Seyfarth

Inclusion and Diversity Webinar Series (Part 2)

Establishing Goals

July 16, 2020

Seyfarth Shaw LLP

Seyfarth
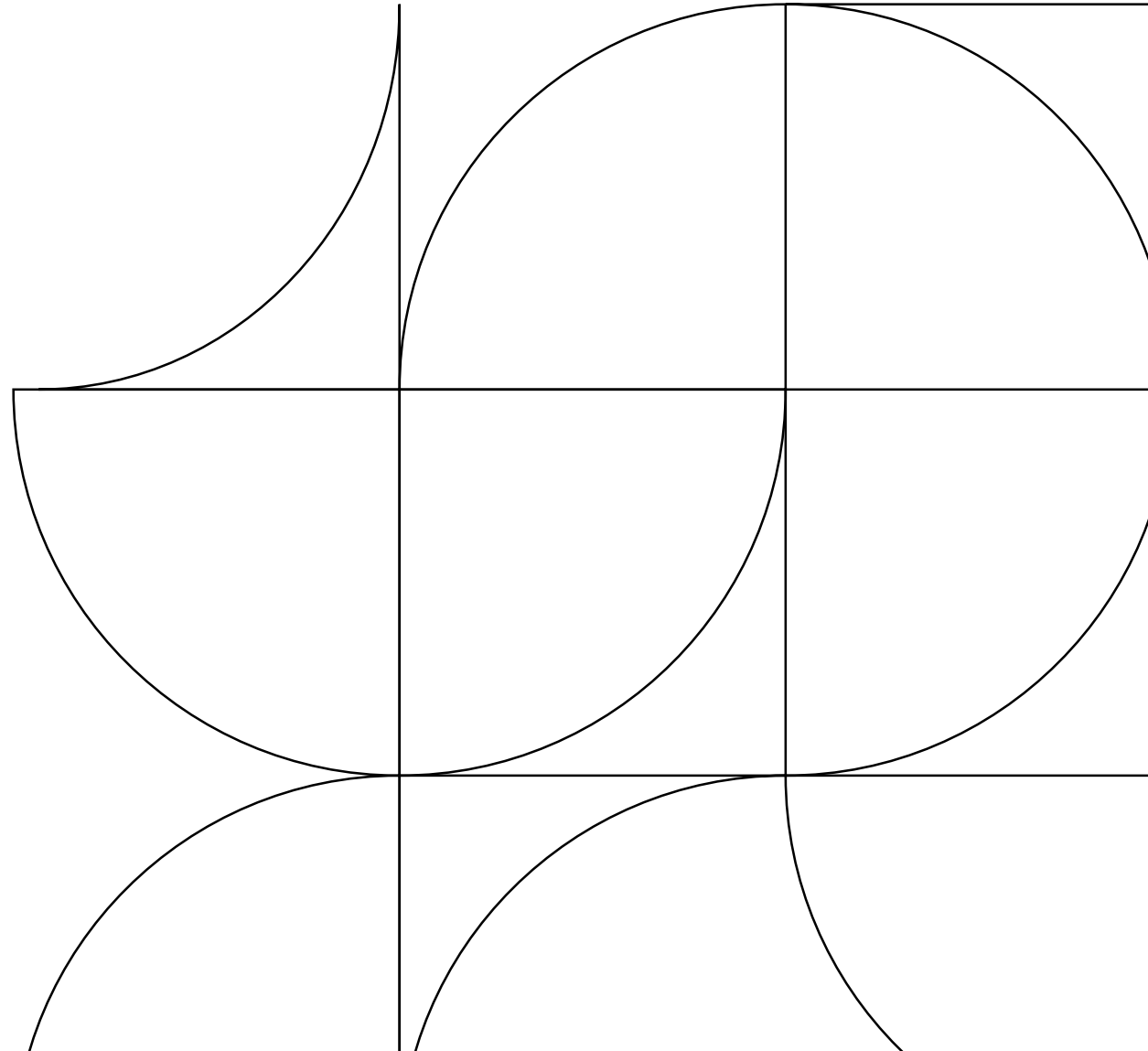
Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

Joining You Today

Laura Maechtlen | Partner
lmaechtlen@seyfarth.com
415-544-1011

Annette Tyman | Partner
atyman@seyfarth.com
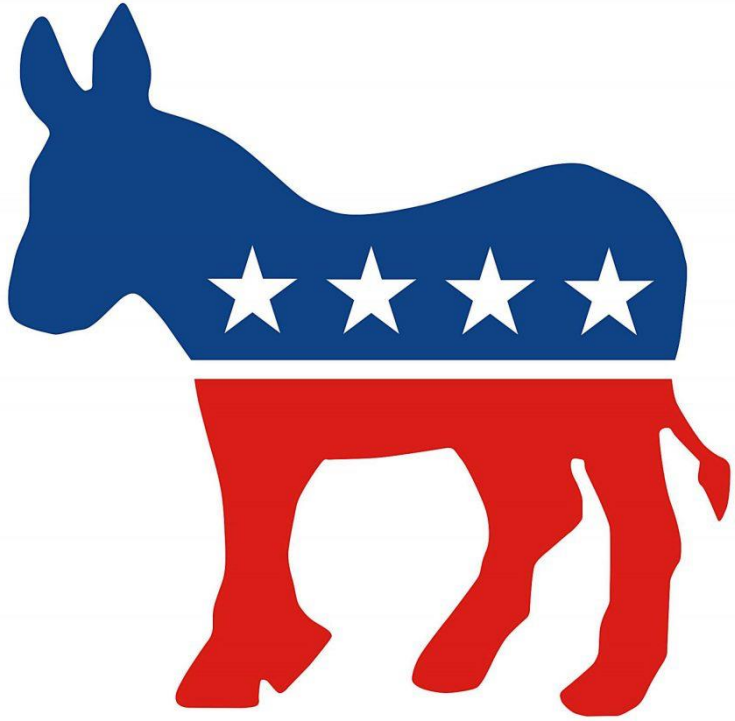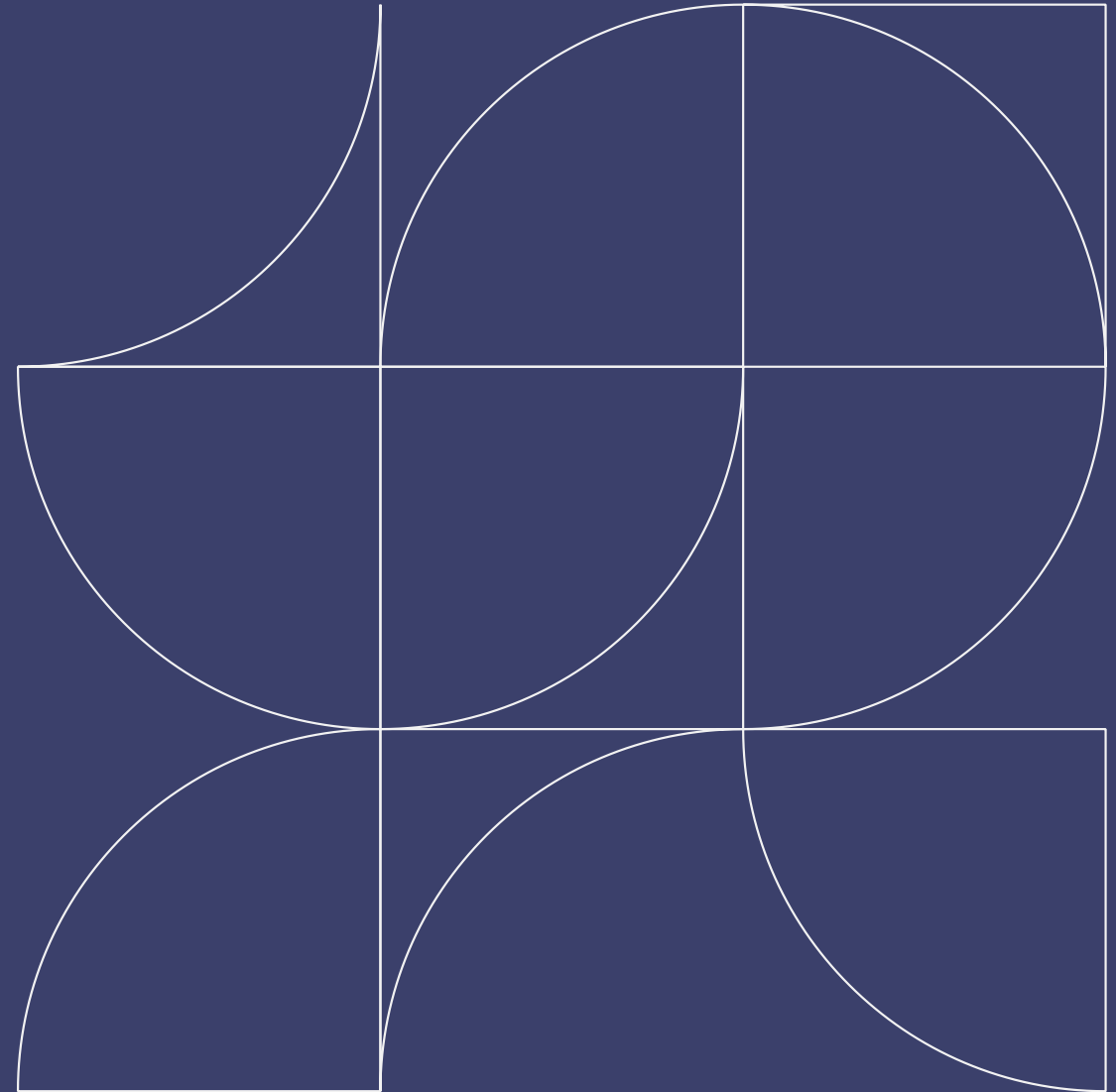312-460-5943

Mike Childers| Associate
mchilders@seyfarth.com
312-460-5222

Agenda

➢ **Societal, Business & Legal Framework**

➢ **Three Step Framework**

➢ **Transparency & Accountability**

Societal, Business & Legal Framework
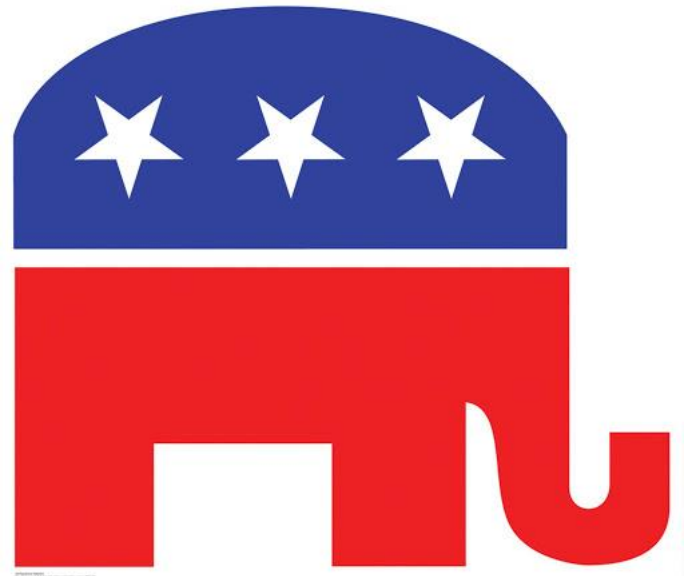
[Diversity] benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Grutter v. Bollinger,
539 U.S. 306, 324 (2003)

Title VII permits diversity efforts designed to open up opportunities to everyone…

…Further, the Commission believes that "persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes" of the statute. However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law.

EEOC Compliance Manual
Section 15-VI(C) Diversity and Affirmative Action
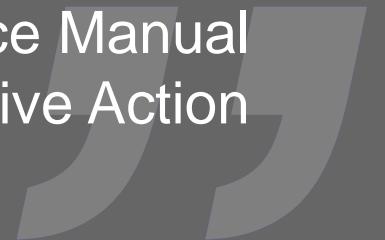
A Risk Spectrum for Establishing Goals and Benchmarks

Tracking Representation Data

Reviewing / Analyzing Representation Data

Setting Benchmarks or Goals

Quotas Or Set Asides

Voluntary Affirmative Action Programs
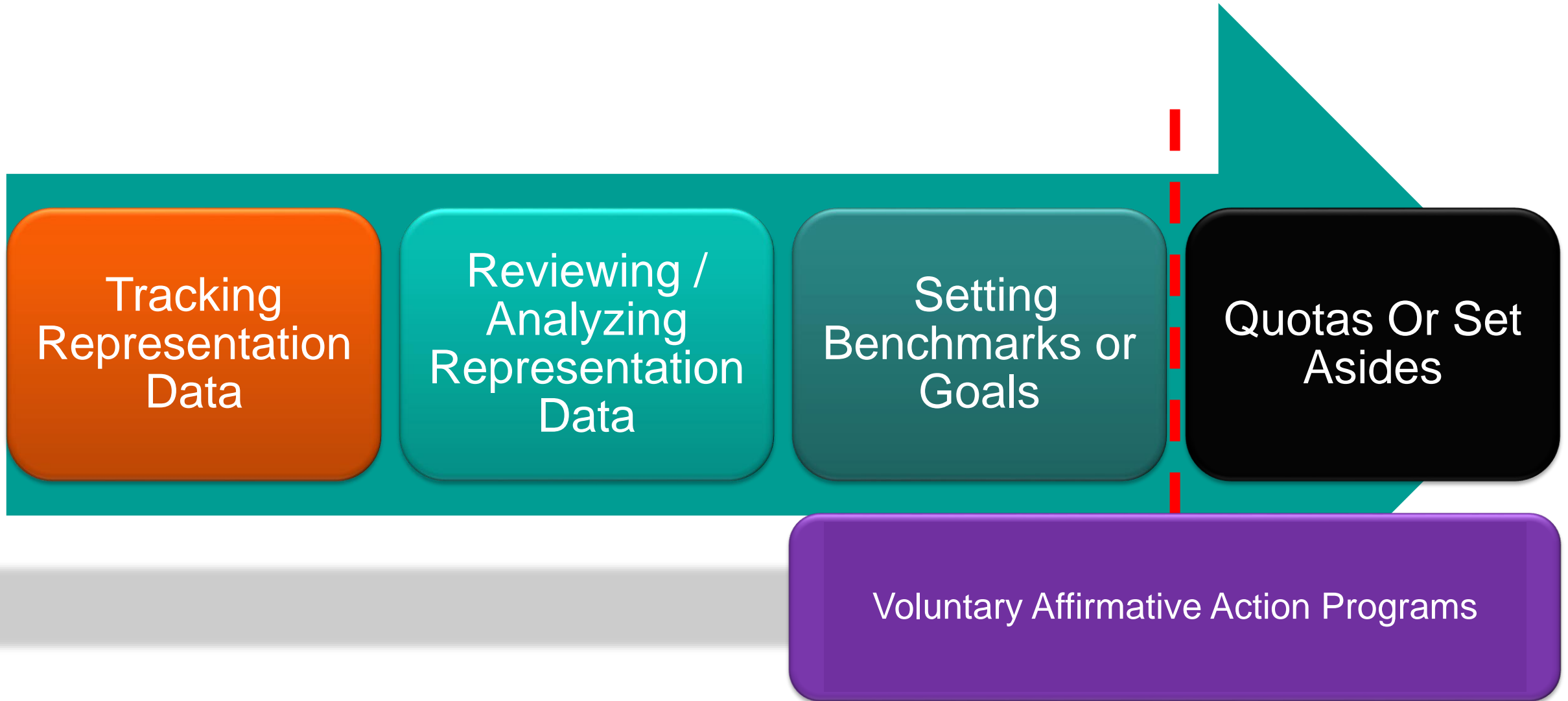
Differentiating Key Concepts

- **Benchmark:** a comparison using some reference, typically outside of the organization; provides aspirational comparator; not mandatory
- **Goal:** a desired outcome for the business; seeking good faith effort for achievement; aspirational; not mandatory

- -

- **Quota:** a required target; mandatory and not optional; specific number that must be met in hiring/promotion/etc.
- **Set-Aside**: a reserved number of jobs/promotions; mandatory and not optional; reserved for certain underrepresented groups

Three Step Framework
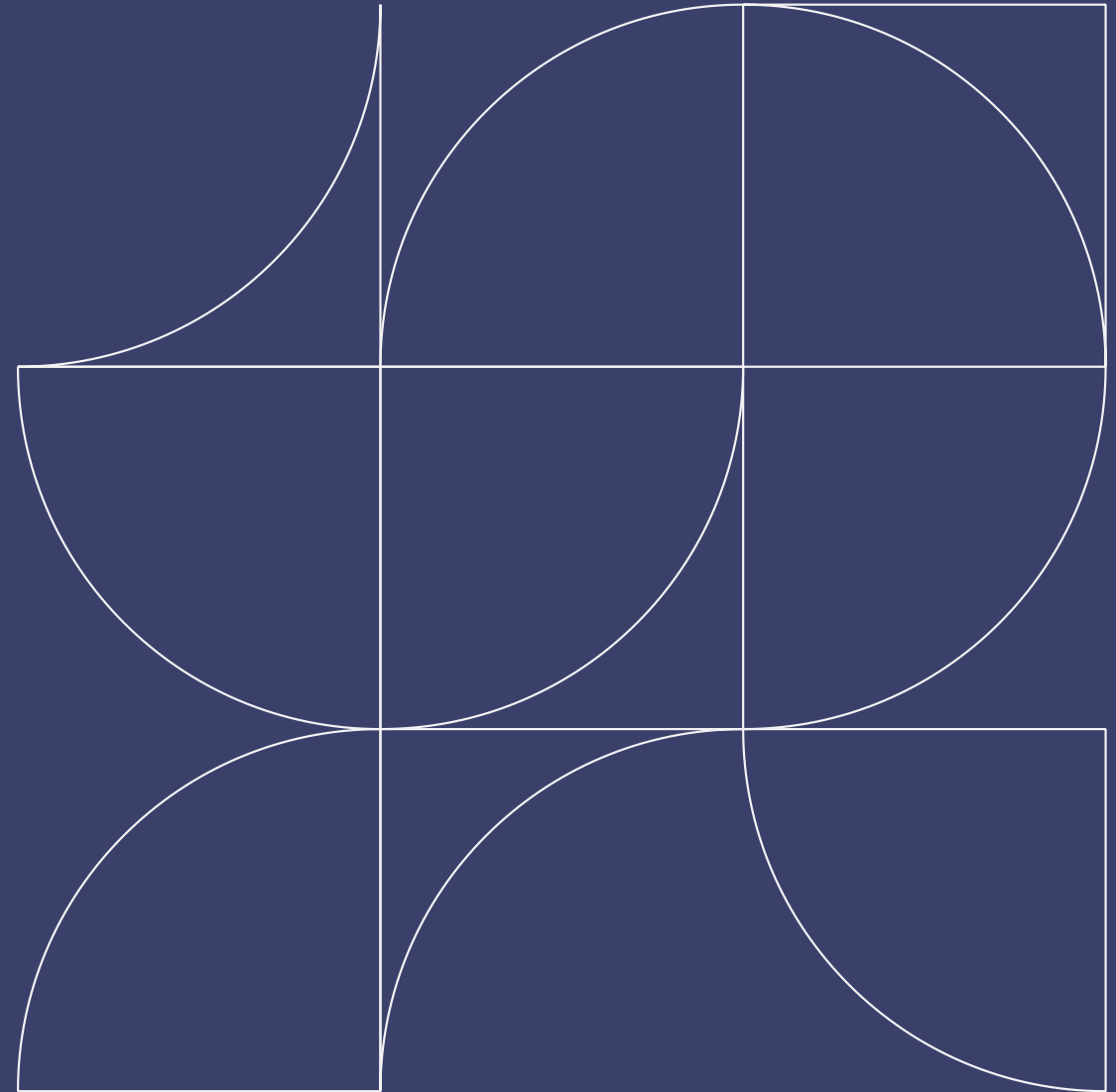
A Three Step Framework
To Establish Goals And Benchmarks

1.
Reasonable
(Privileged)
Self-
Analysis

2.
Reasonable
Conclusion
For I&D
Action

3.
Implement
Lawful
Programs
To Support
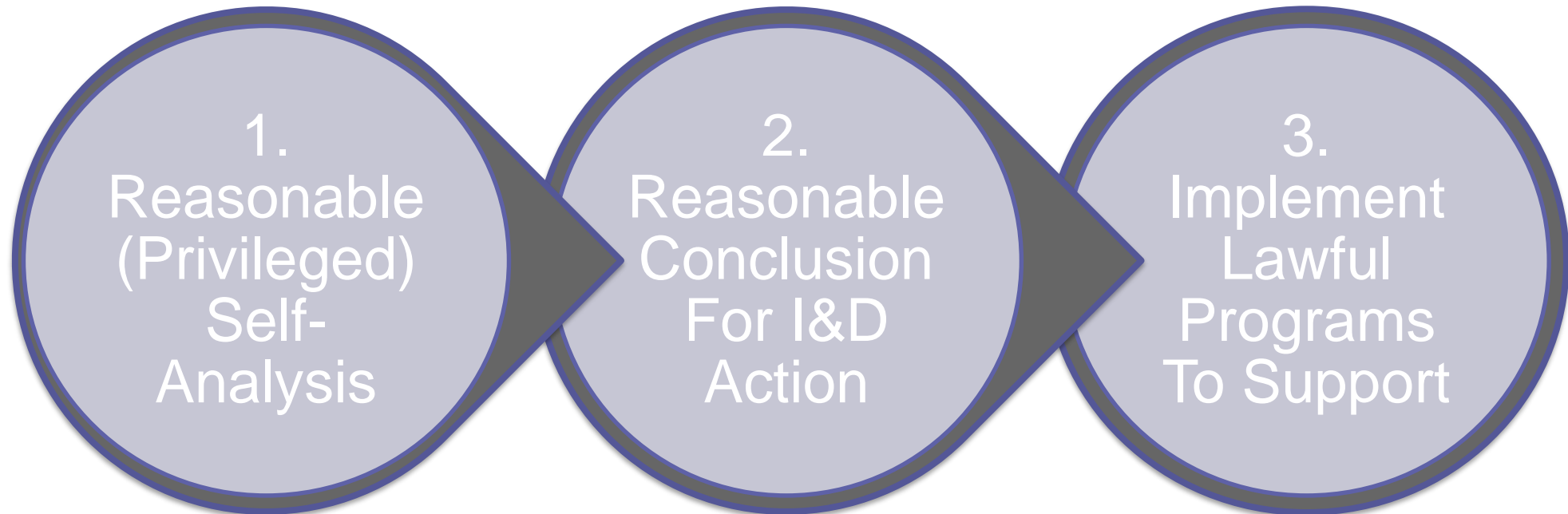
1. Reasonable (Privileged) Self-Analysis

- Effort aimed at identifying areas of opportunity for underrepresented groups and/or company talent strategy

- We recommend conducting the analysis under attorney-client privilege

- Starting point for areas of analysis:
  – Current employee population as compared to the surrounding labor market
  – Compare representation in specific jobs or specific job levels; consider business unit breakouts

- A robust inclusion and diversity program means looking at (under) representation at each level of the company, for example:
  – Representation of supervisors and managers compared to individual contributors
  – Representation of directors compared to middle managers
  – C-suite and Board representation

TIP: A robust inclusion and diversity program cannot be represented by a single number.

Considerations Related To Benchmarks

- The purpose of benchmarks are to establish accurate metrics against which your diversity and progress can be measured

- Benchmarks should be based on a combination of external labor market availability and internal workforce data
  - External market availability comes from:
    - Third party vendors like consultants or market survey firms
    - Government agencies like Bureau of Labor Statistics, U.S. Census Bureau, EEOC, and National Center for Educational Statistics (NCES)
  - Internal availability should be included in the benchmark based on the race and gender composition of the workforce in jobs that might be a source of promotable talent

Additional Considerations Related To Benchmarks

- Regardless of the data source selected to create benchmarks, make sure the benchmark reflects your workforce and you understand what it is saying:
  - Are your benchmarks position specific?
  - How are you defining your "relevant labor market"?
  - How are you identifying the promotable population?
  - How do you applicant pools compare against the benchmark?
  - Do you need to establish multiple benchmarks, or is it more appropriate to blend multiple benchmarks together?
  - If you are using industry specific data, does the industry itself have a problem that may undercut the reliability of that data?

TIP: Benchmarks will define your path – they form the basis for your decision to take action and are the measure against which effectiveness will be judged. Thus, above all else, you must have a clearly articulable reason for why you have chosen the benchmarks that you have.

2. Reasonable Conclusion for Implementing I&D Action

- If the self-analysis reveals areas of opportunity, the company should implement an action plan

- A reasonable basis may exist when the self-analysis indicates that:
  - There is underrepresentation in certain groups, jobs, etc. compared to reasonable benchmarks
  - There are specific practices that are suspected to lead to the results in the self-analysis, for example:
    - A historical recruiting practice to recruit from specific universities
    - Educational requirements – some are absolutely needed, but evaluate if they are all necessary

- A conclusion that a reasonable basis for action exists **does not** require:
  - An admission or finding of discrimination of any type
  - A determination that a Title VII violation occurred
  - A waiver of any defenses that may have existed for prior discrimination

3. Implementing Lawful Programs

- Generally, a reasonable action is one that is designed to:
  - Achieve Title VII's stated purpose
  - Solve issues identified and disclosed in the self-analysis
  - Function as a concerted and reasoned program rather than *ad hoc* events
  - Be in place temporarily and be monitored for effectiveness
  - Avoid unnecessary restrictions on employment and promotional opportunities for the workforce as a whole

- The action must be developed with specific goals and objectives in mind, though these need not necessarily be numerical
  - The goals should be established for **specific** jobs or job levels
  - They should also relate to the factors identified in the self-analysis

Reasonable Action In Response to Self-Analysis

Reasonable Action

- Aspirational goals based on a comparison of the current workforce with the relevant labor pool with annual interim goals aimed at making or measuring progress toward the long range goal

- Engaging in targeted recruitment which focuses on certain populations as part of an overall/larger recruitment strategy

- Eliminating or revising selection procedures or criteria which may have negative impacts on particular populations

- Establishing an apprenticeship program to overcome a lack of skilled applicants

Unreasonable Action

- Discharging White or male employees and replacing them with People of Color or female employees

- Creating or setting aside position openings which are only available to women and/or People of Color

- Establishing a training program that is only offered to female employees

- Refusing to hire or deciding to terminate employees in order to maintain a certain utilization of female and/or minority employees
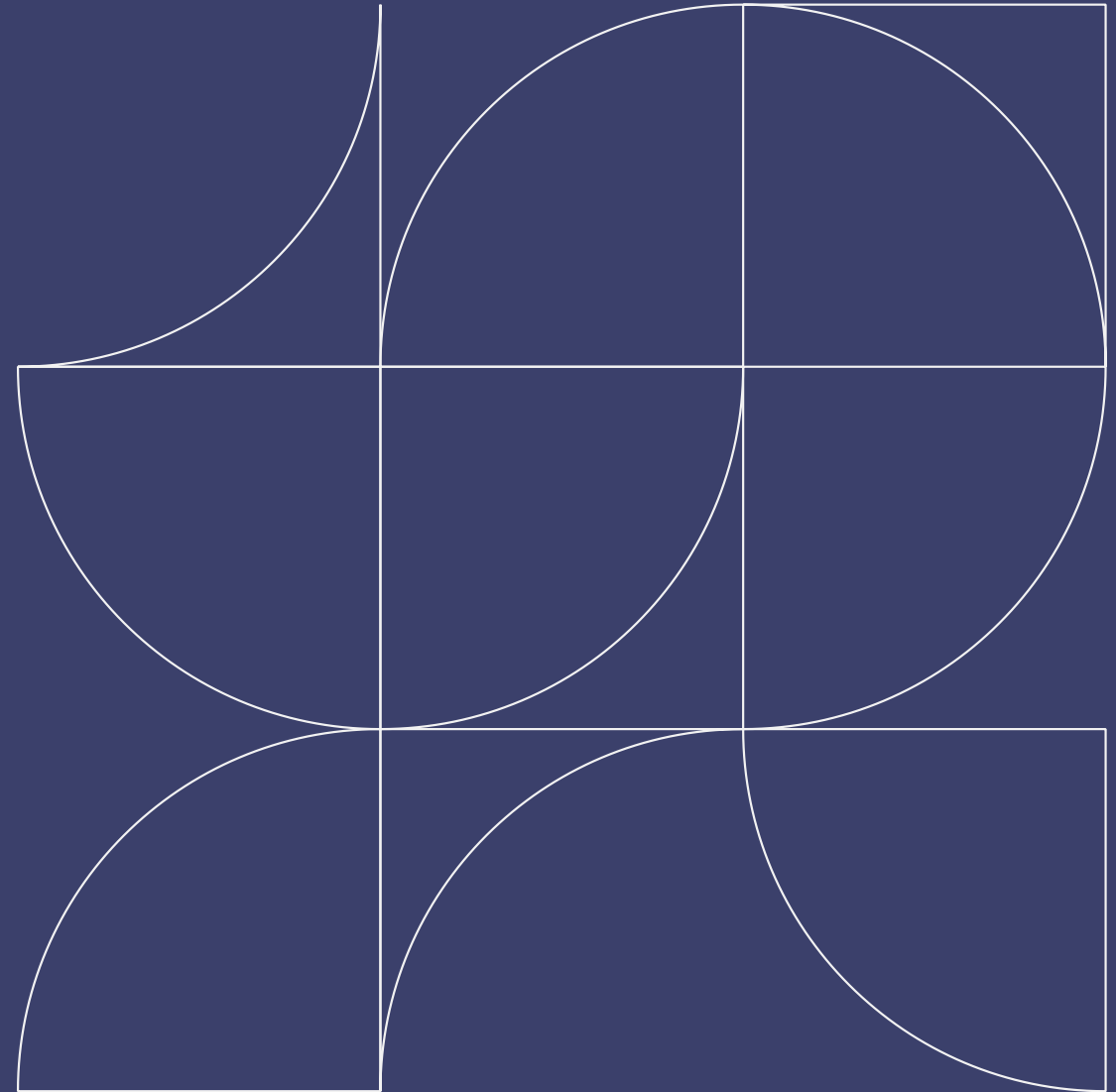
The Larger Risk Spectrum for Reasonable Action

Creating Inclusive Company Culture

Leadership Development & Mentoring

Targeted Recruiting & Outreach

Diverse Slates

Numeric "Goals" Based Selections

Other Ways to Manage Goals and Benchmarks?

- Diversity goals and benchmarks are just one instance of leveraging data and organizational information to build a global I&D strategy

- Also consider:
  - Employee engagement or satisfaction surveys, including "micro feedback"
  - Employee resource group feedback
  - "Courageous conversations" or small group feedback
  - Industry benchmark reports
  - Third party feedback (i.e., employer feedback sites/apps)

Transparency & Accountability

What Does Transparency Look Like in an I&D Strategy?

Greater Demands from Boards, Shareholders, Employees Around Pay and Workforce Demographics

Company Culture

Industry

Business Imperatives

Informed Decisions
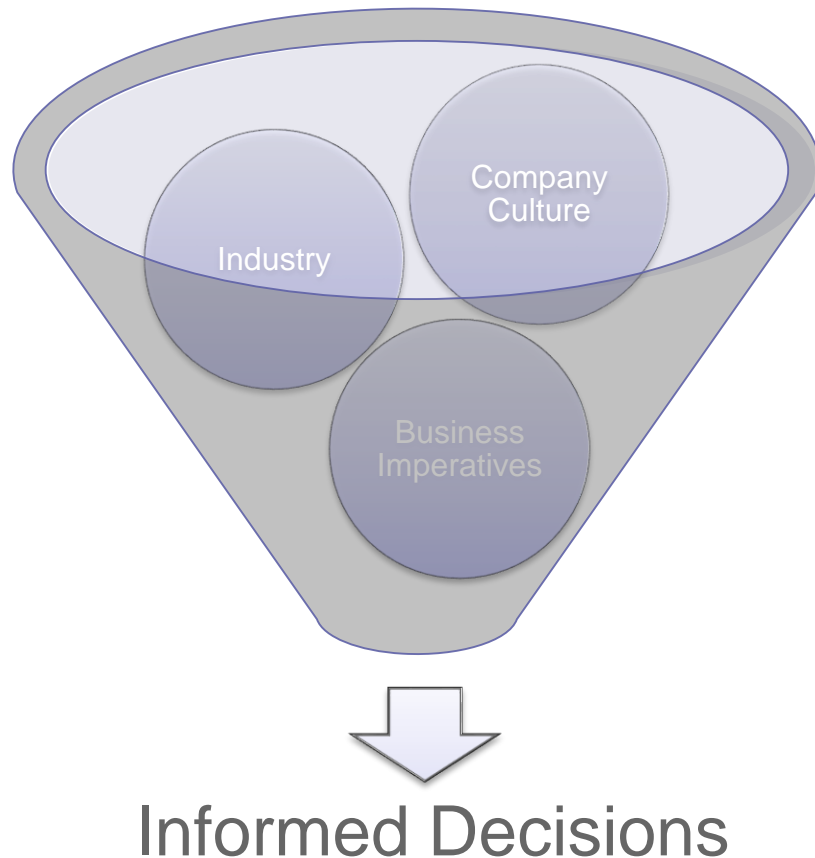
Consider

What You Will Share?

With Whom Will You Share It?

Remember that what you share will be used against you!

The Pros and Cons of Transparency

Pros

- Fosters positive relations with employees, applicants, and other stakeholders
- Greater control over the message; allows the employer to explain their I&D journey
- Creates a positive public association with the company by demonstrating proactive commitment
- Potential to drive action

Cons

- Making a public disclosure could highlight areas of opportunity
- Because there's no single way to "assess" inclusion and diversity, the conversation may become about methodology rather than your efforts or results
- The disclosure may attract additional scrutiny from regulatory agencies and plaintiffs
- Often calls for greater demands on data
- Downward trends are highlighted and must be explained

Accountability: Common Issues

Leadership Accountability

Setting Manager Goals and Objectives

Compensation Impact

Performance Measures

questions?