



June 12, 2026

Via Electronic Mail (Secretarys-Office@SEC.gov)

Secretary Vanessa Countryman
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Petition for Rulemaking to Rescind and Amend Item 407(c)(2)(vi) of Regulation S-K (17 C.F.R. § 229.407(c)(2)(vi)); to Amend Item 11(k) of Form S-1 (17 C.F.R. § 239.11) and Parallel Corporate Governance Line Items in Forms S-11, F-1, and 10; and to Rescind Related SEC Staff Compliance and Disclosure Interpretations

SUMMARY OF PETITION

1. America First Legal Foundation (“AFL”) respectfully petitions the Securities and Exchange Commission (the “Commission” or “SEC”), pursuant to 5 U.S.C. § 553(e)¹ and 17 C.F.R. § 201.192,² to initiate notice-and-comment rulemaking to:
 - a. rescind the diversity disclosure mandates under Item 407(c)(2)(vi) of Regulation S-K, codified at 17 C.F.R. § 229.407(c)(2)(vi),³ and amend that provision with a certification requirement attesting that
 - i. race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics were not

¹ Section 553(e) provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”

² Petition for Rulemaking regulation specific to the SEC.

³ 17 C.F.R. § 229.407(c)(2)(vi) (“Describe the nominating committee’s process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy;”).

considered, directly or indirectly, in any aspect of director nomination or selection, and

- ii. no policy, target, quota, or metric based on those characteristics was applied in the nomination process;
- b. amend Item 11(k) of Form S-1 (17 C.F.R. § 239.11), used by domestic issuers for initial public offerings—and the parallel corporate governance line items in Form S-11 (17 C.F.R. § 239.18), used by real estate companies, Form F-1 (17 C.F.R. § 239.31), used by foreign private issuers, and Form 10 (17 C.F.R. § 249.210), used for Exchange Act registration by domestic companies not offering securities—to cross-reference the revised Item 407(c)(2)(vi), so that the new certification requirement applies to initial public offering and other initial registration statements;
 - c. rescind SEC Staff Compliance and Disclosure Interpretations Item 401 Question 116.11 and Item 407 Question 133.13, which opine on self-identified diversity characteristics disclosures; and
 - d. direct all self-regulatory organizations to remove any rules that mandate consideration of race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in board nominations, selections, or proxy disclosures.
2. AFL petitions the SEC to initiate rulemaking proceedings to replace the current language of 17 C.F.R. § 229.407(c)(2)(vi) as provided below (added text in bold):

Include in any registration statement, proxy statement, information statement, or annual report in which the registrant is required to describe the director nomination process, including any registration statement filed in connection with an initial public offering, a certification attesting that

(A) neither the nominating committee nor the board of directors, nor any person acting on their behalf, considered race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics, directly or indirectly, in any aspect of identifying, evaluating, recruiting, nominating, or selecting any candidate for election to the board of directors; and

(B) no policy, target, quota, aspiration, or metric based on race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics was applied, maintained, or referenced in the nomination process.

3. AFL's petition for rulemaking also proposes amending Item 11(k) of Form S-1 (17 C.F.R. § 239.11),⁴ the standard registration form for domestic initial public offerings, to require a cross-reference to the revised Item 407(c)(2)(vi). AFL urges the Commission to amend part (k) under Item 11 of Form S-1 as follows (added text in bold):

(k) Information required by Item 401 of Regulation S-K (§229.401 of this chapter), directors and executive officers, **and information required by Item 407 (c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi) of this chapter);**

4. AFL proposes parallel amendments to the SEC Forms as provided below (added text in bold):

- a. Item 21 of Form S-11 (17 C.F.R. § 239.18),⁵ the registration statement form used by real estate investment trusts and other real estate companies, to add a cross-reference to Item 407(c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi)) as follows:

Furnish the information required by Item 401 of Regulation S-K (§229.401 of this chapter), **and information required by Item 407 (c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi) of this chapter).**

- b. Item 6 of Form F-1 (17 C.F.R. § 239.31),⁶ the registration statement form used by foreign private issuers for initial public offerings in the United States, to add a cross-reference to Item 407(c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi)) as follows:

Furnish the information required by Item 702 of Regulation S-K (§229.702 of this chapter), **and information required by**

⁴ Form S-1, U.S. SECURITIES AND EXCHANGE COMMISSION <https://perma.cc/KSE9-PQNB>.

⁵ Form S-11, U.S. SECURITIES AND EXCHANGE COMMISSION <https://perma.cc/H453-PR8C>.

⁶ Form F-1, U.S. SECURITIES AND EXCHANGE COMMISSION <https://perma.cc/MHP2-ST8V>.

Item 407 (c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi) of this chapter).

- c. Item 5 of Form 10 (17 C.F.R. § 249.210),⁷ the Exchange Act registration form used by domestic companies becoming reporting issuers without a public offering, to add a cross-reference to Item 407(c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi)) as follows:

Furnish the information required by Item 401 of Regulation S-K (§229.401 of this chapter), **and information required by Item 407 (c)(2)(vi) of Regulation S-K (§ 229.407(c)(2)(vi) of this chapter).**

5. These amendments would ensure that the revised certification requirement in Item 407(c)(2)(vi) applies uniformly to initial registration statements under the Securities Act and the Exchange Act.
6. AFL further requests that the proposed rulemaking provide a basis for liability under the Commission’s authority to investigate and initiate proceedings for any false or misleading statement of material fact in certifications or related disclosures required under the revision to 17 C.F.R. § 229.407(c)(2)(vi). With respect to Form S-1 and other registration statements, misstatements in the proposed certification would be actionable under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which imposes strict liability on issuers for material misstatements in registration statements, and under Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2), which provides a cause of action for material misstatements in prospectuses and oral communications. With respect to post-IPO proxy disclosures, liability would attach under Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 for material misstatements or omissions in proxy solicitations.
7. AFL urges the Commission to direct all self-regulatory organizations (“SROs”), such as The Nasdaq Stock Market LLC and the New York Stock Exchange LLC, to amend their rules within 180 days of the effective date of this rule to remove any provision that requires, incentivizes, or otherwise encourages consideration of race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in board nominations, director selections, committee compositions, or proxy disclosures. Any such self-regulatory organization rules

⁷ Form 10, U.S. SECURITIES AND EXCHANGE COMMISSION <https://perma.cc/NCX4-NCKJ>.

that conflict with the revised language of 17 C.F.R. § 229.407(c)(2)(vi) shall be deemed inconsistent with Section 6(b)(5) of the Exchange Act, 15 U.S.C. § 78f(b)(5), and shall be removed.

8. Publicly traded corporations exist to maximize long-term shareholder value. Achieving this objective requires selecting competent leadership based on merit. Regulatory mandates compelling speech on “diversity” pressure boards to adopt identity-based selection criteria and undermine the meritocratic principles foundational to corporate governance. The Commission’s current diversity disclosure mandate in Item 407(c)(2)(vi) creates inefficiencies in capital allocation, thereby disrupting the core function of shareholder primacy. The Commission should rescind this mandate as set forth herein.

I. Statement of Interest

9. AFL is a national 501(c)(3) nonprofit organization dedicated to defending the constitutional rights of American citizens, upholding the rule of law, and ensuring that the federal government does not enforce regulatory mandates for identity-based preferencing.
10. AFL has a record of litigation and advocacy challenging racially discriminatory, identity-based practices imposed on private companies, government contractors, and across the federal government.⁸ AFL’s mission encompasses efforts to ensure that independent regulatory agencies, such as the SEC, do not use disclosure mandates, compliance frameworks, or approvals of SRO rules to require and ratify practices that consider race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics as criteria in employment, governance, or board member nomination and selection decisions.
11. Because the SEC’s disclosure rules directly shape corporate governance practices and the information provided to shareholders, Item 407(c)(2)(vi) pressures public companies to use protected traits as criteria for board nominations and hiring.

⁸ See, e.g., *Miller v. Bausch Health Cos.*, No. 1:25-cv-25890 (S.D. Fla. filed Dec. 15, 2025) (challenging racial quota imposed on corporate board appointments); *Craig v. Target Corp.*, No. 2:23-cv-00599 (M.D. Fla. filed Aug. 8, 2023) (securities fraud action challenging corporate DEI practices); AM. FIRST LEGAL FOUND., *America First Legal Petitions U.S. Department of Energy to Rescind Biden-Era Regulation Mandating Illegal DEI Discrimination in Federal Contracting* (Jan. 7, 2026) <https://perma.cc/S6ZY-SS7X>. See also AM. FIRST LEGAL FOUND., *Dismantling DEI*, <https://perma.cc/RE2F-6LE7>.

AFL has a direct interest in ending government-mandated consideration of identity characteristics so that corporate America is free to select directors based on merit for the benefit of all shareholders. AFL also has a substantial interest in ensuring that the Commission’s disclosure regime governing initial public offering registration statements does not pressure pre-IPO boards to consider race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in selecting initial directors as a condition of accessing the public capital markets.

II. Background

12. Regulation S-K (17 C.F.R. § 229) serves as the SEC’s “central repository for [filer] disclosure requirements outside of the financial statements.”⁹ Item 407 of Regulation S-K addresses corporate governance matters, including board committees and director independence. Item 407(c) addresses the nominating committee and the director nomination process, requiring specified disclosures about how candidates are identified, evaluated, and selected.
13. On December 16, 2009, the Obama-era Commission adopted amendments to its disclosure rules through the “Proxy Disclosure Enhancements” rulemaking.¹⁰ The stated purpose of the amendments was to “enhance the information provided in annual reports and proxy statements to better enable shareholders to evaluate the leadership of public companies.”¹¹
14. As part of that rulemaking, the Commission amended Item 407(c)(2)(vi) to require new disclosure about how “diversity” is considered in the director nomination process. The amended text requires issuers to describe the nomination process, state “whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director,” and, if a diversity “policy” exists, describe its implementation and assess its effectiveness.¹²
15. Critically, Item 407(c)(2)(vi) does not define “diversity.” In the final rule, the Commission stated that it would permit companies to “define diversity in ways

⁹ Paul S. Atkins, Chairman, *Statement on Reforming Regulation S-K*, U.S. SEC. & EXCH. COMM’N (Jan. 13, 2026), <https://perma.cc/MSW3-L9FW>.

¹⁰ Proxy Disclosure Enhancements, 74 Fed. Reg. 68334 (Dec. 23, 2009).

¹¹ *Id.*

¹² *See id.*; 17 C.F.R. § 229.407(c)(2)(vi).

that they consider appropriate.”¹³ This deliberate vagueness has produced a landscape in which some issuers interpret “diversity” to encompass differences in viewpoint, professional experience, and skills, while others focus explicitly on race, gender, ethnicity, and other demographic characteristics. The latter represents precisely the protected traits that federal civil-rights law and the United States Constitution prohibit from being used as selection criteria.

16. On February 6, 2019, the SEC staff issued two identical Compliance and Disclosure Interpretations (“C&DIs”) that apply to Item 401 of Regulation S-K, Question 116.11, and Item 407 of Regulation S-K, Question 133.13.¹⁴ The interpretations provide guidance on disclosure when a director or director nominee voluntarily provides self-identified diversity characteristics, such as race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics, and has consented to their disclosure.¹⁵ The staff opined that (1) Item 401(e) of Regulation S-K requires a brief discussion of the specific experience, qualifications, attributes, or skills that led to the conclusion that a person should serve as a director, and (2) Item 407(c)(2)(vi) of Regulation S-K requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees.¹⁶ In consideration of these requirements, the staff explained:

“[t]o the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership, has considered the self-identified diversity characteristics referred to above . . . , we would expect that the company’s discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse

¹³ 74 Fed. Reg. 68344.

¹⁴ See DIVISION OF CORPORATION FINANCE, *Regulation S-K Compliance and Disclosure Interpretations* (last updated Mar. 6, 2026), <https://perma.cc/4CTN-Q3ZK> (Questions 116.11 and 133.13).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

work experiences, military service, socio-economic or demographic characteristics, or proxies for these characteristics.”¹⁷

17. Although Item 407(c)(2)(vi) applies to proxy statements filed on Schedule 14A and annual reports on Form 10-K, the provision does not currently apply to most initial public offering registration statements. Item 11(k) of Form S-1 (17 C.F.R. § 239.11) incorporates only Item 407(a) of Regulation S-K (director independence), not Item 407(c)(2)(vi). This creates a regulatory gap: a pre-IPO board may consider protected traits such as race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in director selection without any corresponding SEC line-item disclosure obligation in the registration statement. At the same time, the SEC’s C&DIs at Item 401 Question 116.11 and Item 407 Question 133.13 incorporate the self-identified diversity characteristics into the Item 401(e) qualifications required in Form S-1, thereby pressuring issuers to disclose self-identified characteristics without any certification that protected traits were not considered as selection criteria.

III. Item 407(c)(2)(vi) Conflicts with Federal Civil-Rights Law and Current Executive Policy

18. The diversity disclosure mandate in Item 407(c)(2)(vi) should be rescinded because it exceeds the Commission’s statutory authority, which is confined to prescribing rules “necessary or appropriate in the public interest or for the protection of investors.”¹⁸ The mandate conflicts with Title VII of the Civil Rights Act of 1964, which makes it an unlawful employment practice “to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”¹⁹ Title VII also makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁰ Title VII further provides that nothing therein “shall be interpreted to require any employer . . . to grant preferential treatment to any

¹⁷ *Id.*

¹⁸ 15 U.S.C. § 78n(a)(1).

¹⁹ 42 U.S.C. § 2000e-2(a)(2).

²⁰ 42 U.S.C. § 2000e-2(a)(1).

individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist” with respect to the representation of such groups in the employer’s workforce.²¹

19. The Supreme Court of the United States recently made clear, “As a textual matter, Title VII’s disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs. Rather, the provision makes it unlawful ‘to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.’”²²

20. The United States Constitution, applicable statutory text, and Title VII are clear: racial, ethnic, and sex considerations in hiring, training, compensation, and promotion are patently unlawful.²³ Such practices are inherently and profoundly harmful.²⁴ Discrimination based on characteristics such as race, color, national origin, or sex “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”²⁵ More broadly, discrimination “on the basis of race” is “odious and destructive.”²⁶ Furthermore, the Supreme Court of the United States makes explicit that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”²⁷ It truly “is a sordid business, this divvying us up” by race or sex.²⁸

21. Item 407(c)(2)(vi) creates regulatory pressure to adopt and defend selection practices that consider protected traits by compelling issuers to disclose their

²¹ 42 U.S.C. § 2000e-2(j).

²² *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 309–10 (2025) (citing 42 U.S.C. § 2000e-2(a)(1)) (emphasis in original).

²³ See 42 U.S.C. § 2000e-2(a), (d), and (m); see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616, 621–41 (1987); see also *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644 (2020).

²⁴ Compare 42 U.S.C. § 2000e-2, with 42 U.S.C. § 1981. Our civil rights laws “promote hiring on the basis of job qualifications, rather than on the basis of race or color,” or sex, or national origin, or religion. See *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976). Racial discrimination is invidious in all contexts. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023).

²⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

²⁶ *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

²⁷ *Students for Fair Admissions*, 600 U.S. at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

²⁸ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

consideration of “diversity”—a term that in practice frequently encompasses race, sex, and other demographic characteristics. This pressure operates in direct conflict with Title VII’s prohibition on discrimination “because of” race or sex and its express instruction that the statute does not require preferential treatment based on demographic imbalances. It is also inconsistent with current federal policy under Executive Order 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” which directs federal agencies to eliminate illegal DEI preferences.²⁹ A disclosure mandate that predictably induces consideration of protected traits as criteria in director selection is inconsistent with the statutory prohibition on such consideration under Title VII, nondiscrimination law, and current federal policy.

IV. Statutory Authority for the Proposed Rulemaking

22. Section 14(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) makes it unlawful for any person to solicit proxies “in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”³⁰

23. The phrase “public interest” in Section 14(a) is constrained by the specific purposes of the Exchange Act. Section 3(f) of the Exchange Act, 15 U.S.C. § 78c(f), directs the Commission, whenever it is “engaged in rulemaking” and “is required to consider or determine whether an action is necessary or appropriate in the public interest,” to “consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” Section 2(b) of the Securities Act, 15 U.S.C. § 77b(b), contains a parallel directive.³¹ Together, these provisions confirm that Congress defined the “public interest” for securities-regulation purposes in financial and market-integrity terms, not as an open-ended license to advance contested social-policy objectives, including the consideration of diversity.

²⁹ Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

³⁰ Securities Exchange Act of 1934 § 14(a), Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78n(a)).

³¹ Securities Act of 1933 § 2(b), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77b(b)) (“Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”).

24. Courts have reinforced this constraint. In *Business Roundtable v. SEC*, the D.C. Circuit rejected an expansive reading of the Commission’s authority and held that the SEC’s rulemaking must align with the purposes Congress had in mind in enacting the legislation.³² More recently, in *Alliance for Fair Board Recruitment v. SEC*, the Fifth Circuit, sitting *en banc*, applied the canons of *noscitur a sociis* and *ejusdem generis* to interpret the public-interest provision. The court held that the term “public interest” is defined by reference to the specific harms the Exchange Act was enacted to address, namely “speculation, manipulation, fraud, and removing barriers to exchange competition,” and does not extend to matters unrelated to those core purposes.³³
25. Accordingly, the Commission’s proxy rulemaking authority is limited to prescribing requirements only where they are “necessary or appropriate” for the defined statutory purposes of investor protection, market integrity, and capital formation.
26. The Exchange Act further provides general rulemaking authority in Section 23(a), authorizing the Commission to “make such rules and regulations as may be necessary or appropriate to implement the provisions of” the Act and “for the execution of the functions vested” in the Commission.³⁴ Further, when “making rules and regulations,” the Commission “shall consider among other matters the impact any such rule or regulation would have on competition,” including “reviewing any proposed rule change of a self-regulatory organization.”³⁵
27. To the extent Item 407 applies through Securities Act filings, the Securities Act of 1933 similarly authorizes the Commission to “make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of” that Act.³⁶
28. Section 7 of the Securities Act of 1933, 15 U.S.C. § 77g, authorizes the Commission to prescribe the form and content of registration statements, and Section 19(a) of the Securities Act, 15 U.S.C. § 77s(a), grants the Commission general rulemaking authority to amend registration forms. The proposed amendment to Item 11(k) of Form S-1—and the parallel amendments to Forms S-11, F-1, and 10—is a routine

³² 905 F.2d 406 (D.C. Cir. 1990).

³³ 125 F.4th 159, 169 (5th Cir. 2024) (*en banc*).

³⁴ 15 U.S.C. § 78w(a).

³⁵ *Id.*

³⁶ 15 U.S.C. § 77s(a).

exercise of the Commission’s longstanding form-amending authority to incorporate updated Regulation S-K line items into registration statements. Similarly, Section 23(a) of the Exchange Act, 15 U.S.C. § 78w(a), supports parallel amendments to require the certification in Exchange Act registration statements. None of these amendments raises a major question; each is an incremental conforming change that extends a disclosure requirement the Commission already has authority to prescribe under Regulation S-K.

V. The Commission’s Authority to Direct SROs

29. The Commission has the statutory authority to rescind rules that are no longer justified. The statutory provisions that authorize the Commission to promulgate rules “necessary or appropriate” for investor protection and market integrity necessarily encompass the authority to urge SROs to amend or rescind rules that fail to meet the same standard.
30. With respect to SROs, Section 19(b)(2) of the Exchange Act, 15 U.S.C. § 78s(b)(2), provides that the Commission “shall approve” a proposed SRO rule change only if it finds the proposal consistent with the Exchange Act’s requirements and “shall disapprove” any proposal that fails to meet those requirements.³⁷ The Exchange Act further requires that the rules of a national securities exchange “are not designed to permit unfair discrimination.”³⁸ Following the Exchange Act and the holding in *Alliance*, the Commission should direct all SROs to remove any remaining rules that require or incentivize consideration of race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in board member selection.

VI. The Current Regulation Exceeds the Statutory Purpose of Investor Protection and Market Integrity

31. The Commission’s proxy rulemaking power under Section 14(a) is not a general-purpose authority to compel corporate speech on contentious social or political subjects. It is limited to prescribing rules that are “necessary or appropriate in the public interest or for the protection of investors.”³⁹ That statutory phrase constrains the Commission to mandating disclosures that bear a direct nexus to

³⁷ 15 U.S.C. § 78s(b)(2)(C)(i)–(ii).

³⁸ 15 U.S.C. § 78f(b)(5).

³⁹ 15 U.S.C. § 78n(a)(1).

the enumerated purposes of the Exchange Act: investor protection, market integrity, and the prevention of fraud.

32. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, confirmed this principle in *Alliance for Fair Board Recruitment v. SEC*.⁴⁰ The Fifth Circuit rejected the SEC's argument that board diversity rules were sufficiently "related to" the purposes of the Exchange Act, holding that such rules are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴¹ The court vacated the SEC's approval of Nasdaq's board diversity rules, concluding "that the diversity rules cannot be squared with the Securities Exchange Act of 1934."⁴²
33. The *Alliance* court applied the major questions doctrine, reasoning that because the SEC "has no inherent or implied authority" on its own, the agency's "powers to make major decisions must come only from unequivocal statutory text."⁴³ The court characterized the SEC's approval of diversity-based disclosure rules as a significant action "far outside" the SEC's "ordinary domain," requiring clear congressional authorization that the Commission could not identify.⁴⁴
34. The reasoning of *Alliance* applies with equal force to Item 407(c)(2)(vi). Both the Nasdaq diversity rules and Item 407(c)(2)(vi) compel disclosure of diversity information in the context of board composition and director nominations. Both lack any direct nexus to fraud prevention, market integrity, or the financial performance metrics that investors require to make informed capital-allocation decisions. If the SEC lacked authority to approve Nasdaq's disclosure and diversity rules, then the Commission likewise lacks authority to maintain its own diversity-specific disclosure mandate. The same analysis applies at the IPO stage: extending Item 407(c)(2)(vi) to Form S-1 in its current form would perpetuate the same lack of statutory nexus in the registration statement context, where Section 11 strict liability attaches to material misstatements.

⁴⁰ 125 F.4th 159 (5th Cir. 2024) (*en banc*).

⁴¹ *Id.* at 168.

⁴² *Id.* at 164.

⁴³ *Id.* at 181.

⁴⁴ *Id.*

VII. Protected-Trait Disclosures Harm Shareholders

35. Item 407(c)(2)(vi) compels issuers to describe how protected traits such as race and sex are considered in recruiting and nominating directors. This occurs because “diversity” is frequently understood through the lens of race and sex. Issuers that disclose a “diversity policy” and describe its “implementation” and “effectiveness” are effectively required to publish statements about the role of race, sex, and other demographic characteristics in governance decisions.
36. This disclosure regime creates legal risk for issuers. Any issuer that describes consideration of race or sex as a factor in board nominations may face liability under Title VII, state civil-rights statutes, and the Equal Protection Clause (for state actors), as illustrated by AFL’s actions against multiple publicly traded companies. For example, AFL formally requested that the Equal Employment Opportunity Commission and the Tennessee Attorney General investigate Cracker Barrel Old Country Store, Inc., after the company’s 2024 proxy statement disclosed that its Nominating and Corporate Governance Committee “considers, among other things . . . diversity of age, gender, race and ethnic background” in evaluating potential candidates for the Board of Directors, thereby treating protected characteristics as explicit selection criteria.⁴⁵ Likewise, AFL filed a federal civil-rights complaint with the EEOC against Shake Shack, Inc., citing the company’s May 2023 proxy statement, which established “5-Year Diversity Targets” focused on “women and people of color” for leadership roles and declared that the Board’s “overall diversity” is a “significant consideration in the director nomination process,” with explicit tracking of race, ethnicity, and gender identity.⁴⁶ These actions demonstrate the exposure issuers incur when proxy disclosures or related policies reference protected-trait considerations in board selection.
37. Moreover, issuers that omit or inadequately disclose known material risks arising from diversity initiatives may face securities litigation under federal securities laws. This is illustrated by AFL’s opposition to Target Corporation’s motion to dismiss in *Craig v. Target Corp.*, where the court permitted claims to proceed based on allegations that the company made materially misleading statements in

⁴⁵ See AM. FIRST LEGAL FOUND., *America First Legal Calls for Federal and State Investigations into Cracker Barrel Over Unlawful and Discriminatory Employment Practices* (July 21, 2025), <https://perma.cc/D65R-TF5N>.

⁴⁶ See AM. FIRST LEGAL FOUND., *America First Legal Files Federal Civil Rights Complaint Against Shake Shack For Illegal Race and Sex Discrimination* (Apr. 25, 2024), <https://perma.cc/ZE6G-UCNK>.

its proxy materials by failing to disclose the specific risks of adverse customer reactions and financial losses from its ESG and DEI initiatives.⁴⁷

38. Any issuer that fails to disclose such “diversity” consideration in board nominations and selections, or that describes an insufficient commitment to “diversity,” may face activist pressure, proxy campaigns, and litigation alleging inadequate disclosure. The Commission should not maintain a rule that subjects registrants to this regulatory pitfall, particularly where the disclosure serves no cognizable investor-protection purpose and aims only to serve contestable social objectives.

VIII. The Commission Should Not Compel Disclosure to Advance Social Policy Goals

39. The SEC’s investor-protection mandate does not extend to compelling corporate speech on contested social-policy questions. Regardless of pressure from policy advocates, the Commission may not use its disclosure authority to advance objectives unrelated to financial performance, corporate governance, or a company’s risk profile. The diversity mandate represents an impermissible encroachment by the Commission into social policy.

40. Removing the diversity-specific mandate would leave issuers free to describe, in their proxy statements or other filings, any factors they consider relevant to director nominations, including viewpoint diversity, professional experience, industry expertise, and other attributes relevant to corporate performance. Rescission would reinstate identity-neutral board member nominations and selections based on relevant metrics for increasing shareholder value.

IX. The Diversity Mandate Undermines Merit-Based Corporate Governance Necessary for Efficient Capital Markets

41. Publicly traded corporations are structured to maximize long-term shareholder value. Settled principles of corporate law establish that the board of directors owes the fiduciary duties of care and loyalty to the corporation and its shareholders—duties that require selecting the most competent individuals to serve as directors

⁴⁷ See AM. FIRST LEGAL FOUND., *VICTORY — U.S. District Court Denies Target’s Attempt to Dismiss America First Legal Lawsuit and Transfer Venue; Shareholder Action Against Undisclosed Risks and Losses Caused by Target’s ESG, DEI, and LGBTQ “Pride Campaign” to Continue* (Dec. 4, 2024), <https://perma.cc/T72A-L5XW>.

and officers.⁴⁸ The shareholder primacy model underpinning corporate governance holds that boards must deploy capital and select leadership with a focus on maximizing risk-adjusted returns. Efforts to advance subjective social policy goals extraneous to financial performance fall outside this framework.

42. A regulatory mandate that compels or incentivizes consideration of race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in the director nomination process substitutes identity metrics for competence. This distorts capital allocation by diverting board selection from the merit-based criteria that shareholders rely upon to protect their investments, such as industry expertise, financial acumen, strategic judgment, and operational experience. The result is straightforward: shareholders bear the cost of compliance with diversity disclosure requirements, while value creation takes a backseat to identity-based considerations. These concerns are heightened at the IPO stage, when the issuer first accesses the public capital markets, and Section 11 of the Securities Act imposes strict liability on the issuer for any material misstatement in the registration statement. Investors making initial capital-allocation decisions at the IPO are entitled to a meritocratic governance disclosure framework—not one that pressures identity-based board composition as a condition of market access.

43. Item 407(c)(2)(vi), by compelling issuers to disclose “whether, and if so how” they consider diversity in nominations and to describe any “diversity policy” and assess its “effectiveness,” operates as a regulatory signal that issuers are encouraged to adopt such policies. The practical effect is to encourage boards to adopt identity-based selection metrics, thereby undermining the market-efficiency principles the Exchange Act was designed to safeguard.

44. The now-vacated Nasdaq Rules 5605(f) and 5606 illustrate the same problem in the SRO context. Those rules required listed companies either to satisfy specified demographic targets for board composition or to publicly explain their failure to do so. The Fifth Circuit characterized this requirement as a “public-shaming penalty for a corporation’s failure to abide by the Government’s diversity

⁴⁸ See, e.g., DEL. CODE tit. 8, § 141(a) (providing that the business and affairs of a corporation shall be managed by or under the direction of its board of directors); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

requirements.”⁴⁹ The court correctly recognized that such requirements fall outside the purview of the Exchange Act. Under the same logic, Item 407(c)(2)(vi) should be rescinded as well. The diversity-specific disclosure mandate under this provision undermines the meritocratic system of corporate governance upon which shareholders rely to maximize value.

X. The Current “Diversity” Disclosure Mandate Does Not Produce Decision-Useful Information

45. Item 407(c)(2)(vi) does not define “diversity,” and the Commission’s deliberate decision not to provide a definition has produced a disclosure landscape characterized by language that is neither comparable across issuers nor useful for investor decision-making. Issuers have strong incentives to provide generalized, non-specific disclosures to avoid regulatory, litigation, and reputational exposure. The resulting disclosures are often inconsistent with the Commission’s requirement that filings present information in a “clear, concise, and understandable manner.”⁵⁰ The absence of a standardized definition is especially problematic in the IPO context, where investors are making initial capital-allocation decisions without the benefit of any prior public disclosure history against which to evaluate the issuer’s representations.

46. A disclosure mandate without a standardized definition of “diversity” yields indeterminate, non-comparable information in proxy statements that does not meet the statutory standard of being “necessary or appropriate” for investor protection. The Commission should not maintain rules that impose compliance costs on registrants without delivering decision-useful information to investors.

XI. Conclusion

47. For the foregoing reasons, AFL respectfully requests that the Commission:

- a. Initiate notice-and-comment rulemaking to rescind the current language of Item 407(c)(2)(vi) of Regulation S-K and amend the regulation by replacing it with the text provided in bold in ¶ 2 attesting that race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or

⁴⁹ *All. for Fair Bd. Recruitment*, 125 F.4th at 184 (quoting the majority characterization of Nasdaq Rule 5605(f)).

⁵⁰ See 17 C.F.R. § 230.421(b).

proxies for these characteristics were not considered, directly or indirectly, in any aspect of identifying, evaluating, recruiting, or selecting director nominees, and that no policy, target, quota, aspiration, or metric based on those characteristics was applied in the nomination process;

- b. Adopt the proposed regulatory language, provided in bold text set forth in ¶¶ 3–4 above, to amend Item 11(k) of Form S-1 (17 C.F.R. § 239.11)—and the parallel corporate governance line items in Form S-11 (17 C.F.R. § 239.18), Form F-1 (17 C.F.R. § 239.31), and Form 10 (17 C.F.R. § 249.210)—to add a cross-reference to Item 407(c)(2)(vi) of Regulation S-K, so that the revised certification requirement applies to initial public offering and other initial registration statements;
- c. Direct all SROs to remove any rules requiring or incentivizing consideration of race, sex, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background, socio-economic or demographic characteristics, or proxies for these characteristics in board nominations, director selections, or proxy disclosures, consistent with the U.S. Constitution, federal nondiscrimination law, the purposes of the Commission’s statutory authority, and current federal policy; and
- d. Rescind SEC Staff Compliance and Disclosure Interpretations Item 401 Question 116.11 and Item 407 Question 133.13, which describe the requirement to include self-identified diversity characteristics into disclosures inconsistent with the proposed merit-based rules.

48. The SEC has the statutory authority to rescind and amend disclosure requirements that are unnecessary and inappropriate for investor protection. In light of the discussion above, the Commission should act expeditiously to rescind the diversity disclosure mandate and implement the proposed amendments to the regulation to restore merit-based corporate governance.

Respectfully Submitted,

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