Summary of the September 2023 Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity as it Applies to Corporations

(October 23, 2023)

In September 2023, the New York State Bar Association Task Force on Advancing Diversity issued a report and recommendations (the "Report") addressing the implication of the Supreme Court's decision striking down Harvard's and University of North Carolina's affirmative action policies (the "SFFA Decision").[1] The Report focuses on a "path forward" for universities, corporates/law firms, and the judiciary interested in continuing to pursue diversity, equity, and inclusion (DEI). *See* Report at 2. The purpose of this memo is to summarize the Report's findings as it relates to corporates (including financial services companies). In particular, we discuss the Report's findings regarding: (1) the importance of diversity in corporations, (2) the legal framework and current landscape for corporates, (3) the legal risks of dialing back DEI initiatives, and (4) guidance for private employers.[2]

The Report's Findings on the Importance of Diversity in Corporations

The Report discusses the benefits (demonstrated by decades of social science research) of DEI for corporations, including: (1) enhancing performance, (2) positioning them to serve a diversified consumer/client base, and (3) attracting new employees. *See* Report at 14. The Report (at 14-20) cites several studies demonstrating the many ways diversity can help corporations, including:

- A 2018 Boston Consulting Group study finding that diverse leadership teams lead to innovation and improved financial performance (with companies with above average

[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina,* 143 S.Ct. 2141 (2023)

[2] This memo summarizes portions of the NYSBA Report. It does not purport to discuss the entire report (or all its findings relating to corporations), nor is it meant to provide legal advice or serve as a substitute for retaining legal counsel to assess how these issues impact your organization.

management diversity reporting innovation-related revenue 19% higher and overall EBITA 9% higher than companies with below average management diversity).[3]

- A 2020 McKinsey study of 1,000 public companies finding that companies in the top quartile for racial and ethnic diversity were 36% more likely to have financial returns over their national industry mean.[4]

- A 2019 Wall Street Journal S&P 500 survey finding that the 20 most diverse companies have better operating results and shareholder returns than the least diverse firms.[5]

- A 2017 sociological study finding that nearly two-thirds of U.S. companies with strong racial and ethnic diversity had above-average profitability.[6]

- A 2018 study of venture capital firms finding that diversity meaningfully improves financial performance.[7]

- A 2019 study finding that corporate diversity improves revenue by aligning businesses with increasingly diverse markets and customers.[8]

- A 2020 Glassdoor study finding than more than 75% of employees and jobseekers said that diversity was important in evaluating companies and job offers.[9]

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[3] Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BCG (Jan. 13, 2018), https://bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation

[4] McKinsey & Company, Diversity Wins: How Inclusion Matters (May 2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf

[5] Dieter Holger, *The Business Case for More Diversity*, Wall Street J. (Oct. 26, 2019), https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200

[6] Cedric Herring, *Is Diversity Still a Good Thing?,* 82 Am. Socio. Rev. 868, 876 (2017)

[7] Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, Harvard Bus. Rev. (July–Aug. 2018), https://hbr.org/2018/07/the-other-diversity-dividend%20

[8] Maryam Imam, *Economics of Diversity*, Haley Guiliano LLP (March 1, 2019), https://www.hglaw.com/news-insights/economics-diversity

[9] Glassdoor Team, *Diversity & Inclusion Workplace Survey*, Glassdoor (Sept. 30, 2020), https://www.glassdoor.com/employers/blog/diversity-inclusion-workplace-survey.

- A 2022 Glassdoor and Indeed survey finding that nearly three quarters of workers aged 18-34 would consider turning down a job or leaving a company where their manager did not support DEI initiatives.[10]

The Report's Overview of the Legal Framework and Current Landscape for Corporates

According to the Report, corporate DEI initiatives continue to be legal, even in the wake of the SFFA decision, so long as they comply with such federal antidiscrimination laws as: (1) Title VI of the Civil Rights Act, (2) Title VII of the Civil Rights Act, and (3) 42 U.S.C. § 1981. Indeed, DEI programs received scrutiny (including litigation and shareholder challenges) even prior to the SFFA decision and will continue to do so. Yet (as will be discussed in the next section), anti-DEI risks should be balanced not only against DEI programs' benefits, but also against the risks associated with firms abandoning their DEI commitments.

Title VI of the Civil Rights Act prohibits intentional race-based discrimination, including a pattern or practice of treating one race worse than others, in programs receiving federal funding. Private organizations typically are not subject to Title VI unless: (1) the organization receives federal funds, (2) an organization receives federal funds for a specific activity (in which case that program is subject to Title VI), or (3) the organization is principally engaged in education, health care, housing, social services, or parks and recreation. *See* Report at 40-41.

Title VII of the Civil Rights Act prohibits employment discrimination on the base of race, color, religion, sex, and national origin. However, Title VII guidelines have historically allowed employers to make race-conscious employment decisions under specific circumstances in accordance with appropriately tailored affirmative action plans, as well as to institute DEI initiatives to increase opportunity outside such plans. *See* Report at 41. According to the Report, voluntary affirmative action plans have been permitted in at least three situations: (1) to remedy prior discrimination or correct the effects of such practices, (2) to eliminate a manifest imbalance in traditionally segregated categories, or (3) to eliminate manifest imbalances in the workforce. Such plans have been allowed to incorporate both race-conscious employment decisions and DEI measures (such as recruitment programs). *See* Report 42. Still, even if a voluntary affirmative action plan meets one of the three aforementioned goals, it still must be appropriately tailored to be valid. Among other things, courts look to such factors as whether: (1) the plan contains specific goals and objectives, (2) hiring decisions take numerous factors into account (including the qualifications of underrepresented applicants), (3) the plan does not "unnecessarily trammel the interests" of non-minorities (such as by discharging workers and replacing them through affirmative action), (4) the plan is designed so that diverse applicants compete with all other qualified applicants, (5) the plan does not create an absolute bar to advancement of those falling outside its goals, and (6) the plan is a temporary measure that

[10] *Indeed & Glassdoor's Hiring and Workplace Trends Report 2023*, https://www.glassdoor.com/research/app/uploads/sites/2/2022/11/Indeed-Glassdoors-2023-Hiring-Workplace-Trends-Report-Glassdoor-Blog.pdf.

lasts only until the employer is near reaching its goal. In additional, affirmative action plans have been deemed invalid if they rely on quotas or are used to maintain (rather than attain) a balanced workforce. *See* Report 43. The Report notes that the Supreme Court had held (in *Ricci v. DeStefano*[11]) that employers may not change the practices they use to make employment decisions based on race unless they can demonstrate a strong evidence-based believe that their existing practices violate Title VII because they have a disparate impact. *See* Report at 43. Outside the voluntary affirmative action frameworks, corporations have developed many other DEI programs – including pipelines, affinity/employee resource Groups (ERGs), fellowships/scholarships, training, and mentorship/sponsorship programs. According to the Report, such efforts that do not consider race in hiring, promotion, or other employment decisions, have traditionally been considered legal under Title VII. *See* Report at 44.

Title 42 U.S.C. § 1981 bars race-based discrimination in connection with the making and enforcement of contracts where race is the "but for" cause of the denial of rights. Unlike Title VII – which applies to employers with at least 15 employees[12] and allows for disparate action claims, section 1981 covers employers of any size but is limited to intentional discrimination. Although the SFFA Decision did not cover diversity-focused contracting or funding claims under section 1981, the Report notes that challengers to DEI policies may seek to apply the SFFA's reasoning in the context of supplier diversity commitments and other race-conscious initiatives that are governed by contract. *See* Report at 44-45.

The Report notes that anti-DEI initiatives challenges have existed well before the SFFA Decision – including shareholder requests to retract DEI policies, threats of reverse discrimination litigation, government investigations/enforcement actions, and antitrust law allegations – and goes on to describe several of these efforts. *See* Report at 45-52. While the Report acknowledges that the SFFA Decision may embolden future anti-DEI attacks, it also points out that there are significant risks to companies that back away from their DEI commitments.

<u>The Report's Discussion of the Legal Risks of Dialing Back DEI Initiatives</u>

While several recent anti-DEI attacks have taken the spotlight, the Report (at 52-56) reminds corporations that dialing back from DEI commitments can also pose serious risks. These risks can include:

- greenwashing-like claims by investors and investigations by the Securities and Exchange Commission alleging that firms misled shareholders regarding DEI commitments (with 40 such lawsuits being filed in the past three years);

[11] 557 U.S. 557 (2009)

[12] https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/pages/titleviiofthecivilrightsactof1964.aspx#:~:text=Title%20VII%20is%20a%20provision,with%2015%20or%20more%20employees.

- traditional Title VII claims (given that firms are more likely to face discrimination claims than reverse discrimination claims);

- additional scrutiny of pay and promotion practices and potential claims of pay discrimination;

- harm to the business (given the benefits of diversity);

- reduced investments;

- and public relations backlash.

The Report's Guidance for Private Employers

According to the Report, the SFFA Decision does not facially alter the law governing workplace DEI programs and private employer's decisions -- meaning that firms still have numerous tools at their disposal to foster diversity legally. Rather than requiring firms to abandon their diversity efforts, the Report recommends that firms use the SFFA decision to review and enhance their DEI initiatives "to ensure they are aligned with their recruitment, retention and development, and supplier diversity goals" and mitigate any legal and reputational risk given the evolving climate and legal landscape. *See* Report at 56. The Report (at 56-61) provides several specific recommendations for companies to mitigate risks and strengthen the effectiveness of corporate DEI initiatives. These include:

1) Communicating their continued DEI commitments to internal and external stakeholders;

2) Conducting a privileged assessment of their DEI programs (using counsel);

3) Understanding both the internal and external perceptions of their DEI efforts;

4) Identifying compelling interests and developing measurable objectives for their DEI programs;

5) Increasing DEI disclosure controls;

6) Educating and training employees and management on proper DEI guardrails and practices;

7) Collecting, monitoring, and tracking DEI data;

8) Assuring that DEI programs are encapsulated within a framework of good corporate governance; and

9) Monitoring state and local laws, grassroot efforts, and peer company initiatives.

Additional advice embedded in these recommendations include ensuring that:

- programs do not make or encourage decisions on the basis of race or other protected characteristics;

- firms articulate the tangible benefits of their DEI initiatives and diversity in their workplace;

- employee resource groups (ERGs) are clearly described as employee-led, voluntary, and open to all employees; and

- firms focus on education/training that creates opportunities for employees to share their unique backgrounds and experiences.

The Report (at 61-74) further discusses ways that corporates can continue relying on lawful strategies to achieve their DEI goals relating to the recruitment, retention, and advancement of underrepresented groups. Such techniques include (among others):

- Developing pipelines to reach out to and recruit diverse talent (including expanding the schools from which companies recruit and participating in non-traditional career fairs);

- Creating job postings that attract diverse talent by using of inclusive language and examples of firms' commitments to a welcoming environment;

- Recruiting candidates who have taken non-traditional/linear career paths;

- Developing affinity groups, ERGs, mentorship programs, formal training, robust evaluation/feedback processes, equitable work allocation systems, and networking opportunities;

- Structuring succession planning to try and eliminate implicit and structural biases; and

- Assessing how compensation is structured.

The Report (at 74) also discusses supplier diversity programs, which can both diversify business risks, help small and diverse business owners, support and engage local communities, and foster public trust. According to the Report, while the SFFA decision does not directly impact such programs, companies can work to mitigate their risks by making sure that their supplier diversity materials do not award contracts on the basis of race (or another protected status), considering zero-sum alternatives to increasing the diversity of their supplier base (such as training small on diverse businesses how to apply for certification and compete for business), and reducing payment timelines in from 60/90 to 30 days (to help small/diverse suppliers be able to participate).

One can find a complete list of the Report's 15 recommendations and guidance for corporations and law firms in its Appendix A (pages 88-91).

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According to the Report, although the SFFA Decision is a setback for preserving the benefits of fostering diversity in universities, it is "also a call to action for those committed to the principles of DEI." *See* Report at 85. The Report offers its guidance and recommendations to support organizations, including businesses and corporations, "in maintaining their commitment to diversity and achieving their DEI goals in a matter which is consistent with the Supreme Court's ruling and mitigations the potential risks of a challenging legal landscape." We at Finpublica hope you find this summary of the NYSBA Report, as it relates to corporates and other private employers, helpful.