DEI Initiatives Post-SFFA: Considerations for Boards and Management

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It is no secret that American corporations face vigorous — and often conflicting — demands concerning diversity, equity and inclusion (DEI) initiatives. Over the past year, DEI initiatives and commitments have come under pressure in the face of macroeconomic headwinds, political scrutiny and legal challenges. That pressure has only grown following the Supreme Court's recent decision against affirmative action in *SFFA* v. *Harvard* (as discussed in our prior memo), after which Attorneys General from both red and blue states sent conflicting letters to Fortune 100 companies on what the *SFFA* decision meant for corporate DEI initiatives.

Managing the tension between proponents and opponents of DEI programs and initiatives is particularly complex because of the range of stakeholders involved. Shareholders, employees, customers, suppliers, regulators, stock exchanges and state legislatures are among the groups that have sought to shape the DEI agenda. And DEI is no longer a domestic issue: The European Union's Corporate Sustainability Reporting Directive, which is expected to affect over 3,000 U.S. companies, includes disclosure standards that require firms to assess and disclose workforce and supplier diversity, equity and inclusion policies, practices and metrics to ensure equal treatment and opportunities for all.

Boards and management seeking to navigate across this rapidly shifting DEI landscape should keep the following principles in mind:

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- Directors and officers of public companies in the United States bear fiduciary responsibilities to develop and adopt good-faith policies and strategies designed to maximize the long-term value of the corporation. To that end, boards and management, as part of an informed and deliberate exercise of business judgment, may consider and in turn determine that certain DEI initiatives and strategies advance the company's mission and operational success, by, for example, bringing diverse perspectives to bear on business decision-making and aligning the company's aspirations in this area with those of its workforce, customers and other constituencies.

- Where a DEI policy or strategy is determined, as a matter of business judgment, to further the company's prospects for long-term value maximization, companies should carefully consider how best to communicate the business-grounded rationale for such undertakings and how the company has assessed and sought to balance the competing priorities of its stakeholders. Among the factors to consider include evidence of how DEI initiatives help attract and retain key talent, the impact of DEI strategies on the risk of employment-discrimination claims, how diverse perspectives contribute to better decision-making and business outcomes, and how returns from DEI strategies are commensurate with corporate resources used to further such initiatives.

- Corporate policies and initiatives aiming to promote equity and inclusion and eliminate bias across the workforce and supply chain that were lawful prior to *SFFA* remain lawful after the Court's decision. For example, the latest Supreme Court ruling does not prohibit employers from continuing efforts to reduce bias in hiring and promotion decisions, provide unconscious bias training, conduct outreach to diverse colleges and candidates, include diverse candidates as part of interview slates, establish employee resource groups, include diverse suppliers as part of RFPs, conduct outreach to underserved communities, facilitate mentorship and other pipeline programs to facilitate employee retention, and implement family-friendly and flexible work options. U.S. Equal Employment Opportunity Commission Chair Charlotte A. Burrows has publicly reiterated that DEI initiatives that were legal prior to *SFFA* remain so.

- Setting DEI goals is not *per se* illegal provided the means by which such objectives are pursued are legally permissible. For example, care needs to be taken to ensure that goals are not accomplished through quotas and other mechanistic tools that utilize race or gender or other protected categories as a "tiebreaker" — or where an individual's race, color, religion, sex or national origin is otherwise explicitly factored into employment decision-making — because such practices can violate Title VII of the Civil Rights Act and other antidiscrimination laws that prohibit the use of such protected categories in rendering employment decisions. Employment decisions, including hiring, compensation and promotion, should instead focus on permissible considerations such as the challenges an individual has overcome, the contributions the individual has made to the company's success, and the perspectives and background that an individual may bring to bear on the company's long-term business success.

- While legal scrutiny over corporate DEI initiatives is likely to continue to increase, along with claims of reverse discrimination, the burden of proof borne by plaintiffs has not changed. Plaintiffs seeking to prove discrimination under Title VII will still need to prove that they suffered an "adverse employment action" that was motivated by their race, color, religion, sex or national origin. Companies should continue, as they have done in the past, to maintain practices and procedures that demonstrate compliance with the law. Directors and senior management, for their part, should reinforce the importance of strict adherence to these standards.

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The Supreme Court's decision in *SFFA* has not altered the fiduciary obligations of employers nor has it redrawn the permissible legal contours of DEI initiatives. We nonetheless expect companies to continue facing heightened scrutiny from all sides over why and how they go about identifying, evaluating and implementing DEI policies and goals. For these reasons, we encourage all companies to periodically review and assess their DEI strategies and commitments to ensure they align with broader business purposes and are being implemented in a manner that promotes equity and inclusion for all.

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