

SEC Approves New Nasdaq Rules Covering Board Diversity Disclosures

August 12, 2021

On Friday, August 6, 2021, the U.S. Securities and Exchange Commission (SEC) issued an order (the “Order”) approving certain rule changes proposed by The Nasdaq Stock Market LLC (“Nasdaq”), which will require companies listed on Nasdaq, subject to certain exceptions, to satisfy minimum targets for gender and ethnic diversity on their boards, or to explain in their public disclosures why they are unable to meet those targets. The Order approves a set of rule changes proposed by Nasdaq (the “Diversity Proposal”) in December 2020, which we described in a previous post when such rule changes were proposed.

Diversity Disclosure Requirements

Specifically, the Diversity Proposal, which was amended earlier this year in response to certain comments submitted to the SEC, requires each Nasdaq-listed company, subject to certain exceptions, to (i) provide, to the extent permitted by applicable law, statistical information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the members of a company’s board of directors and (ii) have, or explain why the company does not have, at least two “diverse” directors on its board (including at least one director who is female and one director who is an underrepresented minority or is LGBTQ+). If a company elects the disclosure option over satisfying the Diversity Proposal’s requirements, then such disclosure must be provided in advance of such company’s next annual meeting of shareholders (“Annual Meeting”) and should be included (i) in a proxy or informational statement (or in its Form 10-K or Form 20-F, if it does not file a proxy statement) or (ii) on its website. For purposes of the Diversity Proposal, “diverse” means a director who self-identifies as a female, an underrepresented minority (e.g., a director who is African American, Hispanic, Asian, Native American or two or more ethnicities) or LGBTQ+.

The Diversity Proposal includes certain compliance exceptions. For instance, a company with five or fewer members serving on its board of directors will need to have (or explain why it does not have) at least one board member who is diverse. Foreign issuers and smaller reporting companies (as defined in Rule 12b-2) will be required to have (or explain why it does not have) at least two diverse directors. In the case of a smaller reporting company, at least one diverse director must be someone who self-identifies as a female, with the second director permitted to be a female, an

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underrepresented minority or an LGBTQ+ individual. Special-purpose acquisition companies (SPACs) are exempt from complying with the Diversity Proposal's requirements until such time as a SPAC has consummated its business combination. Subsequent to the business combination, the listed entity must satisfy, or explain why it does not satisfy, the applicable requirements under the Diversity Proposal.

The Diversity Proposal contemplates that Nasdaq-listed companies use a "Board Diversity Matrix" for purposes of satisfying these disclosure obligations. The matrix must disclose (i) the total number of directors, (ii) the number of directors who self-identify as male, female or non-binary, (iii) the number of directors based on race and ethnicity, disaggregated by gender, and (iv) the number of directors who identify as LGBTQ+. In each case, a company's matrix must disclose the number of directors who elected not to provide the company with demographic information. The matrix is meant to be disclosed at least annually and included (i) in such company's proxy or informational statement (or Form 10-K or 20-F, if it does not file a proxy statement) or (ii) on its website. Pursuant to the Order, this disclosure requirement (including publishing the matrix) must be satisfied upon the later of (i) August 8, 2022,¹ and (ii) date on which a company files its proxy statement for its 2022 Annual Meeting.

Transition Timeframes and Phase-In Periods

The diversity requirements themselves will be phased in over time. Specifically:

- All Nasdaq-listed companies (including companies with smaller boards) will be required to have at least one diverse director by the later of (i) August 7, 2023,² and (ii) the date on which the company files its proxy statement for its 2023 Annual Meeting.
- Companies that are listed pursuant to Nasdaq Global Select Market (NGS) or Nasdaq Global Market (NGM) criteria will be required to have at least two diverse directors by the later of (i) August 6, 2025 (i.e., the fourth anniversary of the Order), and (ii) the date on which an NGS or NGM company files its proxy statement for its 2025 Annual Meeting.
- Companies that are listed pursuant to Nasdaq Capital Market (NCM) criteria must have at least two diverse directors by the later of (i) August 6, 2026 (i.e., the fifth anniversary of the Order), and (ii) the date on which an NCM company files its proxy statement for its 2026 Annual Meeting.

For purposes of the foregoing, companies that do not file proxy or informational statements may satisfy their disclosure obligations using Form 10-K or 20-F.

The Diversity Proposal contemplates that NGS or NGM companies will have one year (measured from the later of (i) the company's listing date and (ii) the date on which a company files its proxy statement for its first Annual Meeting after listing) to have at least one diverse director; and two years (measured from the later of (i) two years after the company's listing date and (ii) the date on which a company files its proxy statement for its second Annual Meeting after listing) to have at least two diverse directors. NCM companies must have two diverse directors by the later of (i) the second anniversary of listing and (ii) the date on which it files its proxy statement for its second Annual Meeting. Companies with smaller boards will have two years to have at least one diverse director.

In connection with issuing the Order, Chair Gensler stated that “these rules will allow investors to gain a better understanding of Nasdaq-listed companies’ approach to board diversity, while ensuring that those companies have the flexibility to make decisions that best serve their shareholders.”

As approved, Nasdaq’s rule-change also provides eligible Nasdaq-listed companies with complimentary access to a board recruiting service, which the Nasdaq indicates would provide such companies with “access to a network of board-ready diverse candidates for companies to identify and evaluate.”

Commissioner Roisman voted in support of Nasdaq making recruiting services available to listed companies as they seek to diversify their board rooms; however, he voted against the disclosure-related portions of the Diversity Proposal. Commissioner Peirce voted against the Diversity Proposal in its entirety.

Akin Gump [submitted a letter to the SEC](#) strongly supporting the Diversity Proposal and the firm’s letter is cited several times in the Order. Kerry Berchem, co-leader of the firm’s environmental, social and governance (ESG) and Corporate Governance & Shareholder Activism practice groups, acknowledged the importance of the Order, stating that “Akin Gump strongly supported the Nasdaq diversity proposal because we believe it represents a common sense approach to encouraging corporate boards to embrace principles of diversity and inclusion that have been articulated for many years, but which haven’t found sustained support until the #metoo and Black Lives Matter movements made ignoring these principles untenable. We look forward to working with our clients to implement this new policy.”

¹ The first anniversary of the Order will be August 6, 2022; however, that day is a Saturday. Therefore, consistent with applicable rules, the compliance date for this requirement will be the next regularly occurring business day on which the markets are open for trading (i.e., August 8, 2022).

² August 6, 2023, is a Sunday. Therefore, the compliance date for this requirement will be the next regularly occurring business day on which markets are open for trading (i.e., August 7, 2023).

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