

## Overview of Design Parameters Under Federal Law to Advance a Private Society's DEI Policy

This is a high-level overview of federal nondiscrimination laws that apply to a *private* academic or professional society (Society)—as “design parameters”—if the Society wants to pursue policies that consider *individuals’* race, ethnicity, or gender when conferring opportunities and benefits to advance its mission-driven diversity, equity and inclusion (DEI) interests. More fact- and law-based nuance than can be reflected in an overview is needed to design specific DEI initiatives that would have high-impact and be legally sustainable. Consult the Society’s own lawyers when designing any such identity-conscious DEI policies. **But there is much that a Society can do to advance DEI**, including via strategies that avoid the application of these laws and still have high impact.

**1<sup>st</sup> Question:** What are the Society’s authentic DEI aims, and what actions might it take (i.e., means might it use) that avoid or satisfy federal design parameters to effectively and sustainably advance those aims?

**Action Foundations:** Establish clear and authentic DEI aims. Create an evidence base to ground decisions and allocate scarce resources for DEI initiatives, including: (1) ongoing collection of *qualitative* data on different groups’ experience of climate and culture at the Society *and* quantitative data on DEI barriers and the current and prior racial and gender composition of a Society’s functional areas to help identify priorities for focus; (2) inventorying existing and available “identity-neutral” DEI efforts; and (3) ongoing policy-driven, law-informed, analysis of DEI evidence and efforts for their impact and legal sustainability.

**DEI Aims and Subject Matter Alone Don’t Trigger Federal Law Burdens:** Private Societies may have virtually any DEI mission and related *aims* they value, and may explicitly dedicate programs to any race, ethnicity or gender *subject matter*—without intrusion of federal nondiscrimination law. It is only when the *means* to achieve those *aims* or the criteria for participating in those programs involve consideration of *individuals’* race, ethnicity or gender (i.e., are “identity conscious”) that federal law’s exacting conditions, governing both aims *and* the means used to achieve them, apply to covered private Society activities.

**“Neutral” Policies Don’t Trigger Federal Law’s Intrusion:** Federal law generally permits a Society to treat individuals differently on most bases—other than on the basis of individuals’ race, ethnicity and gender identity status—without significant probing of need or wisdom. And the Supreme Court permits court-labeled “neutral” policies that also increase compositional diversity. (See the text box below.)

**When the Federal Nondiscrimination Mandate Intrudes:** The U.S. Constitution’s Equal Protection Clause does not apply to private Societies. But, federal statutes and agency policies and contracts extend similar equal protection and opportunity principles to Societies if they receive federal funding and—whether or not they receive federal funding—when Societies act in their role as employers and when they contract. The chart below highlights key triggers for when federal nondiscrimination laws and executive orders likely apply to private Society activities.

**When a Society’s DEI Initiatives are Likely Not Subject to Federal Nondiscrimination Laws:** Does the Society (1) receive federal funding or federal contracts; (2) have 15 or more employees; or (3) consider any individual’s race or ethnicity (including as a “minority”-owned business) when contracting? If the answer to all three questions is no, the Society’s DEI initiatives likely will not be subject to federal nondiscrimination laws. Also, even if the answer is yes to (1) or (2), if the Society pursues only “neutral” means to achieve its DEI aims, its DEI policies are unlikely to trigger these laws; and there are exceptions to the laws’ prohibitions (see Appendix A).

**What private societies generally *can do*—while avoiding application of federal nondiscrimination laws:**

Federal nondiscrimination laws generally prohibit differential treatment of individuals wholly or in part due to their race, ethnicity or gender—with limited exceptions requiring (a) a *legally recognized* sufficiently substantial **aim**; (b) evidence of need to consider such individual identity status (because “*neutral*” strategies are used but are alone insufficient) as the **means** to achieving the aim; and (c) a policy **design** that is both precisely tailored (not overbroad) and effective to achieve the aim, without unduly burdening others.

**The following actions generally are permitted, without having to satisfy exacting federal nondiscrimination law standards:**

- (1) Establishing and articulating diversity, equity and inclusion *mission and aims* alone;
- (2) Collecting backward-looking data on existing or prior compositional diversity and tracking trends;<sup>1</sup>
- (3) Designing programs with explicit race/ethnicity/gender-based *subject matter* without restricting participation based on identity status (e.g., program on gender or racial equity or successes in a field); or
- (4) Conferring opportunities and benefits on individuals who meet court-labeled *neutral criteria* or taking other *neutral* action to remove barriers to individuals based on their race, ethnicity or gender.

**Neutral policies** (criteria and strategies) are those that do not—on their face or in practice:

- consider any individual’s race, ethnicity or gender when conferring opportunities or benefits;
- can be satisfied by people of all races, ethnicities and genders;
- serve an authentic Society interest other than merely increasing racial, ethnic or gender compositional diversity; but are known to also increase such diversity (due to societal experience of some groups).

Examples of neutral criteria are those that favor individuals (regardless of their own race, ethnicity or gender) based on their:

- *experience or commitment, not identity status*, such as having a record that demonstrates inclusive conduct, or expertise/knowledge or commitment relating to issues of race or gender;
- first generation and socio-economic status;
- geographical experience (not national origin);
- talents and interests.

**Targeted outreach** to build a more diverse candidate pool—as a complement to a robust general outreach effort—to assure effective communication of the same consequential information and encouragement to all potentially qualified people, including those who might not otherwise know of the opportunity or feel welcome to apply, is generally considered inclusive and neutral in effect, and should not trigger federal nondiscrimination law limitations. However, to be considered neutral, such outreach may not confer material benefits (e.g., no funding, travel/lodging, enrichment), to individuals of some races, ethnicities or genders and not others.

It is only when the **means** (strategies/policies) for achieving DEI aims include considering **individuals’** race, ethnicity or gender when conferring benefits or opportunities—and the Society activity involved is a **covered activity**—that exacting federal nondiscrimination law standards apply. When the law applies, it generally prohibits differential treatment of individuals on the basis of their race, ethnicity or gender—unless a legally recognized exception applies and its conditions are met.

**The following table highlights some typical Society activities, noting certain key factors for whether the activities are covered by federal nondiscrimination law. If the law applies, see Appendix A for an overview of the conditions that must be met to qualify for an exception to the law’s prohibitions.**

<sup>1</sup> Backward-looking data collection is permitted. It is distinguished from setting specific numerical quotas or fixed goals for the future—which the Supreme Court generally finds discriminatory when individual race-, ethnicity- and gender- conscious policies are pursued. Rarely justified exceptions may apply when, e.g., an entity is remedying its own discrimination that has present effects and evidence demonstrates that other remedial means are insufficient.

Society Role/Activity Covered & Related Law	Fed. Law Prohibits Considering an Individual's Race & Ethnicity as Criteria for Conferring Opportunities/ Benefits— <b>unless exceptions apply</b>	Fed. Law Prohibits Considering an Individual's Sex/Gender as Criteria for Conferring Opportunities/ Benefits— <b>unless exceptions apply</b>	Notes: Even if federal nondiscrimination law generally prohibits considering an individual's race/ethnicity or gender when conferring opportunities and benefits, that doesn't necessarily mean the initiative can't be pursued. Work with your lawyer to determine if the initiative can be designed to qualify for an exception.
<p><b>1. Honors and Awards</b></p>	<p>N/A to race if:</p> <ul style="list-style-type: none"> <li>* the honor/award is a privilege or gift, not contractual and not an employment right or benefit;</li> </ul> <p><b>and</b></p> <ul style="list-style-type: none"> <li>* the Society is not a recipient of federal funds for any activity.</li> </ul> <p>Otherwise, see the note at the right.</p>	<p>N/A to gender if:</p> <ul style="list-style-type: none"> <li>*the honor/award is not an employment right or benefit;</li> </ul> <p><b>and</b></p> <ul style="list-style-type: none"> <li>*the Society is not a recipient of federal funds for any education program broadly defined (including any of the following: research, professional development, training, workshops, etc., certificate program, degree program).</li> </ul> <p>Otherwise, see the note at the right.</p>	<p>Whether or not the Society is a federal funding recipient, if an honor/award or a volunteer appointment is contractual, see #5 below. If the honor/award is an employment right or benefit or if a volunteer appointment is legally classified as employment, see #3 (re: societies as employers of <math>\geq 15</math> employees) and #4 (re: societies as employers that are also federal contractors).</p> <p>If the Society is a federal funding recipient, confer with your lawyer. With limited exceptions, under the <b>Civil Rights Restoration Act of 1988 (CRR)</b>, if a Society that receives federal funds is in the “principal business” of education (though it is not a college, university or state system), or if the federal funds are provided to the Society as a whole, the CRR:</p> <ul style="list-style-type: none"> <li>(1) applies <b>Title VI</b> (prohibiting <b>race/ethnicity</b> discrimination by recipients of federal funding for <i>any activity</i>) entity-wide to <b>all</b> activities (not just to the federally funded activity); and</li> <li>(2) applies <b>Title IX</b> (prohibiting <b>gender</b> discrimination by recipients of federal funding for any broadly defined <i>education program</i>) entity-wide, at least to <b>all</b> education programs (not just to the federally funded education program). <b>All</b> activities of a Society are covered, if education is the primary business.</li> </ul>

<p><b>2. Volunteer Board Appointments</b></p>	<p>N/A to race if:</p> <ul style="list-style-type: none"> <li>* the appointment is not contractual or an employment relationship;</li> </ul> <p><b>and</b></p> <ul style="list-style-type: none"> <li>* the Society is not a recipient of federal funds for any activity.</li> </ul> <p>Otherwise, see the note under #1.</p>	<p>N/A to gender if:</p> <ul style="list-style-type: none"> <li>*the appointment is not legally classified as an employment relationship;</li> </ul> <p><b>and</b></p> <ul style="list-style-type: none"> <li>*the Society is not a recipient of federal funds for any education program broadly defined (including any of the following: research, professional development, training, workshops, etc., certificate program, degree program).</li> </ul> <p>Otherwise, see the note under #1.</p>	
<p><b>3. Employment if the Society Employs 15 or more employees</b></p> <p>The main anti- race, national origin, and sex<sup>2</sup> discrimination</p>	<p>✓ race</p>	<p>✓ gender</p>	<p>Also applies to religion. There are exceptions allowing imposition of limited <b>gender</b>-based “bona fide occupational qualification” requirements that do not perpetuate stereotypes of roles, interests, or capabilities and are justified by biological and physiological differences. No such exceptions are</p>

<sup>2</sup> Under Title VII, and likely other federal nondiscrimination laws, “sex” includes biological sex, sexual orientation, gender identity, and gender expression (gender), at least insofar as there is differential treatment of an individual for failing to conform to sex stereotypes or if a person of one biological sex is treated differently than a person of another biological sex would be treated (e.g., based on biological sex, gender identity or sexual orientation) in the same circumstances.

<p>in employment federal statute, Title VII, applies to employment applications, hiring, promotion, firing, and other terms, conditions and benefits of employment</p>			<p>justified or apply to race and ethnicity.</p> <p>There are limited exceptions for limited individual race and gender conscious action to address persistent lack of equal employment opportunity (as defined by federal law) if ongoing neutral remedial efforts fail. Design parameters apply to qualify for an exception.</p>
<p><b>4. Employment if a Society is a Federal Contractor</b></p> <p>Executive Orders and OFCCP regulations apply equal employment opportunity principles to employment entity-wide by contractors with contracts totaling &gt; \$10,000</p> <p><i>[EO 11246, as amended by EO 13672, 13665, 13279; administered by the Dept. of Labor, Office of Federal Contract Compliance Programs (OFCCP)]</i></p>	<p>✓ race</p>	<p>✓ gender</p>	<p>Also requires an annual Affirmative Action Plan (AAP) to protect and advance Equal Employment Opportunity; applies to employers with <math>\geq 50</math> employees and any single federal contract of <math>\geq \\$50K</math>.</p> <p>Requires good faith efforts to remedy presumed discrimination and underutilization, as defined in OFCCP regulations and policies—but does not authorize race- or gender- discrimination (differential treatment) as a remedy. Also prohibits religion-based discrimination.</p> <p>Also prohibits employment discrimination against:</p> <p>(1) disabled individuals if an employer has any federal contract of <math>&gt; \\$15K</math> (also an annual AAP if the employer has <math>\geq 50</math> employees and any single contract of <math>\geq \\$50K</math>) and</p> <p>(2) veterans, if an employer has a federal contract <math>\geq \\$150K</math> (also an annual AAP if the employer has <math>\geq 50</math> employees).</p>
<p><b>5. Contracts of Any Kind</b></p> <p>A federal non-race discrimination civil rights law, Section 1981, applies to making (terms, conditions, process) and enforcing all kinds of</p>	<p>✓ race</p>	<p>N/A to gender</p>	<p>May apply to arrangements imposing conditions on, e.g., publications or financial support or employment, whether or not formally called a “contract.”</p> <p>Would <b>not</b> apply to “no strings-attached” <b>grants, scholarships, and gifts</b>, and likely would not apply to <b>honors and awards</b> that are granted as a privilege and</p>

<p>contracts (including, e.g., contractual arrangements among <b>private parties</b>, <b>employment</b> contracts, and <b>publishing</b> contracts)</p> <p><i>[42 USC 1981]</i></p>			<p>not under a contractual relationship.</p>
<p><b>6. Education Programs (at least) of a Society that is a Recipient of Federal Funding for <i>any</i> Education Program</b></p> <p>The anti-sex discrimination in education federal law, Title IX, applies when federal funding or assistance is provided for any broadly defined education program, including, e.g., research, training, professional development, workshops, etc.—and degree and certificate granting programs</p>	<p>N/A to race</p>	<p>✓ gender</p>	<p>Applies to all roles and supporting functions (including program delivery and participation, employment, administration) involved in creating and delivering broadly defined education programs.</p> <p>US Dept. of Ed. (USED) regulations and enforcement apply to educational institutions and entities that receive USED funding. Other federal funding agencies’ regulations and enforcement apply to their funding recipients.</p> <p><i>The Civil Rights Restoration Act of 1988 extends application of Title IX beyond the federally funded education program at least to <b>all</b> education programs of the Society (and possibly all Society activities) entity-wide, if the funding is provided to the whole entity, and clearly extends Title IX to all activities of the Society if its principal business is education.</i></p>
<p><b>7. All Activities of a Society that is a Recipient of Federal Funding for <i>Any</i> Purpose</b></p> <p>The anti- race and national origin discrimination federal law, Title VI applies when federal funding or assistance is provided for <i>any</i> activities.</p>	<p>✓ race</p>	<p>N/A to gender</p>	<p>US Dept. of Ed. (USED) regulations and enforcement apply to education institutions and recipients of USED funds; other federal funding agencies’ regulations and enforcement apply to other recipients. Employment is covered if funds are provided for that purpose.</p> <p><i>The Civil Rights Restoration Act of 1988 extends application beyond the funded program to all activities of the Society if its principal business is education or the funding is provided to the whole entity.</i></p>

## Appendix A

### Exceptions to the Federal Nondiscrimination Mandate—and Related Conditions to Qualify for Them

When federal law applies to a Society's activities, the law allows limited exceptions to its nondiscrimination mandate—provided that rigorously applied, exacting legal conditions are satisfied. The exceptions *permit (but do not require)* limited consideration of an individual's race, ethnicity or gender when conferring opportunities and benefits if three requirements of "strict scrutiny" for race and ethnicity or "intermediate or heightened scrutiny" for gender are met:<sup>3</sup>

(1) **There must be a legally recognized aim of sufficient importance and measurability** as a justification. Such an aim may not perpetuate stereotyping. *Seeking to reflect in a Society's workforce or educational activities the same representation of individuals of a race, ethnicity or gender as exists in the general population is not a justification.* Establishing a quota, fixed numerical goal, or cap/allocation based on these identities is prohibited (except for rare, typically court-ordered or approved, remedies to an entity's own intentional discrimination with present effects, e.g., desegregation orders).

(2) **There must be evidence that any individual race, ethnicity, or gender identity-conscious means (initiatives, policies) are necessary and precisely tailored (not overbroad) to achieve the legally sufficient aims.** Evidence must show that court-labeled neutral strategies alone are inadequate to achieve the aims (which data often can demonstrate in education settings), and that identity-conscious means are not unduly burdensome on others. If a person's race and gender are considered (a woman of color), the need to consider each identity must be evaluated.

(3) **There must be ongoing, periodic review of aims and means** to assure that race, ethnicity and gender of individuals are not considered more or for a longer period than is justified by evidence.

**Different Aims in Education and Employment Justify Exceptions:** While a Society may have a strong interest in DEI in its research/education and employment programs, the legal regimes that govern the design of employment programs and education programs are different, requiring different *aims* to justify race-, ethnicity- and gender- conscious *means*, as follows:

- **For employment, the aims must be remedial:** affirmative action to remedy an employer's own presumed or actual discrimination or failure to provide equal opportunity ("underutilization" or "manifest imbalance") on the basis of race, ethnicity or gender, defined as substantial disparities under federal law and as reflected in the Society/federal contractor's annually updated Affirmative Action Plan.<sup>4</sup> Race-, ethnicity- or gender- conscious affirmative action remedies are rarely permitted: only when need can be proven by a persistent and substantial, legally recognized disparity—after ongoing neutral means are pursued—and where there is not an undue burden on others. Identity-consciousness is not justified in layoff decisions because courts

---

<sup>3</sup> There is a theoretical (but often hard to discern in practice) distinction in importance of aims, degree of evidence and precision of tailoring of means to aims that are required for race vs. gender.

<sup>4</sup> A comparison is made between (1) the representation of a racial, ethnic or gender group in the Society's own relevant workforce (a category of position, at a seniority level, in one or a cluster of related disciplines or areas of expertise that share a recruitment market) and (2) that group's representation in the available and qualified labor pool from which the Society could recruit for the position. If the representation of the group in the Society's relevant workforce is less than 80% of its representation in the available and qualified recruitment pool, there is a legally and OFCCP-recognized "underutilization" which is likely similar to what courts call a manifest imbalance under Title VII. If the disparity is 2 or more standard deviations, presumed discrimination exists. **The problem with federal employment law's measure of discrimination and underutilization, as applied to STEMM fields, is that where representation is poor in the labor pool for relevant disciplines, similarly poor representation in those disciplines at the Society would not provide a remedial justification for race-, ethnicity- or gender-conscious affirmative action.**

have determined that substantial individual vested rights would be affected.

- For education programs of *degree-granting educational institutions*, the aims must be the **universally beneficial educational experiences and outcomes for all students that are associated with broad student body diversity** (including but not defined by racial and gender diversity). This diversity interest is not “affirmative action” to remedy race and gender inequity. Positive diversity-associated experiences for **all** students is the aim. Demographics are relevant only to create a setting where positive diversity-associated experiences can occur. Adequacy of demographics is measured, not by a numerical goal, but in relation to the student experience.

*It is unclear whether or how this rationale would apply to a Society’s federally funded education/research programs. The Supreme Court hasn’t considered that context or considered Societies’ diversity interests for sufficiency. Remedying an entity’s own discrimination with present effects is a rarely used or successful justification.*

- **A stepped approach to pursuit of DEI efforts is important**—with emphasis on inclusive barrier removal and outreach efforts and neutral criteria being required to justify any limited consideration of individuals’ race, ethnicity or gender.

**Legal Landscape and Conclusion:** Importantly, neutral barrier removal and strategies may be pursued to advance diversity *and* equity interests, even when a legal justification for considering individuals’ race, ethnicity and gender is lacking. They may be particularly important for employment in many STEM fields, where the paucity of people of color and women in the available qualified recruitment pool and a similar paucity (on a percentage basis) in a Society’s relevant workforce result in there being no remedial justification for race- and gender- conscious affirmative action under the federal employment law. (See footnote 4 for the applicable measure of a remedial justification.) Serious attention to neutral barrier removal and strategies is not only required by law as part of building an evidence base in employment and education contexts to justify pursuit of any race-, ethnicity- and gender- conscious diversity strategies; neutral barrier removal and strategies can be significant contributors to positive policy goals.

The legal landscape now and for the foreseeable future is challenging, with a Supreme Court that has become increasingly hostile to identity-consciousness, and active anti-DEI activists that are pursuing litigation and administrative agency claims. Societies have not been the focus of these actions; and while legal principles do apply across the board, there is little guidance on how the law applies in the Society context.

One thing is clear: this is a time for strong commitment and wise action. In the current legal landscape, Societies are well-advised to confer with their own lawyers to assess their legal risk tolerance in relation to rewards when designing specific DEI initiatives. In this balance, the sweetest spot is occupied by strategies that are effective in advancing DEI goals (have high reward) without triggering the exacting standards of federal nondiscrimination laws (pose low risk). Keep in mind these key considerations:

- (1) fealty to existing legal design parameters for consideration of race, ethnicity or gender of individuals minimizes the risk of intrusive federal agency enforcement and of lawsuits that bring bad facts to an unsympathetic court and result in worse, more limiting law; and
- (2) whether the Society has made an evidence-based evaluation of the extent to which neutral strategies would advance its DEI aims, before it considers race-, ethnicity- and gender-conscious strategies, and is using neutral strategies with positive impact as much as possible (even if limited individual race-, ethnicity, and gender-conscious strategies are also needed).