

SEC APPROVES NASDAQ'S BOARD DIVERSITY RULE

AUGUST 2021

On August 6, 2021, the SEC issued an order approving the Nasdaq's proposed rule requiring that each listed company have certain levels of board diversity or explain why it does not (the "Board Diversity Rule").

The Board Diversity Rule will require each Nasdaq-listed company, subject to certain exceptions, to have, or explain why it does not have, at least two members of its board of directors who are "Diverse," including at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+. The new rule also requires each Nasdaq-listed company, subject to certain exceptions, to publicly disclose in an aggregated form, to the extent permitted by applicable law, information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board of directors. See Appendix A to this Client Alert for the required format for this disclosure.

For this purpose:

- "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.
- "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.
- "Underrepresented Minority" means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.
- "Two or More Races or Ethnicities" means a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander.

On August 6, 2021, Nasdaq published "Nasdaq's Board Diversity Rule: What Nasdaq-listed Companies Should Know" to guide companies in complying with the new diversity rule.

Nasdaq-listed companies will have a transition period to meet the diversity objectives or explain their reasons for not doing so, and the timeframe is based on a company's listing tier:

- Nasdaq Global Select Market or Nasdaq Global Market companies are required to have, or explain why they do not have, one diverse director by August 7, 2023, and two diverse directors by August 6, 2025.
- Nasdaq Capital Market companies are required to have, or explain why they do not have, one diverse director by August 7, 2023 and two diverse directors by August 6, 2026.
- Companies with boards that have five or fewer directors, regardless of listing tier, are required to have, or explain why they do not have, one diverse director by August 7, 2023.

Despite the phased compliance dates, companies listed on the Nasdaq who do not currently have diverse boards should start now to identify and appoint or elect diverse directors to satisfy the requirements of the new rules in order to avoid the adverse disclosure about their lack of board diversity. Nasdaq-listed companies should also determine how the prescribed board diversity matrix will affect their proxy statement disclosures. We do not mean to suggest that companies should be motivated only by the disclosure requirements. Many studies indicate that companies with more diverse boards tend to perform better.

The Board Diversity Rule is not without controversy: The SEC approved it on a 3-2 party-line vote. Commissioner Hester Peirce set forth her objections to the new diversity disclosure rule in her “Statement on the Commission’s Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity submitted by the Nasdaq Stock Market LLC.”

The Board Diversity Rule will likely be challenged in court on various grounds, including violations of the U.S. Constitution and the Civil Rights Act of 1964 and that the Nasdaq failed to show that the proposal is consistent with the Securities Exchange Act’s affirmative criteria enumerated in Section 6(b)(5). Nonetheless, companies in general – not just Nasdaq-listed companies – should recognize that the diversity rule is part of a larger push by industry players – including state governments, large institutional investors, pension funds, and proxy advisors, like ISS and Glass Lewis – for more diverse boards.

ADDITIONAL INFORMATION

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Appendix A

5606. Board Diversity Disclosure

(a) Each Company must annually disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified characteristics in a substantially similar format below. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

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