respect to all investments and grants to recipient charities."[26] Were this not the case, the donor-advised fund would not have the tax benefit for the donors that makes it so attractive, leading financial firms like Goldman to accumulate billions in assets in the donor-advised funds for which they receive fees for managing.

America First Legal and Students for Fair Admissions were making it harder for Goldman Sachs to achieve their stated goals in at least two ways. First, Miller's group AFL was both bringing lawsuits and trying to influence policymakers to make it illegal for employers to consider diversity in any way, including in setting hiring targets the way Goldman Sachs did.

In the meantime, Blum's group SFFA was making it less likely that the elite universities from which Goldman Sachs recruits would even admit people from underrepresented backgrounds. Indeed, in May 2022, when Goldman Sachs announced its new diversity goals for vice presidents, it reiterated its diversity goals for entry-level hires, but SFFA's case against Harvard and North Carolina was currently before the Supreme Court with its central argument that race and ethnicity could not be considered in admissions, supported by AFL.

Goldman Sachs either did know or should have known that their statements about their commitment to diversity, equity, and inclusion were misleading because there was already controversy around donations from donor-advised funds to certain groups, and the work of Miller and Blum's groups was already well-publicized.

Materiality: We are glad the SEC now officially recognizes, beginning in the 2020 amendments to the Reg S-K disclosure requirements, that the "human capital" of a company's workforce and its plans to strengthen that human capital are important to investors and should therefore be disclosed. Specifically, after the 2020 amendments, companies must now disclose "any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel)."[27] Goldman Sachs' targets for a more diverse workforce are such an objective. Moreover, in response, 96% of S&P 100 companies discussed diversity, equity, and inclusion initiatives as part of their disclosures.[28]

Whether the disclosure rules should be more principles-based, as in the 2020 Amendments, or more prescriptive, as some are urging for the forthcoming Human Capital Management Disclosure rulemaking[29], there appears to be consensus among both the regulator and the regulated that diversity, equity, and inclusion efforts are part of the human-capital information important to investors.

[26] gsg.goldman.com, last visited May 6, 2024.
[27] Regulation S-K §229.101 (c) (2) (ii).
[28] Gibson Dunn survey, January 9, 2023.
[29] Dec 14, 2023 letter to SEC Chair Gary Gensler from Senators Sherrod Brown and Mark Warner.

There is good reason for investors to consider the "human capital" of a company generally, and DEI efforts specifically, in determining whether to invest. Indeed, research on gender diversity and DEI commitments supports the connection between a diverse workforce and an increase in share price.[30] Evidence also indicates that a more diverse workforce leads to better decision-making, and at a time of heightened attention to and concern about opportunities for people of color, Goldman Sachs was no doubt appealing not only to investors, but potential clients and employees as well.

To be sure, disclosure requirements are not necessarily coextensive with materiality but here, where Goldman Sachs was portraying itself as aggressively pursuing concrete diversity goals, the duty then arose to immediately disclose the donor-advised fund giving to Miller and Blum as a material fact necessary "in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[31]

And though the amount donated by Goldman Sachs in 2022 may have been relatively modest in light of its overall spending on diversity, equity and inclusion efforts, its impact was outsized. Blum's 2023 win before the Supreme Court in the Harvard and North Carolina cases—and Miller's machine-gun attacks on DEI programs—have caused companies to question, and in some cases, roll back efforts exactly like the one Goldman Sachs claimed to be pursuing. And the SEC has been clear that any materiality analysis must be not only quantitative but qualitative as well.[32]

For these reasons, we ask that the SEC investigate Goldman Sachs for publicly stating that they were committed to a more diverse workforce while quietly giving money to organizations dedicated to making it harder to achieve that very goal.

Sincerely,

Jason Solomon
Director, National Institute for Workers' Rights

Cc: Kathryn Ruemmler, Chief Legal Officer and General Counsel, Goldman Sachs
Megan Hogan, Chief Diversity Officer and Global Head of Talent, Goldman Sachs

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[30] See David P. Daniels, Jennifer E. Dannals, Thomas Z. Lys, and Margaret A. Neale, *Do Investors Value Gender Diversity?*, Organization Science (forthcoming); Li Fei, Chris K.Y. Lo and Christopher Tang, Will Diversity Equity and Inclusion Commitments Improve Manufacturing Firms Performance? A Signaling Theory Perspective on DEI Announcements, Working Paper, UCLA Anderson School of Management (2023).
[31] 17 CFR § 240.10b-5 (b).
[32] SEC Staff Accounting Bulletin #99.