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# Nasdaq Proposes Board Diversity Listing Requirements

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Securities and Capital Markets

On December 1, 2020, the Nasdaq Stock Market LLC ("Nasdaq") submitted a proposal (the "Proposal") to the Securities and Exchange Commission (the "SEC") to amend its listing standards to require, subject to certain exceptions, new disclosures regarding director diversity. If adopted, the Proposal would require the board of a Nasdaq-listed company to have at least one female director and one diverse director and report data on board diversity. The Proposal is subject to review by the SEC, including a public comment process.

## 1 Trend Toward Diverse Boards

There has been increasing focus on board of director diversity over the past several years. In 2018, California enacted a law mandating publicly held corporations with principal executive offices located in the state to have at least one female board member.[1] That law has recently been expanded to require such corporations also to include a member of an underrepresented community.[2] Also, the staff of the SEC's Division of Corporation Finance (the "Staff") has issued a Compliance & Disclosure Interpretation suggesting that under Item 401(e)(1) of Regulation S-K a company should disclose in its proxy statement or annual report self-identified diversity characteristics of directors.[3] In addition, proxy advisory firms and institutional investors continue to encourage board diversity through their voting guidelines, and some investment banks have refused to participate in initial public offerings of companies without diverse directors.[4]

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[1] Colorado has enacted a law encouraging, but not requiring, mandatory minimum numbers of diverse directors, and Maryland, Illinois, and Washington have enacted laws imposing disclosure requirements regarding board of director diversity (in Washington's case, the disclosure is required in lieu of compliance with a requirement to have at least 25% of a board comprised of persons self-identifying as women). Other states are considering adopting similar measures.

[2] See our client alert here for additional information.

[3] SEC Regulation S-K Compliance & Disclosure Interpretations, Question 116.11.

[4] See our client alert here for additional information on ISS's 2021 benchmark policy updates. In particular, under the ISS updates, ISS research reports will highlight Russell 3000 or S&P 1500 companies with no apparent racial or ethnic diversity on their boards. Also, effective with annual meetings in 2022, ISS will generally recommend voting against or withholding a vote from, the chair of the nominating committee, or other directors on a case-by-case basis, where the board has no apparent racially or ethnically diverse members. Glass Lewis currently recommends voting against a nominating committee chair where the board does not have a female director; beginning in 2022, this voting policy will be based upon a requirement that a board have at least two female directors. Glass Lewis will also assess the quality of a company's proxy statement disclosure relating to board diversity, skills and the director nomination process.

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## The Proposal

The Proposal would require a board of directors of a Nasdaq-listed company to have at least one director who self-identifies as female and at least 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 LGBTQ+ (a "diverse" director). Smaller reporting companies and companies that had that status in the past year would have flexibility to either comply with this aspect of the Proposal, or, alternatively, to comply by having two directors who self-identify as female. Foreign issuers would be able to comply with the Proposal in a manner similar to smaller reporting companies, that is, by having two directors who self-identify as female if they cannot meet the general requirement of one female and one diverse director.[5] Additionally, the standard for a diverse director for a foreign issuer may be based on diversity classifications of the issuer's home country jurisdiction.

The Proposal has a phase-in period under which a company would have two years to have at least one female or diverse director and four years to have both a female and a diverse director (or five years for companies listed on the Nasdaq Capital Market). A public company not previously subject to a substantially similar requirement of another national securities exchange (such as a company that conducts an initial public offering or a direct listing or is switching listing from The New York Stock Exchange) would have one year to satisfy these requirements.

The Proposal would also require a Nasdaq-listed company to disclose annually the diversity characteristics of its board members, starting with the first year after effectiveness of the Proposal, and, in future years, for the current year and the year prior to that year. This diversity data may be provided in the company's annual meeting proxy statement or on its website. The Proposal includes a suggested presentation format for the data, but a company may instead present the information in a substantially similar way. The suggested presentation is a table with entries for specified diverse groups, for which a company would provide a tabulation.

Foreign issuers, although subject to the same presentation requirements as domestic issuers, are permitted, instead of disclosing diversity characteristics for individual directors, to indicate a total number of directors who are part of an underrepresented community in that country. The Proposal also acknowledges that collection of information relating to director diversity by foreign companies may conflict with laws in foreign jurisdictions. In those instances, a company would be required to disclose in its proxy statement or on its website this reason for not providing the diversity disclosure required by the Proposal.

Any company with a board that does not comply with the board diversity requirement would need to explain the reasons for this noncompliance. However, Nasdaq indicated in the Proposal that it would only look to confirm that the company has provided an explanation and would not evaluate the substance of such explanation.[6] Nasdaq says that failure to comply with the Proposal could lead to delisting. A company that does not comply would have to cure the

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[5] The Proposal defines a foreign issuer as either: (i) a foreign private issuer; or (ii) an issuer that (1) is a "foreign issuer" under Exchange Act Rule 3b-4 and (2) has its principal executive office located outside the United States.

[6] The proposal was accompanied by several new FAQs related to the Proposal on the Nasdaq website, one of which, #1771, provides examples of reasons that might be submitted to explain the failure to satisfy the minimum diverse director requirement.

deficiency by the later of its next annual meeting and 180 days from the event that caused the deficiency.

The Proposal exempts acquisition companies, asset-backed issuers and other passive issuers, cooperatives, management investment companies, issuers of solely non-voting preferred securities, debt securities and derivative securities, and issuers of securities under Nasdaq's Rule 5700 series (such an exchange-traded funds).

## 3 Looking Forward

It has been reported that Nasdaq acknowledges that most of its listed companies would not meet the proposed listing standards were they adopted today. The Proposal notes that in 2019, women held 19% and racial minorities held 10% of director positions at Russell 3000 companies. Additionally, the Proposal states that fewer than 20 persons who self-identified as LGBTQ+ served on the boards of Fortune 500 companies in 2018.

Nasdaq announced that it will partner with Equilar to help Nasdaq-listed companies identify and recruit diverse directors by facilitating access to Equilar's diversity network.

If approved, we expect that Nasdaq's requirements could set the groundwork for similar listing standards to be adopted by other national securities exchanges as well as, potentially, new disclosure requirements by the SEC.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Securities and Capital Markets practice:


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