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SEC approves Nasdaq's board diversity rules

On August 6 the SEC approved the Nasdaq Stock Market's proposal to amend its listing rules to require operating companies listed on its U.S. exchanges to provide annual disclosures about the diversity of their board membership.

The new rules require listed companies, beginning in 2022, to disclose each year specified board-level diversity data in a uniform format in their annual proxy or information statement or on their website. In addition, after a more extended phase-in period, companies must either meet the exchange's board diversity "objectives" as set forth in the rules or, if they do not, explain why. The rules define diversity in terms of gender identity, race and ethnicity, and LGBTQ+ identity, as self-identified by board members. Listed foreign issuers may elect to comply with alternative requirements modified to accommodate their different diversity considerations and restrictions under home country law.

Nasdaq underscores that the new rules enact a "disclosure-based framework" for board diversity, rather than establish a mandate that boards achieve particular diversity levels. Accordingly, under Nasdaq's "comply-or-explain" governance approach, a company explaining why it does not meet the applicable diversity objective will not face delisting or other Nasdaq sanctions.

Companies will first be required to disclose board-level diversity data in accordance with new Rule 5606 (Board Diversity Disclosure) in 2022, generally by August 8, 2022. Nasdaq has provided for a two- to five-year phase-in period for initial compliance with new Rule 5605(f) (Diverse Board Representation), under which most Nasdaq-listed companies will be required by August 6, 2025 (or August 6, 2026 in the case of Nasdaq Capital Market companies) either to have, or explain why they do not have, at least *two* diverse directors. Such companies

will be required to have, or explain why they do not have, at least *one* diverse director by August 7, 2023. Calendar-year companies planning to provide board-level diversity data in their proxy or information statement (instead of posting the data on their website) will need to collect the information by early next year so it can be included in the 2022 filing.

On August 6 the SEC also approved Nasdaq's board recruitment service proposal, which will provide eligible companies with a one-year complimentary recruitment service to facilitate their recruitment of diverse board candidates.

Nasdaq's proposal, in the form it was most recently amended and approved by the SEC, is available [here](#). The SEC's order approving the rule changes can be read [here](#).

Nasdaq disclosure approach

The new rules incorporate several noteworthy features that will govern disclosures about board diversity:

- **Scope:** The rules measure diversity in terms of gender identity, race and ethnicity, and LGBTQ+ identity. To qualify as "Diverse" under the rules, a director must self-identify as "Female," as an "Underrepresented Minority," or as "LGBTQ+," as these terms are defined in the rules and discussed below. Companies may consider and report additional diversity attributes, such as nationality, disability, or veteran status, but directors with those attributes alone will not be considered diverse for purposes of Nasdaq's board diversity objectives, and information about such attributes may not be included in the Nasdaq-created matrix for disclosure of board-level diversity data.
- **Self-identification:** The disclosure of diversity data and status will rest on self-identification by board members in a category considered as diverse under the rules. If a director does not

self-identify in one of those categories, a company will not be able to treat the director as diverse for purposes of the required disclosures.

- **Aggregation:** To protect privacy interests of board members, companies must present the diversity data primarily on a board-level – or aggregated – basis. Some commenters on the proposed rules expressed concern that in certain cases it may be possible to reverse-engineer aggregated data to identify diverse board members.
- **Comparability:** The new rules are intended to provide investors with access to consistent and comparable diversity data across the population of Nasdaq-listed companies. To ensure consistency and comparability, Nasdaq will require companies to present their board diversity statistics in a uniform format.

Although these requirements will circumscribe the presentation of board-level diversity data and discussion of director diversity tied to the rules, companies will be free to supplement those disclosures with additional information.

Mandatory annual disclosure of board-level diversity data (Nasdaq Rule 5606)

Under new Rule 5606 (Board Diversity Disclosure), operating companies listed on Nasdaq’s U.S. exchanges, and not expressly exempted from the new requirements by operation of Rule 5605(f)(4), will be required to disclose annually board-level diversity data in accordance with the requirements described below.

Format of disclosure. To provide consistent and comparable data, companies must use Nasdaq’s “board diversity matrix” set forth in the rule (available [here](#)) or a “substantially similar” uniform format. The disclosure must be captioned “Board Diversity Matrix” and specify the date as of which the company compiled the diversity data. The information in the matrix must be included in a searchable format. As discussed in the following section, listed foreign issuers may elect to disclose their data in an alternative Nasdaq-created diversity matrix. Nasdaq observes that such companies may be prohibited under their home country law from requesting directors to provide information about the diversity attributes identified in the U.S. company matrix, and the diversity categories based on race and ethnicity in that matrix may be of limited relevance to them.

Companies wishing to provide additional information about board diversity may not “substantially alter” the board diversity matrix to do so, but instead may present the information supplementally below the matrix or in a separate table. For example, a company wishing to disclose information regarding directors who are disabled or have veteran status could do so as part of its overall diversity discussion, but may not edit the matrix to add those categories. Similarly, a company may choose to disclose supplemental information regarding other self-identified ethnic categories the company considers relevant to its diversity policies, such as Middle Eastern or North African (which fall within the White category under the rule), but may not modify the matrix to add such a category.

Content of disclosure. Rule 5606 provides instructions on how to complete the disclosure.

- **Presentation:** In Part I of the board diversity matrix, companies will be required to disclose under a Gender Identity heading the total number of directors who self-identify as Female, male, and Non-Binary, as well as the number who did not disclose their gender information. In this context, the “Female” and “male” designations are based on gender self-identification as a woman or man, respectively, without regard to the individual’s designated sex at birth. The term “Non-Binary” is used to refer to genders that are not solely man or women. The rule specifies that someone who is non-binary may have more than one gender, no gender, or a gender not in relation to the gender binary.

U.S. companies also will be required to disclose diversity data based on race and ethnicity under a “Demographic Background” heading in Part II of the matrix. This presentation will disclose the total number of directors in each gender category (if disclosed) who self-identify as African American or Black, Alaska Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities, as those terms are defined in the rule and discussed below.

“Foreign issuers” – which Nasdaq defines for purposes of the rules to include “foreign private issuers” as defined in Exchange Act Rule 3b-4(c) and companies considered “foreign issuers” under Exchange Act Rule 3b-4(b) which have principal executive offices located outside the United States – may use a different,

designated matrix to disclose diversity data based on race and ethnicity, and show instead the number of directors who self-identify as an “Underrepresented Individual in Home Country Jurisdiction.” The matrix includes a space for a foreign issuer to indicate if it is prohibited under home country law from disclosing diversity information specified in the rule. A foreign issuer subject to such a prohibition will not be required to provide the prohibited information.

For both U.S. companies and foreign issuers, the Demographic Background section also requires disclosure of the number of directors who self-identify as LGBTQ+, as well as the number of directors who did not disclose their gender, or their racial and ethnic or LGBTQ+ identity. Unlike the racial and ethnic data, which for U.S. companies will be broken down by gender category (potentially enabling the responses of individual directors to be identifiable), the LGBTQ+ information will be provided solely on an aggregated basis to address privacy concerns.

- *Demographic terms:* The Demographic Background section of the board matrix uses the categories of demographic attributes defined below. Nasdaq indicates that the categories based on race and ethnicity in the U.S. company matrix reflect categories used by the U.S. Equal Employment Opportunity Commission (EEOC) and are to be construed in the same manner. The exchange also explains that the definition of “LGBTQ+” is largely based on the category contained in California’s board diversity law. Rule 5605(f)(1) and the instructions to the matrix define the demographic terms and LGBTQ+ as follows:
 - *Black or African American* (not of Hispanic or Latinx origin): A person having origins in any of the Black racial groups of Africa
 - *Native American or Alaska Native:* A person having origins in any of the original peoples of North and South America (including Central America), and who maintain cultural identification through tribal affiliation or community recognition
 - *Asian:* A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam

- *Hispanic or Latinx:* A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. The term Latinx applies broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e
- *Native Hawaiian or Pacific Islander:* A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands
- *White* (not of Hispanic or Latinx origin): A person having origins in any of the original peoples of Europe, the Middle East, or North Africa
- *Two or More Races or Ethnicities:* A person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Native American or Alaska Native, Asian, Hispanic or Latinx, or Native Hawaiian or Pacific Islander
- *Underrepresented Individual in Home Country Jurisdiction:* A person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Foreign Issuer’s principal executive offices (as reported on the Foreign Issuer’s Form F-1, 10-K, 20-F, or 40-F)
- *LGBTQ+:* A person who identifies as any of the following: lesbian, gay, bisexual, transgender or as a member of the queer community

Self-identification by directors. Disclosure by directors will be voluntary, and directors will not be required to self-identify with respect to gender identity, race and ethnicity, or LGBTQ+ identity. As noted above, the board matrix primarily reflects aggregated information and allows a company to indicate in the matrix that diversity information was not disclosed by one or more directors. Companies with such disclosure would be in compliance with the requirement that they disclose board-level data, but any directors not providing such information would not qualify as diverse under the rules with respect to any non-disclosed categories, since they would not have self-identified in such categories. With respect to directors who *do* self-identify, Nasdaq indicates that companies have no duty to evaluate independently whether the self-identification is reasonable.

Frequency of disclosure. After the phase-in period, companies will be required to disclose board diversity data once each year. For the first year in which a company is required to disclose such data, it will be required to publish the data for the current year only. Thereafter, the company will be required to publish its data for the current year and the immediately prior year. If, within the same year, a company changes its board composition after it publishes its diversity matrix, the company may publish its updated information, but will not be required to do so.

Location of disclosure. Under Rule 5606(b), companies must provide the board diversity matrix (a) in their proxy or information statement for their annual shareholder meeting (or if they do not make such a filing, in their Form 10-K or 20-F report) or (b) on their website. If a company elects to provide such disclosure on its website, it must publish the disclosure concurrently with its proxy or information statement (or if it does not make such a filing, its Form 10-K or 20-F report) and submit a URL link to the disclosure through the Nasdaq Listing Center within one business day after the posting. Companies choosing the website option will be required to post their initial disclosure by August 8, 2022 if they filed their 2022 proxy or information statement before that date.

Initial compliance date. A currently listed company must comply with these requirements by the later of August 8, 2022 or the date during 2022 on which the company files its proxy or information statement for its annual shareholder meeting (or if it does not make such a filing, the date on which the company files its Form 10-K or 20-F report). As discussed below, a newly listed company must comply with these requirements within one year of listing.

Comply-or-explain rule on director diversity objectives (Nasdaq Rule 5605(f))

New Rule 5605(f) (Diverse Board Representation) specifies director diversity objectives for listed companies. A listed company may comply with the rule either by meeting the applicable diversity objective specified in Rule 5605(f)(2) or by explaining in accordance with Rule 5605(f)(3) why it has not done so.

Board diversity objectives. The rule establishes numerical objectives for directors that qualify as diverse. Most listed companies will be required, following the phase-in periods described below, to have at least two diverse directors, including one director who self-identifies as Female and one director who self-identifies as either an Underrepresented Minority or as LGBTQ+, or explain why they do not.

Rule 5605(f) articulates the following framework for the diversity determination:

- **Qualification as Diverse:** A director will qualify as “Diverse” under the rule if the director self-identifies in one or more of the following categories: Female; Underrepresented Minority (or, with respect to a foreign issuer, Underrepresented Individual in Home Country Jurisdiction, defined as described above); or LGBTQ+.
 - *Female* means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.
 - *Underrepresented Minority* means an individual who self-identifies as one or more of Black or African American, Native American or Alaska Native, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities (as such terms are defined as described above).
 - Nasdaq clarifies that a director who self-identifies as Non-Binary with respect to gender identity will not be considered diverse based solely on such self-identification. The exchange also indicates that a director self-identifying in Two or More Races or Ethnicities also must self-identify in each applicable category.
- **Covered board members:** Only persons serving as members of the company’s board of directors can qualify as diverse directors under the rule. The company may not count the diversity of its emeritus directors, retired directors, or advisory board members to meet the diversity objective.
- **Explanation for not meeting diverse director objective.** A listed company will not fail to comply with Rule 5605(f) simply because it has not met the applicable board diversity objective specified in Rule 5605(f)(2). The company may elect to comply with the rule by explaining in accordance with Rule 5605(f)(3) why it does not

have the specified number of diverse directors. The explanation must satisfy several requirements set forth in the rule and discussed in Nasdaq's SEC submission.

- *Content:* The company must (a) specify the diversity objective in Rule 5605(f)(2) applicable to it (to inform investors unfamiliar with the rule) and (b) explain the reasons why it does not meet the objective (e.g., why it does not have at least two diverse directors).
- *Timing and location:* The company must provide the explanation before its next annual meeting of shareholders (a) in any proxy or information statement (or, if the company does not make such a filing, in its Form 10-K or 20-F report) or (b) on the company's website. If the company provides the explanation on its website, it must submit the disclosure concurrently with the foregoing filing and submit a URL link to the disclosure through the Nasdaq Listing Center within one business day after the posting.
- *Nasdaq review:* Nasdaq indicates that its review of the company's explanation will be limited to confirming that the explanation conforms to the requirements of Rule 5605(f)(3). In particular, Nasdaq states that it "will not evaluate the substance or merits" of the explanation. Although Nasdaq will afford companies latitude in framing the explanation, the exchange emphasizes that the disclosure must explain the *reasons* for why the company does not have the applicable number of diverse directors, and that it would not be sufficient merely to state that "the Company does not comply with the Nasdaq diversity rule."
- *Compliant disclosure:* Nasdaq's submitted a letter to the SEC during the proposal process that offers examples of explanations the exchange would find sufficient under Rule 5605(f)(3). According to this guidance, a "company can choose to disclose as much, or as little, insight into the company's circumstances or diversity philosophy as the company determines." Nasdaq indicates that a company would be in compliance with Rule 5605(f)(3) if it explains that it does not meet the diversity objective because:
 - "it does not believe Nasdaq's listing rule is appropriate"; or

- "it does not believe achieving Nasdaq's diversity objectives [is] feasible given the company's current circumstances"; or
- the company's nominating committee "considers a variety of professional, industry, and personal backgrounds and skill sets to provide the Board with the appropriate talent, skills, and expertise to oversee the Company's business" or "is committed to ensuring that the Board's composition appropriately reflects the current and anticipated needs of the Board and the company."

Nasdaq notes in its proposal that if a company does not meet the applicable board diversity objective, it may consider attributes of diversity that do not fall within the definition of "Diverse" and discuss those attributes of its board members as part of the statement it provides under Rule 5605(f)(3).

Grace period following director departures.

Under Rule 5605(f)(6), a company that meets the applicable diversity objective but later ceases to meet it because of a board vacancy resulting from a director resignation or other event will have a grace period to satisfy Rule 5605(f)(2) or (f)(3). The period will extend until the later of one year following the date of the vacancy or the date on which the company files its proxy or information statement (or if the company does not make such a filing, the date on which it files its Form 10-K or 20-F report) in the year following the year in which the vacancy occurred. A company in this situation may publicly disclose that it is relying on the grace period, instead of explaining why it does not meet the board diversity objective.

Diversity objectives and phase-in periods. In recognition of the differences in resources and board composition among listed companies that could affect their compliance with the new requirements, Rule 5605(f) specifies diversity objectives and phase-in periods for initial compliance that vary across different types of companies.

Phase-in-periods based on Nasdaq listing tier.

The rule provides for a phase-in period based on a company's listing tier before the companies are first required to meet the diversity objectives or explain their reasons for not doing so.

- *Global Select Market and Global Market:* A company listed on the Nasdaq Global Select Market or the Nasdaq Global Market is required to have at least (a) one diverse director by August 7, 2023 (or at that time explain why the company does not have one such director) and (b) two diverse directors, including one who self-identifies as Female and one who self-identifies as either an Underrepresented Minority or LGBTQ+, by August 6, 2025 (or at that time explain why the company does not have two such directors).
- *Capital Market:* A company listed on the Nasdaq Capital Market is required to have at least (a) one diverse director by August 7, 2023 (or at that time explain why the company does not have one such director) and (b) two diverse directors, including one who self-identifies as Female and one who self-identifies as either an Underrepresented Minority or LGBTQ+, by August 6, 2026 (or at that time explain why the company does not have two such directors).

In each case the compliance dates may be deferred until the company files its proxy or information statement for the annual shareholder meeting during the applicable year (or if it does not make such a filing, its Form 10-K or 20-F report).

Diversity objectives based on board size or company classification. For certain listed companies, the diversity objectives are based on other criteria and without reference to listing tier.

- *Companies with five or fewer directors:* A company with five or fewer directors, regardless of listing tier, is required to have at least one diverse director, who may self-identify as Female, an Underrepresented Minority, or LGBTQ+, by August 7, 2023 (or at that time explain why the company does not have one diverse director). Such a company is not required to have at least two diverse directors (or to explain why it does not). If a company has five directors, none of whom is diverse, and adds a new, diverse director, the company will remain subject to the objective of one diverse board member unless it further expands the board beyond such sixth member.
- *Smaller reporting companies:* A company qualifying as a “smaller reporting company” under SEC rules – generally a company with (a) a public float of less than US\$250 million or (b) annual revenue of less than US\$100 million and either no

public float or a public float of less than US\$700 million) – may satisfy the diversity objective by having at least two directors who self-identify as Female (instead of one director who self-identifies as Female and one who self-identifies as LGBTQ+ or an Underrepresented Minority). A company will be considered a smaller reporting company for purposes of the rule regardless of whether it applies the SEC’s scaled disclosure requirements available to smaller reporting companies.

- *Foreign issuers:* A foreign issuer may satisfy the minimum diversity objective by including on its board at least two directors who self-identify as Female, or by including at least one director who self-identifies as Female and one who self-identifies as LGBTQ+ or as an Underrepresented Individual in Home Country Jurisdiction.

Phase-in periods for newly listed companies. Newly listed companies will have a two-year phase-in period, dependent on their listing tier.

For purposes of Rule 5605(f), newly listed companies include companies listing on Nasdaq in connection with an initial public offering, a direct listing, a transfer from another exchange or over-the-counter market, a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with a special purpose acquisition company (SPAC) that in each case were not previously subject to a substantially similar requirement of another exchange.

- *Newly listing on Global Select Market or Global Market:* A company newly listing on the Nasdaq Global Select Market or the Nasdaq Global Market is required to have (or explain why it does not have) at least (a) one diverse director by one year after the listing date, or, if later, the date on which the company files its proxy or information statement for the company’s first annual shareholder meeting following listing (or if it does not make such a filing, its Form 10-K or 20-F report) and (b) two diverse directors by two years after the listing date or, if later, the date on which the company files its proxy or information statement for the company’s second annual shareholder meeting following listing (or if it does not make such a filing, its Form 10-K or 20-F report).
- *Newly listing on Capital Market:* A company newly listing on the Nasdaq Capital Market is required to have (or explain why it does not have)

at least two diverse directors by two years after the listing date or, if later, the date on which the company files its proxy or information statement for the company's second annual shareholder meeting following listing (or if it does not make such a filing, its Form 10-K or 20-F report).

A newly listed company that lists after August 6, 2021 but before the applicable initial compliance date for a *currently listed* company, as set forth above, has until the later of (a) the applicable compliance date for a currently listed company or (2) the applicable compliance date for a newly listed company to comply with the rule. As a result, a newly listed company will not be required to comply with the rule before a currently listed company, notwithstanding the two-year phase-in period otherwise applicable to newly listed companies.

Compliance dates for companies ceasing to be a foreign issuer, smaller reporting company, or exempt company. Any company that ceases to qualify as a foreign issuer, a smaller reporting company, or an exempt company will not be required to comply with the requirements of Rule 5605(f) until one year after the date on which the company's status changes, or, if later, the date on which the company files its proxy or information statement for the company's first annual shareholder meeting following the status changes (or if it does not make such a filing, its Form 10-K or 20-F report).

Companies exempt from new rules

Pursuant to Rule 5605(f)(4), Nasdaq has exempted the types of companies listed below from the application of its board diversity rules. Nasdaq notes that these companies do not have boards or, if they do, their security holders "do not expect to have a say in the composition of their boards" because the companies are not operating entities, do not list equity securities, or list securities not having the right to vote for the election of directors. The exempted companies consist of the following:

- acquisition companies;
- asset-backed issuers and other passive issuers;
- cooperatives;
- limited partnerships;
- management investment companies;
- issuers of non-voting preferred securities, debt securities, and derivative securities that do not have equity securities listed on Nasdaq; and

- issuers of securities under Nasdaq's Rule 5700 series (such as exchange-traded funds).

Listing consequences for non-compliance with new rules

If a company fails to provide the board diversity matrix under Rule 5606, Nasdaq will notify the company that it is not in compliance with a listing requirement. In such an event, the company will be allowed 45 calendar days to submit a plan sufficient to satisfy the Nasdaq staff that the company is taking measures to regain compliance, in accordance with amended Rule 5810(c)(2). If the company does not then regain compliance (typically within 180 days), it will receive a staff delisting determination letter, which may be appealed through Nasdaq's hearings panel process.

If a company (that is not relying on the grace period provided by Rule 5605(f)(6) in connection with a board vacancy, as described above) fails to meet the applicable diversity objective specified in Rule 5605(f)(2) and fails to provide an explanation for why the applicable objective has not been met as required by Rule 5605(f)(3), Nasdaq will notify the company promptly. In accordance with amended Rule 5810(c)(3), the company will have until the later of its next annual meeting of shareholders or 180 days from the date of the event that caused the deficiency to cure the deficiency. If it does not cure the deficiency within that period, it will receive a staff delisting determination letter, which may be appealed through Nasdaq's hearings panel process.

Looking ahead

Nasdaq's board diversity rules represent a significant new development in listed-company governance, but one that has been the subject of sharply divergent views.

The SEC approved the rules over the dissenting votes of two Commission members. The statements supporting and opposing approval issued by the Commissioners upon publication of the SEC's order touched on the principal themes expressed by commenters on the proposed rules. The statements in support of the order issued by SEC Chair Gensler and Commissioners Lee and Crenshaw echoed Nasdaq's contention that the new disclosures, by providing consistent and comparable data on board diversity, would improve the quality of information available to investors in making investment and voting decisions. This conclusion was contested by dissenting Commissioners Peirce and Roisman, who objected

that Nasdaq had failed to make its case on the value of the diversity disclosures to investors and to show that its proposal was consistent with the enumerated purposes of the Exchange Act by which the SEC was statutorily obligated to evaluate the proposal.

Although Nasdaq eschewed a mandate requiring board diversity among its listed companies, the exchange believes that its disclosure-based framework will “encourage” some companies to increase the number of diverse directors. It would not be surprising if Nasdaq’s Diverse Board Representation rule has this effect on board composition. The comply-or-explain regulatory technique deployed in the rule – which the SEC uses in administering some of its own corporate governance rules – has a record of influencing corporate conduct to favor compliance over the publication of disclosure that may be unfavorably received by stakeholders. Accordingly, for many listed companies, preparation for compliance with Nasdaq’s new disclosure requirements can be expected to form only part of a wide-ranging review of current policies and potential future initiatives on board diversity.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

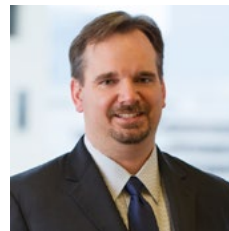
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