

# AMERICAN BANKER

**Conservative Court's Ruling is an Omen About DEI Under Trump**

**American Banker**

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**December 13, 2024**

[\[Link\]](#)

The backlash to diversity initiatives in corporate America was well underway prior to the Nov. 5 election. But Donald Trump's presidential victory seems likely to provide additional momentum for conservative groups fighting a movement that started to take off late in the first Trump administration.

A ruling by a narrowly divided federal appeals court this week may offer a preview of what's ahead for the push for greater diversity, equity and inclusion in corporate America. The 5th Circuit Court of Appeals [struck down a Nasdaq rule](#) that would have required companies listed on the stock exchange to make disclosures about the race, gender and sexual orientation of their board members.

"Nasdaq described the Board Diversity Proposal to impose 'aspirational diversity objectives.' And corporations that do not meet those objectives must explain why they failed," Judge Andrew Oldham wrote in the majority opinion. "That is not a disclosure requirement. That is a public-shaming penalty for a corporation's failure to abide by the Government's diversity requirements."

Nasdaq is a self-regulatory organization, not a government agency, but its rule was approved by the Securities and Exchange Commission. Conservative groups sued the SEC, and the appeals court found that the agency should not have approved the Nasdaq rule because the rule could not be squared with the Securities Exchange Act of 1934.

The decision has a couple of near-term consequences for banks. First, many bank stocks are traded on Nasdaq, and the ruling means that those companies won't have to make the mandated disclosures about the demographics of their directors. Banks and other publicly traded companies will still have to make other disclosures about their directors, including their ages and qualifications.

Nasdaq said in a written statement that while its rule simplified and standardized disclosure requirements, benefiting both companies and investors, it respects the court's decision and doesn't intend to seek further review.

An SEC spokesperson said the agency is reviewing the decision and "will determine next steps as appropriate." But the SEC will have new leadership early next year under the Trump administration, which would seem to make an appeal unlikely.

"When an agency like the SEC is so repeatedly & thoroughly embarrassed in federal court for flouting the law, it loses its legitimacy as a law enforcement body," said [Vivek Ramaswamy](#), who is co-heading Trump's so-called Department of Government Efficiency with Elon Musk, in a post on the social platform X.

The ruling's second short-term impact on banks stems from the role some of them play as investment managers that seek out information about publicly traded companies. During the court proceedings, Nasdaq pointed to evidence that large investment management firms such as Goldman Sachs view information about the composition of corporate boards as valuable but hard to acquire.

Corporate DEI initiatives expanded in the wake of George Floyd's murder in 2020, and the 5th Circuit's decision appears to be a harbinger that those efforts will be on a rockier path during the second Trump administration.

"The court's decision here is not only correct on the law, but also consistent with the will of the American people, who are sick and tired of seeing their government engage in divisive identity politics," Stefan Padfield, executive director of the conservative Free Enterprise Project, [told USA Today](#). The National Center for Public Policy Research, which was one of the plaintiffs in the lawsuit, runs the Free Enterprise Project.

Stephen Hall, legal director at the financial reform advocacy group Better Markets, called the ruling a "terrible setback" for transparency.

"A rapidly growing number of investors, including the largest investment managers in the world, are demanding information about the composition of corporate boards, and specifically their level of racial and gender diversity," Hall said in a press release. "That information helps investors make decisions about which companies to support with their capital."

**Michael Gold, co-chair of the corporate practice at the law firm Saul Ewing, said the appeals court's ruling will likely fuel cynicism about how the courts operate. He pointed out that a [three-judge panel on the 5th Circuit](#) — comprised entirely of judges appointed by Democratic presidents — had upheld the Nasdaq rule in an earlier ruling. That ruling was appealed to the entire 5th Circuit, where a majority of the judges were appointed by Republican presidents.**

**The 5th Circuit voted earlier this year to hear the case, and then the appeals court struck down the Nasdaq rule by a one-vote margin.**

**"I would just say it's kind of a prime example of why so many people think the courts are controlled by politics, rather than by law," Gold said.**

In a dissenting opinion, Judge Stephen Higginson wrote that the role Congress prescribed for the SEC doesn't allow the agency to displace Nasdaq's private business judgment with the SEC's own policy priorities, and that the agency therefore had no choice but to approve the board diversity rule.

"Congress created a unique, limited role for the SEC that didn't permit it to reach a different conclusion here, regardless of whatever good faith disagreement might exist in policy debates about disclosure of corporate board leadership composition," Higginson wrote.