Published on *The National Law Review* https://natlawreview.com

SEC Approves Nasdaq's Board Diversity Disclosure Requirements

Article By:

Matthew S. Brown

Farzad F. Damania

Brian Hecht

Lawrence D. Levin

Mark J. Reyes

Alyse A. Sagalchik

On August 6, the Securities and Exchange Commission (SEC) approved Nasdaq listing rules implementing new board diversity disclosure requirements that will apply to most Nasdaq-listed companies (the Board Diversity Rules). The Board Diversity Rules will generally require Nasdaq-listed companies to:

- have, or publicly disclose why they do not have, at least two diverse directors (including at least one self-identified female director and at least one director who self-identifies as an "underrepresented minority" or LGBTQ+, each as defined below); and
- publicly disclose board diversity statistics using a standardized format on an annual basis.

As described in this advisory, the Board Diversity Rules have deferred compliance dates and transition periods. The Board Diversity Rules also provide flexibility and compliance alternatives for certain companies, including companies with five or fewer directors, foreign issuers and smaller reporting companies. While the Board Diversity Rules specifically carve out registered closed-end funds and special purpose acquisition companies (SPACs), the rules are applicable to business development companies (BDCs).

Background

The Board Diversity Rules follow various initiatives that aim to address corporate diversity. For example, the state of California has adopted legislation that requires publicly traded companies headquartered in California to have board members from underrepresented communities, as well as to have a minimum number of female directors depending on board size. Proxy advisory firms, institutional investors and investment banks also have developed policies that generally support increased board diversity. For example, Goldman Sachs has announced that it will only underwrite initial public offerings in the United States and Europe if a company has multiple diverse candidates for board seats.

Nasdaq filed its original proposal with the SEC on December 1, 2020, and subsequently amended the proposal on February 26, 2021 to add compliance flexibility for smaller boards and allow for a lengthier compliance period for newly listed companies. The SEC approved the Board Diversity Rules as proposed.

Rule 5605(f): Diverse Board Representation

New Rule 5605(f) requires Nasdaq-listed companies to have, or publicly disclose why they do not have, at least two diverse directors, including:

- at least one self-identified female director; and
- at least one director who self-identifies as an "underrepresented minority" or as LGBTQ+.

For this purpose, the Board Diversity Rules include the following definitions:

- "Female" means an individual who self-identifies 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" (meaning a person who self-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).

Notably, Nasdaq provided some compliance flexibility for certain types of issuers:

- Companies with five or fewer directors will only be required to have one diverse director (or publicly disclose the absence of a diverse director), and are permitted to add a single diverse director to a five-person board without automatically becoming subject to the general requirement to have at least two diverse directors (so long as the company did not have any diverse directors before it expanded its board).
- Smaller reporting companies, as defined in SEC rules, can satisfy Rule 5605(f) with two female directors, or with one female director and one director who is an underrepresented minority or LGBTQ+.

Foreign private issuers, as defined in SEC rules, can satisfy Rule 5605(f) with two female directors, or with one female director and one director who is an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices, or LGBTQ+.

Disclosure Requirements

A company that elects to meet the diverse board requirements outlined above is not required to disclose compliance. If a company elects not to meet the diverse board requirements outlined above, it can instead: (1) disclose the specific requirements of the Board Diversity Rules that are applicable; and (2) explain the reasons why it does not comply with those requirements. This disclosure must be provided in any proxy statement or information statement that the company files, or can alternatively be provided on the company's website so long as the company posts the disclosure concurrently with its annual proxy statement or information statement filing.

Compliance Period Phase-In

The compliance period for Rule 5605(f) is phased and varies depending upon which tier of Nasdaq a company is listed, as follows:

Currently Listed Companies		
Nasdaq Tier	*Initial Compliance: One Diverse Director*	*Full Compliance: Two Diver Directors*
Nasdaq Global/Global Select Market	Later of (i) August 7, 2023 or (ii) the filing date of the company's proxy statement for its 2023 annual meeting	Later of (i) August 7, 2025 o filing date of the company's statement for its 2025 annu
Nasdaq Capital Market	Later of (i) August 7, 2023 or (ii) the filing date of the company's proxy statement for its 2023 annual meeting	Later of (i) August 7, 2026 o filing date of the company's statement for its 2026 annu
Newly Listed Companies		
Nasdaq Tier	*Initial Compliance: One Diverse Director*	*Full Compliance: Two Diver Directors*
Nasdaq Global/Global Select Market	Later of (i) one year from listing or (ii) the filing date of the Company's proxy statement for its first annual meeting following listing	Later of (i) two years from lis the filing date of the Compa statement for its second ann meeting following listing
Nasdaq Capital Market	N/A	Later of (i) two years from lis the filing date of the Compa statement for its second ann meeting following listing

The transition period outlined above for newly listed companies applies to any company that lists on Nasdaq and that 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, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with a SPAC.

Cure Period

A company that falls out of compliance with Rule 5605(f) will be required to achieve compliance by the later of (1) its next annual meeting; or (2) 180 days from the event causing the deficiency. However, if the compliance failure arises from a board vacancy, the company will be required to achieve compliance by the later of (1) one year from the date of vacancy; or (2) the filing date of its proxy statement for its annual meeting in the calendar year following the year of the vacancy.

Rule 5606: Board Diversity Disclosure

In addition to the disclosure requirements in Rule 5605(f) described above, new Rule 5606(a) requires Nasdaq-listed companies to publicly disclose board diversity statistics on an annual basis in a standardized format, as follows:

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

Foreign issuers will be permitted to provide a modified matrix that includes information about the issuer's home jurisdiction and is tailored to the applicable requirements of the Board Diversity Rules.

Board Diversity Matrix Compliance Deadline

A company is required to provide its initial board diversity matrix by the later of (1) August 8, 2022; or (2) the filing date of its proxy statement for its 2022 annual meeting. Following the first year of applicability, companies will be required to include in the matrix information for the current year and the immediately preceding year.

Exempt Entities

Entities exempt from compliance with the Board Diversity Rules include: SPACs (prior to a business combination); asset-backed issuers and other passive issuers; cooperatives; limited partnerships; management investment companies; and issuers whose only securities listed on Nasdaq are non-voting preferred securities, debt securities, derivative securities and certain other securities listed under Nasdaq's Rule 5700 Series (which include, but are not limited to: non-convertible debt securities, exchange-traded fund (ETF) shares, equity and commodity index-linked securities, paired class shares and index warrants).

Nasdaq exempts "management investment companies" from certain of its corporate governance listing rules, including the Board Diversity Rules, based on the premise that funds "registered under the Investment Company Act of 1940 (1940 Act) are already subject to a pervasive system of federal regulation in certain areas of corporate governance." The current Nasdaq definition of "management investment companies" excludes BDCs because BDCs are not registered under the 1940 Act, even though BDCs are generally subject to all of the same corporate governance regulation under the 1940 Act as registered investment companies. Due to this distinction, Nasdaq-listed BDCs will be required to comply with the Board Diversity Rules, unlike their registered open- and closed-end fund counterparts.

Board Recruiting Services

The SEC also approved the implementation of board recruiting services that will provide certain Nasdaq-listed companies with access to a network of board-ready diverse candidates for consideration and evaluation.

Conclusion

In preparation to comply with the Board Diversity Rules, Nasdaq-listed companies to which these rules apply should consider:

- identifying diverse candidates for vacant and/or additional board seats;
- developing disclosure controls and procedures and other compliance policies surrounding the collection and disclosure of board diversity information in advance of the 2022 proxy season; and
- updating nominating and corporate governance committee charters and policies to specifically include diversity as defined under Nasdaq's Board Diversity Rules as a factor to consider in identifying and evaluating director candidates.

The full text of the SEC approval order is available here, and the full text of the Board Diversity Rules is available here (see Sections 5605 and 5606).

Vlad Bulkin, Timothy Kirby, Jeffrey Patt and Jennifer Howard also contributed to this article.

©2025 Katten Muchin Rosenman LLP

National Law Review, Volume XI, Number 228

Source URL:https://natlawreview.com/article/sec-approves-nasdaq-s-board-diversity-disclosure-

requirements