

SEC Approves Anticipated Nasdaq Board Diversity Rules

Background

On August 6, 2021, the Securities and Exchange Commission (SEC) approved Nasdaq's board diversity rules. The rules include "diversity objectives" that require Nasdaq-listed companies to either have or explain why they do not have at least two diverse directors. The diversity objectives provide that companies must have at least one woman director and one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+. Under the rules, companies are also now required to annually disclose their board diversity statistics using a prescriptive matrix, referred to as the "board diversity matrix." A company's repeated failure to comply with the rules would subject the company to delisting. In an effort to help companies comply with the rules, Nasdaq will offer listed companies access to a board recruitment service.

Approval of the rules comes after the initial proposal by Nasdaq on December 1, 2020. This initial proposal was revised on February 26, 2021, to: (1) ease the requirement on companies with five or fewer board members (these companies are only required to have or explain the absence of a single diverse board member); (2) allow newly listed companies additional time to achieve compliance; and (3) provide a grace period to regain compliance for companies that fail to maintain compliance due to a board vacancy. The rules also provide flexibility for foreign issuers and smaller reporting companies, both of which may satisfy the diversity objectives by having two female directors. SPACs are exempt from the diversity objectives until their business combinations.

Compliance Timeframes

Nasdaq has updated its guidance with respect to the rules and the timeline for compliance and provided FAQs.

Diversity Objectives Disclosure

Nasdaq-listed companies will have a transition period to meet the diversity objectives or explain why they do not meet such objectives:

- Nasdaq Global Select Market and 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 of 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.

A company must meet the diversity objectives or explain why it has not met the objectives, by the **later** of the applicable compliance date described above or the date of filing of the company's proxy or information statement for the company's annual shareholders meeting for the calendar year of the applicable compliance date. This would mean that, for calendar year-end companies, compliance would be required no later than the date on which the company files its proxy or information statement for its annual meeting in 2023 and 2025, as applicable. If a company does not file a proxy or information statement, then it must meet the diversity objectives, or provide the reason why it does not, by the filing date of its Form 10-K or Form 20-F of that same year.

Board Diversity Matrix Disclosure



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Related Practice Areas

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Nasdaq-listed companies have until the **later** of August 8, 2022, or the date the company files its proxy or information statement for the company's annual shareholder meeting during 2022, to publicly disclose board-level diversity data using the **matrix** substantially in the format described in the rules. Instead of providing this disclosure in its proxy or information statement, a company may elect to provide the disclosure on its website concurrently with the proxy or information statement.

Practical Implications

Nasdaq-listed companies that do not currently have the requisite diverse directors and have not already begun the process of recruiting diverse directors should quickly do so in order to comply with the new rules in a timely fashion.

Nasdaq-listed companies must also plan to include the board diversity matrix in future proxy and information statements. Of particular note, calendar year-end companies must provide the matrix in their proxy or information statements for their 2022 annual meeting of shareholders. Accordingly, companies must quickly consider how to obtain self-identifying diversity status of directors for the matrix, such as including self-identification questions in their annual director and officer questionnaires or interviewing directors to obtain this information.
