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Putting Its Money Where the Diversity Is: Corporate America's Collaborative Actions to Increase Diversity in Law Firms

Cultural Competence

Law Department Management



CHEAT SHEET

- ***Uniquely capable.*** Corporate America can drive workplace diversity in the legal world by using its purchasing power as leverage to drive change.
- ***Think of the client.*** Diverse teams have been shown to achieve better and more collaborative results when serving a client.
- ***Finding a resolution.*** On August 8, 2016, the American Bar Association (ABA) released Resolution 113, which urged providers of legal services to expand and create opportunities at all levels of responsibility for diverse attorneys.
- ***Disclosure and action.*** The ABA created a standardized survey to encourage law firms to disclose and improve upon diversity reports.

Corporate America recognizes that diversity and inclusion must happen — not because we are made to do it, nor solely because it is the right thing to do, but because it is the best thing to do. With that in mind, and as the primary purchaser of legal services, corporate legal departments need to drive the necessary changes in the provision of legal resources to be competitive and successful domestically

and globally. Relying on the providers of legal services to diversify the profession and their own firms unilaterally has not been effective enough. It must be a team effort of both purchasers and providers.

This article will discuss certain recent actions taken by the American Bar Association (ABA), including the passage of a resolution aimed at increasing economic opportunity for diverse attorneys and encouraging clients to seek greater diversity among legal service providers. In particular, a new uniform measurement tool, the Model Diversity Survey, will provide increased transparency of information and data. Clients will now be able to make more informed and rational buying (and termination) decisions based upon a law firm's current diversity and move towards its overall improvement. By putting its money where diversity is found, corporate America will encourage the providers of legal services to act, so that together we can work to improve the legal profession, law firms, and corporate America.

Despite client demand, the lack of progress in advancing diversity in the legal profession is disconcerting

In the past, the foundation for promoting diversity [was rooted](#) in ensuring equal rights from a legal, moral, and religious perspective. This was the heart of the [civil rights movement](#) of the 1960s. Providing equal opportunities to qualified individuals regardless of their background has also been viewed as simply the right thing to do, given the historical and continuing marginalization of women, people of color, LGBT individuals, persons with disabilities, and other diverse individuals. These reasons for advancing diversity remain true and valid today.

More recently, in addition to the traditional reasons for promoting diversity, the business case for diversity [has been established](#). Results show that increased diversity in the workplace leads to better financial results for companies. Increasing diversity within those companies allows them to better understand and respond to the needs of their customers as the US population becomes more diverse. Leaders in corporate America also recognize that, to be successful as a business, they [must embrace diversity and inclusion](#) to win the war for talent, make the best decisions, increase engagement, and improve productivity. To achieve this, an enterprise must ensure the development of diverse teams for internal and external resources, at all levels of responsibility, to successfully implement business objectives.

Despite the strong reasons for advancing diversity and inclusion, the legal profession [is far behind](#) comparable professions, such as the medical, accounting, and engineering fields when it comes to increasing diversity. For example, while 88 percent of attorneys in the United States are white, 72 percent of physicians and surgeons are white. Additionally, from a racial perspective, blacks and Latinos are nearly a third of the population, but only comprise approximately nine percent of attorneys. Women are slightly over half of the population but comprise only 36 percent of attorneys.

Of course, diversity does not stop with race and gender. It includes the diversity of thought, perspective, background, ethnicity, sexual orientation and identity, disability, and several other traits that define who we are as people. It means having those differing perspectives as a part of the organization and affording opportunities for them to assume roles for which they are qualified. As one would expect, there is significant correlation between the traditionally recognized diversity categories, such as gender, race, and different perspectives. The benefits of true diversity, however, come from the full and equal participation of all persons. For too long, the legal profession has been without all of those benefits.

The [lack of diversity](#) in the legal profession in comparison to other professions is disconcerting, particularly given the unique role of the legal profession in society. First, the legal profession is considered an honorable profession, whose members should uphold the highest standards of conduct. It is, therefore, antithetical to the legal profession's values to exclude qualified individuals from opportunities to participate in the profession at all levels, whether or not such exclusion is intentional. In some instances, this comes as a result of the culture associated with the legal profession or with unconscious biases, each of which should be addressed.

Second, legal professionals create, interpret, and enforce laws. The legitimacy of those laws will come into question when those same legal professionals do not reflect the increasingly diverse society to which those laws apply. The legal profession must take significant actions to achieve equal representation from qualified members of different groups.

While, in many respects, in-house groups within corporate America are increasing diversity, law firms lag behind with essentially no increase. In leadership roles, the percentage of women general counsel of the Fortune 500 has increased continuously since 2014 to 25 percent in 2016. Alternatively, the percentage of racially diverse (black, Latino, and Asian) attorneys at the same level has remained at approximately 10 percent with minimal growth. In comparison, [the percentage of women or racial minorities](#) in equity partnership ranks remained essentially flat from 2014 to 2015, with women increasing less than a percentage point to 17.8 percent of equity partners and racial minorities remaining at 5.6 percent of equity partners.

[Given the numbers](#) of women and people of color who have been attending law school for years, the underrepresentation of diverse attorneys in legal leadership positions is not entirely a pipeline problem. In fact, at least half of [law school graduates](#) are women, and a quarter of law students are people of color. As of 2014, women attorneys and attorneys of color accounted for approximately 45 and 22 percent of law firm associates, respectively. The numbers above show, however, that women attorneys and attorneys of color are not represented to the same extent at higher tiers of the legal profession.

The purchasers of legal services can drive change

As the purchasers of legal services, corporate America is uniquely positioned to drive the behavior of the legal service providers. [According to one report](#), one third of corporate clients spend US\$50 and US\$75 million per fiscal year on outside legal expenses, while 19.6 percent spend between US\$70 and US\$100 million, 8.7 percent spend between US\$100 and US\$150 million, and a smaller percentage spend even more. These amounts should incentivize law firms.

Corporate clients have long requested that their law firms provide them with diverse legal teams. The majority of them, seeing the benefits of diversity, expect that their legal matters will be staffed with, and a portion of their legal services will go to, diverse attorneys. While corporate clients may think that they are making progress by analyzing the nature of their overall spend and considering the individuals providing their services, it ultimately is not translating into changes in the overall demographics of law firms. Instead, these corporate clients are often just receiving "rotating associates," which fails to improve diversity at all levels of responsibility within law firms. To date, the efforts of corporate clients to increase diversity through their purchasing power has been ad hoc and unsuccessful. But, that should now change.

The ABA Diversity & Inclusion 360 Commission has taken significant

steps to advance diversity

The ABA is not an enterprise made up of law firms, governmental agencies, or in-house attorneys. It is, however, a collection of individuals who represent a wide array of business organizations, firms, and governmental agencies. Those individuals are of varying backgrounds and perspectives. The ABA has established [four goals](#) that will assist the organization in carrying out its mission equally among this diverse membership. Of these four, Goal III aims to eliminate bias and increase diversity in the legal profession. It also seeks to ensure, among other things, that all people have “full and equal participation” in the legal profession.

On August 4, 2015, Paulette Brown became president of the American Bar Association and created the [Diversity & Inclusion 360 Commission](#) (the Commission). Brown divided the Commission into four working groups to assess diversity and inclusion in the legal profession and to create action plans to achieve Goal III. The Economic Case Working Group (Economic Group), in consultation with the leadership of a number of affinity bar associations, focused on advancing diversity in the legal profession, explored ways to increase economic opportunities for diverse attorneys, and drafted Resolution 113 (the Resolution). The Resolution urges legal service providers to expand and create opportunities for diverse attorneys and asks clients to direct a greater percentage of legal spend in their direction.

Given the ABA’s expansive and diverse membership, it’s uniquely situated to bring together and encourage the cooperation of both law firms and corporations. The Economic Group understood the value of the ABA’s broad-based membership and rich history of working to eliminate bias in the legal profession when it drafted the Resolution and its associated report (the Report). The new measures would enable law firms and corporations to work together as a team to increase diversity in the legal profession.

The ABA Resolution and supporting Report

On August 8, 2016, the ABA’s House of Delegates passed the Resolution proposed by the Economic Group and supported by the Report, which identifies the areas of opportunity to increase diversity at all levels. A core premise of the Report is that, despite increased diversity in law schools, the progress in increasing diversity in the legal profession has been glacial. The Report notes that diverse attorneys are not represented at all levels of responsibility within law firms. The Report further identifies the lack of a uniform process for comparing law firm diversity metrics and for allowing law firms to showcase their diversity performance.

Based on the Report, the Resolution urges all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibility for diverse attorneys. The Report states that increasing diversity at all levels will make the legal field a more appealing profession for diverse individuals, increase the number of diverse attorneys, and remediate the issues of implicit bias in the legal profession. The Resolution urges corporate clients to facilitate the creation of opportunities for diverse attorneys by directing a greater percentage of the legal services that they purchase, both currently and in the future, to diverse attorneys. In addition, the Report encourages corporate clients to use a Model Diversity Survey (Survey) in procuring and evaluating legal services. The Report acknowledges that both corporate clients and law firms need uniformity in the way they report and receive diversity metrics.

The Model Diversity Survey will create transparency

The primary tool provided to implement the Resolution is [the Survey](#). The members of the Economic Group who constructed the Survey included leaders in law firms, the public sector, and major corporate clients. The team reviewed dozens of broadly distributed diversity surveys given to law firms and chose the best, and most widely used questions. This diversity of perspectives ensures that the Survey is neither law firm nor client-centric.

In designing the Survey, the Economic Group debated each question. For example, a request for several years of past data in a law firm's diversity efforts might have been helpful, yet would defeat one of the primary purposes of the Survey — making the measurement of diversity within law firms both uniform and straightforward. The Economic Group endeavored to strike the right balance between the value of great detail and the ease of providing responses, the latter of which should lead to widespread adoption of the Survey.

Although many corporate clients, including those in the Economic Group, have spent considerable time and effort developing their own surveys and questions, the value of data uniformity far outweighs the benefit of unique questions. Of course, corporate clients are always free to ask additional questions of firms they are using or may choose to use in the future.

The Survey, however, will serve as the standard. The Survey helps law firms address the administrative burden and resources required to complete a multitude of very different surveys, as some firms annually have to complete over 50 surveys with different definitions, time frames, and questions. The Survey is consistent in its definitions and time frame, with data collected to be representative of the law firm as of December 31 of each year. Ideally, firms will choose to publish the data on their website annually, referencing it in any requests for data or requests for proposals (RFPs). Law firms will be freed from the time and effort currently expended in responding to numerous well-intentioned client requests for diversity data every year.

The Survey will seek not only the overall demographic makeup of participating law firms, but, more importantly, will also strive to attain the makeup of leadership positions and committees at those firms. The Survey will allow for the measurement of trends in law firm partnership ranks, hiring practices, attrition rates, lawyers working on flexible schedules, and the ranks of highest compensated attorneys. It will allow law firms to indicate whether they have diverse ownership. It will provide an opportunity for law firms to explain other diversity/inclusion initiatives and programs that they support. Finally, it will give corporate clients the chance to ask specific questions about the demographic makeup of firm personnel working on their matters.

The Survey has the potential to make a meaningful difference to the legal profession. First, the Survey is available for use by, and designed for, corporations in all industries and law firms of all sizes. Second, the Survey will be one of the very few law firm diversity surveys that is both free and does not require a paid membership to use. Therefore, small companies and law firms committed to diversity can easily obtain and use the Survey to support the Resolution or showcase their diversity. Finally, when implemented, the Survey will be the most widely available diversity survey of its kind. Because the results will be captured in a uniform manner, it will allow for the data to be documented, compared, and used to report on the progress of diversity in the legal profession. In fact, the American Bar Foundation stands ready to collect, aggregate, and distribute data collected through the Survey.

The Commission created principles of the original intent behind the Survey so that limited future modifications would retain the spirit of simplicity and uniformity of the Survey. It is the hope that the Survey will balance the complexity of asking questions on diversity with the desired result of broad-

based information and data, leading to fairness for all. It was the belief of the Economic Group that the Survey should remain short and succinct, similar to its current four page length, with one additional page of potential client-specific questions.

Key items of focus in the Survey included:

- Firm ownership by diverse attorneys.
- Equity partners, non-equity partners, associates, counsel, and other attorneys by diverse classification.
- Leadership or management roles of diverse attorneys.
- New hires by diverse classification.
- Promotion by diverse classification.
- Attrition of attorneys by diverse classification.
- Attorneys on a reduced hours schedule.
- Highest compensated attorneys by diverse classification.
- Other initiatives the law firm may highlight.

Corporate America's in-house departments will implement the Resolution

Corporate clients have a unique and significant power to quickly drive change in the legal profession by directing resources to law firms that have diverse attorneys at all levels of responsibility in the firm, as well as to minority- and women-owned law firms. In the past, corporate clients have requested diversity metrics from law firms, but managing partners of major firms would likely say that corporate clients have taken little action on those metrics. The Institute for Inclusion in the Legal Profession found that only 12.5 percent of corporate clients either reduced the amount of work given to a law firm underperforming in its diversity metrics or terminated their relationship with a law firm for underperforming in its diversity metrics.* Of the action taken within that small 12.5 percent of the time, only around one in six corporate clients actually terminated interactions with the law firms.

* The data shows that no corporate client pulled a current matter from a firm based upon its underperformance in its diversity metrics.

In order for the Resolution to be successful, a substantial number of corporate clients must now both collect and use the data. That means taking action. With this in mind, on September 7, 2016, the general counsel of ABM Industries Incorporated, American Express, Biogen, Bristol-Myers Squibb, CBS Corporation, The Clorox Company, CVS Health, eBay Inc., EMC, Guardian Life Insurance, The Hartford, HP Inc., LPL Financial, Marsh & McLennan, MassMutual, McDonald's Corporation, New York Life Insurance Company, PepsiCo, Inc., TIAA, United Airlines, Verizon Communications, Vertex Pharmaceuticals, Voya, and Walmart sent a letter to the general counsel of the Fortune 1000 asking their support of, and agreement to, the following five points:

1. The Fortune 1000 general counsel are asked to agree to support the Resolution, because the principles within the Resolution are critical to progress being made.
2. The general counsel are asked to request that firms that provide a significant portion of legal

services to their company complete the Survey. The Survey should be used to begin collecting data consistent with the data that will be collected by other corporate clients.

3. The general counsel are asked that firms responding to their RFPs, or otherwise competing to acquire a significant legal matter, should complete the Survey. This will allow the enterprise to compare data of law firms that they are considering based on the aggregate data of all firms. In this way, the corporate client can address, up front, its concerns about the law firm's diversity to determine whether the firm has a convincing and viable plan of action for increasing diversity and whether or not it will use the firm.
4. Most importantly, the general counsel are asked to use the information obtained through the Survey as *one of the factors* by which they retain or terminate law firms. This is a critical action. While it will be helpful to collect aggregated data on diversity in law firms for the sake of tracking progress or the lack thereof, actions must be made based, at least in part, upon the results of the Survey in order to move closer to achieving Goal III. As noted above, corporate clients in the past haven't taken stock in the diversity metrics of a law firm, and haven't changed their inclusion practices at various levels of responsibility. Law firms will be incentivized to quickly increase diversity at all levels when their income, or a significant portion thereof, is tied to the results.
5. The general counsel are asked to notify the ABA that their respective legal departments support the above four actions, so that the ABA can publish a list of the companies committed to this mission. This step, which is very similar to Rick Palmore's "Call to Action," is important to make it as transparent as possible to the public which corporations are actively working towards diversity in the legal profession. For corporations that notify the ABA of their support, it will likely lead to a positive public perception. Corporate legal departments choosing not to support the above run the risk of not getting the best talent and most comprehensive legal representation that the profession has to offer, and conversely, may run the risk of their counterparts outperforming them.

Corporate clients of all sizes may and should also agree to the above points. The alignment of corporate clients' expectations and actions based upon those expectations will finally create the force needed to increase diversity in the legal profession. Law firms will understand that corporate America is no longer willing to wait for change. In the same way that corporate America has had to quickly adjust to the needs of its increasingly diverse clients, law firms will need to quickly adjust to the requirements of its clients, which are more rapidly becoming diverse.

Companies signed on to the General Counsel Initiative to implement American Bar Association Resolution 113

ABM Industries
American Express Company
Biogen
Boise Cascade
Booz Allen Hamilton
Bristol-Myers Squibb
Capital One Financial
CBS Corporation
The Clorox Company
CVS Health Company
eBay
Echo Star

Eli Lilly
EMC
Guardian Life Insurance
The Hartford
Hess Corporation
HP Inc.
Interpublic Group
John Hancock
Kodak
Lincoln Financial Group
Lockheed Martin
LPL Financial

Marsh & McLennan
MassMutual
MasterCard
McDonald's
McKesson Corporation
Meritor
MetLife
New York Life Insurance Company
Northrop Grumman
PepsiCo
Pitney Bowes
The Principal Financial Group
Rockwell Automation
Securian Financial Group
TIAA
United Airlines
Verizon Communications
Vertex Pharmaceuticals
Varian Medical Systems
Viacom
Visa
Voya Financial
Wal-Mart Stores
The Williams Companies

Implementation of the Resolution will benefit all attorneys

The efforts to achieve Goal III through implementation of the Resolution are expected to increase representation of diverse attorneys at all levels in the legal profession. Law firms will benefit from selecting the best of all qualified individuals, regardless of background, and gain a greater assortment of perspectives in their firms. Those firms will also reap the benefit of their diversification by receiving more work from corporate clients.

In addition, these efforts are intended to create greater opportunity for diverse attorneys. Once diverse attorneys are given equal opportunities, they will have greater chance to obtain leadership roles in the legal profession. For example, currently, women may at times not be provided with challenging assignments for a variety of reasons, including the perception of being less capable or less available due to family commitments. However, if the actions taken by corporate clients and law firms in support of the Resolution compel law firms to provide women with increasingly higher levels of responsibility and a better quality of work, more women attorneys will have an equal opportunity to exhibit their skills and ability to balance competing demands. Consequentially, this may lead to more women being promoted.

These efforts will also obtain better results for clients. Diverse teams have been shown to achieve better results, as diverse legal providers can better serve diverse clients. For example, [in a study](#) of a team of twelve students running a business, a mix of males and females performed better than teams with only males or only females. Similarly, the improved performance of a firm, based upon its increase in diversity, will lead to more business and potentially expand opportunities for all attorneys in the firm.

Finally, these efforts are intended to increase trust in the legal profession as one of ethical conduct and integrity by seeking equal opportunity for access, acceptance, and advancement.

The Resolution is intended to move the needle toward the realization of Goal III. However, it would be remiss to fail to mention that, to accomplish the above, true inclusion is necessary. Inclusion means respecting and acknowledging diverse backgrounds, valuing different perspectives, and providing space for diverse individuals to share ideas and be their authentic selves. Meaningful attainment of the inclusion aspect of diversity and inclusion will require a shift in culture for much of the legal profession. Despite a firm's intentions to diversify at all levels, unless a firm is willing to take affirmative steps to chip away at the "dominant culture" and be more inclusive of other experiences and perspectives, that firm will continue to find that those who do not naturally fit into the culture will be less likely (or willing) to remain at the firm as advancement therein becomes increasingly illusory. As part of these proactive steps, firms will need to become more aware of the impact of unconscious bias and take the necessary steps to counteract it — including training its leadership in unconscious bias. Law firms should expect the culture shift to benefit them as well, as they must operate in an increasingly diverse society with increasingly diverse clients.

Conclusion

Diversity at all levels of responsibility within all the providers of legal resources, in-house and at law firms, is necessary to make corporate America successful. Working together, in-house and external counsel should be able to drive this initiative and achieve Goal III. Through the use of a standardized information-gathering tool, the purchasers of legal services will now be able to make more informed and rational buying, and termination, decisions based upon the diversity of the firms retained and the

firms' progress toward improving and maintaining diversity in comparison to other firms.

In-house legal departments and governmental agencies are encouraged to use the Survey and the results received from its use in making their decisions to retain existing firms, hire new firms, or terminate firm relationships. Law firms are encouraged to accurately complete the Survey and publish it — ideally on their website — to demonstrate their desire for diversity and transparency about their diversity efforts. Purchasers of legal services will therefrom be more informed in their decisions regarding the firms they choose, including, among other factors in the decision, the diversity of the teams they can provide. Diversity committees at law firms and in in-house groups are encouraged to put pressure on their leadership to join in this initiative.

For years now, legal departments across the country have been seeking diversity within the law firms that they use to represent their respective companies. They have done so because they long ago realized the economic benefits of having more diverse perspectives internally driving and externally representing their business. The legal profession as a whole and, frankly, law firms as business entities have been too slow to come to this same realization. While some of these firms have tried, and some progress has been made, diversifying the profession from top to bottom has remained elusive.

That must change. With the Survey, and the recommitment of corporate legal departments to diversity and inclusion, a new day should arrive. Through uniform measurement and evaluation of America's law firms, the legal profession should catch up to and surpass others in terms of diversification. It will be appropriate that we as a collection of lawyers do so. We represent a profession that swears an oath to the principles that all are equal under the law and that opportunity should be identical for all, no matter their particular being or background. It is time for our profession to make this happen. It is time for corporate America to put its money where diversity is found.

The letter from the Fortune 500 general counsel asks the Fortune 1000 general counsel to join and support the commitment to the following:

- You agree that you support ABA resolution 113;
- You agree that you will ask the firms that provide a significant portion of your legal services to complete the Model Survey (of course you may continue to ask these firms additional questions specific to your business and the actual attorneys that serve you);
- You agree that firms you currently do not retain and that are competing to handle a significant matter for your company will complete the Model Survey;
- You agree that the information obtained through the Model Survey will be used as a factor in determining what firms to retain or terminate in providing legal service to your company; and,
- You agree that you will advise Keevin Woods, director, Commission for Racial and Ethnic Diversity in the Profession at the American Bar Association, keevin.woods@americanbar.org, and Alan Bryan, senior associate general counsel – legal operations and outside counsel management for Wal-Mart Stores, Inc. at alan.bryan@walmartlegal.com, that you support the above four principles, such that they can work together to maintain and publish an ongoing list of those of us that have committed to them.

Further Reading

US Census Bureau, Quick Facts, and Am. Bar. Ass'n, Lawyer Demographics: Year 2015.

See, e.g., William Guillory, "Becoming a Diverse Law Firm – Why It Is Important, and the Skills Necessary to be Effective in an Increasingly Diverse Environment," Workforce Diversity Network, ; Liane Jackson; Arin N. Reeves, Written in Black & White: Exploring Confirmation Bias in Racialized Perception of Writing Skills, Nextions (April 4, 2014).

Mark Roellig & Catherine Simes, "Storm on the Horizon: Implications of the Growing Diversity Disparity between Corporate America and their Law Firms," Leadership Council on Legal Diversity; MP McQueen, "Minority Ranks at Large Law Firms Show Little Growth," The American Lawyer Online (May 28, 2015), available at www.advance.lexis.com.

Minority Corporate Couns. Ass'n, Vault/MCCA Survey 2015.

Press Release, Nat'l Ass'n of Minority and Women Owned Law Firms, Inclusion Initiative Companies Spend More than \$1 Billion on Minority- and Women-Owned Law Firms (May 23, 2016). (describing the Inclusion Initiative, in which one billion dollars has been spent by corporate clients with minority- and women-owned law firms).

New ABA President to Focus on Diversity, Inclusion in Justice System, ABA Bar Ass'n (Aug. 4, 2015).

Rick Palmore, "A Call to Action: Diversity in the Legal Profession," Ass'n Corporate Couns. (Oct. 2004), Additionally, Palmore has indicated his support of the Resolution and this five prong request to general counsel.

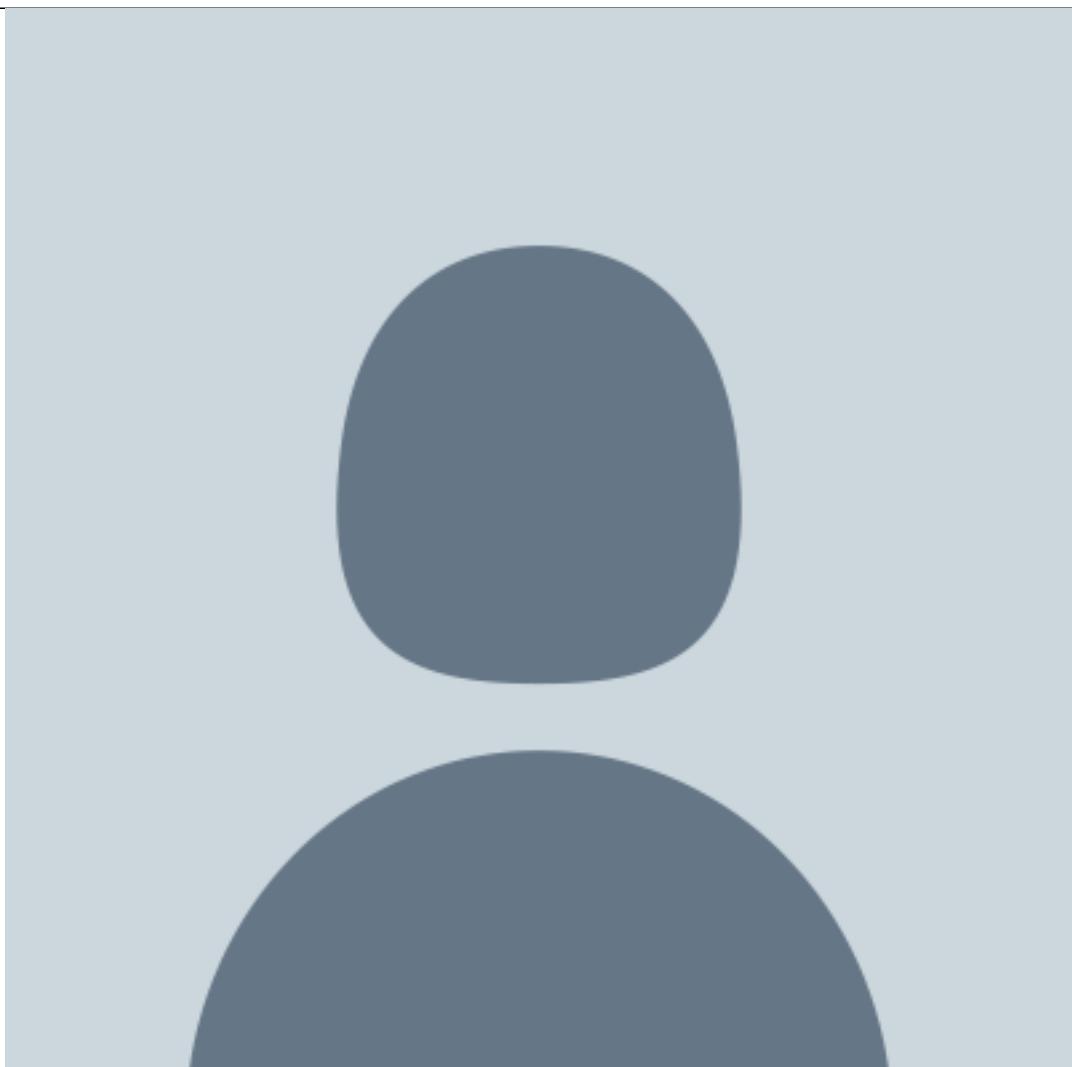
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