Assessing Supplier Diversity Risks in the Post-*Students for Fair Admissions* Landscape

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Seyfarth Shaw LLP

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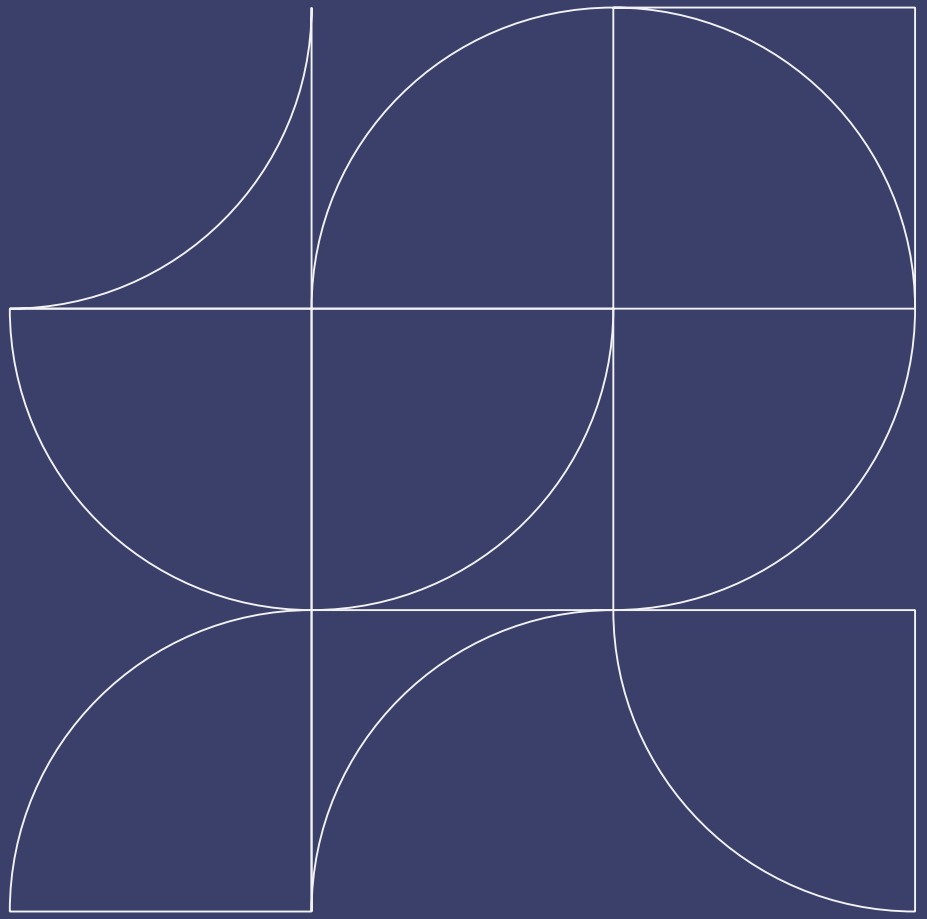
Agenda

01 Background and Legal Landscape

02 Supplier Diversity & Section 1981

03 Practical Implications

Background and Legal Landscape



SFFA

- ***Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.; Students for Fair Admissions, Inc. v. Univ. of N.C.; et al.*[1] 143 S. Ct. 2141 (2023)**
  - The Supreme Court ruled that colleges and universities may no longer use race-conscious admissions policies to foster diversity in their student bodies
  - Violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964
  - Court's Concern:
    - Lack of concrete way to measure progress towards the goals articulated by the schools — goals such as encouraging a robust exchange of ideas, fostering innovation and problem-solving and training future leaders
    - No "end point" to the schools' race-based admission policies and no defined point at which the race-based measures would end
    - By treating race as an evaluative factor, the schools were incorrectly assuming that all persons in a race share similar views or experiences

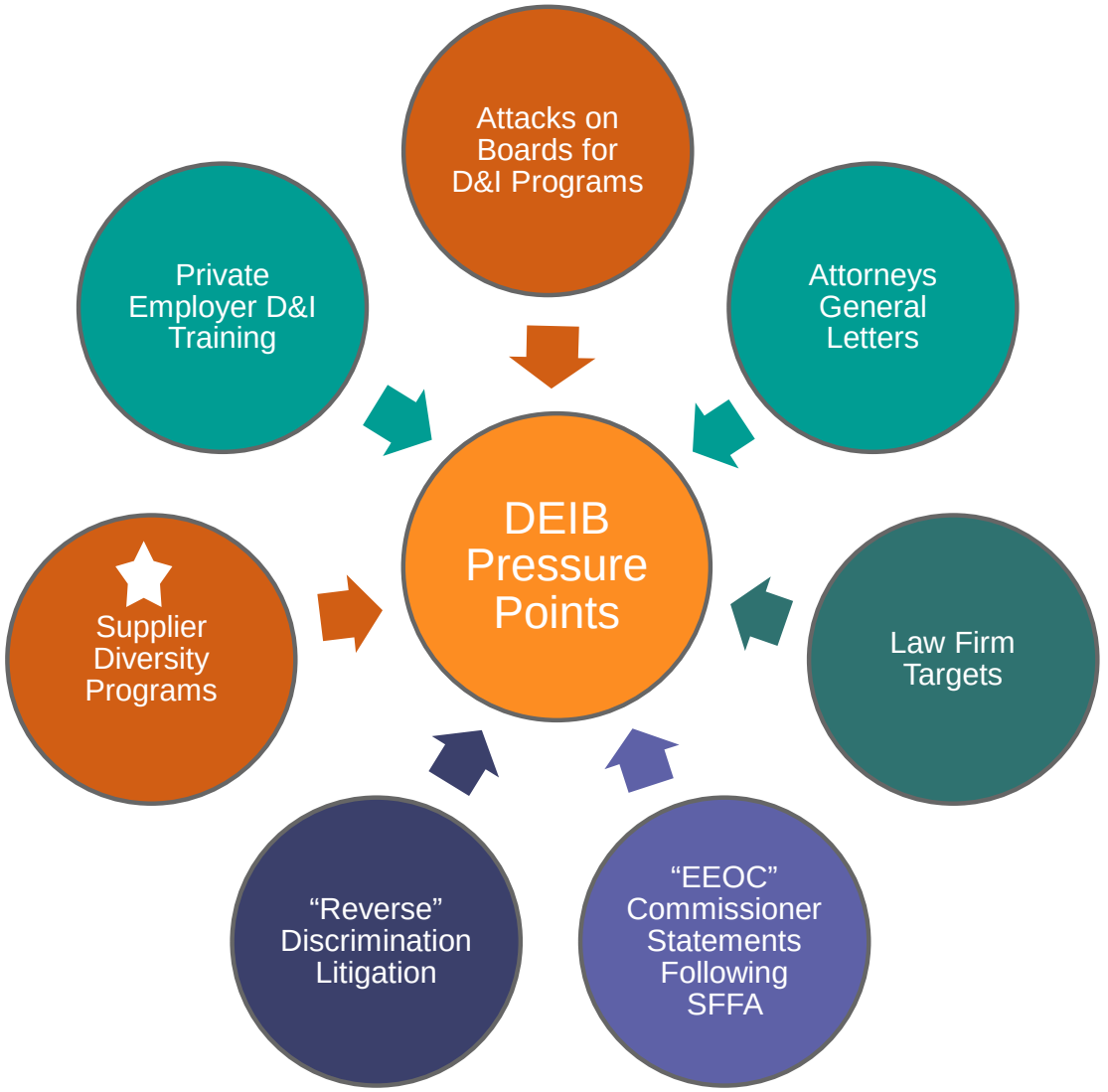
SFFA and Private Employers

- No direct legal implications for private business:
  - The rulings have no immediate impact on the legal standards that govern affirmative action and DEI in private employment.
  - The Fourteenth Amendment does not apply to private companies.
  - The different legal frameworks, interpreting cases, and agency guidance, thus seemingly limit the reach of the rulings and insulate private workplaces and their DEI programming.

[T]o safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin—period. If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way.

Gorsuch, J., Concurring

DEIB Landscape – Post SCOTUS SFFA Decision



Post-*SFFA*

- *Ultima Servs. Corp. v. United States Dep't. of Agriculture*, No. 2:20-CV-00041 (E.D. Tenn.)
  - Small Business Administration contracts with other agencies "to furnish articles, equipment, supplies, services, or materials to the Government, or to perform construction work for the Government."
  - SBA operates program to provide subcontracts "to socially and economically disadvantaged small business concerns."
  - The court held that the 8(a) program violates the equal-protection component of the Fifth Amendment
    - Quoting *SFFA*, stated program lacked "goals that are sufficiently coherent for purposes of strict scrutiny."
    - Not "narrowly tailored" ("[*SFFA*] reaffirms that racially conscious government programs must have 'a logical end point.'"]).

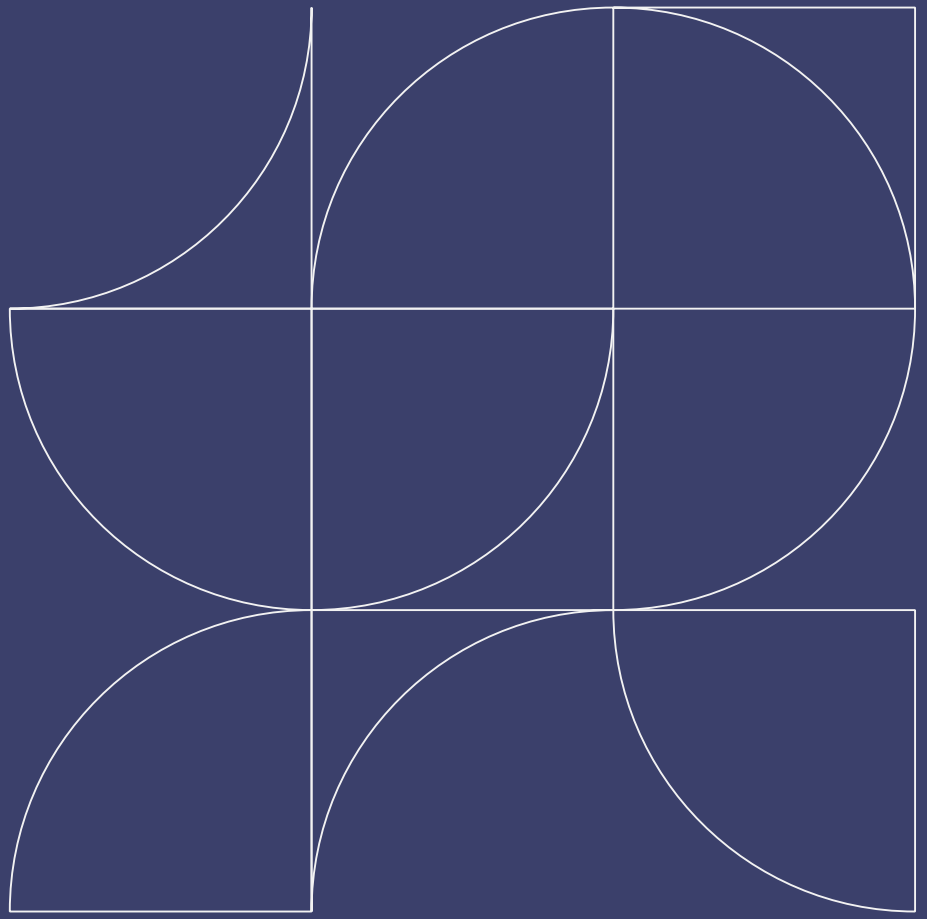
Post-*SFFA*

- *American Alliance for Equal Rights v. Fearless Fund Management, LLC, et al. (N.D. Ga)*
  - American Alliance for Equal Rights (“AAER”) filed a lawsuit against Fearless Fund Management LLC to test the impact of *SFFA* on affirmative action in the context of private contracting
  - Fearless Fund operates a program that provides grants and other perks of value to small businesses, and allegedly offers those benefits only to black women
  - The plaintiffs claim that they have members who are “ready and able” to apply for the program but are ineligible because they are not black women
  - The plaintiffs argue “Section 1981 prohibits intentional race discrimination in the making and enforcement of public and private contracts,” and contend that the program therefore discriminates against non-black entrants to the program because of their race

Takeaways

- *SFFA*, *Fearless Fund*, and *Ultima* are not Section 1981 Supplier Diversity Cases
- Language in those opinions coupled with quotes from advocacy organizations show that that supplier diversity programs are going to be targeted
  - From *Ultima*: "[t]he facts in *Students for Fair Admissions, Inc.* concerned college admissions programs … its reasoning is not limited to just those programs."
- Courts have held "purposeful discrimination that violates the Equal Protection Clause also will violate § 1981." *Anderson v. City of Boston*, 375 F.3d 71, 78 n.7 (1st Cir. 2004)
- Not a stretch that a court could apply the logic in *Ultima* to a private company
- Unclear whether courts would apply employment law principles (e.g., voluntary affirmative action) to supplier diversity cases, or if those voluntary affirmative standards will even survive in a post-*SFFA* world

Background and Legal Landscape on Section 1981



Legal Landscape

Section 1981 of the Civil Rights Act of 1866

- Section 1981 and state equivalents, grant all individuals within the US the same rights and benefits as "enjoyed by white citizens" in contractual relationships
- Section 1981 prohibits discrimination on the basis of race in the making, performing, and modifying of contracts
  - Intentional Discrimination
- A defendant to a Section 1981 claim does not necessarily need to be an actual party to a contract to violate Section 1981

Legal Landscape

Title VII and Section 1981

- Historically, the majority of section 1981 claims have been in the employment discrimination context
  - Key Differences
    - Race only
    - Intentional Discrimination
    - Applies to independent Contractors
    - Small employers
    - No administrative precursors
- Section 1981 and Title VII's jurisprudence has developed together in the employment area
  - Courts have applied *McDonnell-Douglas* framework to Section 1981 claims, for example

Legal Landscape

Section 1981 – Discrimination in Contracting

- Distinct historical roots and general reference to contracting broadens its application beyond employment discrimination
- Racial discrimination:
  - Housing
  - Franchising
  - Education
  - Social club membership
  - Insurance coverage
  - Commercial transactions

Legal Landscape

Approved “Affirmative Action” in Employment

- Title VII has a long history of permitting “voluntary affirmative action” in employment
  - *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616 (1987)
  - *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)
- That standard has been applied in Section 1981 cases
  - *Setser v. Novack Investment Co*., 657 F.2d 962 (8th Cir.1981) (concluding that § 1981 does not bar affirmative action programs in an employment case)
  - *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est*., 470 F.3d 827, 829 (9th Cir. 2006) (applying Title VII affirmative action principles to a private educational institution in a Section 1981 case)

Section 1981 in Franchising

"What if a white prospective franchisee sued a franchisor which, acting in accordance with its affirmative action program or set-asides, rejected that white person's application in favor of a minority franchisee? Given that [cases involving governmental entities] do not apply because the franchisor is a private entity, could the white prospective franchisee nevertheless succeed with a section 1981 claim?"

S. Motors Chevrolet, Inc. v. Gen. Motors, LLC, No. CV414-152, 2014 WL 5644089, at *2 (S.D. Ga. Nov. 4, 2014)

Does Affirmative Action Apply?

- Would the courts treat a franchisor's existing, established affirmative action policy or set-aside program as evidence of "intentional discrimination" sufficient to carry a section 1981 action?

- Would the goals and objectives of affirmative action qualify as a legitimate noneconomic reason for choosing a minority franchisee over a white franchisee?"

Legal Landscape

“Affirmative Action” and Section 1981

- *Sec. & Data Techs., Inc. v. Sch. Dist. of Philadelphia*, 145 F. Supp. 3d 454 (E.D. Pa. 2015)
  - A prospective nonminority security contractor was denied multi-million dollar contract with school based on race in violation of §§ 1981 and 1983
  - Evidence of discrimination included:
    - statement by superintendent to ensure “all these white boys” did not receive all school district's contracts
    - internal inquiry regarding why a “black firm” was not selected for the project and direction that the contract be awarded to a black-owned firm
    - statements by superintendent that she was tired of the School District's business going to contractors who do not look like her and that she was sick of contracts going to majority vendors
  - Summary judgment denied
  - No formal discussion of applicable framework or affirmative action

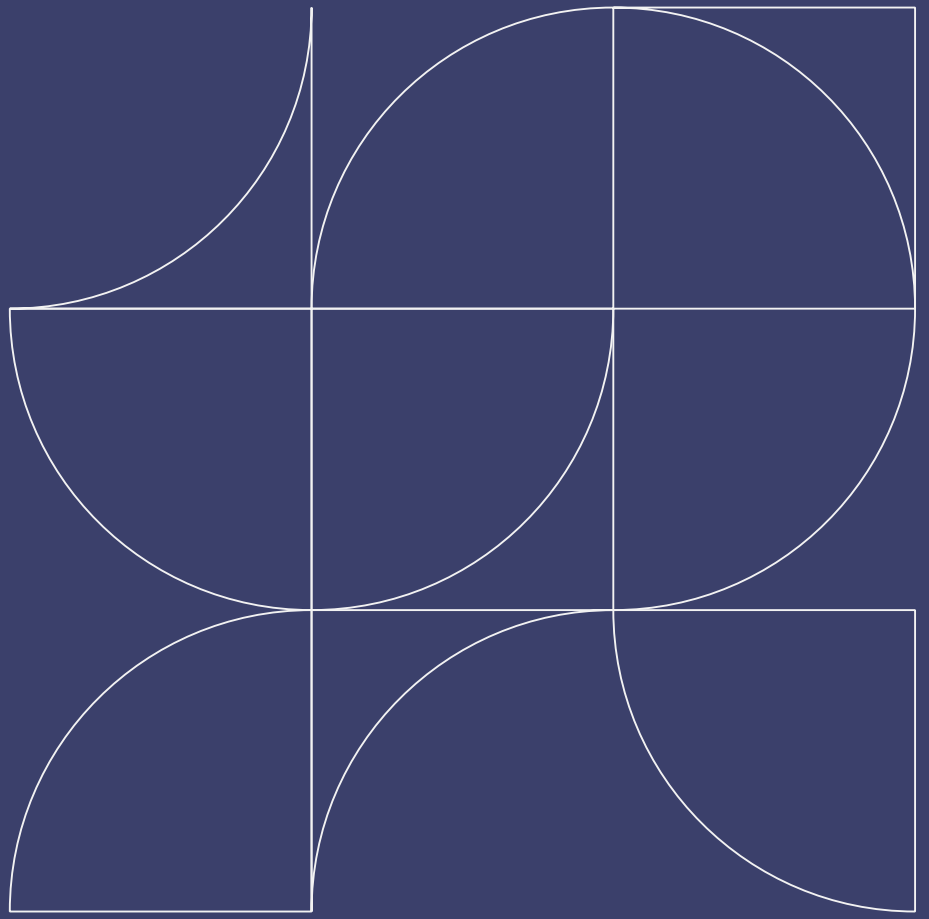
“Affirmative Action” and Section 1981

- *Frost v. Chrysler Motor Corp.,* 826 F. Supp. 1290, 1297 (W.D. Okla. 1993)
  - Chrysler maintained a Marketing Investment Program – for new dealerships in geographies lacking well-resourced private investors to run them
    - Chrysler paid dealers as employees to run these (including benefits)
    - Over time, MIP participant can buy out Chrysler’s ownership
  - Chrysler Minority Development Program – served as pipeline to MIP
  - White plaintiff sued under Section 1981 and Title VII because she was ineligible/not selected for these programs because of race
  - Chrysler asserted that programs operated pursuant to a voluntary affirmative action program
  - Summary judgment granted for plaintiff—court finds alleged plan was pretext for racial discrimination

Supplier Diversity Programs

- “We have created the Supplier Diversity Benefits program (SDB), through which we certify diverse-owned businesses. This network is the preferred resource to select diverse suppliers for contracting opportunities.”
- “Our goal is $50B in spend with diverse suppliers in the next 10 years.”
- “We have committed to spending $1B in diverse spend”
- “We support diverse-owned businesses by creating networking and business-building opportunities through programming, mentorship, sponsorship, and more.”

Practical Implications



Moving Forward

Do we maintain a Supplier Diversity Program* after *SFFA?

- Some organizations have charged into the breach on Supplier Diversity after SFFA, even in the face of direct challenges.

  "We are not scared, we are fearless."

- Others have suspended operation of Supplier Diversity programs, potentially for retooling

  SBA has suspended applications to entire 8(a) program following *Ultima Services*

- Still others have maintained the programs but pulled back from publicizing those efforts.

  Quiet de-posting of diversity reports

Moving Forward

How to leverage *SFFA* to insulate a Supplier Diversity Program from legal challenge?

- *SFFA*: Promoting diversity of experience is a legitimate goal, but assuming that people will contribute to diversity based on race is unlawful discrimination.

- Rather than using race as a proxy for diversity of experience, focus on specific traits actually held by individual applicants.
  - Use short essays or interviews to bring out life experiences
  - Explore connection of applicant to community being served
  - Document specific trait and actual diversity-add of successful candidate and describe relationship to organizational goals

Moving Forward

How to leverage *SFFA* to insulate a Supplier Diversity Program from legal challenge?

- *SFFA*: Race-neutral steps may promote diversity

- Consider measures that may help diverse suppliers succeed in a competitive marketplace, irrespective of race
  - Allow contracting terms that may empower smaller businesses to bid and compete (e.g., shorter payment cycle, lesser capital or insurance requirements)
  - Outreach to suppliers through channels that promote diversity, without providing any advantage in bidding
  - Reevaluate any measures that may entrench particular suppliers (the legacy admissions problem).

Focus on public profile of Supplier Diversity Program

- Structural insulation for a Supplier Diversity program may be wasted, if individuals administering program describe it incorrectly.
  - Statements from executives often used as evidence of pretext in discrimination cases
  - Align marketing collateral and other public statements about diversity program with principles from SFFA.
    - "We want to look like the communities we serve."
    - "We want to help [insert race]-owned businesses succeed."
  - Specific training for executives regarding discussion of diversity programs – do's and don'ts

More cutting-edge approaches

- Viability of affirmative action as a remedial measure in Supplier Diversity context is unclear
- Statistical analysis may help establish underrepresentation of certain groups among supplier base
  - Difficult to identify pool of potential suppliers
  - Relevant data sets may be elusive
  - Prospect for dueling experts in litigation
- Establish parameters for program to ensure that it is temporary and has defined end-point(s)

thank you

contact information

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