THE WHITE HOUSE

WASHINGTON

February 9, 1998

MEMORANDUM FOR:

SYLVIA MATHEWS
MARIA ECHAVESTE
ELENA KAGAN
JUDY WINSTON

FROM: DAWN CHIRWA AND BILL KINCAID

RE: Review of Draft Self-assessment Guide on Affirmative Action for Institutions of Higher Education.

The attached draft guide has been cleared by the Department of Education and the Department of Justice. The Office for Civil Rights at Education would like to use the document in consultations with individual postsecondary institutions, as well as in regional meetings for institutions which have affirmative action programs. We have been working with ED and DOJ to make the document more user-friendly and to better convey Administration support for properly conducted affirmative action programs. Before proceeding with further constituency vetting, we would like to get internal comments.

We would appreciate it if you could review the document and provide any comments to Dawn (at 6-7963) by COB Friday, February 13. We would be happy to discuss this if necessary.

cc: Mike Cohen
Julie Fernandes
Scott Palmer
Peter Rundlet
Bob Shireman

AFFIRMATIVE ACTION ASSESSMENT OUTLINE

Postsecondary Admissions and Financial Aid Programs

February 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ASSESSMENT OUTLINE

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INTRODUCTION

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

As used in this Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because courts have determined that recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool typically should not be subject to heightened constitutional scrutiny, this Outline should not be used to assess those types of programs. This Outline also does not address programs undertaken pursuant to a court order.

In 1994, the U.S. Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) [hereinafter Financial Aid Guidance]. Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive funds. The Financial Aid Guidance is included with this Outline and can be found on the Education Department's web site at www.ed.gov.

This Self Assessment Outline consists of an **Overview**, a legal **Guide**, and a **Worksheet**. The Overview highlights the Guide's comprehensive presentation of federal standards applicable to affirmative action in admissions and financial aid. The Worksheet is included to aid institutions in collecting the information necessary to conduct a thorough review of their programs. The Worksheet is designed to help institutions identify and organize information relevant to the legal standards discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers will be conclusive as to the validity of any particular program.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the appropriate consideration of race or national origin by educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for technical assistance. A list of OCR offices and staff available to assist you is included in this guidance.

ASSESSMENT OVERVIEW

Federal legal standards that apply to the consideration of race or national origin in higher education arise from the Constitution and Title VI of the Civil Rights Act of 1964. This summary is intended as a brief overview of the comprehensive legal discussion in the Guide, which must be thoroughly considered in using the Assessment Outline.

1. COVERAGE OF THE OUTLINE

- Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.

- This Assessment Outline applies to admissions and financial aid programs where race, color, or national origin is a factor in decision making. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. The Outline does not apply to admissions or financial aid decisions made without regard to race or national origin.

SEE GUIDE,

- The legal standards governing the use of race or national origin in awarding financial aid are generally the same as those applicable to admissions decisions. The Department has published guidance on the use of race or national origin in financial aid programs, 59 Federal Register 8756 (1994) (copy included with this Outline). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.

- Institutions in the Fifth Circuit, should consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards. Institutions in the Fourth Circuit, should consider the *Podberesky v. Kirwan* decision, as described in the Guide.

2. CONSIDERATION OF RACE OR NATIONAL ORIGIN IS PERMISSIBLE WHEN THE STRICT SCRUTINY TEST IS SATISFIED

- Under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible for colleges and universities to consider race or national origin in making admissions decisions and in awarding financial aid provided that they satisfy the legal test of "strict scrutiny."

SEE GUIDE,

- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.

3. REMEDYING DISCRIMINATION AND ACHIEVING CAMPUS DIVERSITY ARE COMPELLING INTERESTS SUPPORTING CONSIDERATION OF RACE OR NATIONAL ORIGIN

- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.

SEE GUIDE,

- Remedying the effects of past discrimination constitutes a compelling interest that justifies the narrowly tailored use of race or national origin in admissions or financial aid.

- In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.

REMEDIAL PURPOSES

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination.

- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

SEE GUIDE,

- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.

DIVERSITY PURPOSES

SEE GUIDE,

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

- Colleges and universities may justify the use of race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.

- For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others.

4. USES OF RACE OR NATIONAL ORIGIN MUST BE NARROWLY TAILORED

The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race or national origin-based classification. If an institution supports its affirmative action program on remedial purposes or the attainment of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.

SEE GUIDE,

CONSIDERATION OF RACE/NATIONAL ORIGIN- NEUTRAL ALTERNATIVES AND THE NEED FOR THE USE OF RACE OR NATIONAL ORIGIN

- A school's use of race should be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.

SEE GUIDE,

- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of recruitment or admissions criteria that do not include race).

MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

- Set-asides or quotas should not be used unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also

SEE GUIDE,

particularly vulnerable to challenge.

- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available.

- Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may be evidence of flexibility.

Duration and Periodic Review

- The duration of the use of a racial classification should be no longer than is necessary to its purpose. The classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changing circumstances.

See Guide,

- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

Burden on Non-Beneficiaries

- Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that unsettles. legitimate, firmly rooted expectations or imposes the entire burden on particular individuals crosses that line.

See Guide,

> For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be

considered narrowly tailored.

- Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

ASSESSMENT GUIDE

I. When is an Institution Covered by the Constitution or Title VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are a part of state government, public colleges and universities are covered by the Fourteenth Amendment.

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[1] Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.[2] Title VI permits affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.[3]

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.[4]

II. When Does an Admissions or Financial Aid Program Use a Classification Based on Race or National Origin?

This Guide applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decision making. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This Guide does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the Guide would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not

based on race or national origin.

III. Compliance with the Constitution and Title VI: Strict Scrutiny

The Supreme Court has determined that the Constitution requires that any government program that uses race or national origin as a factor in decision making must satisfy "strict scrutiny".[5] As explained above, this same standard applies under Title VI to all schools receiving federal funds. The strict scrutiny test is rigorous, but it is important to remember that affirmative action programs are allowed under this standard as long as they meet the two prongs of the test. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.[6] The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. The Compelling Interest

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.[7] The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination constitutes a compelling interest.[8] With respect to non-remedial interests, in his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.[9] The United States supports Justice Powell's opinion as a correct statement of law under the Constitution and Title VI.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

1. Remedying the Effects of Discrimination

a. General Standards

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin. This

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin.

discrimination could fall into two categories. First, an institution can seek to remedy the effects of its own discrimination. Second, the federal government or a state or local government may seek to remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion.[10]

Thus, a public institution may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate.

In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.[11] The fact and legacy of general, historical societal discrimination, however, is an insufficient basis for affirmative action. Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.[12]

An institution should be able to identify with some precision the discrimination to be remedied. In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination.[13]

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. Rather, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.[14] This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.[15] For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities. In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.[16]

When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

The Title VI regulations require that an institution receiving federal

financial assistance that has previously discriminated take action to overcome the effects of that prior discrimination.[17] Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

B. Fifth Circuit Standards: Remedial Objectives

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.[18] Rather, in the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself. "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."[19] This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.[20] A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.[21]

2. Non-Remedial Interests

A. Diversity

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of

The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.[22] During the nearly two decades since *Bakke* was decided, Justice Powell's opinion has been relied on by both public and private institutions of higher education throughout the United States in crafting their admissions policies. It has also been relied on by lower federal and state courts.[23] The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI. The United States has relied on Justice Powell's opinion as a basis for concluding that affirmative action in higher education for purposes of achieving the educational benefits of diversity does not violate Title VII, so long as the affirmative action plan meets the narrow tailoring standards set out in that opinion.

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[24] For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.[25] Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

> For example, in their *Amici Curiae* brief filed in the *Piscataway* case, a coalition of educational organizations, representing a substantial portion of the higher education community, presented to the Supreme Court social science research and evidence of a consensus view among educators that campus diversity has a measurable positive effect on educational outcomes and that diversity is essential to the missions of colleges and universities. They stated: "Both kinds of evidence support the conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype."[26]

B. Other Non-Remedial Interests

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but

concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.[27] It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.[28] Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

C. Fifth Circuit Standards: Non-Remedial Interests

The United States believes that, as Justice Powell stated in *Bakke,* diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit concluded that Justice Powell's view that diversity is a compelling interest did not represent a majority opinion of the Supreme Court in *Bakke* or in any subsequent decision of the Supreme Court. The *Hopwood* court held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.[29] That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.[30] However, the only non-remedial interest at issue in the case was diversity, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "'a social emergency rising to the level of imminent danger to life and limb.'"[31] Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi may not use affirmative action to foster diversity in order to enrich the academic experience and should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than diversity.

B. Narrow Tailoring

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decision making. It also ensures that such action is truly necessary and that less intrusive, efficacious means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly

tailored is highly fact-specific. As applied by the courts, the factors that typically determine whether a measure is narrowly tailored are the following: (I) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver; (iii) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decision making process; (iv) the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on non-minorities by the program.

Before describing each of the components, two general points about the narrow tailoring test deserve mention. First, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

I. Race-Neutral Alternatives

Before resorting to race-conscious action, an institution should give serious consideration to race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decision making. For example, the Supreme Court found that a preference for minority-owned businesses was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting before adopting race-conscious measures, such as targeted financial assistance for small or new businesses.[32]

> In the context of higher education, an institution might consider the use of socioeconomic, geographic or other criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

The Supreme Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,[33] and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."[34] Accordingly, an institution need not exhaust race-neutral alternatives, but it must give them serious attention and must use them

where efficacious.

2. Scope of Program, Flexibility and Waivers

If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A program need not be limited to the specific individuals who suffered the past discrimination. But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups who did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.[35]

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.[36] In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the unavailability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.[37] Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

3. Manner in Which Race is Used

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. Thus programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups.

In this regard, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge. Second, where an institution considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in Bakke indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.[38]

Two types of racial classifications are especially vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups.[39] A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the positions in the entering class of the medical school for members of racial and ethnic minority groups.[40]

The second type of classification vulnerable to attack on flexibility grounds is a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class for minorities, in that the burden imposed on non-minority students in the financial aid context -- possibly receiving less aid -- is less severe than the burden imposed by an admissions program -- not being admitted to the institution at all. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award. Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.[41]

For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. Comparison of Numerical Targets to the Qualified Applicant Pool

When evaluating the use of a numerical goal in a remedial affirmative action program, the Supreme Court has compared the numerical goal to the percentage of minorities in the relevant labor market or industry. The Court has rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in Richmond's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.[42] Therefore, institutions that use numerical goals and targets therefore should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. Duration and Periodic Review

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves. A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is subject to meaningful periodic review in order to ascertain the continued need for the measure.[43] Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

6. Burden on Non-Minorities

Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.[44] For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. Conclusion

Properly designed and conducted affirmative action programs in institutions of higher education are permissible under the Constitution and Title VI. Any covered institution that uses race or national origin as a basis for decision making should review its program to determine if it comports with the strict scrutiny standard. Appended to this Guide is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

ENDNOTES

. 42 U.S.C. 2000d (1994).

. *See* 42 U.S.C. 2000d-4a(2)(A) (1994).

. With respect to the kinds of race-conscious measures at issue in this Guide, the restrictions of Title VI and of the Equal Protection Clause are coextensive. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 328-55 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with constitutional requirements. *See Guardians Assn.. v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.)(1983)(in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J., concurring); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ.).

. Those regulations are located in 34 C.F.R. Part. 100 (1997).

. *Adarand*, 515 U.S. at 235.

. *Adarand*, 515 U.S. at 200.

. 438 U.S. 265 (1978).

. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).

. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

. *See Croson*, 488 U.S. at 491-93 (plurality opinion); id. at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).

. *See Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); *Cf. Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).

. *See Croson*, 488 U.S. at 499, 505.

. *See, e.g., Fordice*, 505 U.S. at 730 n.4.

. *See Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).

. *See Croson*, 488 U.S. at 500.

. *Id.* at 501-02, 509.

. 34 C.F.R. 100.3(b)(6)(I).

. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)

. *Id.* at 954.

. *See id.* at 951.

. *See id.* at 954-55 (*citing Fordice*, 505 U.S. at 731-32).

. *Bakke*, 438 U.S. at 311-14.

23. *See Davis v. Halpern*, 768 F. Supp. 968, 975-76 (E.D.N.Y. 1991); *DeRonde v. Regents of the Univ. Of Calif.*, 28 Cal.3d 575, 625 (1981); *McDonald v. Hogness*, 92 Wash.2d 31 (1979). But see *Hopwood*, 78 F.3d at 942 (concluding that Justice Powell's opinion did not represent the views of the majority of the Court)(see *Fifth Circuit Standards: Non-remedial Interests,* below).

. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); *see Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

. *See id.* at 305, 307, 313. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *cf. Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).

26. Brief Of *Amici Curiae* American Council On Education, *Et Al.* In Support Of Petitioner at 6, Board of Education of the Township of Piscataway v. Taxman, No. 96-679 (Supreme Court) (On Writ of Certiorari).

. *Bakke*, 438 U.S. at 310 (Powell, J.)

. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

. *See Hopwood*, 78 F.3d at 944, 948.

. *Id.* at 944, 948.

. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

. *Croson*, 488 U.S. at 507.

. *See Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).

. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); *cf. Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).

. *Croson*, 488 U.S. at 506.

. *See, e.g., United States v. Paradise*, 480 U.S. 149, 177-78 (1986).

. *See Croson*, 488 U.S. at 508 (discussing *Fullilove,* 448 U.S. at 488 (1980) (plurality opinion)).

. *See Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

39. In *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied,* 514 U.S. 1128 (1995), the U.S. Court of Appeals for the Fourth Circuit sustained a constitutional challenge to a state university scholarship program open only to African American students. *Podberesky* held that the university failed to provide sufficient factual support that its challenged scholarship program was narrowly tailored to the asserted interest in remedying the present effects of past discrimination. Institutions located in the Fourth Circuit, which includes the states of Virginia, Maryland, North Carolina, and South Carolina, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.

. *Bakke*, 438 U.S. at 275.

. *See Bakke*, 438 U.S. at 315-17; *see also Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

. *See Croson*, 488 U.S. at 507.

. *See Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

. *See Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

ASSESSMENT WORKSHEET

About the Worksheet

The Worksheet is a starting point for colleges and universities to use in reviewing their admissions and financial aid programs. The checkpoints are keyed to the legal discussion in the Guide, which must be carefully considered in using the Worksheet.

- Keep in mind that the Worksheet is designed to help institutions identify and organize information relevant to the applicable legal standards, as discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers necessarily is dispositive as to the validity of any particular program.

- For the best use of this Worksheet, and the entire Outline, we encourage institutions to consult with their legal counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included with this Outline.

The consideration of race or national origin in financial aid programs is covered by the same legal standards as admissions although there are some questions that are discrete to each program. The Worksheet covers admissions and financial aid programs separately, with cross references between the two sections, to avoid repetition when the issues are the same.

ADMISSIONS WORKSHEET

➥How do the school's programs work?

✓ CHECKPOINT(S) BASELINE INFORMATION

1. If the institution has decided to consider race and national origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?

➪GUIDE, PP.

2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

➥Is the consideration of race or national origin supported by a compelling interest?

✓ CHECKPOINT(S) COMPELLING INTEREST

3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

➪GUIDE, PP.

➥Does the college or university have a duty to remedy discrimination on the basis of race or national origin?

✓ CHECKPOINT(S) REMEDIAL PURPOSES

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.

➪GUIDE, PP.

5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?

6. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of the following groups: I) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.

7. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?

8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number

of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

➥Is the institution seeking to achieve the educational benefits of diversity?

✓ CHECKPOINT(S) DIVERSITY PURPOSES

11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?

➪GUIDE, PP.

12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?

13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

➥Is the use of race or national origin in remedial or diversity programs narrowly tailored?

✓ CHECKPOINT(S) NEED FOR USE OF RACE OR NATIONAL ORIGIN AND RACE/NATIONAL ORIGIN NEUTRAL ALTERNATIVES

14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

➪GUIDE, PP.

15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?

16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

✓ CHECKPOINT(S) MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

17.How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?

➪GUIDE, PP.

18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

✓ CHECKPOINT(S) DURATION AND PERIODIC REVIEW OF THE USES OF RACE OR NATIONAL ORIGIN

➪GUIDE, PP.

19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

➪GUIDE, PP.

20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? . What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?[1] If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

✓ CHECKPOINT(S) COMPELLING INTERESTS

4. Why does the program consider race or national origin in financial aid decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to

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"Rased-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

remedy discrimination, see checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see checkpoints 11-13, above.

✓ CHECKPOINT(S) NARROW TAILORING OF REMEDIAL OR DIVERSITY PROGRAMS

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See checkpoints 14-20, above.

6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

✓ CHECKPOINT(S) PRIVATE GIFTS RESTRICTED BY RACE OR NATIONAL ORIGIN

7. Are racial or other criteria attached by the donors to the award of any financial aid funds?, If so, can the institution justify the use of race under any of the principles of the OCR policy financial aid guidance?

8. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

1, p. 5, 10, 11, 13, 14, 16

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AFFIRMATIVE ACTION ASSESSMENT OUTLINE

Postsecondary Admissions and Financial Aid Programs

February 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ASSESSMENT OUTLINE

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INTRODUCTION

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

As used in this Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because courts have determined that recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool typically should not be subject to heightened constitutional scrutiny, this Outline should not be used to assess those types of programs. This Outline also does not address programs undertaken pursuant to a court order.

In 1994, the U.S. Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) [hereinafter Financial Aid Guidance]. Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive funds. The Financial Aid Guidance is included with this Outline and can be found on the Education Department's web site at www.ed.gov.

This Self Assessment Outline consists of an **Overview**, a legal **Guide**, and a **Worksheet**. The Overview highlights the Guide's comprehensive presentation of federal standards applicable to affirmative action in admissions and financial aid. The Worksheet is included to aid institutions in collecting the information necessary to conduct a thorough review of their programs. The Worksheet is designed to help institutions identify and organize information relevant to the legal standards discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers will be conclusive as to the validity of any particular program.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the appropriate consideration of race or national origin by educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for technical assistance. A list of OCR offices and staff available to assist you is included in this guidance.

ASSESSMENT OVERVIEW

Federal legal standards that apply to the consideration of race or national origin in higher education arise from the Constitution and Title VI of the Civil Rights Act of 1964. This summary is intended as a brief overview of the comprehensive legal discussion in the Guide, which must be thoroughly considered in using the Assessment Outline.

1. COVERAGE OF THE OUTLINE

- Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.

- This Assessment Outline applies to admissions and financial aid programs where race, color, or national origin is a factor in decision making. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. The Outline does not apply to admissions or financial aid decisions made without regard to race or national origin.

SEE GUIDE,

- The legal standards governing the use of race or national origin in awarding financial aid are generally the same as those applicable to admissions decisions. The Department has published guidance on the use of race or national origin in financial aid programs, 59 Federal Register 8756 (1994) (copy included with this Outline). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.

- Institutions in the Fifth Circuit, should consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards. Institutions in the Fourth Circuit, should consider the *Podberesky v. Kirwan* decision, as described in the Guide.

2. CONSIDERATION OF RACE OR NATIONAL ORIGIN IS PERMISSIBLE WHEN THE STRICT SCRUTINY TEST IS SATISFIED

- Under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible for colleges and universities to consider race or national origin in making admissions decisions and in awarding financial aid provided that they satisfy the legal test of "strict scrutiny."

SEE GUIDE,

- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.

3. REMEDYING DISCRIMINATION AND ACHIEVING CAMPUS DIVERSITY ARE COMPELLING INTERESTS SUPPORTING CONSIDERATION OF RACE OR NATIONAL ORIGIN

- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.

SEE GUIDE,

- Remedying the effects of past discrimination constitutes a compelling interest that justifies the narrowly tailored use of race or national origin in admissions or financial aid.

- In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.

REMEDIAL PURPOSES

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination.

- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

SEE GUIDE,

- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.

DIVERSITY PURPOSES

SEE GUIDE,

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

- Colleges and universities may justify the use of race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.

- For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others.

4. USES OF RACE OR NATIONAL ORIGIN MUST BE NARROWLY TAILORED

The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race or national origin-based classification. If an institution supports its affirmative action program on remedial purposes or the attainment of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.

SEE GUIDE,

CONSIDERATION OF RACE/NATIONAL ORIGIN- NEUTRAL ALTERNATIVES AND THE NEED FOR THE USE OF RACE OR NATIONAL ORIGIN

- A school's use of race should be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.

SEE GUIDE,

- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of recruitment or admissions criteria that do not include race).

MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

- Set-asides or quotas should not be used unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also

SEE GUIDE,

particularly vulnerable to challenge.

- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available.

- Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may be evidence of flexibility.

Duration and Periodic Review

- The duration of the use of a racial classification should be no longer than is necessary to its purpose. The classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changing circumstances.

See Guide,

- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

Burden on Non-Beneficiaries

- Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that unsettles. legitimate, firmly rooted expectations or imposes the entire burden on particular individuals crosses that line.

See Guide,

> For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be

considered narrowly tailored.

- Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

ASSESSMENT GUIDE

I. When is an Institution Covered by the Constitution or Title VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are a part of state government, public colleges and universities are covered by the Fourteenth Amendment.

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[1] Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.[2] Title VI permits affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.[3]

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.[4]

II. When Does an Admissions or Financial Aid Program Use a Classification Based on Race or National Origin?

This Guide applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decision making. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This Guide does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the Guide would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not

based on race or national origin.

III. Compliance with the Constitution and Title VI: Strict Scrutiny

The Supreme Court has determined that the Constitution requires that any government program that uses race or national origin as a factor in decision making must satisfy "strict scrutiny".[5] As explained above, this same standard applies under Title VI to all schools receiving federal funds. The strict scrutiny test is rigorous, but it is important to remember that affirmative action programs are allowed under this standard as long as they meet the two prongs of the test. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.[6] The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. The Compelling Interest

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.[7] The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination constitutes a compelling interest.[8] With respect to non-remedial interests, in his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.[9] The United States supports Justice Powell's opinion as a correct statement of law under the Constitution and Title VI.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

1. Remedying the Effects of Discrimination

a. General Standards

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin. This

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin.

discrimination could fall into two categories. First, an institution can seek to remedy the effects of its own discrimination. Second, the federal government or a state or local government may seek to remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion.[10]

Thus, a public institution may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate.

In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.[11] The fact and legacy of general, historical societal discrimination, however, is an insufficient basis for affirmative action. Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.[12]

An institution should be able to identify with some precision the discrimination to be remedied. In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination.[13]

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. Rather, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.[14] This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.[15] For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities. In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.[16]

When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

The Title VI regulations require that an institution receiving federal

financial assistance that has previously discriminated take action to overcome the effects of that prior discrimination.[17] Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

B. Fifth Circuit Standards: Remedial Objectives

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.[18] Rather, in the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself. "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."[19] This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.[20] A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.[21]

2. Non-Remedial Interests

A. Diversity

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of

The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.[22] During the nearly two decades since *Bakke* was decided, Justice Powell's opinion has been relied on by both public and private institutions of higher education throughout the United States in crafting their admissions policies. It has also been relied on by lower federal and state courts.[23] The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI. The United States has relied on Justice Powell's opinion as a basis for concluding that affirmative action in higher education for purposes of achieving the educational benefits of diversity does not violate Title VII, so long as the affirmative action plan meets the narrow tailoring standards set out in that opinion.

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[24] For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.[25] Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

For example, in their *Amici Curiae* brief filed in the *Piscataway* case, a coalition of educational organizations, representing a substantial portion of the higher education community, presented to the Supreme Court social science research and evidence of a consensus view among educators that campus diversity has a measurable positive effect on educational outcomes and that diversity is essential to the missions of colleges and universities. They stated: "Both kinds of evidence support the conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype."[26]

B. Other Non-Remedial Interests

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but

concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.[27] It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.[28] Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

c. Fifth Circuit Standards: Non-Remedial Interests

The United States believes that, as Justice Powell stated in *Bakke,* diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit concluded that Justice Powell's view that diversity is a compelling interest did not represent a majority opinion of the Supreme Court in *Bakke* or in any subsequent decision of the Supreme Court. The *Hopwood* court held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.[29] That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.[30] However, the only non-remedial interest at issue in the case was diversity, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "'a social emergency rising to the level of imminent danger to life and limb.'"[31] Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi may not use affirmative action to foster diversity in order to enrich the academic experience and should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than diversity.

B. Narrow Tailoring

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decision making. It also ensures that such action is truly necessary and that less intrusive, efficacious means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly

tailored is highly fact-specific. As applied by the courts, the factors that typically determine whether a measure is narrowly tailored are the following: (I) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver; (iii) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decision making process; (iv) the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on non-minorities by the program.

Before describing each of the components, two general points about the narrow tailoring test deserve mention. First, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

I. Race-Neutral Alternatives

Before resorting to race-conscious action, an institution should give serious consideration to race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decision making. For example, the Supreme Court found that a preference for minority-owned businesses was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting before adopting race-conscious measures, such as targeted financial assistance for small or new businesses.[32]

> In the context of higher education, an institution might consider the use of socioeconomic, geographic or other criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

The Supreme Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,[33] and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."[34] Accordingly, an institution need not exhaust race-neutral alternatives, but it must give them serious attention and must use them

where efficacious.

2. Scope of Program, Flexibility and Waivers

If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A program need not be limited to the specific individuals who suffered the past discrimination. But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups who did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.[35]

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.[36] In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the unavailability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.[37] Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

3. Manner in Which Race is Used

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. Thus programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups.

In this regard, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge. Second, where an institution considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in Bakke indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.[38]

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Two types of racial classifications are especially vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups.[39] A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the positions in the entering class of the medical school for members of racial and ethnic minority groups.[40]

The second type of classification vulnerable to attack on flexibility grounds is a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class for minorities, in that the burden imposed on non-minority students in the financial aid context -- possibly receiving less aid -- is less severe than the burden imposed by an admissions program -- not being admitted to the institution at all. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award. Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.[41]

For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. Comparison of Numerical Targets to the Qualified Applicant Pool

When evaluating the use of a numerical goal in a remedial affirmative action program, the Supreme Court has compared the numerical goal to the percentage of minorities in the relevant labor market or industry. The Court has rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in Richmond's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.[42] Therefore, institutions that use numerical goals and targets therefore should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. Duration and Periodic Review

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves. A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is subject to meaningful periodic review in order to ascertain the continued need for the measure.[43] Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

6. Burden on Non-Minorities

Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.[44] For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. Conclusion

Properly designed and conducted affirmative action programs in institutions of higher education are permissible under the Constitution and Title VI. Any covered institution that uses race or national origin as a basis for decision making should review its program to determine if it comports with the strict scrutiny standard. Appended to this Guide is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

ENDNOTES

. 42 U.S.C. 2000d (1994).

. *See* 42 U.S.C. 2000d-4a(2)(A) (1994).

. With respect to the kinds of race-conscious measures at issue in this Guide, the restrictions of Title VI and of the Equal Protection Clause are coextensive. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 328-55 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with constitutional requirements. *See Guardians Assn.. v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.)(1983)(in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J., concurring); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ.).

. Those regulations are located in 34 C.F.R. Part. 100 (1997).

. *Adarand*, 515 U.S. at 235.

. *Adarand*, 515 U.S. at 200.

. 438 U.S. 265 (1978).

. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).

. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

. *See Croson*, 488 U.S. at 491-93 (plurality opinion); id. at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).

. *See Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); *Cf. Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).

. *See Croson*, 488 U.S. at 499, 505.

. *See, e.g., Fordice*, 505 U.S. at 730 n.4.

. *See Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).

. *See Croson*, 488 U.S. at 500.

. *Id.* at 501-02, 509.

. 34 C.F.R. 100.3(b)(6)(I).

. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)

. *Id.* at 954.

. *See id.* at 951.

. *See id.* at 954-55 (*citing Fordice*, 505 U.S. at 731-32).

. *Bakke*, 438 U.S. at 311-14.

23. *See Davis v. Halpern*, 768 F. Supp. 968, 975-76 (E.D.N.Y. 1991); *DeRonde v. Regents of the Univ. Of Calif.*, 28 Cal.3d 575, 625 (1981); *McDonald v. Hogness*, 92 Wash.2d 31 (1979). But see *Hopwood*, 78 F.3d at 942 (concluding that Justice Powell's opinion did not represent the views of the majority of the Court)(see *Fifth Circuit Standards: Non-remedial Interests,* below).

. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); *see Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

. *See id.* at 305, 307, 313. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond* , 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *cf. Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).

26. Brief Of *Amici Curiae* American Council On Education, *Et Al.* In Support Of Petitioner at 6, Board of Education of the Township of Piscataway v. Taxman, No. 96-679 (Supreme Court) (On Writ of Certiorari).

. *Bakke*, 438 U.S. at 310 (Powell, J.)

. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

. *See Hopwood*, 78 F.3d at 944, 948.

. *Id.* at 944, 948.

. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

. *Croson*, 488 U.S. at 507.

. *See Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).

. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); *cf. Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).

. *Croson*, 488 U.S. at 506.

. *See, e.g., United States v. Paradise* , 480 U.S. 149, 177-78 (1986).

. *See Croson*, 488 U.S. at 508 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).

. *See Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

39. In *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied,* 514 U.S. 1128 (1995), the U.S. Court of Appeals for the Fourth Circuit sustained a constitutional challenge to a state university scholarship program open only to African American students. *Podberesky* held that the university failed to provide sufficient factual support that its challenged scholarship program was narrowly tailored to the asserted interest in remedying the present effects of past discrimination. Institutions located in the Fourth Circuit, which includes the states of Virginia, Maryland, North Carolina, and South Carolina, should review *Podberesky*, as that decision will guide the evaluation of the remedial use of racial classifications in higher education in that circuit.

. *Bakke*, 438 U.S. at 275.

. *See Bakke*, 438 U.S. at 315-17; *see also Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

. *See Croson*, 488 U.S. at 507.

. *See Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

. *See Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

ASSESSMENT WORKSHEET

About the Worksheet

The Worksheet is a starting point for colleges and universities to use in reviewing their admissions and financial aid programs. The checkpoints are keyed to the legal discussion in the Guide, which must be carefully considered in using the Worksheet.

- Keep in mind that the Worksheet is designed to help institutions identify and organize information relevant to the applicable legal standards, as discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers necessarily is dispositive as to the validity of any particular program.

- For the best use of this Worksheet, and the entire Outline, we encourage institutions to consult with their legal counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included with this Outline.

The consideration of race or national origin in financial aid programs is covered by the same legal standards as admissions although there are some questions that are discrete to each program. The Worksheet covers admissions and financial aid programs separately, with cross references between the two sections, to avoid repetition when the issues are the same.

ADMISSIONS WORKSHEET

➥How do the school's programs work?

✓ CHECKPOINT(S) BASELINE INFORMATION

1. If the institution has decided to consider race and national origin as factors in its admissions process, is the admissions process guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?

➪GUIDE, PP.

2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

➥Is the consideration of race or national origin supported by a compelling interest?

✓ CHECKPOINT(S) COMPELLING INTEREST

3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

➪GUIDE, PP.

➥Does the college or university have a duty to remedy discrimination on the basis of race or national origin?

✓ CHECKPOINT(S) REMEDIAL PURPOSES

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.

➪GUIDE, PP.

5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?

6. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of the following groups: I) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.

7. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?

8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number

of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

➥Is the institution seeking to achieve the educational benefits of diversity?

✓ CHECKPOINT(S) DIVERSITY PURPOSES

11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?

➪GUIDE, PP.

12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?

13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

➥Is the use of race or national origin in remedial or diversity programs narrowly tailored?

✓ CHECKPOINT(S) NEED FOR USE OF RACE OR NATIONAL ORIGIN AND RACE/NATIONAL ORIGIN NEUTRAL ALTERNATIVES

14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

➪GUIDE, PP.

15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?

16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

✓ CHECKPOINT(S) MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

17.How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?

➪GUIDE, PP.

18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

✓ CHECKPOINT(S) DURATION AND PERIODIC REVIEW OF THE USES OF RACE OR NATIONAL ORIGIN

➪GUIDE, PP.

19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

➪GUIDE, PP.

20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? . What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?[1] If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

✓ CHECKPOINT(S) COMPELLING INTERESTS

4. Why does the program consider race or national origin in financial aid decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to

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"Rased-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

remedy discrimination, see checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see checkpoints 11-13, above.

✓ CHECKPOINT(S) NARROW TAILORING OF REMEDIAL OR DIVERSITY PROGRAMS

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See checkpoints 14-20, above.

6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

✓ CHECKPOINT(S) PRIVATE GIFTS RESTRICTED BY RACE OR NATIONAL ORIGIN

7. Are racial or other criteria attached by the donors to the award of any financial aid funds?, If so, can the institution justify the use of race under any of the principles of the OCR policy financial aid guidance?

8. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

Is the use of race or national origin narrowly tailored?

CHECKPOINT(S) Burden on Non-Beneficiaries

- 20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? . What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

WORKSHEET

STUDENT FINANCIAL AID

Baseline Information

CHECKPOINT(S)

- 1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

- 2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"? If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

Financial Aid for Disadvantaged Students

CHECKPOINT(S)

- 3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

Compelling Interests

CHECKPOINT(S)

- 4. Why does the program consider race or national origin in financial aid decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to remedy discrimination, see Admissions checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see Admissions checkpoints 11-13, above.

Narrow Tailoring of Remedial or Diversity Programs

CHECKPOINT(S)

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See Admissions checkpoints 14-20, above.

- 6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

Private Gifts Restricted by Race or National Origin

CHECKPOINT(S)

- 7. Are racial or other criteria attached by the donors to the award of any financial aid funds?, If so, can the institution justify the use of race under any of the principles of the OCR policy financial aid guidance?

- 8. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

PLEASE DELIVER TO DAWN CHIRWA AND BILL KINCAID, ASAP.

NOTE TO DAWN CHIRWA AND BILL KINCAID

Re: Handouts for OCR Workshop/ACE Conference

The attached handouts track the worksheet in the current affirmative action package. We will present the questions through overheads that summarize the handouts in bullet form.

We would like to get handouts to ACE for printing by Wednesday. Please call me, (312) 886 8360 or Art, (202) 205 9703.

Thanks for your help.

John Fry
2/3/98

ASSESSMENT WORKSHEET

ADMISSIONS and STUDENT FINANCIAL AID

WORKSHEET

ADMISSIONS

How does the school's admissions process work?

CHECKPOINT(S) Baseline Information

- 1. If the institution considers race and national origin as factors in its admissions process, are admissions guided by a written affirmative action plan? How are admissions structured? For public institutions, is the consideration of race mandated or authorized by legislation?

- 2. What standards guide admissions decisions and how does the admissions process work? How and at what point in the admissions process is each admissions criterion weighted and considered? Is each admissions criterion educationally justifiable and closely related to the institution's mission? How and at what points are race or national origin considered and weighted in admissions? How and at what point(s) are minority students being admitted?

Is there a compelling reason to consider race or national origin ?

CHECKPOINT(S) Compelling Interest

- 3. Why does the program consider race or national origin in admissions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose?

Is there a duty to remedy discrimination and its effects?

CHECKPOINT(S) Remedial purposes

- 4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.
- 5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?

Is there a duty to remedy discrimination and its effects?

- 6. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of: i) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.
- 7. Based on the answers to item 6, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?
- 8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they identify the number of qualified minorities in the applicant pool, or explain what the number would be "but for" the exclusionary effects of discrimination? Is there evidence that discrimination has hampered minority opportunity in education, or is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

Is there a duty to remedy discrimination and its effects?

- 9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

- 10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

Is the school pursuing the educational benefits of diversity?

CHECKPOINT(S) Diversity purposes

- 11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?

- 12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?

- 13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

Is the use of race or national origin narrowly tailored?

CHECKPOINTS Need for Use of Race/ National Origin:Race-Neutral Alternatives

- 14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

- 15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?

- 16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

Is the use of race or national origin narrowly tailored?

CHECKPOINT(S) Manner Race or National Origin is Used, Flexibility, and Pool of Beneficiaries

- 17. How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?
- 18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

Is the use of race or national origin narrowly tailored?

CHECKPOINT(S) Duration and Periodic Review of the Uses of Race or National Origin

- 19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

AFFIRMATIVE ACTION ASSESSMENT OUTLINE

Postsecondary Admissions and Financial Aid Programs

February 1998

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ASSESSMENT OUTLINE

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INTRODUCTION

Properly designed and conducted affirmative action programs that consider race or national origin in postsecondary admissions and financial aid decisions are permissible under federal law. This guide is designed to help postsecondary institutions that have, or are considering establishing, affirmative action programs assess whether those programs are consistent with Title VI of the Civil Rights Act of 1964 and the Constitution. Institutions that operate affirmative action programs should rigorously review those programs on a regular basis to ensure that they continue to be necessary and that they are being conducted consistent with the applicable legal standards.

As used in this Outline, the term "affirmative action" means the use or consideration of race or national origin as a factor in admissions or in the award of financial aid. Because recruitment and outreach programs designed to increase the number of minorities in an institution's applicant pool raise distinct questions and typically should not be subject to heightened constitutional scrutiny, this guide should not be used to assess those types of programs. This Outline also does not address programs undertaken pursuant to a court order.

In 1994, the U.S. Department of Education published guidance regarding its evaluation under Title VI of an institution's consideration of race or national origin in the award of financial aid. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (1994) [hereinafter Financial Aid Guidance]. Institutions should consult that guidance for a more specific discussion of affirmative action in financial aid decisions, including an institution's involvement with privately donated race-restrictive funds. The Financial Aid Guidance is included with this Outline and can be found on the Education Department's web site at www.ed.gov.

This Self Assessment Outline consists of an **Overview**, a legal **Guide**, and a **Worksheet**. The Overview highlights the Guide's comprehensive presentation of federal standards applicable to affirmative action in admissions and financial aid. The Worksheet is included to aid institutions in collecting the information necessary to conduct a thorough review of their programs. The Worksheet is designed to help institutions identify and organize information relevant to the legal standards discussed in the Guide, but not every question necessarily will be relevant to each institution. In addition, no single answer or combination of answers will be conclusive as to the validity of any particular program.

There is much uncertainty with respect to the law on affirmative action at this time. New decisions, by the Supreme Court or lower courts, may significantly affect the standards governing the appropriate consideration of race or national origin by educational institutions. An institution's programs may also be affected by state law requirements, such as Proposition 209 in California. We encourage institutions to consult with their counsel, and to contact the Office for Civil Rights ("OCR") at the Department of Education, for assistance. A list of OCR offices and staff available to assist you is included in this guidance.

ASSESSMENT OVERVIEW

Federal legal standards that apply to the consideration of race or national origin in higher education arise from the Constitution and Title VI of the Civil Rights Act of 1964. This summary is intended as a brief overview of the comprehensive legal discussion in the Guide, which must be thoroughly considered in using the Assessment Outline.

1. COVERAGE OF THE OUTLINE

- Public institutions that are part of a state's government are subject to the Fourteenth Amendment of the Constitution. Public and private institutions that receive federal financial assistance from the U.S. Department of Education are subject to Title VI.

- This Assessment Outline applies to admissions and financial aid programs where race, color, or national origin is a factor in decision making. It applies both to programs in which race or national origin is the sole factor in a decision and to those in which race or national origin is one of many factors considered. The Outline does not apply to admissions or financial aid decisions made without regard to race or national origin.

SEE GUIDE.

- The legal standards governing the use of race or national origin in awarding financial aid are generally the same as those applicable to admissions decisions. The Department has published guidance on the use of race or national origin in financial aid programs, 59 Federal Register 8756 (1994) (copy included with this Outline). The Financial Aid Guidance is also available on the Department of Education's internet web site, www.ed.gov.

2. CONSIDERATION OF RACE OR NATIONAL ORIGIN IS PERMISSIBLE WHEN THE STRICT SCRUTINY TEST IS SATISFIED

- Under the Constitution and Title VI of the Civil Rights Act of 1964 it is permissible for colleges and universities to consider race or national origin in making admissions decisions and in awarding financial aid provided that they satisfy the legal test of "strict scrutiny."

SEE GUIDE.

- To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.

3. REMEDYING DISCRIMINATION AND ACHIEVING CAMPUS DIVERSITY ARE COMPELLING INTERESTS SUPPORTING CONSIDERATION OF RACE OR NATIONAL ORIGIN

- The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin.

SEE GUIDE,

- Remedying the effects of past discrimination constitutes a compelling interest that justifies the narrowly tailored use of race or national origin in admissions or financial aid.

- In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in admissions to attain the educational benefits of diversity where race or national origin is considered as one factor among many.

REMEDIAL PURPOSES

- The Title VI regulations require a recipient of federal funds that has discriminated in violation of Title VI or its regulations to take remedial action to overcome the effects of past discrimination.

SEE GUIDE,

- A college that has been found to have discriminated by a court or an administrative agency like the U.S. Department of Education, Office for Civil Rights, must take steps to remedy that discrimination. A finding could also be made by a State or local legislative body, as long as the body finding discrimination had a strong basis in evidence identifying discrimination within its jurisdiction for which remedial action is required.

- Absent such formal findings by a court, agency or legislature, a college may take race-conscious remedial action if it has a strong basis in evidence for concluding that the affirmative action is necessary to remedy the effects of its past discrimination and is narrowly tailored to remedy that discrimination.

SEE GUIDE,

- In *Regents of the University of California v. Bakke*, Justice Powell concluded that achieving the educational benefits of campus diversity is a compelling reason for considering race or national origin in admissions in a narrowly tailored way. According to Justice Powell's opinion, colleges may seek diversity in admissions to fulfill their academic mission through the "robust exchange of ideas" that flows from a diverse student body. The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

- Colleges and universities may justify the use of race or national origin to achieve fundamental educational goals through campus diversity. An institution must be able to support its claim that diversity serves its educational objectives.

- For the consideration of race and national origin in admissions to be lawful under a diversity rationale, an institution's definition of diversity must include characteristics in addition to race or national origin. Such diversity characteristics may include other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, geographic background, as well as various others.

4. USES OF RACE OR NATIONAL ORIGIN MUST BE NARROWLY TAILORED

The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race or national origin-based classification. If an institution supports its affirmative action program on remedial purposes or the attainment of diversity, the use of race or national origin must be narrowly tailored to achieve its purposes.

SEE GUIDE,

- Whether a college's consideration of race or national origin meets the narrow tailoring requirements of Title VI and the Constitution depends upon factors established by federal case law.

Consideration of Race/National Origin- Neutral Alternatives and the Need for the Use of Race or National Origin

See Guide.

- A school's use of race should be necessary and focused as narrowly as possible on the achievement of the school's compelling interest, for example, remedial or diversity objectives.

- Before resorting to race-conscious action, it is important that an institution consider seriously the use of race-neutral alternative approaches (e.g., the use of recruitment or admissions criteria that do not include race).

Manner Race or National Origin is Used, Flexibility, and Pool of Beneficiaries

See Guide.

- Set-asides or quotas should not be used unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge.

- The use of classifications based on race or national origin should be flexible. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available.

  Consideration of race or national origin as one factor among several other admissions criteria in some circumstances may be evidence of flexibility.

Duration and Periodic Review

SEE GUIDE

- The duration of the use of a racial classification should be no longer than is necessary to its purpose. The classification should be periodically reexamined to determine whether there is a continued need for its use or whether it should be modified based on changing circumstances.

- OCR considers annual reviews the best practice to satisfy this aspect of Title VI's narrow tailoring requirements.

BURDEN ON NON-BENEFICIARIES

SEE GUIDE

- Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that unsettles. legitimate, firmly rooted expectations or imposes the entire burden on particular individuals crosses that line.

> For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored.

- Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race or national origin will address this factor satisfactorily. It is not necessary to show that no student's opportunity to be admitted has been in any way diminished. Rather, the use of race or national origin must not, overall, place an undue burden on students who are not eligible for that consideration.

NOTES

If your institution is in the Fifth Circuit, remember to consult the Fifth Circuit Standards sections of the Guide and the *Hopwood* decision for the appropriate standards.

If your institution is in the Fourth Circuit, remember to consult the *Podberesky v. Kirwan* decision as described in the Guide.

ASSESSMENT GUIDE

I. When is an Institution Covered by the Constitution or Title VI?

Both the Constitution and Title VI of the Civil Rights Act of 1964 may apply to an institution's affirmative action programs. The Fourteenth Amendment to the United States Constitution prohibits states from denying any person equal protection of the laws. Because they are a part of state government, public colleges and universities are covered by the Fourteenth Amendment.

Title VI provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[1] Any public or private institution that receives financial assistance from the federal government is subject to the requirements of Title VI. A public institution that receives federal financial assistance is therefore covered by both the Constitution and Title VI. Title VI covers all of the operations of an institution that receives federal financial assistance, including the institution's involvement in the award of privately donated funds.[2] Title VI permits affirmative action measures that would satisfy the requirements of the Fourteenth Amendment.[3]

The Office for Civil Rights at the Department of Education is responsible for enforcing the requirements of Title VI at institutions receiving federal education funds. Institutions subject to Title VI must abide by the provisions of the statute and comply with regulations promulgated by the Office for Civil Rights.[4]

II. When Does an Admissions or Financial Aid Program Use a Classification Based on Race or National Origin?

This Guide applies to admissions and financial aid programs that use criteria based on race, color, or national origin as a factor in decision making. It applies both to programs in which race or national origin is the sole factor underlying the institution's decision and to those in which race or national origin is one of many factors considered. This Guide does not apply to admissions decisions or financial aid awards that are based on race-neutral factors. For example, the Guide would not apply to an institution's support for disadvantaged students through admissions or financial aid, as long as the determination that a student is disadvantaged is not based on race or national origin.

III. COMPLIANCE WITH THE CONSTITUTION AND TITLE VI: STRICT SCRUTINY

The Supreme Court has determined that the Constitution requires that any government program that uses race or national origin as a factor in decision making must satisfy "strict scrutiny".[5] As explained above, this same standard applies under Title VI to all schools receiving federal funds. To satisfy strict scrutiny, the institutional interest underlying an affirmative action measure must be "compelling" and the measure must be "narrowly tailored" to serve that interest.[6] The compelling interest inquiry centers on "ends" and asks why an institution is classifying individuals on the basis of race or national origin. The narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the race-based classification.

A. THE COMPELLING INTEREST

The Supreme Court has held, in the *Regents of the University of California v. Bakke* decision, that a college or university may consider race in its admissions process.[7] The interests that may justify the consideration of race or national origin in higher education can be divided into two broad categories: remedial interests and non-remedial interests. The Supreme Court repeatedly has held that remedying the effects of past discrimination constitutes a compelling interest.[8] In his landmark opinion in *Bakke*, Justice Powell concluded that a university may consider race in its admissions process in order to foster diversity among its student body to further the university's educational objectives.[9] The United States supports Justice Powell's opinion as a correct statement of law under the Constitution and Title VI.

The Court's decisions have not foreclosed the possibility that non-remedial interests other than fostering diversity for educational purposes may also be compelling, but no such interest has been recognized as compelling by the Supreme Court to date. Thus, there are substantial questions as to whether and in what settings such other non-remedial objectives can constitute a compelling interest.

1. REMEDYING THE EFFECTS OF DISCRIMINATION

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin.

a. General Standards

Remedying the identified effects of past discrimination constitutes a compelling interest that can support an institution's use of a classification based on race or national origin. This discrimination could fall into two categories. First, an institution can seek to remedy the effects of its own discrimination. Second, the federal government or a state or local government may seek to

remedy the effects of discrimination committed within its jurisdiction, including discrimination committed by private actors, where the government becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion.[10]

> Thus, a public institution may, consistent with its authority, seek to remedy the effects of past discrimination in its educational system, including discrimination by local school systems or by private entities, that it has helped to perpetuate.

In either category, the remedy may be aimed at ongoing patterns and practices of exclusion or at the lingering effects of prior discriminatory conduct.[11] The fact and legacy of general, historical societal discrimination, however, is an insufficient basis for affirmative action. Similarly, amorphous claims of discrimination in education that are not related to an institution's programs are inadequate.[12]

An institution should be able to identify with some precision the discrimination to be remedied. In justifying remedial affirmative action based on the current effects of past discrimination, an institution should be prepared to articulate how any current conditions that limit educational opportunities by race or national origin are related to past discrimination.[13]

It is not necessary for a court to make a judicial finding of discrimination before an institution may undertake remedial measures. Rather, the institution must have a "strong basis in evidence" for its conclusion that remedial action is necessary.[14] This evidence should approach what the Supreme Court has called "a prima facie case of a constitutional or statutory violation" of the rights of minorities.[15] For example, significant statistical disparities between the number of minorities admitted to an institution and the percentage of minorities in the pool of qualified applicants might permit an inference of discrimination that would support the use of racial or ethnic criteria intended to correct those disparities. In making this comparison, a school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications may be drawn who would meet the school's admissions standards. However, mere underrepresentation of minorities compared to the percentage of minorities in the general population is an insufficient predicate for affirmative action.[16]

When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

The Title VI regulations require that an institution receiving federal financial assistance that has previously discriminated take action to overcome the effects of that prior discrimination.[17] Thus if a court, a federal agency, or a legislative or administrative body has found that a covered institution has engaged in discrimination, that institution must take steps to remedy that discrimination. The same obligation arises if the institution itself determines that remedial action is necessary to correct the effects of past

➥Does the college or university have a duty to remedy discrimination on the basis of race or national origin?

✓ CHECKPOINT(S) REMEDIAL PURPOSES

➪GUIDE, PP

4. Are there facts that show discrimination? Is the program justified solely by reference to general societal discrimination, general assertions of discrimination in education, or a statistical underrepresentation of minorities as compared to their percentage of the general population rather than the relevant pool of qualified applicants? Without more, these are impermissible bases for affirmative action.

5. Has a court, legislative body, or agency made a finding that the institution has discriminated against minorities? Is the institution the subject of a court desegregation order or a legislative or administrative finding of unlawful discrimination? Did the body making the finding have a strong basis in evidence for its conclusion? Does the institution itself have a strong basis in evidence for concluding that it has discriminated? If the institution is public, has a state or local government made findings of discrimination within its jurisdiction, including discrimination by private actors? Are there present effects of any such past discrimination? Was the government, or is the government now, a passive participant in that discrimination so as to perpetuate the exclusion? Did the institution help to perpetuate that discrimination?

6. Identify the racial and ethnic composition (%African American, Hispanic, Asian-American, American Indian, white) of the following groups: I) the institution's student body; ii) the institution's qualified applicants; and iii) the pool of qualified potential applicants from which the institution draws its students, for example, students meeting the school's admission requirements living in the areas served by the institution.

7. Based on the information above, is there underrepresentation at the school of qualified students from particular races or national origins? If so, is the statistical disparity significant?

8. What is the nature of the evidence? Is it statistical or based on written documents? Are statistics based on comparisons to the general minority population, or are they more sophisticated and focused? For example, do they attempt to identify the number of qualified minorities in the applicant pool, or seek to explain what the number would look like "but for" the exclusionary effects of discrimination? Is there evidence on how discrimination has hampered minority opportunity in education, or

is the evidence simply based on generalized claims of societal discrimination? In addition to any statistical or documentary evidence, are there persons who have knowledge or other anecdotal evidence of discrimination?

9. Since the adoption of the program, have additional findings of discrimination been made that could serve to justify the need for the program when it was adopted? If not, can such evidence be assembled now? Is there new evidence that the remedial program is no longer necessary?

10. Apart from any past findings or court orders, is there past discrimination affecting admissions at that institution? Has the institution determined whether the effects of past discrimination continue? If there have not been findings of past discrimination, is there a strong basis in evidence to believe that there may be a current violation or the continuing effects of past discrimination?

➥Is the institution seeking to achieve the educational benefits of diversity?

✓ CHECKPOINT(S) DIVERSITY PURPOSES

⇨GUIDE, PP.

11. Is affirmative action in admissions used to achieve the educational benefits of diversity? What is the institution's definition of diversity? What are the institution's mission statements and how do they relate to its diversity objectives?

12. The institution must articulate how achieving greater diversity would foster an educational goal beyond diversity for diversity's sake. What are the educational benefits of diversity at the institution? What are the bases for the educational benefits the institution identifies?

13. Does diversity include factors other than race and national origin? If so, what factors? Which admissions criterion or groups of criteria are related to the diversity goal? How is each weighted and considered in the admissions process?

➥Is the use of race or national origin in remedial or diversity programs narrowly tailored?

✓ CHECKPOINT(S) NEED FOR USE OF RACE OR NATIONAL ORIGIN AND RACE/NATIONAL ORIGIN NEUTRAL ALTERNATIVES

➪GUIDE, PP.

14. If race or national origin is considered as a positive factor, has the institution made efforts to achieve its goals in race-neutral ways? If so, what efforts were made and what were the results?

15. If race-neutral measures were not undertaken, why does the institution believe that such efforts would be insufficient to serve its compelling interest without relying on race? What was the nature and extent of the deliberation over any race-neutral alternatives? Was there a judgment regarding the relative effectiveness of race-neutral alternatives and race-conscious measures?

16. Does the college have data to show whether affirmative action is necessary? When did the institution begin implementing its affirmative action program? Does the institution have statistics or other evidence to show the effect of the program on achievement of diversity objectives or remedying the effects of discrimination, e.g., data regarding minority participation levels before and after affirmative action programs began?

✓ CHECKPOINT(S) MANNER RACE OR NATIONAL ORIGIN IS USED, FLEXIBILITY, AND POOL OF BENEFICIARIES

➪GUIDE, PP.

17.How does the college assess whether diversity has been achieved? Does the admissions process incorporate numerical goals? By what process were these goals derived? Do all or only some of the schools or programs have goals? If the program is remedial, are the goals related to the percentage of minorities in the pool of qualified applicants, and do the beneficiaries include people in racial or ethnic groups for whom there is insufficient evidence of prior discrimination?

18. Are admissions decisions made through separate tracks, admissions committees, or eligibility criteria defined on the basis of race or national origin? Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such factual requirement, does the program operate that way in

practice? Or is race just one of several factors -- a "plus" -- used in decision making? Could the objectives of any program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

✓ CHECKPOINT(S) DURATION AND PERIODIC REVIEW OF THE USES OF RACE OR NATIONAL ORIGIN

➪GUIDE, PP

19. Is the program subject to periodic oversight, and if so, what is the nature of that oversight? Does the periodic review assess whether the form or extent to which race or national origin is considered should be modified in light of the outcomes of the affirmative action program? Has the program ever been adjusted or modified in light of periodic review? What were the results of the most recent review? Even if there was a compelling justification at the time of adoption, that may not be the case today. In that regard, does the program have an end date? Is there evidence of what might result if the racial classification were discontinued?

✓ CHECKPOINT(S) BURDEN ON NON-BENEFICIARIES

➪GUIDE, PP

20. Does the institution periodically assess whether its consideration of race or national origin in admissions places an undue burden on students not eligible for that consideration? . What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification established by the program? Does the program displace those persons from existing positions or financial aid awards? What is the nature and extent of the impact on non-beneficiaries in admissions? Does the impact of the program fall upon a particular group or class of students, or is it more diffuse? What is the extent of other opportunities outside of the program? Are persons who are not beneficiaries of the program put at a significant competitive disadvantage as a result of the program?

STUDENT FINANCIAL AID WORKSHEET

✓ CHECKPOINT(S) INITIAL INFORMATION NEEDS

1. Is the institution's financial aid program guided by a written affirmative action plan? How is the institution's financial aid process structured?

2. Does the institution's financial aid programs include the consideration of race or national origin (as either an exclusive factor or as one among a number of factors)? If so, how? Does the institution fund or administer "race-based scholarships"?[1] If so, what is the justification for each consideration of race or national origin? Are the institution's reasons consistent with the Department's race-targeted scholarship policy?

✓ CHECKPOINT(S) FINANCIAL AID FOR DISADVANTAGED STUDENTS

3. Schools may target financial aid for disadvantaged students, e.g., students from low-income families, or aid based on students' being in the first generation to attend college or family income. Does the institution's definition of "disadvantaged" used for participation in the program include any consideration of race? If not, then the program is not a racial classification subject to strict scrutiny. If yes, the program is subject to strict scrutiny and does not fit within this principle.

✓ CHECKPOINT(S) COMPELLING INTERESTS

4. Why does the program consider race or national origin in financial aid decisions? Is it intended to remedy discrimination, to foster diversity to achieve an educational objective, or for some other purpose? If the use of race is intended to remedy discrimination, see checkpoints 4-10, above. If it is intended to foster diversity to achieve an educational objective, see checkpoints 11-13, above.

"Rased-based scholarships" or "race-targeted aid" mean, for the purposes of this Guide, any financial aid for which eligibility is limited to persons of a specific racial or ethnic background. Each of the questions in this section on financial aid also are applicable to financial aid programs where race or ethnicity are used only as a plus-factor in deciding awards. This section is based upon the Department's 1994 race-targeted scholarships policy.

✓ CHECKPOINT(S) NARROW TAILORING OF REMEDIAL OR DIVERSITY PROGRAMS

Are financial aid decisions that consider race or national origin narrowly tailored to achieve their purpose? See checkpoints 14-20, above.

6. If race-based scholarships are awarded, how many does the institution award annually? How many students at the institution, by race and national origin, receive non-race-based financial aid, annually? What proportion of total financial aid at the institution (institutional, state, local, Federal, private) is earmarked for race-based scholarships? Does a comparison of the amount of race-targeted financial aid provided to students to the total amount of aid provided to students without regard to race or national origin show that the program places an undue burden on other students who are not eligible for race-targeted aid?

✓ CHECKPOINT(S) PRIVATE GIFTS RESTRICTED BY RACE OR NATIONAL ORIGIN

7. Are racial or other criteria attached by the donors to the award of any financial aid funds?, If so, can the institution justify the use of race under any of the principles of the OCR policy financial aid guidance?

8. Is any race-targeted aid received by the college's students provided directly to students without involvement by the institution? If so, under the policy guidance, Title VI does not apply. If the college makes privately provided race-targeted aid part of its operations by getting involved in the offering or administration of the aid (e.g., through selection of recipients, distribution of funds), can the college justify the use of the aid under a diversity or remedial rationale?

discrimination. When a finding of prior discrimination, whether by a court, an agency, a legislative body, or the institution itself, rests on a strong basis of evidence that the institution discriminated, the institution may use narrowly tailored affirmative action measures to remedy the discrimination.

B. Fifth Circuit Standards: Remedial Objectives

In *Hopwood v. Texas*, the U.S. Court of Appeals for the Fifth Circuit held that the law school at the University of Texas could not rely on past discrimination by other schools in the Texas state system, including other schools at the University of Texas, as a predicate for considering race in its admissions process.[18] Rather, in the view of the court, the law school's constitutionally valid remedial interests extended no farther than redressing the effects of any prior racial discrimination by the law school itself. "As a result, past discrimination in education, other than at the law school, [could not] justify the present consideration of race in law school admissions."[19] This holding is binding precedent in the Fifth Circuit. Accordingly, postsecondary institutions in Texas, Louisiana, and Mississippi cannot use discrimination by other actors in the state's educational systems as a predicate for considering race or national origin in admissions and financial aid. In addition, one "functionally separate unit" of an institution, such as a medical school, cannot rely on past discrimination by other units in that institution.[20] A particular school in those states must have a strong basis in evidence for concluding that there exist present effects from discrimination for which that school itself is responsible. However, if a state or institution of higher education has an obligation to remedy state or institution-wide discrimination, *Hopwood* does not prohibit the appropriate legislative or administrative body, or the governing body of the institution, from using affirmative action to remedy that discrimination in its component schools.[21]

2. Non-Remedial Interests

A. Diversity

In his landmark opinion in *Bakke*, Justice Powell stated that a university may have a compelling interest in considering the race of applicants in its admissions process in order to foster greater diversity among its student body. Such diversity brings a wider range of perspectives to campus, which in turn contributes to a more robust exchange of ideas. This exchange is a central mission of higher education and in keeping with the time-honored value of academic freedom. Moreover, in the view of Justice Powell, the First Amendment protection of academic freedom supports allowing a university to "make its own judgments" regarding education, including the selection of its student body.[22] The United States supports Justice

The United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

Powell's opinion as a correct statement of the law under the Constitution and Title VI.[23]

In order for diversity to qualify as a compelling interest, an institution must seek a further objective beyond the mere achievement of diversity itself. The Court has consistently rejected "racial balancing" as a goal of affirmative action, because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[24] For example, in *Bakke*, Justice Powell stated that diversity in an institution's student body can serve the further goal of enriching the academic experience, but found no compelling interest in assuring that the student body had a specified percentage of particular minority groups or reducing the deficit of minorities in the medical profession.[25] Accordingly, an institution that uses affirmative action to achieve diversity must have a sound educational objective for its diversity program. A school must be able to support its claim that diversity provides educational benefits and serves the school's educational objectives.

> For example, in their *Amici Curiae* bried filed in the *Piscataway* case, a coalition of educational organizations, representing a substantial portion of the higher education community, presented to the Supreme Court social science research and evidence of a consensus view among educators that campus diversity has a measurable positive effect on educational outcomes and that diversity is essential to the missions of colleges and universities. They stated: "Both kinds of evidence support the conclusion that diversity improves education and advances the goals of imparting knowledge where there was preconception, and fostering mutual regard where there was hostile stereotype."[26]

B. Other Non-Remedial Interests

The Supreme Court has had little occasion to address other non-remedial objectives. In his *Bakke* opinion, Justice Powell assumed that a state could have a compelling interest in "improving the delivery of health-care services to communities currently underserved," but concluded that the university had failed to prove that reserving sixteen percent of the seats in its medical school class for minority students was either needed or geared to promote that goal.[27] It is not clear whether a racial classification that was narrowly tailored to this interest could survive strict scrutiny.[28] Whether other non-remedial interests can be sufficiently compelling to justify the use of classifications based on race or national origin should be considered on a case-by-case basis.

C. Fifth Circuit Standards: Non-Remedial Interests

The United States believes that, as Justice Powell stated in *Bakke*, diversity may constitute a compelling interest justifying the consideration of race in higher education. However, in *Hopwood*, the U.S. Court of Appeals for the Fifth Circuit concluded that Justice Powell's view that diversity is a compelling interest did not represent a majority opinion of the Supreme Court in *Bakke* or in any subsequent decision of the Supreme Court. The *Hopwood* court held that an institution's interest in diversity to enrich the academic experience cannot satisfy strict scrutiny.[29] That ruling is binding in the states of Texas, Louisiana and Mississippi. Accordingly, institutions in those three states cannot use affirmative action to foster diversity among their student body in order to enrich the academic experience.

Institutions in the Fifth Circuit should be aware that there is language in *Hopwood* that suggests that remedying past wrongs is the only compelling state interest that can justify classifications based on race.[30] However, the only non-remedial interest at issue in the case was diversity, and it may be argued that the holding of *Hopwood* does not extend to other non-remedial interests that were not before the panel. *Hopwood* itself noted that Justice Scalia has suggested one possible non-remedial compelling interest -- "'a social emergency rising to the level of imminent danger to life and limb.'"[31] Because the case before it did not present such an interest, the panel did not take a position on Justice Scalia's suggestion. Institutions in Texas, Louisiana, and Mississippi should consult with their counsel before using classifications based on race or on national origin to further any non-remedial interest other than diversity, and cannot use affirmative action to foster diversity in order to enrich the academic experience.

B. Narrow Tailoring

In addition to advancing a compelling goal, any use of race must also be "narrowly tailored." This ensures that race-based affirmative action is the product of careful deliberation, not hasty decision making. It also ensures that such action is truly necessary and that less intrusive, efficacious means to the end are unavailable.

The determination of whether a particular affirmative action program is narrowly tailored is highly fact-specific. As applied by the courts, the factors that typically determine whether a measure is narrowly tailored are the following: (i) whether the institution considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope and flexibility of the affirmative action program, including whether the racial classification is subject to a waiver; (iii) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decision making process; (iv) the comparison of any numerical targets to the percentage of qualified minorities in the applicant pool; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden imposed on non-minorities by the program.

Before describing each of the components, two general points about the narrow tailoring

test deserve mention. First, it is unlikely that an affirmative action program must satisfy every factor. A strong showing with respect to most of the factors may compensate for a weaker showing with respect to others.

Second, all of the factors will not be relevant in every case. The objective of the program may determine the applicability or weight to be given a factor, and factors may play out differently in remedial programs than they will in non-remedial programs.

1. Race-Neutral Alternatives

Before resorting to race-conscious action, an institution should give serious consideration to race-neutral alternatives, that is, measures that do not rely on race or national origin as a factor in decision making. For example, the Supreme Court found that a preference for minority-owned businesses was not narrowly tailored in part because the local government did not consider other, race-neutral means to increase minority participation in contracting before adopting race-conscious measures, such as targeted financial assistance for small or new businesses.[32]

> In the context of higher education, an institution might consider the use of socioeconomic criteria that do not include race or national origin, or increasing efforts to solicit applications from students who have not traditionally applied for admission, including minority students.

The Supreme Court has not specified the extent to which an institution must consider race-neutral measures before resorting to race-conscious action. Justice Powell has suggested that in a remedial setting, it is not necessary to use the "least restrictive means" where they would not accomplish the desired ends as well,[33] and has described the narrow tailoring requirement as ensuring that "[less] restrictive means" are used when they would promote the objectives of a racial classification "about as well."[34] Accordingly, an institution need not exhaust race-neutral alternatives, but it must give them serious attention and must use them where efficacious.

2. Scope of Program, Flexibility and Waivers

If an affirmative action program's scope exceeds that necessary to achieve the compelling interest underlying the program, the program is not narrowly tailored. A program need not be limited to the specific individuals who suffered the past discrimination. But a program undertaken to remedy past discrimination against certain races should not include preferences for other racial groups who did not experience that discrimination. For example, the Supreme Court found that a set-aside program for minority contractors was not narrowly tailored in part because the city's evidence of discrimination, all of which pertained to the

treatment of African Americans, did not provide a predicate for the program's preferences for Aleuts, Asian Americans, and Hispanics.[35]

Courts have looked favorably upon plans in which numerical targets are waived if there are not enough qualified minority applicants.[36] In the context of government contracting, for example, Congress permitted officials to waive a national goal of ten percent participation by minority contractors if it was necessary given the unavailability of qualified minority contractors in a particular area, or if a grantee demonstrated that his or her best efforts would not succeed in achieving the target.[37] Waivers such as these ensure that a program is flexible, and are especially important if the program uses a relatively rigid measure such as a quota or set-aside.

3. Manner in Which Race is Used

An integral part of the narrow tailoring requirement is the manner in which race is used. Flexible programs are more likely to be narrowly tailored than programs with rigid requirements. Thus programs in which certain admissions positions or financial aid awards are open only to members of designated racial or ethnic groups are significantly less likely to satisfy the narrow tailoring requirement than programs that merely consider race or national origin as one of many factors and are open to all races and ethnic groups.

In this regard, two general principles are apparent with respect to admissions. First, set-asides or quotas should not be used in an admissions program unless such measures are absolutely essential to remedying discrimination and its effects. In addition, admissions programs that rely on separate tracks or separate decision-making procedures that prevent a comparison among applicants of different races and ethnic origins are also particularly vulnerable to challenge. Second, where an institution considers race or national origin to foster diversity for educational objectives, Justice Powell's opinion in Bakke indicates that the program should give consideration to diversity characteristics in addition to race or national origin, such as other life experiences, achievements, talents, interests, extracurricular activities, economic disadvantages, and geographic background.[38]

Two types of racial classifications are especially vulnerable to a challenge on the ground that they are too rigid. First and foremost are affirmative action programs in which a specific percentage of positions or financial aid is set aside for minorities. A good example is the medical admissions program that the court invalidated in *Bakke*, which reserved sixteen percent of the positions in the entering class of the medical school for members of racial and ethnic minority groups.[39]

The second type of classification vulnerable to attack on flexibility grounds is a program in which race or national origin is the sole or primary factor in determining eligibility -- for example, a scholarship program reserved for minorities. A scholarship program reserved for minorities may be distinguished from an admissions quota reserving a portion of seats in a class

for minorities, in that the burden imposed on non-minority students in the financial aid context -- possibly receiving less aid -- is less severe than the burden imposed by an admissions program -- not being admitted to the institution at all. But a scholarship program open only to minorities is less flexible than a scholarship program in which race is one of many factors that determine eligibility for the award. Under both the admissions set-aside and the minority scholarship program, persons not within the designated categories are ineligible for certain benefits or positions. This is not the case in programs where race or national origin is deemed a plus in evaluating an applicant's file but does not insulate the applicant from comparison with all other candidates for the available benefit.[40]

For a detailed discussion of the standards that should be applied to minority scholarship programs, institutions and their counsel should consult the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

4. Comparison of Numerical Targets to the Qualified Applicant Pool

Where an affirmative action program is justified on remedial grounds, the Supreme Court has compared any numerical goal to the percentage of minorities in the relevant labor market or industry. The Court rejected a city's target of providing thirty percent of its contracts to minority businesses where the target had been selected as roughly halfway between one percent, the percentage of contracts previously awarded to African American businesses, and fifty percent, the percentage of African Americans in Richmond's population. What was required, the Court stated, was a target that was related to the percentage of African Americans in the pool of qualified contractors, not the percentage in the general population.[41] Institutions that use numerical goals and targets therefore should select a goal that is related to the percentage of minorities in the pool of qualified applicants. A school may consider the pool of qualified students who actually apply for admission, and the larger pool of students in areas from which applications are drawn who would meet the school's admissions standards.

5. Duration and Periodic Review

A particular affirmative action measure should remain in place only as long as it is needed to achieve the compelling interest that it serves. A race-based classification is therefore more likely to satisfy the narrow tailoring test if it has a definite end date or is subject to meaningful periodic review in order to ascertain the continued need for the measure.[42] Reexamination of affirmative action programs also allows an institution to fine tune its classification or discontinue it if warranted, which may allow the program to satisfy other factors in the narrow tailoring test. The Office for Civil Rights recommends annual reviews to ensure compliance with this aspect of the narrow tailoring requirements of Title VI.

6. Burden on Non-Minorities

Affirmative action necessarily imposes some burden or disadvantage on persons who do not belong to the racial or ethnic groups favored by the program's classifications. While some burdens are acceptable, others may be too high. In general, a race-based classification that "unsettle[s] . . . legitimate, firmly rooted expectation[s]" or imposes the "entire burden . . . on particular individuals" crosses that line.[43] For example, if an institution terminated scholarships that had been awarded to particular non-minority students in order to fund a scholarship program for minority students, that might place too much of a burden on the affected non-minority students to be considered narrowly tailored. Generally, the less severe and more diffuse the impact on non-minority students, the more likely that a racial or ethnic classification will address this factor satisfactorily.

For a more detailed discussion of narrow tailoring in the context of race-targeted financial aid, see the Financial Aid Guidance, 59 Fed. Reg. 8756 (1994).

IV. Conclusion

Any covered institution that uses race or national origin as a basis for decision making should review its program to determine if it comports with the strict scrutiny standard. Appended to this Guide is a nonexhaustive checklist of questions that will aid institutions in collecting the information necessary to conduct a thorough review. Because the questions are just a guide, no single answer or combination of answers is necessarily dispositive as to the validity of any particular program.

ENDNOTES

1. 42 U.S.C. 2000d (1994).

2. *See* 42 U.S.C. 2000d-4a(2)(A) (1994).

3. With respect to the kinds of race-conscious measures at issue in this Guide, the restrictions of Title VI and of the Equal Protection Clause are coextensive. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 284-87 (Powell, J.), *id.* at 328-55 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For other purposes, however, the requirements of Title VI and its implementing regulations are not completely coextensive with constitutional requirements. *See Guardians Assn.. v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 584, 589-93 (White, J.)(1983)(in disparate impact case not involving affirmative action, Title VI can be violated without proof of the discriminatory intent necessary to prove a constitutional violation); *id.* at 623-24 (Marshall, J., concurring); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ.).

4. Those regulations are located in 34 C.F.R. Part. 100 (1997).

5. *Adarand*, 515 U.S. at 235.

6. *Adarand*, 515 U.S. at 200.

7. 438 U.S. 265 (1978).

8. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-506 (1989); *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996).

9. 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

10. *See Croson*, 488 U.S. at 491-93 (plurality opinion); id. at 518-19 (Kennedy, J. concurring in part and concurring in the judgment).

11. *See Adarand*, 515 U.S. at 269-70 (Souter, J. dissenting); *Cf. Fordice*, 505 U.S. at 727-29 (state must eradicate policies and practices traceable to prior de jure system that continue to foster segregation).

12. *See Croson*, 488 U.S. at 499, 505.

13. *See, e.g., Fordice*, 505 U.S. at 730 n.4.

14. *See Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion).

15. *See Croson*, 488 U.S. at 500.

16. *Id.* at 501-02, 509.

17. 34 C.F.R. 100.3(b)(6)(I).

18. 78 F.3d 932, 951 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)

19. *Id.* at 954.

20. *See id.* at 951.

21. *See id.* at 954-55 (*citing Fordice*, 505 U.S. at 731-32).

22. *Bakke*, 438 U.S. at 311-14.

23. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court applied intermediate scrutiny to a preference for minority-owned broadcasters and held that exposing the nation to diverse perspectives in broadcasting was an important governmental interest. The Court thus did not consider whether the government's interest in seeking diversity in broadcasting was compelling. *Adarand* overruled *Metro Broadcasting* insofar as it held that benign race-based action by the federal government is subject to intermediate scrutiny, but did not address whether diversity in broadcasting can be a compelling, as opposed to important, interest.

24. *Bakke*, 438 U.S. at 307 (Powell, J.) (reducing deficit of minorities in medical school and the medical profession); *see Croson*, 488 U.S. at 507; *Johnson v. Transportation Agency*, 480 U.S. 616, 639 (1987).

25. *See id.* at 305, 307, 313. Similarly, in the law enforcement context, diversifying the ranks of officers may at times serve vital public safety and operational needs, thereby enhancing the agency's ability to carry out its functions effectively. *See Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert v. City of Richmond*, 648 F.2d 925, 931-32 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *cf. Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997) (upholding preference for a black lieutenant at a boot camp for young offenders based on the finding that the camp would not achieve its rehabilitative mission absent the preference because 70% black inmate population unlikely to accept military regimen with less than a 6% black security staff and no black lieutenants).

26. Brief Of *Amici Curiae* American Council On Education, *Et Al.* In Support Of Petitioner at 6, Board of Education of the Township of Piscataway v. Taxman, No. 96-679 (Supreme Court) (On Writ of Certiorari).

27. *Bakke*, 438 U.S. at 310 (Powell, J.)

28. Justice Powell approvingly quoted the state court below, which had noted that there were more precise and reliable ways to identify applicants who were genuinely interested in the medical problems of underserved communities than race, namely, a demonstrated concern for the problem in the past and a declaration that practicing in such a community was an applicant's primary professional goal. *Id.* at 310-11.

29. *See Hopwood*, 78 F.3d at 944, 948.

30. *Id.* at 944, 948.

31. *Id.* at 944 (quoting *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment)).

32. *Croson*, 488 U.S. at 507.

33. *See Fullilove v. Klutznick*, 448 U.S. 448, 508 (Powell, J., concurring).

34. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion of Powell, J.); *cf. Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc) (Posner, J.) (in reviewing affirmative action measures, courts must be "sensitiv[e] to the importance of avoiding racial criteria . . . whenever it is possible to do so, [as] *Croson* requires"), *cert. denied*, 510 U.S. 908 (1993).

35. *Croson*, 488 U.S. at 506.

36. *See, e.g., United States v. Paradise*, 480 U.S. 149, 177-78 (1986).

37. *See Croson*, 488 U.S. at 508 (discussing *Fullilove*, 448 U.S. at 488 (1980) (plurality opinion)).

38. *See Bakke*, 438 U.S. at 315 (Because "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," a program "focused solely on ethnic diversity would hinder rather than further attainment of genuine diversity.") (Powell, J.)

39. *Bakke*, 438 U.S. at 275.

40. *See Bakke*, 438 U.S. at 315-17; *see also Johnson*, 480 U.S. at 616 (upholding program that did not set aside any positions for women).

41. *See Croson*, 488 U.S. at 507.

42. *See Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring); *Fullilove*, 448 U.S. at 513 (Powell, J., concurring).

43. *See Johnson*, 480 U.S. at 638; *Sheet Metal Workers*, 478 U.S. at 488 (Powell, J., concurring).

Office for Civil Rights

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Organization: Domestic Policy Counsel

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Fax Number: 456-2857

Number of Pages (excluding cover page):

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From: Art Coleman
Deputy Assistant Secretary

Phone Number: 202-205-5557

Fax Number: 202-205-5381

Message: Look forward to talking at 5:00

If there are transmission problems, please call Millie Palmer at 202-205-5557.

NOTE TO BILL KINCAID, DAWN CHIRWA, RICHARD JEROME

Re: Assessment Outline

We have revised the self assessment package in response to Bill's suggestions. The package is now an Outline, comprising an Overview, a Guide (the legal memo), and a Worksheet (the checkpoints).

Please flag the presentation of Bakke on pages 2 and 5. The Guide reflects the discussion of Bakke the Department of Education believes appropriate and necessary. Our version omits from p. 5 of the Guide a sentence that was provided by DoJ after we discussed our concerns:

> While no majority opinion for the Supreme Court has squarely addressed when a non-remedial objective may constitute a compelling interest that can justify the use of narrowly tailored race-conscious measures, the United States supports Justice Powell's opinion as a correct statement of the law under the Constitution and Title VI.

To ensure that colleges understand that there is an issue about the legal weight of Powell's opinion, we added the Fifth Circuit's rejection of Powell -- as not writing for a majority-- to the Hopwood section, on pages 5-6.

Our position is that the scope of the holding in Bakke and the effect to be given Justice Powell's opinion on diversity are issues on which differing interpretations are reasonably possible. From discussions with attorneys representing two universities in federal litigation on diversity issues, we know that the authoritativeness of Powell's opinion and the extent of the holding in Bakke will be litigated. Counsel in these pending cases and higher education groups representing a substantial majority of colleges and universities in the country will have major legal concerns about the "no majority opinion" language. In addition to affecting the defense of pending law suits, including this language in materials designed to support lawful practices may tend to discourage colleges and universities from pursuing diversity in a lawful manner. We believe that the United States has no compelling need to weigh in on this unresolved issue at this time.

In response to Bill's suggestions, we added some text boxes with key excerpts from the Guide. We also added, on page 5 a reference to the educational benefits of diversity claimed by ACE et al. in their amici brief in Piscataway.

We look forward to completing the vetting process and issuing assessment materials that will meet a widespread need for information.