Consumer Finance Monitor (Season 6, Episode 2): An Update on Diversity, Equity, and Inclusion in the Consumer Financial Services Industry, with Special Guest Naomi Mercer, Senior Vice President for Diversity, Equity, and Inclusion, American Bankers Association

Speakers: Dee Spagnuolo, Brian Pedrow, and Naomi Mercer

Dee Spagnuolo:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the consumer financial services group at Ballard Spahr.

I'm your host Dee Spagnuolo. I'm a partner in the litigation department and white collar group at Ballard, where I focus on internal investigations and compliance. One of my areas of expertise is in the diversity, equity, and inclusion space, and I am co-chair of the DEI counseling initiative.

Outside of my practice, I serve as a member of the firm-wide executive team as partner in charge of attorney career advancement, where I oversee hiring, evaluations, compensation, and the advancement of the firm's associates, attorneys, and of counsel lawyers. I sit on the firm's diversity council, which means I understand the challenges that many organizations face in implementing DEI strategies. That is to say I walk the walk, not just talk the talk. I'll be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com.

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Today, I am joined by my partner Brian Pedrow, and our guest, Naomi Mercer of the American Bankers Association, and we will be discussing updates and predictions for diversity, equity, and inclusion in the consumer financial services industry. I think you'll find there's something for everyone.

We'll start with some baseline questions, look at the big picture framework, and then we'll move into political and regulatory updates, some of which will be in the form of predictions as we track moving targets in a constantly evolving space.

So with that, let me turn it over to Naomi and then to Brian to share their self-introductions and to get us started with the substance of today's program. Naomi, welcome to Ballard Spahr, and tell us a bit about yourself.

Naomi Mercer:

Thank you for having me. I am Naomi Mercer, the senior vice president for diversity, equity and inclusion with the American Bankers Association. I came to this role in 2019, and my primary focus is on our member banks. I help them by providing guidance, thought leadership, tools and resources for their DE&I programs and initiatives.

Prior to coming to the ABA, I had a 25-year career as an Army officer. I was a human resources officer and a West Point professor, well, the United States Military Academy. I was a professor there on a couple of different rotations, and my Army career ended or culminated in an assignment at the Pentagon running the Army's gender integration and religious accommodation programs for basically an enterprise of 1.2 million people. So I was very, I guess well suited to pivot to the banking industry and to DE&I.

I'm also the author of the recent book, we launched it in October at our annual convention, DEI Foundations to help our banks with their DE&I programs. Thank you so much for having me. Brian, over to you.

Brian Pedrow:

Thanks. Hello everyone, and thank you for tuning into our podcast. I am a partner in Ballard Spahr's Philadelphia office where I have practiced labor and employment law for 34 years. I represent employers in all types of litigation, advice, transactional matters, pretty much anything related to the workforce. And along with Dee, I co-lead the firm's DEI counseling initiative, which is dedicated to helping our clients and organizations build and enhance their DEI programs.

I also serve on Ballard Spahr's diversity council and lead our DEI educational initiative in developing learning opportunities for our entire workforce. So like Dee I walk the walk, and like Naomi, although I don't think I quite compare to Naomi's walk, which is pretty impressive.

So with that, let's kick off our discussion with this question. Why is DEI important at financial institutions and organizations in general? Dee, what are your thoughts?

Dee Spagnuolo:

Brian, thanks for the question. Let me start by level setting with a few definitions for our listeners so that they can understand what we mean when we use the term diversity, when we say equity, when we say inclusion. Oftentimes these terms are lumped together, we've been doing it in saying DEI, but they have distinct meanings.

So diversity is a quantitative measure of a representation within a community. Equity is often defined as ensuring that access, resources and opportunity are provided for all, especially those who have faced historical disadvantage. And inclusion is ensuring an environment that is welcoming to all, regardless of their demographics and ensuring that everyone feels valued.

I like to use an analogy, I can't take credit for it, but DEI consultant in Netflix, VP of inclusion strategy, Vernā Myers has described diversity as being invited to the dance, equity as being asked to dance, and inclusion as having an opportunity to select the playlist. And it's a cute analogy, but one that I think really helps people understand the distinction among those terms.

So with that baseline information, why does it matter? Why are we here talking about DEI? And why have we seen financial institutions placing a greater emphasis on programs? And frankly, all kinds of organizations, even beyond financial institutions? There are both internal and external factors that are worth examining here.

There are financial reasons that are advanced by innovation and creativity that come with a diverse workforce. There are elements of team cohesion and morale that are implicated when diversity, equity and inclusion are considered within an organization and within a workforce.

Several years ago, McKinsey coined the term the diversity dividend and found that there's a strong correlation between the diversity of executive teams and the likelihood of financial out-performance. And since that study came out, we've talked a lot about diversity dividend, and I think we've moved beyond convincing constituents and stakeholders that there is a diversity dividend to really focusing on how we achieve that diversity dividend.

We also have seen that in the venture capital space. Studies have shown that homogenous teams have weaker investment outcomes. And across industries, the economic impact of diversity, as I mentioned, is well established and much of that ties to innovation and creativity. Diversity of thought, diversity of background and diversity of lived experiences better position teams to innovate in a way that can drive market growth. That is part of why financial institutions and corporate America more broadly really understand the importance of a DEI program.

As for the equity and inclusion components of DEI programs, when team members have access to resources and feel that they are valued, they're more likely to participate, they're more likely to contribute and to offer a free exchange of ideas. And of course, all of these factors are necessary to elevate performance and to elevate that bottom line.

And when I think about it in the context of the talent wars and the great resignation that we saw in 2021, and certainly in the first half of 2022, at the end of the day, it just makes good sense that for the resources that we put into, as an organization, to recruiting and retaining talent, that we would leverage that talent to the best of their ability, that we would create an environment that allows our workforce to bring their whole selves to work so that they can be performing at top capacity for the benefit of everyone.

So remember, it's not enough to have a diverse workforce or to have a diverse guest list for the dance. In order to truly benefit from diversity, we want to ensure that there are systems in place that allow everyone to not only dance at that event, but to have a voice in selecting that playlist. And you think about how much more interesting the playlist will be if you have a diverse team selecting the playlist.

And I just wanted to touch upon, and we'll talk about it a little bit more later, but when you look at your organization and how your organization interfaces with communities and customers and potential customers, I mean, that's another reason why DEI programs are so important.

And we've seen really strong momentum in this space when we hear so much discussion, so much emphasis put on ESG, environmental, social, and governance factors. And we see shareholders flexing their collective power to move financial institutions to more deliberately consider their role in society, their impact on the planet, their policies, their practices, and their governance structures that impact not only their internal organizations, but the world around them.

And we're going to talk a little bit more about that later, but I'll stop there. I just wanted to just give in broad strokes an outline of why we're here today talking about DEI programs. I'm going to tee up the next question and direct it to you, Naomi.

What are some of the main challenges? I just talked about the benefits, but what are the main challenges and opportunities an organization is presented with when implementing the strategy? Not so much developing, but implementing. So over to you, Naomi.

Naomi Mercer:

Thanks, Dee. Well, first of all, cultural change is difficult and it takes a lot of time and dedicated effort. That's the main challenge. There's a model that I use called the pathway to a diverse, equitable, and inclusive organization, and it has three phases.

The first phase is the culture as it is, whatever that is for your organization. And usually though, for most of our company cultures, because we didn't go into building a company thinking about DE&I, the culture is one of assimilation. And so when someone is hired into that organization, they're expected to change themselves to fit into the culture of the organization, even if that means they have to suppress authentic parts of themselves because they're from an underrepresented group.

So that can be very disturbing for a lot of people. And this is also where if you are trying to build a diverse organization, if you have an assimilation as culture, this is where you may have great diversity hiring and recruiting, but they're going to leave out the back door because those employees don't feel included because they're not able to bring their perspective and the fullness of who they are to their teams, to their table, and to the work that they do.

The second part of that pathway is a period of change. And this period can be very chaotic. And this is also where organizations that are trying to become more diverse, equitable, and inclusive, this is where they're the most likely to give up because it is chaotic and it's difficult to affect the changes that we want to see in our organizations, especially because the timeline is long.

A lot of times you have organizations that try to do too much at once. One of the things I advise our member banks to do when they're doing their DE&I strategy, especially for the first time, I tell them to pick two things they want to work on instead of trying to do everything because they all acknowledge, well, there's so much more that we need to do.

But when you're just getting started, it's overwhelming to try and do everything, and you can't do it all at once. So we try to have them pick something that's reasonable for them to achieve, and then in a year or two, they're going to redo their strategy and they can pick more and do more programs.

The other part of that is sometimes our member banks in particular, or other organizations as well, they're paralyzed by how much they need to do, so they don't do anything. And so they have difficulty even getting started. One of the tools I use the most frequently with our bankers is a DE&I framework that basically sets out, here are some steps or some considerations you need to think about as you are forming a DE&I program.

And that goes from assessment that needs to be iterative to getting stakeholder buy-in, planning their strategy, the accountability for the programs that they do, professional development, team building, equitable processes, and all of that has to link DE&I to the core values of the organization and their business strategy, or they're not going to get that far. So we talk through things like that because that's a real stopping point for many organizations is they just don't know where to start and what they should think about.

Moving too quickly and alienating part of your workforce is also a big challenge. I had some conversations, some really tough conversations with some of our members who after the murder of George Floyd, they formed a DE&I council, they were moving forward, but in that process, they also alienated some of their workforce.

So they weren't focused on the inclusion piece as much as they should have been. And so that's another, it's a little mantra of mine, is to tell our bankers inclusion first, worry about that first, the diversity hiring and all of that, it will come later.

Dee, I loved the example you used about the dance. The way that I put it in less poetic terms is that inclusion and equity are some processes, and those processes get you to diversity. Diversity is your outcome. You shouldn't be focused on the hiring and recruiting until you've ensured that your inclusion piece is there for the workforce that you already have.

But there's also great opportunity in all of this. I've talked about some of the challenges, but when that cultural change moment is starting to occur and there's momentum, it's a great opportunity to re-envision an organization's culture and recognize that while cultural shifts are hard, and sometimes we as human beings, we are very resistant to change, and that a cultural shift will take a lot of time, but it can take the organization to a new level of innovation and retention of their employees and their customers. It expands outward.

So it's also a wonderful opportunity, not just from the business side that you described so well, Dee, but also from the inclusiveness and the team building that happens among their workforce. And for our banks, they all have community partners, the team building and inclusiveness that happens with them too.

So that brings me to the next question, and Dee, I'll kick this over to you. Does DE&I apply to just employees or also to customers and suppliers?

Dee Spagnuolo:

Thanks for that, Naomi. It's an important question. And certainly when we talk about DEI programs, there's often a major focus around talent acquisition and talent development as you alluded to. And that's a fine place to begin with any DEI program and it's also a natural place to begin, as we've seen, but a more evolved program, and maybe it's DEI 2.0 for an organization. As you say, there's a danger in taking on too much right out of the gate. But a robust and more sophisticated program will look at pillars beyond the workforce.

And in fact, in the financial industry specifically, the voluntary standards under Section 342 of Dodd-Frank, and I know we'll talk a bit more about the regulatory landscape in a moment, but the voluntary standards under Section 342 actually look at several areas beyond an organization's workforce profile and employment practices.

For example, one of the pillars of those standards, talks a lot about organizational commitment to diversity and inclusion. And again, the standards came out before we commonly used equity in talking about this. So if you hear me say diversity and inclusion, it's a reference or perhaps a quote from those standards.

But organizational commitment is this concept that in looking at an organization, in looking at the senior leadership, it's important to assess whether senior leadership is promoting DEI within the organization. And by senior leadership we're talking about, or the standards are talking about, not just those employees who are executives, but looking beyond that to the demographics of the board as well and board policies, and does the board have, for example, a subcommittee or a committee on DEI where DEI is a standing agenda item on a regular cadence with board discussions?

So it's looking at organizational policies and practices with a real emphasis at tone at the top. And the reason for that is because in promulgating the standards, there was a deep understanding and recognition that DEI initiatives cannot be successful without, not only buy-in from the top of an organization, but active participation.

DEI is not something that within an organization, organization leaders can say to the head of HR, "Okay, go and do this, good luck. This is important to us. And this is your responsibility." It is a shared responsibility, that is one of the goals of any DEI program to ensure that DEI initiatives and thinking about issues of DEI are embedded into the DNA of an organization.

Beyond that, and again, sticking with the voluntary standards under Section 342, especially in light of our listeners here, there's procurement and business practices, what many organizations call supplier diversity. And this standard looks at best practices in the supplier diversity space, including whether or not organizations have policies to provide fair opportunity for minority-owned or women-owned businesses to compete for contracts, to compete for business as vendors. And this could be vendors of goods or services.

In broad strokes, the idea with any supplier diversity program is to promote transparency and equal access to information. When we think about who the incumbent vendors are within an organization or foreign organizations, those who have been working and supporting and getting contracts for a company for years and years, when we look at the demographics of those vendors, statistically, they tend to not be diverse. They tend to not be women owned.

So the idea is getting a broader perspective of individuals to the table to compete for that work. And it often comes down to having access to information. The incumbent knows what the company likes. The incumbent knows how a company operates. The incumbent might know when a contract is coming up for bid. So it's transparency and communication to ensure that a broader range of individuals and a more diverse range of individuals as vendors have a seat at the table.

So there's equal opportunity, and of course that leads to economic development in diverse communities, but the benefits go further. We were talking about in the workforce that a diverse workforce will promote innovation and creativity and drive the bottom line.

Well, likewise, vendors who are diverse and collaborating with a company can bring those same factors of innovation and creativity. They can also build bridges to more diverse customer bases, again, going back to the bottom line. And these are some of the reasons why the financial regulators will consider their own supplier diversity and expect that their regulated entities will do the same.

One more area that I want to touch on before I turn it over to Brian, speaking of financial regulators, they also expect that their regulated entities will exhibit transparency with respect to their DEI initiatives. Now, I just talked about that with respect to supplier diversity, but when I'm talking about transparency more broadly in the DEI context, we mean the level of communication both within an organization and externally facing.

And this really presents a fantastic opportunity within an organization to involve, if you have a communications team, if you have a marketing team to bring more individuals to the table. Again, this idea that DEI should not just live and sit within one part of the organization, that it should reach across departments. And this is again, what financial regulators expect their regulated institutions to be thinking about.

So what is it when I say be transparent? Well, transparent about what? It's not just an organization's DEI successes. I mean, I think we're all quick to be transparent about that and to promote our successes, but what are the challenges, and what are the failures?

And Naomi, as you were saying, that not every initiative is going to be a huge success. It's important to take stock of what you're doing on a regular basis and say, is this initiative driving the outcome that we're looking for? And if it isn't, can it be modified? Or is it something that we have to say to ourselves, this isn't working and we're going to set it aside and think about things in a different way? And I think that willingness to do that and to be transparent about that is critically important.

So there's a lot to be said about communicating externally and internally, but in the interest of time, I'm going to segue into our next topic and direct it to you, Brian. If you would, share your thoughts on the role of legal counsel in the development of and implementation of DEI programs. How can and should counsel contribute to the success of any DEI program?

Brian Pedrow:

Yes, Dee, I do think legal plays a role in the development of DEI planning. And I don't say that just because I'm a lawyer. And that role, by the way, is not just at the outset, it's not just at the beginning when things are starting. I think it needs to be a role played throughout the process, including during the implementation phase.

Remember, DEI initiatives should evolve with time as the organization changes, as it sees successes and failures in its program and its societal priorities are shifting. And in my view, legal has a role in the DEI programmatic development throughout the life cycle of a DEI program for a number of reasons.

One is that DEI does not exist in a vacuum. If it's done right, it becomes part of the organization's DNA, a phrase you've heard us use on this podcast already, which means it should impact many decisions that the organization is making, whether related to the workforce, procurement, goods and services, marketing, community engagement, many of the areas Dee touched upon.

These decisions in turn may have legal consequences for the organization. So to that end, DEI should coexist with other legal frameworks that govern how the organization behaves. For example, I'll use the workforce arena, an area that I work in day in and day out. DEI coexists with equal employment opportunity laws at the federal, state, and local levels. If the entity is a governmental contractor, DEI coexists with affirmative action legal requirements.

On the EEO front, we're seeing an increasing number of reverse discrimination suits with the added trend that some of these lawsuits are citing specifically DEI initiatives as the driving force behind personnel decisions that are being challenged because they've adversely impacted someone in particular in reverse discrimination cases, whites and or males. These claims are asserting that the white male was not hired, was not promoted, or was terminated because of the DEI focus and initiatives at the organization.

So this suggests there is an EEO line that DEI should not cross, and I'll quote the EEOC here, "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. For example, it's well settled that organizations cannot adopt rigid quotas based on protected class status."

Let me offer a couple of examples to illustrate how this is playing out today in the courts. There was a recent well-publicized jury trial in North Carolina involving a healthcare company that got hit with a $10 million jury award. It was subsequently reduced to about 4 million. The case involved reverse race and gender discrimination claims by a white male. And in the case, the white male was terminated and replaced by two women, one white and one African American.

The white male asserted that the decisions leading to the action were motivated by the employer's DEI initiative, including a specific timeline within which the organization was aiming to have its workforce reflect the community and to embed DEI in the culture, twin goals that we see in many, many DEI programs.

The claims were bolstered here by statistical evidence, which demonstrated the adverse impact the DEI program was having on white males. Also, the plaintiff in the case was not the only white male terminated in the relevant time period. And the case involved evidence that executive bonuses were specifically tied to DEI goals.

In other recent cases, we're seeing judges refusing to dismiss claims or to grant summary judgment for the employer on these kind of claims. In other words, allowing them to advance to jury trials like the one that happened in North Carolina.

A very recent Georgia case against a telecommunications company decided this past June, a white male succeeded in defeating a motion to dismiss his race and gender claims. And again, these were premised on the company's shifting practices in hiring and retention designed to align with its DEI goals.

Google's also facing race discrimination claims stemming from its DEI program, including claims by a white male that the tech giant had adopted quota based hiring practices and systematically told its recruiters to purge Caucasian and Asian American candidates in favor of Hispanic, African American and female candidates.

So all of that's to say legal can and should play a role in making sure DEI programs, the initiatives around them, the implementation of the initiatives, and equally importantly, the communications around those initiatives are designed and implemented to stay within what I would call appropriate EEO boundaries.

In other words, the organization needs to understand those boundaries and communicate them to managers who, as we all know, can sometimes be overzealous about DEI goals, especially if there are financial or compensation consequences tied to those goals.

So let me pass it back to Naomi and ask you if you would, Naomi, to tell us what's happening on the regulatory front. While we're talking about legal developments, what's happening in the regulatory world, particularly with the OMWIs and the Dodd-Frank voluntary standards?

Naomi Mercer:

Thanks, Brian. And as Dee already referenced Dodd-Frank, that was passed in response to the 2008 financial crisis. And part of the legislation created the Offices of Minority and Women Inclusion. So for short we call them the OMWIs. And those were created at the financial regulators. They have a two-fold purpose.

First, the OMWIs are responsible for doing the internal DE&I for the regulatory agencies' workforce itself, as you mentioned, Dee, for their supplier diversity and those sorts of programs. So they're working on the agency. But the other part of their purpose is they're supposed to be DEI advisors in a way for the banking industry. Part of this is a voluntary DE&I self-assessment that the agencies run every year for their regulated banks or for the banks that report to them.

Currently, the 2021 data, it was collected this past spring and early summer, however, it has not been released by the OMWIs. So we don't know the numbers from 2021 and that data. We only have the 2020 reports at the moment.

Legislation has been introduced more than once in committee to make the self-assessment mandatory for all of the regulated banks, however, that legislation has yet to make it out of committee and most likely won't with a new chair beginning in January with the new term and the changeover in control of the house.

So at ABA, we encourage our member banks to do the self-assessment because the OMWIs are very willing to share the data with us as well as with Congress. And that helps us also have a better picture of the diversity in our banks, though there are some limitations to the self-assessment about the aspects of diversity that they are assessing.

However, with the 2020 reporting data, the FDIC had a 27% reporting rate. That was up quite a bit from their 2019 data, which was only 17%. It was 15.6% of the banks reported to the OCC for their 2020 data. And I actually could not find the reporting rate for the Federal Reserve Bank. So the reporting rates are actually very low, though the FDIC seems to have made some improvements in the past year or two.

And ABA does encourage our member banks because we want that data, but also some of our banks, what they've told us as to why they do or do not report, some of our banks do the reporting. First of all, especially our larger member banks, they report because that data is out there already. It's in the public domain, and so they go ahead and do the OMWI self-assessment.

But some of our smaller banks report that the reason they do it is as a way of holding themselves accountable. When they do that self-assessment, they see their own data and it's like, oh, we've made improvements here, or maybe we backslid a little bit here, or this is another area we need to focus on.

And some of our banks, the reason they give for not reporting their data is even though this is not supposed to happen, they have some anxiety that the bank examiners and the regulator will hold their numbers against them if their bank is not as diverse as some nebulous standard. So there's that anxiety there that I think also needs to be addressed.

Part of the purpose of the OMWIs is to also share leading practices with banks, but we're actually not seeing much of that part of their purpose really play out in their reports. Notably, the OCC's last report lists about five leading practices for the banks. It was like a one-pager, and we want more of that for our banks, and I think the banking industry needs it.

The majority of the OCC's report does focus on their internal DE&I, which is great, but it doesn't focus on the self-assessments. So we would like to see more of the leading practices from the regulators because we feel that it legitimizes those practices for the banking industry.

We are also, however, cautiously optimistic that the internal work that the OMWIs are doing is building empathy on the part of the regulators, that the examiners understand how difficult DE&I can be within their own agency. And so they'll understand that it may be very difficult in community banks or in some of our larger banks just based on the conditions and the culture that are already in existence. So we would like to see more from the OMWIs, but we hope that that empathy is also there too.

I think we need to go to our next question, which is what might happen with DEI programs as a result of the Supreme Court decision on affirmative action. And so I will kick that back over to our illustrious lawyers, Dee and Brian.

Brian Pedrow:

Thank you, Naomi. Appreciate that. I would say that first it is important to recognize that these Supreme Court cases on affirmative action, and they're the race-conscious admissions cases involving Harvard and the University of North Carolina, these cases arise under Title VI of the Civil Rights Act, which is a provision of federal law that prohibits race, color, and national origin discrimination in programs that receive federal financial assistance like higher education.

These are not Title VII employment cases, so the decisions may end up being confined to the educational context. Nevertheless, having said that, if the court strikes down or limits race-conscious decisions in university admissions, something that many are predicting is going to happen just based on the oral arguments on October 31st, then the rationale for that decision could be imputed to the workplace context, including in terms of DEI.

I think it's less likely to have any ripple effects on affirmative action for government contractors, even though we use the same term affirmative action in admissions versus affirmative action in the workplace. I think it's less likely to affect government contracting affirmative action because that exists through a separate federal law and executive orders and regulations, none of which are before the Supreme Court in the Harvard and UNC cases.

Now, one potential impact that we could see is the court's ruling could scale back or could even eliminate what today are limited circumstances where an employer is permitted to inject considerations of race or gender or other protected classes in its employment decision-making processes.

This kind of race-conscious decision-making under prior Supreme Court cases is permitted only if the employer is specifically adopting a plan to remedy past discrimination, something many employers don't want to readily acknowledge, or there's been a manifest imbalance in a traditionally segregated job category.

And even then, while that may open the door to some consideration of protected classification in hiring, recruiting, or promotion decisions, even then the plan has to have flexible goals as compared to rigid quotas that allow each candidate for a position to compete against all other qualified candidates.

And the plan cannot, quote, "unnecessarily trammel the interests of the majority group," end quote, and it has to be temporary in nature. So when I said there are limited circumstances and a very specific way for race-conscious decision-making to enter employment decisions, those are the requirements. This limited exception could disappear or at the very least be drawn into question by the US Supreme Court decision involving race-conscious admissions decisions depending on how the court opts to rule.

Dee, I know you and I have been talking about these cases for some time now in the diversity context. What are your thoughts?

Dee Spagnuolo:

So Brian, I'm going to go to the other end of the spectrum here and look at what could potentially be the extreme end of the implications for these decisions. And this is not intended to be a political statement, but the reality is, we have a court here where we have conservative justices in the super majority, and where we've seen that this court, there is a willingness to overturn legal precedents.

With that backdrop and of course with the benefits of having listened to the oral arguments and read the transcript of these oral arguments back in October, I think that every organization be it a private organization, a public organization, including outside of the higher ed space, so certainly within the financial industry sector, should be taking inventory of their DEI programs now, in the event that the holdings in these two cases, the Harvard case and the UNC case might open the door to analogous attacks under Title VII.

I agree Title VII is not before the court, but again, that does not mean that Title VII will be off limits in terms of the ripple effect that the decisions in higher ed could have. So what does that mean? So taking the extreme end of the spectrum, what does that mean?

It means that there's a possibility that the Supreme Court's ruling stands for the proposition that consideration of race in any way, shape or form runs afoul of the law. This would include during the recruitment stage when DEI programs tend to focus on casting a wide net to ensure a diverse pool of qualified applicants from whom to choose.

If that principle, that holding that race is never to be considered, if it's extended to workplace diversity programs, it really could have far-reaching implications including ... We looked at a few examples. And again, I think that every organization should be looking at what initiatives they have in place and doing that now, in preparation for these decisions.

Let's look at some examples. Many organizations have aspirational goals with respect to hiring and promoting diverse executives or more diverse individuals in specific underrepresented job categories. Let's look at some common examples, women in tech or representation of Black and Hispanic individuals in executive roles. Those are very common areas where we've worked with organizations to say, okay, what can we do to help address some really glaring differences in your data with respect to these areas?

So those are aspirational goals, and I think that that is an area, depending on the wording of the majority decision ... Let's just put it on the table. I think we have a majority decision that's going to strike down part of the admissions processes at both UNC and Harvard.

So assuming that's the case, the way in which the decision is drafted, could implicate something like aspirational goals, because certainly aspirational goals, while they're not quotas, while organizations have been careful to stay on the legal side of that line, I believe that that legal line will shift as a result.

And then we have initiatives like diverse pools or diverse slate requirements, such as ensuring that a woman or a person of color is interviewed for a role. Based on what I heard in the oral arguments, I actually think that this initiative could be among the most vulnerable because a conservative court, which we have would see interviews as that necessary step in the ultimate employment decision.

So as we get closer to that ultimate employment decision, if we are thinking about race in any of the initiatives we put in place, even though it's not the ultimate decision, as we get closer to it, I think those initiatives will be among the most vulnerable coming out of the court's decision here.

Also, it would be important for organizations to be thinking about and looking at their training and development programs that target a specific diverse population, especially if there is an arguable link between that training program, that development program, and promotion or compensation. So again, these are going to be areas of vulnerability I predict coming out of the court's decisions here.

And then we have, broadly speaking, participation in or funding of diverse internship programs and really looking at what the criteria are to be able to participate in those programs. Those are areas that will come under attack.

And to be clear, it may not be, and it likely won't be that the decision itself specifically goes after DEI programs outside of higher ed, but the analogies that will be drawn between Title VI for those who are recipients of federal financial assistance and the language of Title VII, there's similar language there. And so that is the bridge. That is not a big leap to take, especially with this court.

And one other anticipated impact, and again, this came up in the oral arguments on October 31, is that a ruling against race-conscious admissions practices could reduce the number of diverse college graduates, which in turn would narrow the pipeline for qualified applicants for corporate jobs, jobs in the financial industry and beyond. And this would make DEI driven outreach to attract qualified, diverse candidates more challenging.

And as the solicitor general argued on behalf of the government, there's a negative impact that will hit industries outside of higher education. The banking industry, the legal industry, hospitals, medical research, and the military, all of those industries were referenced in the discussions in the oral arguments. All of those industries currently benefit from increased innovation, creativity, and collaboration when diverse teams are at the table.

So there's the immediate potential legal impact, and then there's the tail of this decision as we look at a potentially less diverse educational space and those individuals who will be the next generation of the workforce and leaders in our workforce.

So of course, the script is not yet written, but those are my predictions, and the tail of those decisions, as I mentioned, will have a ripple effect beyond admissions in higher education.

Brian Pedrow:

I do agree, Dee. I think it's unlikely the majority opinion is going to address these issues directly, but I would not be surprised if a dissenting opinion and there are going to be one or more dissenting opinions if this goes the way we think it's going to go, raises these issues, which may cause the majority to respond in advance to these questions, maybe in a footnote. If I had to predict where it's going to come up, I think we could see something in the majority opinion in a footnote responding to arguments the dissent is raising about the ripple effects on diversity.

Dee Spagnuolo:

Yeah, or even a split among our conservative justices where there's a concurring opinion that goes down the path of talking about Title VII and perhaps provides a roadmap for the next plaintiff to bring a lawsuit to overturn decades of precedent. A lot moving pretty quickly in this space.

So Naomi, I'm going to turn it to you and I think it's worth pointing out that much of the oral argument in the admissions cases asked the question of how do we know when a race-conscious system has succeeded? What does it look like? When do we know when we're done? And so with that, I want to ask you, what does success look like with DEI programs in the financial industry, and how does an organization know that it has achieved its goals with a successful DEI program?

Naomi Mercer:

Well, we call it a DE&I journey, and there's a sense that the journey is always ongoing. How can we improve? Who are we leaving out? What do we need to do next? These should be questions that the organization returns to frequently. Success looks different for every organization. No one organization has the same starting point, they don't have the same culture, they don't have the same outcomes. This is part of what makes diversity, equity, and inclusion so difficult.

We'd love to have this kind of off the shelf little box toolkit, what have you, that we give to our banks and say, just do this and you'll reach DEI success, but that's impossible because the cultures are so different. The geographic factors and just the applicant pool that even banks can pull from to hire is different wherever they are, and even among different bank branches.

So DEI, in our opinion, must be tailored to the organization, and that's part of what makes it so challenging and so time intensive as well, is that tailoring piece. We don't have that nice little toolkit that we can grab off the shelf and just hand over.

But generally speaking, if I had to describe what success looks like with DE&I would say it's having fully integrated DE&I into everything the organization does from how people treat each other to policies that are equitable, to their communications and marketing, and various things that define the brand of the organization.

When you've reached that point of integration, even to how the customers, they feel valued and they want to continue their business relationship with the organization as well as community partners and having diverse teams, when you've reached that integration across many dimensions of the organization and that the teams or the people in the workforce, and it flows outward to the customers and to the suppliers, that they feel valued and that across many dimensions of identity that their worldview is accepted and that they can bring their authentic selves to that organization. Those kinds of teams, they build cohesion and they're very creative. They don't become homogeneous echo chambers.

So with that integration across all parts of the organization, that's what success really looks like. It's having a culture that welcomes and values diversity because the hard work of inclusion and equity have already been done, and that diversity just builds from there. So Dee, I will turn it back over to you.

Dee Spagnuolo:

Great. Thank you so much, Naomi. That's a great place to end. We really appreciate your participating. Brian, thank you so much.

And on a final note to our listeners, to make sure you don't miss our future episodes, subscribe to our show on your favorite podcast platform, Apple Podcasts, Google, Spotify, or wherever you listen. Don't forget to check out our blog, consumerfinancemonitor.com for daily insights of the financial services industry.

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