ALERT

Biden Administration Issues Guidance to Universities on Implementing Supreme Court Affirmative Action Ruling

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TAKEAWAYS

- A Department of Education letter and Q&A document outlines lawful ways for universities to promote diverse student bodies.
- Higher education institutions are urged to "redoubl[e] efforts to recruit and retain" students from underserved communities, without making discriminatory selection decisions.
- The Administration's Q&A guidance outlines helpful strategies and guardrails that employers and associations may wish to take as models for their own DEI initiatives.

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On Monday, August 14, the Department of Justice's Civil Rights Division and the Department of Education's Office for Civil Rights (together, the "Departments") issued a letter (the "Letter") to colleges and universities advising compliance with the Supreme Court's June 29, 2023, decisions, *Students for Fair Admissions v. Harvard* and *Students for Fair Admission v. University of North Carolina* (together, *SFFA*). The guidance urges colleges and universities to "redoubl[e] efforts to recruit and retain talented students from underserved communities, including those with large numbers of students of color" and to adopt "a greater focus on fostering a sense of belonging."

The Supreme Court's Basis for Ending Affirmative Action in Admissions

In *SFFA*, the Supreme Court held that race-conscious admissions programs at Harvard and the University of North Carolina were unconstitutional and violated Title VI because their means of accomplishing diversity: (i) lacked objectives focused and measurable enough to warrant the use of race; (ii) treated applicants' race as a negative factor; (iii) involved racial stereotyping; and (iv) lacked a "logical end point." As explained in our

June 30 alert, using race as a "plus" factor in holistic admissions processes had been considered lawful since the Supreme Court's decision in *Grutter v. Bollinger*, 539 US 306 (2003), which held that student body diversity was a compelling interest sufficient to justify race-conscious admissions that were narrowly tailored to achieve that goal. In *SFFA*, the Supreme Court ended that exception to the otherwise applicable prohibition on using race in selection decisions, under the Equal Protection Clause of the Fourteenth Amendment and Title VI. Significantly, the decision did not reject the importance of the goal of diversity—characterizing it as "commendable" and "worthy"—but rather faulted the means that Harvard and UNC used to achieve that goal.

Biden Administration Guidance on Lawful Strategies to Promote Diversity

As a result of the *SFFA* decision, colleges and universities no longer may use racial preferences in making admissions decisions—one of the most direct ways to intentionally achieve diversity among their student populations. The Letter, together with Q&A Guidance, seeks to help colleges and universities navigate within the bounds of *SFFA* to continue to strive for and achieve racially diverse campuses. In the Letter, the Biden Administration reiterates its call to affected stakeholders to "seize the opportunity to expand access," including by "valuing students who have overcome adversity." Recognizing the barriers that *SFFA* created, the Letter notes that achieving this end may mean "redoubling efforts" to recruit and retain students from underserved communities. The Letter affirms that diverse student bodies are "core to [institutions'] commitment to excellence," that "learning is enriched" in classrooms with a diversity of participants, and that "individuals who attend diverse schools are better prepared for our increasingly racially and ethnically diverse society and the global economy." As a result, diversity, equity, and inclusion (DEI) measures outside of the admissions selection process will become more critical elements of any strategy to increase or maintain diverse student bodies.

The Q&A Guidance addresses a number of key strategies:

- **Targeted outreach, recruitment, and "pathway programs"**

The *SFFA* decision does not prevent institutions from pursuing targeted outreach, recruitment, and "pathway programs" to achieve diversity. An institution may consider race and other demographic factors to achieve a diverse student applicant pool by, for example, targeting school districts or high schools that are underrepresented in the institution's applicant pool. Additionally, institutions may offer pathway programs to particular groups of applicants by partnering with a particular high school or geographic area. The institution may then give pathway program participants preference in the admissions process, but only if admission to the pathway program is based solely on non-racial criteria (though, as with college admissions, institutions may consider how race has impacted an individual applicant's lived experience).

- **Collection of Demographic Data**

By collecting and using demographic data institutions can develop outreach, recruitment, and pathway programs consistent with their goals of achieving diversity. Access to demographic data can also help institutions ensure that their admissions practices do not inadvertently discriminate against protected classes, or otherwise create unintentional, artificial barriers to admission. However, institutions should consider steps to ensure that admissions officers do not use race *qua* race to make admissions decisions.

- **Evaluation of Admissions Policies**

Colleges and universities are encouraged to reexamine admissions practices—not just to ensure compliance with *SFFA*, but to review preferences for legacy status or donor affiliation. The Guidance notes that such markers are "unrelated to a prospective applicant's individual merit or potential," and "further benefit privileged students," in turn "reduc[ing] opportunities for others who have been foreclosed from such advantages."

The Guidance further explains that institutions may make admission decisions based on race-neutral criteria, such as admitting all students in the top portion of their high school class, or by considering factors such as socioeconomic status, geographic location, whether the applicant is a citizen or member of a Tribal Nation, and experiences of adversity, including experiences linked to the applicant's race.

- **Student Yield and Retention Strategies and Programs**

Finally, the Guidance notes the importance of instilling in all students, and, in particular underrepresented students, a "sense of belonging" on campus. Institutions may bolster students' sense of belonging through offices of diversity, campus cultural centers, as well as support clubs, activities, and affinity groups. Such groups may have a race-related theme, provided they are open to all students, regardless of race.

While schools can no longer consider an applicant's race as a factor in admissions, they are not required to ignore race altogether. In recruiting, institutions may still identify and engage in outreach to prospective students based on race. And in admissions, they may use race-neutral alternatives to help mitigate the impact of the Court's ruling on campus diversity, equity, and inclusion.

Unanswered Question: Race-Targeted Financial Aid and Scholarships

Notably, the Guidance did not directly address the lawfulness of race-targeted financial aid or other programs, outside of admission selection decisions. Prior to the *SFFA* decision, the Department of Education's 1994 policy guidance on Nondiscrimination in Federally Assisted Programs under Title VI had permitted higher education institutions to "take race or national origin into account as one factor, with other factors, in awarding financial aid if necessary to promote diversity" or to "use race or national origin as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity." The 1994 policy guidance noted that, unlike with the zero-sum outcomes of admissions decisions, in which accepting one applicant will remove an available admissions spot, "the amount of financial aid available to students is not necessarily fixed," and "the use of race-targeted financial aid by colleges and universities does not, in and of itself, dictate

that a student would be foreclosed from attending a college solely on the basis of race." Whether this distinction is sufficient to remove race-targeted financial aid from the reach of the *SFFA* decision is still an open question that awaits ultimate resolution through further agency guidance or court decisions. Indeed, the Department of Education's online link to the 1994 policy guidance now states: "Under Review: This document and the underlying issues are under review by the U.S. Department of Education (as of August 19, 2021). Please note that this notation does not have the effect of reinstating this guidance."

If colleges and universities discontinue race-targeted financial aid, that would remove a support that is critical to the ability of some minority students to attend the schools to which they are admitted. In that event, higher education institutions may need to rely on community foundations that are not subject to Title VI regulations to step into the breach and provide targeted scholarships, as happened in California following the 1996 passage of Proposition 209, which ended affirmative action in California's public colleges and universities.

Lessons on Lawful DEI for Workplaces and Associations

While the Biden Administration's Guidance was addressed to issues of college and university admissions, the strategies the Guidance endorses can be used in other contexts as well, such as building a diverse workplace or promoting diversity in association membership or leadership ranks. Race-based selection decisions in these contexts were unlawful even before the *SFFA* decision, regardless of whether made with the goal of advancing diversity. Under Title VII (for employment) and the federal anti-discrimination law 42 U.S.C. § 1981 (for the making and enforcement of contracts), using race as a factor in selection decisions is unlawful discrimination.

The lesson the Guidance offers is to focus on *inclusion*, rather than race-conscious *selection*. Tracking and attending to race and other demographics and engaging in purposively inclusive measures, increasing outreach and training, and adopting diversity as part of an organization's mission and goals are and remain lawful. For federal contractors, collecting and analyzing demographic data is a required part of complying with affirmative action regulations enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Employers that are not government contractors can voluntarily engage in some of these measures.

Institutions and employers should be intentional and strategic about how they use any demographic data they gather. The Guidance cautions that "institutions should consider steps that would prevent admissions officers who review student applications from using the data to make admissions decisions based on individual applicants' self-identified race or ethnicity." Indeed, in some contexts, removing access to demographic data and other information correlated with race or gender has resulted in significantly more diversity in selection decision outcomes. For example, the National Aeronautics and Space Administration (NASA) has now adopted anonymized selection processes for many of its programs due to the success of those structural changes in increasing the gender diversity of selections. Anonymized screening has also been adopted by some large employers as a way to prevent implicit bias from affecting hiring decisions.

Higher education institutions, employers, and associations that misinterpret the breadth and applicability of the *SFFA* decision and cease efforts to promote diversity and inclusion may increase other legal risks. Appropriately crafted and implemented diversity, equity, and inclusion strategies can safeguard against the risk of creating, maintaining, or failing to identify discriminatory practices. Inclusivity strategies can also strengthen an organization's ability both to attract and to retain diverse candidates—whether on campus, in the workplace, or in association membership.

In short, while the Biden Administration's new Guidance does not have the force of law, it serves as a reminder that efforts to implement other tools and strategies in furtherance of diversity can mitigate the impact of the *SFFA* ruling. And, in consultation with legal counsel, higher education institutions, employers, and associations may continue to maintain and develop DEI strategies.