August 9, 2021

SEC Approves Nasdaq Board Diversity Requirements

On Friday, August 6, 2021, the SEC approved Nasdaq's board diversity requirements.[1] As a result:

- by August 8, 2022, or the date of the company's proxy/information statement for its 2022 annual meeting (if later), each Nasdaq listed company will need to provide statistical disclosures regarding the self-identified diversity characteristics of its board members in a prescribed board diversity matrix format (which is based on the matrix currently required in the EEO-1 report by the Equal Employment Opportunity Commission);

- by August 7, 2023, or the date of the company's proxy/information statement for its 2023 annual meeting (if later), each Nasdaq listed company will need to have at least one director who self-identifies as diverse, meaning they self-identify as female or as an "Underrepresented Minority" (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+), or to alternatively explain why the company does not meet this board diversity objective; and

- by August 6, 2025, or the date of the company's proxy/information statement for its 2025 annual meeting (if later), each Nasdaq Global Select and Global Markets listed company[2] will need to have at least two directors who self-identify as diverse, including at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority, or alternatively to explain why the company does not meet these board diversity objectives.

These listing requirements also apply to non-U.S. issuers (including foreign private issuers) and smaller-reporting companies, though they will be permitted to satisfy the board diversity objectives with two directors who self-identify as female, and, in the case of non-U.S. issuers, will have more flexibility to identify appropriate and applicable diversity categories reflective of the demography of their principal jurisdictions. Companies with small boards (five or fewer directors) will only need one director who self-identifies as diverse to meet the board diversity objectives.

This is a significant step by a U.S. stock exchange, and likely the first of more ESG-related rules to come, as the SEC itself has indicated its intent to take up board diversity rulemaking in the next year. Private ordering has already made significant strides to advance board diversity and related disclosure, particularly among larger public companies. Institutional investors and proxy advisory firms have been pushing for diversity on boards and related disclosure for several years, and boards have been responsive, adding both female and other underrepresented populations to their membership. Thus, while Nasdaq companies may need to revise the format of their diversity disclosure, many already have done significant work to meet these board diversity objectives or have met them. Along with the above rulemaking, Nasdaq has been approved to offer one-year's free board recruiting services through its partnership with Equilar to help advance diversity at companies that do not meet these new requirements.

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[1] The Nasdaq proposal adopted by the SEC is available here. Nasdaq's guidance on the implementation of these rules is available here.

[2] Nasdaq Capital Markets listed companies have an additional year to meet these board diversity objectives.

How are companies to make these diversity disclosures?

To improve the consistency and comparability of statistical board diversity disclosures, Nasdaq will require companies to use a provided matrix for the disclosure (see Annex A, Form of Board Diversity Disclosure Matrix, and Annex B, Form of Board Diversity Disclosure Matrix for Foreign Issuers) and ensure that it is searchable. Companies may not substantially alter the matrix, but may supplement the disclosure with additional information related to their directors (for example, information on a director-by-director basis or additional information on additional diversity categories, skills, experience and attributes of each of the directors). After the first year, companies will need to present the board diversity disclosure matrix for both the current and immediately prior year.

If a company meets the applicable board diversity objectives, no further disclosure is required. If a company is not in compliance with the applicable board diversity requirements, it must then include a statement (i) specifying the applicable requirements and (ii) explaining why it has not complied with them.

The explanatory statement and statistical diversity disclosures must be presented together, either in the company's annual meeting proxy or information statements, Annual Report on Form 10-K or Form 20-F (if it does not file proxy or information statements) or on its website. If a company elects to post the disclosure on its website, it will also need to submit the disclosures, with a URL, to the Nasdaq Listing Center within one business day after its posting.

What happens if a company no longer meets the board diversity objectives?

A company that no longer meets the applicable board diversity objectives due to a vacancy on its board (for example, if a director resigns or dies) will have until the later of (i) one year from the date of the vacancy or (ii) the date the company files its proxy statement or its information statement (or, if it does not file a proxy or information statement, its Form 10-K or 20-F) for its annual meeting of shareholders in the calendar year *after* the year in which the vacancy occurs, to satisfy the applicable board diversity objectives. During this period, the company can publicly disclose that it is relying on the grace period, instead of explaining why it does not meet the board diversity objectives.

What happens if a company fails to include the required disclosures?

If a company fails to provide the required diversity disclosures (either the board diversity disclosure matrix or an explanatory statement regarding any failure to meet board diversity objectives), Nasdaq will notify the company of its noncompliance. Companies will have 45 days to submit a plan to Nasdaq to regain compliance, after which Nasdaq can allow the company up to 180 days to regain compliance. If a company then fails to regain compliance, Nasdaq will issue a Staff Delisting Determination.

Are non-U.S. issuers subject to these requirements?

Even though non-U.S. issuers are generally permitted to follow home country corporate governance practices in lieu of Nasdaq-mandated corporate governance rules, "foreign issuers"[3] are subject to these listing requirements. Because some foreign issuers may have offices in jurisdictions that limit or prohibit self-identification questionnaires (particularly on these grounds), and because the definition of "Underrepresented Minority" may vary depending on local demographics, Nasdaq has offered foreign issuers some flexibility in their compliance. Specifically, foreign issuers may:

- use a different disclosure matrix (see Annex B, Form of Board Diversity Disclosure Matrix for Foreign Issuers) reflecting the total number of directors on the board and any voluntary diversity self-identification offered by directors;

- provide and use an alternate definition of Underrepresented Minority, based on the relevant national, racial, ethnic, indigenous, cultural, religious or linguistic identities in the jurisdiction of their principal executive offices; or

[3] For these board diversity requirements, Nasdaq has defined "foreign issuers" to include foreign private issuers and other foreign companies that have their principal executive offices located outside the United States.

- satisfy the board diversity requirement by having two directors who self-identify as female.

Although foreign issuers cannot simply rely on home country practices, if they elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, they may satisfy the listing requirements by explaining their reasons for doing so instead of meeting the diversity objectives of the rule. A company that ceases to be a foreign issuer will have until the later of (i) one year from the date it no longer qualifies as a foreign issuer and (ii) the date it makes its annual meeting filing during the following calendar year to meet the requirements applicable to domestic companies.

Are smaller-reporting companies subject to these requirements?

Yes, smaller-reporting companies are subject to these requirements, though, like foreign issuers, they may satisfy the board diversity requirement by having two directors who self-identify as female. If a company ceases to be a smaller-reporting company, it will have until the later of (i) one year from the date it no longer qualifies as a smaller-reporting company and (ii) the date it makes its annual meeting filing during the following calendar year to meet the applicable requirements.

Are controlled companies subject to these requirements?

Yes. There are no exemptions for controlled companies from these requirements.

How can companies with small boards meet the board diversity objectives?

A company with a board of directors consisting of five or fewer members (a "small board") will only need to demonstrate that it has at least one director who self-identifies as diverse (instead of two). Moreover, a company that had a small board prior to becoming subject to the board diversity objectives may add a sixth director who self-identifies as diverse in order to meet this reduced board diversity objective without becoming subject to the requirement to have, or explaining why it does not have, at least two directors who self-identify as diverse. However, if such company subsequently expands its board, it will be required to have, or explain why it does not have, at least two directors who self-identify as diverse.

When must newly listed companies comply?

Newly listed companies (including those listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a business combination with a SPAC) that were not previously subject to a substantially similar requirement on another stock exchange must provide the statistical board diversity disclosures within one year of their listing. Newly public companies must satisfy the applicable board diversity objectives by the date that is (i) one year or two years from the date of listing as set forth below or (ii) the date the proxy or information statement is filed for their first or second annual meeting (as applicable, per below) after the listing:

- Nasdaq Global Select or Nasdaq Global Market listed companies have one year to comply with the objective to have at least one director who self-identifies as diverse and two years to comply with the objective to have at least two directors who self-identify as diverse (or, in each case, explain why they do not);

- Nasdaq Capital Market listed companies have two years to comply with the objective to have at least two directors who self-identify as diverse (or explain why they do not); and

- companies with a small board listing on any Nasdaq tier have two years to comply with the objective to have at least one director who self-identifies as diverse (or explain why they do not).

A company listing after August 6, 2021, but prior to the effective date of the objectives, has until the later of the effective date of the objective or the two-year phase-in period for newly listed companies to comply. For example, a company that listed on the Nasdaq Global Market on September 30, 2022 would have until September 30, 2023 (or the filing of their 2023 proxy/information statement if later) to comply with the requirement to have at least one director who self-identifies as diverse and until August 6, 2025 (or the filing of their 2025 proxy/information statement if later) to comply with the requirement to have at least two directors who self-identify as diverse (or, in each case, explain why they do not).

Are any companies exempt from the board diversity objectives?

Consistent with Nasdaq's approach to permit exemptions from its corporate governance standards, the following companies are exempt from these requirements because they do not have boards, list equity securities or are not operating companies: acquisition companies listed under IM-5101-2, asset-backed issuers and other passive issuers, cooperatives, management investment companies, issuers of non-voting preferred securities, debt securities and derivative securities, and issuers of securities listed under the Rule 5700 Series. Any company that ceases to be exempt will have until to the later of (i) one year from the date it no longer qualifies as an exempt company and (ii) the date it makes its annual meeting filing during the following calendar year to meet the requirements applicable to domestic companies.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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Annex A – Form of Board Diversity Disclosure Matrix

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	#			

Annex B – Form of Board Diversity Disclosure Matrix for Foreign Issuers

Board Diversity Matrix (As of [DATE]) **To be completed by Foreign Issuers (with principal executive offices outside of the U.S.) and Foreign Private Issuers**				
Country of Principal Executive Offices:	[Insert Country Name]			
Foreign Private Issuer	Yes/No			
Disclosure Prohibited Under Home Country Law	Yes/No			
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
Underrepresented Individual in Home Country Jurisdiction	#			
LGBTQ+	#			
Did Not Disclose Demographic Background	#			