

# JEDI Legal Regulation: The United States

## Legislation or Policy

### Nasdaq Board Diversity Listing

In August 2021, the SEC approved the Nasdaq proposal to amend its listing standards to encourage greater board diversity and to require board diversity disclosures around race and ethnicity for Nasdaq-listed companies, with a “comply or explain” framework in place.

### Russell 3000 Board Diversity Disclosure Initiative

Asks for the disclosure of the makeup of Russell 3000 companies’ boards of directors – inclusive of gender, race and ethnicity.



### EEO-1 Reports (Equal Employment Opportunity Commission)

Private companies with more than 50 employees are required to provide a demographic breakdown of a company’s workforce by race and gender, as part of the effort for increased and more standardized methods for racial and ethnic disclosure.

### SEC Amendment to Item 101(C)

Securities and Exchange Commission (SEC) amended Item 101(c) under Regulation S-K, calling on employers to disclose human capital measures or objectives that a company deems material to its business. This measure goes a step beyond the previous requirement to only disclose the number of employees. Even with this amendment, the new human capital reporting requirements make no mention of diversity data disclosure.

## Investor Implications

- Increasing disclosure requirements and shifts in the investment industry around diversity reporting, albeit as a first step, is largely focused on gender, race, and ethnicity and not other forms of diversity such as non-binary gender identity, sexual orientation, disability, and other demographic identifiers.
- Increasing calls for conducting racial equity audits, ideally using a third party and getting companies to disclose diversity information about their recruiting, retention and promotions.
- Companies have had to look outside of the usual channels—other boards and CEOs—to find diverse board candidates.
- The EEOC requires EEO-1 Reports be sent to the Commission, but does not require public disclosure of the reports’ contents. Currently only 25% of US companies have publicly disclosed this data, with an even smaller subset disclosing an annual breakdown of the representation of different ethnic minorities at various levels across the organisation.

## Legislation or Policy (cont.)

### Office of Minority and Women Inclusion

Established in January 2011, is responsible for implementing section 342 of the [Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010](#). It focuses on increasing the participation of minority- and women-owned businesses and the national banks, federal savings associations, and federal branches and agencies of foreign banks regulated by the Office of the Comptroller of the Currency (OCC). They have implemented a [voluntary diversity self-assessment](#) for regulated entities to use in assessing their diversity policies and practices.

### Department of Labor Proposed ESG-related Reporting Rule

This signals a more permissive regulatory environment for fiduciaries considering ESG factors when making investment decisions and voting proxies on behalf of US retirement plans and investors subject to ERISA.

### The Equal Protection Clause of the U.S. Constitution (Fourteenth Amendment)

Requires state and federal governments to provide equal protection for its people under the law, meaning state actions regarding a “fundamental right” cannot discriminate on the basis of race, religion, or gender; it is unclear if this also applies to sexual orientation.

## Investor Implications

- As the OMWI’s diversity self-assessment tool is voluntary,, the submission rates have since been extremely low, with only 4 percent of firms reporting their data as of 2021. To tackle the low response rate, some have suggested the OMWI’s diversity self-assessment be required in annual reports for all entities regulated under the SEC’s purview.

The Proposed Rule includes five key changes from the earlier 2020 Rule, which has been seen as imposing new hurdles when considering ESG factors in making fiduciary investment decisions for plans:

1. De facto recognition of ESG as material to investment risk and return
2. Pecuniary Factors Test is now the Risk-Return Test (and ESG counts)
3. Tie-Breaker Test redrafted to be broader and easier
4. QDIAs can use ESG—and no special rules for DC plans
5. Mostly back to old proxy voting rules

Find more analysis [in this article](#).





## US Federal Law

### Title VII of the Civil Rights Act of 1964

Prohibits employers from discriminating against applicants and employees on the basis of race, colour, religion, sex, and national origin (including membership in a Native American tribe). It also protects applicants and employees from retaliation for asserting their rights Title VII. The prohibition against discrimination extends to all terms, conditions, and privileges of employment. It also prohibits practices that seem neutral but have a disproportionate impact on a protected group. This law applies to private employers with at least 15 employees, state and federal governments, employment agencies, and labour organisations.

Title VII is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). Additional state laws may extend prohibitions against employment discrimination. Other federal anti-discrimination in employment laws include:

- [the Equal Pay Act of 1963 \(EPA\)](#): illegal to pay different wages to men and women); the Age Discrimination in Employment Act of 1967 (ADEA) (protects people who are 40 or older from discrimination because of age
- [Title I of the Americans with Disabilities Act of 1990 \(ADA\)/Rehabilitation Act of 1973](#): illegal to discriminate against a qualified person with a disability
- [The Genetic Information Nondiscrimination Act of 2008 \(GINA\)](#): illegal to discriminate against employees or applicants because of genetic information
- [the Immigration Reform and Control Act of 1986 \(IRCA\)](#): prohibits discrimination against employees or applicants based on national origin

A full list of US federal anti-discrimination laws, which apply to education, housing, lending, voting, and other realms, is available [here](#).

