LEGAL UPDATES AND NEWS

SEC Approves Nasdaq's Board Diversity Rules for Nasdaq-Listed Companies

On August 6, 2021, the Securities and Exchange Commission (the "SEC") approved Nasdaq's new listing rules related to board diversity requirements and disclosure. The new rules require Nasdaq-listed companies to publicly disclose diversity statistics regarding their board of directors. Additionally, the rules require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors (including at least one director who self-identifies as a female and at least one director who self-identifies as a member of an underrepresented community, as defined below). Nasdaq has stated that it will not evaluate the substance or merits of a company's explanation as to why it does not meet the diversity objectives. It will merely verify that an explanation has been provided.

Nasdaq's stated goal with the new 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 as part of their deliberations concerning directors, either by including two diverse directors or explaining their rationale for not meeting the requirement.

Nasdaq's rule-change also provides eligible Nasdaq-listed companies with initial complimentary access to a board recruiting service, which Nasdaq indicates would provide such companies with "access to a network of board-ready diverse candidates for companies to identify and evaluate."

Disclosure of Board Diversity Statistics

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

The board diversity matrix should be presented in substantially the same format as shown below:

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	#	#	#	#

The rules allow for aggregated information and companies may designate any director who does not wish to disclose a particular gender, race or sexual orientation as “undisclosed” in the diversity matrix.

Each company listed on Nasdaq prior to August 6, 2021 has until the later of August 8, 2022 or the date the company files its proxy statement for its annual meeting in calendar year 2022 to comply with the board diversity disclosure requirement. Each company newly listing on Nasdaq after August 6, 2021 must comply with the board diversity requirement within one year of listing.

Minimum Board Diversity Requirement

The new rules require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors, including one director who self-identifies as female and one who self-identifies as 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+ (defined as lesbian, gay, bisexual, transgender or a member of the queer community). However, a board with five or fewer directors will only need to have, or explain why they do not have, at least one diverse director. Additionally, companies that file with the SEC as smaller reporting companies are also able to satisfy the minimum board diversity requirement by having two directors who self-identify as female. These diversity requirements can only be satisfied by directors who actually sit on the board of directors of the company, not emeritus directors, retired directors or advisory directors.

The new rules provide for gradual compliance for the diversity composition requirement for a company listed with Nasdaq on or before August 6, 2021, whereby they must have at least one diverse director by an earlier date and full compliance at a later date. The period for achieving compliance with the number of diverse directors depends on the company's tier:

Nasdaq Exchange Tier	**Period to Initially Comply (One Diverse Director)**	**Period to Fully Comply (Two Diverse Directors)**
Nasdaq Global Select Market or Nasdaq Global Market	The later of August 7, 2023 or the date its files its proxy statement for its annual meeting in calendar year 2023	The later of August 6, 2025 or the date the company files its proxy statement for its annual meeting in calendar year 2025
Nasdaq Capital Market	The later of August 7, 2023 or the date its files its proxy statement for its annual meeting in calendar year 2023	The later of August 6, 2026 or the date the company files its proxy statement for its annual meeting in calendar year 2026

The rules take a similar approach in phasing-in compliance for a company newly listing with Nasdaq after August 6, 2021 depending on tier:

Newly-Listed Company Exchange Tier	**Period to Initially Comply (One Diverse Director)**	**Period to Fully Comply (Two Diverse Directors)**
Nasdaq Global Select Market or Nasdaq Global Market	The later of one year from the date of listing or the date of filing its proxy or information statement for its first annual meeting following listing	The later of two years from the date of listing or the date of filing its proxy or information statement for its second annual meeting following listing
Nasdaq Capital Market	Not applicable	The later of two years from the date of listing or the date of filing its proxy or information statement for its second annual meeting following listing

This new listing "phase-in" period will apply to companies listing in connection with an initial public offering, a direct listing or a transfer from another exchange or the over-the-counter market.

If a company fails to meet the minimum board diversity requirements, it will have until the later of its next annual meeting or 180 days from the event causing the deficiency to achieve compliance. A company that ceases to maintain compliance with the board diversity requirements due to a board vacancy, will have until the later of: one year from the date of vacancy; or the date it files its proxy statement in the calendar year following the year of the vacancy to have the requisite number of diverse directors or explain the deficiency. A company that relies on this grace period should disclose such reliance in advance of its next annual meeting in its proxy statement or on its website.

<u>Disclosure of Diversity Statistics and Board Makeup</u>

Both the board diversity matrix and the minimum board diversity disclosure must be provided in a company's annual meeting proxy statement or on its website. If the disclosure is provided on the company's website, the company must submit such disclosure, and include a URL link to the disclosure, through the Nasdaq Listing Center within one business day after such posting.

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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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