

MEMORANDUM

TO: Interested Parties

FROM: Disability:IN

DATE: November 29, 2021

SUBJECT: Demographic Data Collection and Disclosure by Federal Government Entities: Legal Authority and Best Practices

Disability:IN is a 501(c)(3) not-for-profit organization focused on employment and economic advancement opportunities for people with disabilities. Disability:IN is the leading resource for business disability inclusion worldwide with a network of over 400 corporations that expands opportunities for people with disabilities across enterprises.

We strongly believe that a demographic disclosure requirement for public companies would have a positive effect on diversity and inclusion efforts and can benefit shareholders as well as stakeholders. In addition, there are strategic and financial benefits from diversity, which is why this information is material to investors.¹ We also believe those requirements work best when they include a broad range of diversity categories, including disability status.

We were encouraged to see that the U.S. Securities and Exchange Commission (SEC) included a proposed rule on Human Capital Management Disclosure in its Spring 2021 Regulatory Agenda.² As discussed further below, diversity has a strong influence on corporate performance, and data-driven approaches are the most effective path to enhancing diversity and inclusion.³ This memo describes our view of the SEC's legal authority to mandate corporate disclosure of demographic data, including disability data; existing federal law related to demographic data collection; and best practices for collecting data on the basis of disability status.

¹ *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 151 (2d Cir. 2017) ("Materiality casts a net sufficiently wide to encompass every fact that would significantly alter the total mix of information that a reasonable investor would consider in making an investment decision.") (emphasis added); *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 308 (S.D.N.Y. 2010) ("Material facts include those "which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." They include any fact "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities." (emphasis added)); see also *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 616 (7th Cir. 2012) ("The "reasonable investor" standard ensures that investors have access to information important to their investment decisions.")

² Office of Information and Regulatory Affairs, Office of Management and Budget, Securities and Exchange Commission: Spring 2021 Regulatory Agenda, RIN: 3235-AM88, Human Capital Management Disclosure, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM88>

³ See e.g., Executive Order 14035: Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, 86 Fed. Reg. 34593 (June 30, 2021) (Mandating the development of a Government-wide Diversity, Equity, Inclusion and Accessibility Strategic Plan that would promote a data-driven approach).

I. SEC Legal Authority to Mandate Disclosure of Demographic Data, Including Disability Data

Federal law gives the SEC broad authority to require issuers of covered securities to make periodic disclosures regarding “the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters.”⁴ Several other provisions of law give the SEC similar authority over mandatory disclosures by covered entities.⁵

Diversity and inclusion efforts have a strong relation to corporate performance and are, therefore, an appropriate matter for SEC disclosure requirements. According to a 2020 study by McKinsey and Company, companies in the top quartile for gender diversity in executive teams were 25 percent more likely to have above-average profits than companies in lower quartiles.⁶ The study further found that companies in the top-quartile for ethnic and cultural diversity had 36 percent greater profitability than those in the lowest quartile.⁷

Studies similarly find enhanced performance and competitiveness among companies with greater disability diversity. Accenture reported in 2018 and 2020 that companies that implemented the most disability inclusion best practices created more profit and long-term value than companies that maintained fewer of these practices.⁸ The 2018 report found that over a four-year period these disability inclusion “Champions” had “28% higher revenue, double the net income and 30% higher economic profit margins.”⁹ The 2020 study found that organizations focused on disability engagement grew sales 2.9 times faster and profits 4.1 times faster than their peers.¹⁰ Moreover, companies that improved their inclusion of persons with disabilities over time were four times more likely than others to have total shareholder returns that outperformed those of their peer group.¹¹ Finally, the Center for Talent Innovation found that 75% of employees with disabilities in the United States have ideas that would drive value for their companies – compared with 61% of employees without disabilities, further demonstrating the value of disability diversity on performance.¹²

Collecting disability data is vital for a strong diversity and inclusion program. People with disabilities are disproportionately unemployed and underemployed. The unemployment rate for persons with disabilities was 12.6 percent in 2020 compared to 7.9 percent for persons without disabilities.¹³ Bureau of Labor Statistics (BLS) data also shows that persons with disabilities were more likely to be unemployed than persons without disabilities who have similar levels of educational attainment.¹⁴ Of course, these figures only represent persons with disabilities who are in the labor force. According to BLS, nearly 80 percent of

⁴ 15 U.S.C. § 77c(b)(4).

⁵ See e.g., 15 U.S.C § 77f, 77g; 15 U.S.C § 78l, 78m

⁶ McKinsey and Company, *Diversity Wins: How Inclusion Matters* (May 19, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>

⁷ *Id.*

⁸ Accenture, *Getting to Equal: The Disability Inclusion Advantage*, https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf; Accenture, *Getting to Equal 2020: Disability Inclusion*, https://www.accenture.com/_acnmedia/PDF-142/Accenture-Enabling-Change-Getting-Equal-2020-Disability-Inclusion-Report.pdf.

⁹ Accenture, *Getting to Equal: The Disability Inclusion Advantage*, n.14 at 6.

¹⁰ Accenture, *Getting to Equal 2020: Disability Inclusion*, n. 14 at 15.

¹¹ Accenture, *Getting to Equal: The Disability Inclusion Advantage*, n. 14 at 7.

¹² Center for Talent & Innovation, *Disability and Inclusion – US Findings*, https://coqual.org/wp-content/uploads/2020/09/CoqualDisabilitiesInclusion_KeyFindings090720.pdf.

¹³ Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics 2020* (Feb. 24, 2021), <https://www.bls.gov/news.release/pdf/disabl.pdf>

¹⁴ *Id.*

persons with disabilities were not in the labor force in 2020 and not all of them are out by choice.¹⁵ Adopting policies that allow these persons to enter the workforce benefits not just individual companies, but the economy as a whole. Accenture found, for instance, that the economy would receive a boost of \$25 billion annually if just one percent more people with disabilities joined the workforce.¹⁶

Increasing shareholder demand for corporate accountability and reporting on environmental, social, and governance (ESG) criteria and the rise of ESG-focused investment products also demonstrates that this information is material to investors and necessary for them to make informed investment choices.¹⁷ This movement is in line with current Federal policy, which encourages data-driven approaches for evaluating and improving Diversity, Equity, Inclusion, and Accessibility efforts and recommends the use and analysis of demographic data as a key element in those efforts.¹⁸

As such, Disability:IN believes the SEC is in a strong position to enhance diversity and inclusion efforts and further its mission to protect investors by requiring disclosure of certain diversity data. The key is selecting the best measures and models for that disclosure.

II. Federal Law and Collection of Diversity Information

Nothing in federal law prohibits employers from acquiring demographic information from employees, including information related to disability, race, national origin, gender, gender identity, sexual orientation, and veteran status, so long as that information is collected on a voluntary basis. In fact, federal law already requires the collection and submission of certain demographic information from certain employers.

A. Title VII

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.¹⁹ The statute requires employers to make and keep records (as determined by the EEOC) relevant to the determinations of whether unlawful employment practices have been or are being committed, preserve such records, and produce reports as the Commission prescribes by regulation or order.²⁰

Pursuant to this statutory authority, the EEOC has required employers with more than 100 employees to collect information about the gender, race, and ethnicity of their employees, and to report it to the EEOC by filing the Employer Information EEO-1 Report (EEO-1) on a yearly basis.²¹ The EEO-1 requires

¹⁵ *Id.* (Reporting that at least 3 percent of persons with disabilities who were considered out of the labor force reported that they wanted a job).

¹⁶ Accenture, *Getting to Equal: The Disability Inclusion Advantage* at 4.

¹⁷ Kai H.E. Liekefett, Holly J. Gregory, and Leonard Wood, *Shareholder Activism and ESG: What Comes Next and How to Prepare* (May 29, 2021), <https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare/>.

¹⁸ Executive Order 14035 *supra* n. 2 at Section 5

¹⁹ 42 U.S.C. § 2000e-2(a).

²⁰ 42 U.S.C. § 2000e-8(c) (“Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.”).

²¹ U.S. Equal Employment Opportunity Commission, *EEO-1: Who Must File*, EEOC, <https://www.eeoc.gov/employers/eo1survey/whomustfile.cfm>.

employers to offer employees the opportunity to self-identify their membership in the following categories:

Gender

- Male
- Female

Race/Ethnicity

- Hispanic or Latino
- White (Not Hispanic or Latino)
- Black or African American (Not Hispanic or Latino)
- Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino)
- Asian (Not Hispanic or Latino)
- American Indian or Alaska Native (Not Hispanic or Latino)
- Two or More Races (Not Hispanic or Latino)

If an employee declines to self-identify, employment records or observer identification may be used.²²

Employers must make clear that the decision to self-identify is voluntary. As a best practice, employers should state the reasons for which the information is being collected, how the information will be used, and that any data collected will be kept confidential and will only be used in accordance with applicable law.²³

The employer must provide the demographic data to the EEOC in a set of broad job classifications established by the EEOC, such as professionals, sales workers, craft workers etc. These classifications may not be particularly relevant to the actual job categories used by the employer.²⁴

In addition, the EEOC requires that if an employer chooses to keep records regarding employment decisions, such as application forms from applicants, the employer must then keep those records for a period of one year.²⁵ Where records are maintained, it is recommended that they be kept separately

²² U.S. Equal Employment Opportunity Commission, *Standard Form 100, Employer Information Report EEO-1 Survey Instruction Booklet* (Appendix, Section 4)

<https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm> ("If an employee declines to self-identify his or her race and/or ethnicity, employment records or observer identification may be used.")

²³ *Id.* (noting that language such as the following may be used:

The employer is subject to certain governmental recordkeeping and reporting requirements for the administration of civil rights laws and regulations. In order to comply with these laws, the employer invites employees to voluntarily self-identify their race or ethnicity. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information obtained will be kept confidential and may only be used in accordance with the provisions of applicable laws, executive orders, and regulations, including those that require the information to be summarized and reported to the federal government for civil rights enforcement. When reported, data will not identify any specific individual.)

²⁴ The job classifications are: Executive/Senior Level Officials and Managers; First/Mid-Level Officials and Managers; Professionals; Administrative Support Workers; Technicians; Sales Workers; Craft Workers; Operatives; Laborers and Helpers; Service Workers. See the sample EEO-1 form:

https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeo1survey/eeo1-2-2.pdf.

²⁵ See 29 C.F.R. part 1602.14 ("Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or

from the employee's basic personnel file or other records available to those responsible for personnel decisions.²⁶

B. The Americans with Disabilities Act and the Genetic Information Non-Discrimination Act.

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability.²⁷ Under the ADA, employers are generally prohibited from asking *job applicants* whether they have a disability.²⁸ Employers may ask *employees* if they have a disability only if the questions are job-related and consistent with business necessity.²⁹ For example, employers have been permitted to ask employees whether they are infected with COVID-19 only because that information is necessary to protect the health and safety of others in the workplace.³⁰

The EEOC's longstanding position, however, is that employers may ask applicants and employees to voluntarily self-identify as individuals with disabilities for purposes of an employer's "affirmative action program" if the employer is undertaking affirmative actions because of a federal, state, or local law or if "the employer is voluntarily using the information to benefit individuals with disabilities."³¹ The EEOC defines affirmative action programs broadly, to include strategies that will improve the recruitment, hiring, advancement, and retention of applicants and employees with disabilities.³²

Under the Genetic Information Non-Discrimination Act (GINA), an employer may not ask employees or applicants about their genetic information.³³

C. The Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination based on age.³⁴ The ADEA does not explicitly prohibit an employer from asking a job applicant's age or date of birth. However, an EEOC fact sheet explains that "such inquiries may deter older workers from applying

the personnel action involved, whichever occurs later.") The EEOC has stated that it reserves the right to issue additional regulations regarding record keeping. 29 C.F.R. part 1602.12. ("The Commission has not adopted any requirement, generally applicable to employers, that records be made or kept. It reserves the right to impose recordkeeping requirements upon individual employers or groups of employers subject to its jurisdiction whenever, in its judgment, such records (a) are necessary for the effective operation of the EEO-1 reporting system or of any special or supplemental reporting system as described above; or (b) are further required to accomplish the purposes of title VII, the ADA, or GINA. Such record-keeping requirements will be adopted in accordance with the procedures referred to in section 709(c) of title VII, section 107 of the ADA, or section 207(a) of GINA, and otherwise prescribed by law.")

²⁶ U.S. Equal Employment Opportunity Commission, *EEO-1 Instruction Booklet*, EEOC, <https://www.eeoc.gov/employers/eo-1-survey/eo-1-instruction-booklet>.

²⁷ 42 U.S.C. § 12112(a).

²⁸ 42 U.S.C. § 12112(d)(2)(A).

²⁹ 42 U.S.C. § 12112(d)(4)(A).

³⁰ See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

³¹ U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations under the ADA*, EEOC, <https://www.eeoc.gov/policy/docs/preemp.html>.

³² EEOC also uses this definition in its regulations implementing Section 501 of the Rehabilitation Act, which requires the federal government to engage in affirmative action to increase the employment rate of individuals with disabilities. 29 C.F.R. part 1614.203(d).

³³ 42 U.S.C. § 2000ff-1(b)

³⁴ 29 U.S.C. § 623(a)(1).

for employment or may otherwise indicate possible intent to discriminate based on age, contrary to the purposes of the ADEA. If the information is needed for a lawful purpose, it can be obtained after the employee is hired.”³⁵

D. Section 503 of the Rehabilitation Act

Section 503 of the Rehabilitation Act prohibits federal contractors and subcontractors from discriminating on the basis of disability and requires federal contractors to take affirmative action to recruit, hire, promote, and retain individuals with disabilities.³⁶ OFCCP issued revised regulations interpreting federal contractor requirements under this law in 2014.³⁷ While those regulations reiterate the general prohibitions on certain medical exams and inquiries contained in the ADA,³⁸ they also require contractors to invite applicants and employees to voluntarily self-identify as a person with a disability as part of the contractors’ affirmative action obligations.³⁹ Contractors are required to provide this self-identification data to OFCCP upon request of the agency.⁴⁰

E. Vietnam Era Veterans’ Readjustment Assistance Act of 1974

The Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) requires federal contractors to take affirmative action to employ protected veterans and advance them in employment.⁴¹ The categories of “protected” veterans include disabled veterans, recently separated veterans, active-duty wartime or campaign badge veterans, and armed forces service medal veterans.⁴² Federal contractors are required to collect and annually report data on the total number of these employees in their workforce, broken down by job category and hiring location, and the total number of new employees hired that fall under protected veteran status.⁴³ The data is collected from employees and applicants on a voluntary basis.

III. Best Practices for Collecting Diversity and Inclusion Information for Disability

The sections above describe the SEC’s legal authority to require disclosure of certain diversity data and existing federal law around such disclosure. As they note, the SEC has broad authority to require this collection and nothing in federal law prohibits employers from obtaining this data on a voluntary basis. The next question is what kind of data the SEC should require employers to collect and disclose.

The obvious starting point for such collection is the EEO-1 form. As discussed above, the EEOC requires companies with 100 or more employees and federal contractors to collect certain information on the composition of their workforce on the basis of gender and race/ethnicity. Many employers collect this information by asking their employees to self-identify their gender, race, and/or ethnicity. It would be easy for employers to collect information regarding employee disability status at the same time.

The SEC can look to existing diversity data collection efforts, such as that required by Section 503 of the Rehabilitation Act, for a model on how companies can best collect that information. Some might be concerned that collecting disability data might be difficult, as the social understanding of what constitutes a disability is often narrower than the term is defined under federal law. Persons might also feel

³⁵ U.S. Equal Employment Opportunity Commission, *Facts About Age Discrimination*, EEOC, <https://www.eeoc.gov/eeoc/publications/age.cfm>.

³⁶ 29 U.S.C. 793

³⁷ 41 CFR part 60-741 *et seq.*

³⁸ 41 CFR part 60-741.23

³⁹ 41 CFR part 60-741.62

⁴⁰ 41 CFR part 60-741.62

⁴¹ 38 U.S.C. 4212

⁴² 41 CFR part 61-300.10

⁴³ 41 CFR part 61-300.10

disinclined to self-identify due to social stigma. In a sample form for federal contractors (see attached), OFCCP sought to avoid those issues by broadly describing the use of the data (stressing it is voluntary and for purposes of benefiting employees with disabilities), providing a brief exemplary list of qualifying disabilities (such as blindness, deafness, cerebral palsy, cancer, depression, diabetes, immune disorders, etc.), and then limiting the actual disclosure option to: "Yes, I have a disability," "No, I don't have a disability," or "I don't wish to answer."⁴⁴ This is a model form that could be adopted by all public companies.

IV. Conclusion

The SEC is in a strong position to further diversity and inclusion efforts and provide shareholders and investors with information they need to make informed decisions by mandating that companies release certain demographic information. Federal law gives the SEC discretion to mandate this disclosure. In addition, nothing in existing federal antidiscrimination law prohibits companies from collecting this information on a voluntary basis. The EEO-1 form is the most logical starting place for this kind of disclosure, but we strongly urge the SEC to go beyond collection on gender, race, and ethnicity and add collection categories for disability status. As detailed in the best practices section, existing data collection efforts under Section 503 of the Rehabilitation Act can serve as an example of what this would look like.

⁴⁴ Department of Labor, *Voluntary Self-Identification of Disability Model Form*, https://www.dol.gov/sites/dolgov/files/OFCCP/regs/compliance/sec503/Self_ID_Forms/503Self-IDForm.pdf.

Voluntary Self-Identification of Disability

Form CC-305
Page 1 of 1

OMB Control Number 1250-0005
Expires 05/31/2023

Name: _____
Employee ID: _____
(if applicable)

Date: _____

Why are you being asked to complete this form?

We are a federal contractor or subcontractor required by law to provide equal employment opportunity to qualified people with disabilities. We are also required to measure our progress toward having at least 7% of our workforce be individuals with disabilities. To do this, we must ask applicants and employees if they have a disability or have ever had a disability. Because a person may become disabled at any time, we ask all of our employees to update their information at least every five years.

Identifying yourself as an individual with a disability is voluntary, and we hope that you will choose to do so. Your answer will be maintained confidentially and not be seen by selecting officials or anyone else involved in making personnel decisions. Completing the form will not negatively impact you in any way, regardless of whether you have self-identified in the past. For more information about this form or the equal employment obligations of federal contractors under Section 503 of the Rehabilitation Act, visit the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) website at www.dol.gov/ofccp.

How do you know if you have a disability?

You are considered to have a disability if you have a physical or mental impairment or medical condition that substantially limits a major life activity, or if you have a history or record of such an impairment or medical condition. *Disabilities include, but are not limited to:*

- Autism
- Autoimmune disorder, for example, lupus, fibromyalgia, rheumatoid arthritis, or HIV/AIDS
- Blind or low vision
- Cancer
- Cardiovascular or heart disease
- Celiac disease
- Cerebral palsy
- Deaf or hard of hearing
- Depression or anxiety
- Diabetes
- Epilepsy
- Gastrointestinal disorders, for example, Crohn's Disease, or irritable bowel syndrome
- Intellectual disability
- Missing limbs or partially missing limbs
- Nervous system condition for example, migraine headaches, Parkinson's disease, or Multiple sclerosis (MS)
- Psychiatric condition, for example, bipolar disorder, schizophrenia, PTSD, or major depression

Please check one of the boxes below:

- Yes, I Have A Disability, Or Have A History/Record Of Having A Disability
No, I Don't Have A Disability, Or A History/Record Of Having A Disability
- I Don't Wish To Answer

PUBLIC BURDEN STATEMENT: According to the Paperwork Reduction Act of 1995 no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. This survey should take about 5 minutes to complete.

For Employer Use Only

Employers may modify this section of the form as needed for recordkeeping purposes.

For example:

Job Title: _____ Date of Hire: _____