
LEGAL UPDATES AND NEWS

Nasdaq Proposes Board Diversity Rules for Nasdaq-Listed Companies

Recently, Nasdaq filed a proposal with the Securities and Exchange Commission (the “SEC”) to adopt new listing rules related to board diversity requirements and disclosure. If approved by the SEC, the new rules would require Nasdaq-listed companies to publicly disclose diversity statistics regarding their board of directors. Additionally, the rules would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors.

Nasdaq’s stated goal with the proposed requirements is to provide stakeholders with a better understanding of a company’s board composition and enhance investor confidence that Nasdaq-listed companies are considering diversity with their selection of directors, either by including two diverse directors or explaining their rationale for not meeting the requirement.

The SEC normally has 45 days from the date that notice of the proposed rules is published in the Federal Registrar to approve or disapprove the proposed rules. If the proposed rules are approved by the SEC, disclosure of board diversity statistics would be required within one year of the SEC’s approval of the proposed rules. As proposed, the timeframe to meet the proposed minimum board composition requirements, or provide a public explanation of the reasons for not meeting the requirement, would be two years from the SEC approval date (the “Approval Date”) for the first diversity director and a range of dates thereafter, based on a company’s listing tier, for the second diversity director.

Disclosure of Board Diversity Statistics

The proposed rules would require Nasdaq-listed companies to provide statistical information about each director’s gender, race, and LGBTQ+ status. Following the first year of disclosure, companies would be required to disclose the current year and immediately prior year diversity statistics.

Each company listed on Nasdaq prior to the Approval Date would have one year from the Approval Date to comply with the board diversity disclosure requirement. Each company newly listing on Nasdaq after the Approval Date would be required to comply with the board diversity requirement within one year of listing

Minimum Board Diversity Requirement

The proposed rules would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors, including one female and one who is either from an underrepresented minority (defined as 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) or LGBTQ+. However, companies that file with the SEC as smaller reporting companies would also be able to satisfy the minimum board diversity requirement by having two female directors. As proposed, the diversity requirements would only be satisfied by directors who are actually sitting on the board of directors of the company, not emeritus directors, retired directors or members of advisory boards.

Nasdaq-listed companies would have two years from the Approval Date to have one diverse director. Further, Nasdaq proposes for each company to have, or explain why it does not have, two diverse directors no later than: (i) four years after the Approval Date, for companies listed on the Nasdaq Global Select or Nasdaq Global Market; or (ii) five years after the Approval Date, for companies listed on the Nasdaq Capital Market.

Minimum Board Diversity Requirement Phase-In Period for Newly Listed Companies

Any company newly listing on Nasdaq would be permitted one year from the date of listing to satisfy the minimum board diversity requirement, as long as the company was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange. This phase-in period would apply after the end of the transition periods described in the above paragraph for the minimum board diversity requirement. For companies that list after the Approval Date, but prior to the end of the transition periods set forth in the above paragraph, they would be required to satisfy the minimum board diversity requirement by the later of the applicable transition period or one year from the date of listing.

Disclosure of Diversity Statistics and Board Makeup

The proposed rules would require that both the board diversity matrix and minimum board diversity disclosure be provided in a company's annual meeting proxy statement or on the company's website. If the disclosure were to be on the company's website, the company would be required to submit such disclosure, and include a URL link to the disclosure, through the Nasdaq Listing Center no later than 15 days after the company's annual meeting.

Timing

The SEC has until January 25, 2021 (45 days from the date that the notice of the proposed rules was published in the Federal Registrar) to approve or disapprove the proposed rules. However, this review period can be extended by up to 45 days (90 days in total) if the SEC determines an extension is necessary and can be extended by an even longer period of time with Nasdaq's consent.

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Please contact any of our attorneys below if you have any questions regarding the information contained in this newsletter.

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