

NASDAQ: PROPOSED BOARD DIVERSITY RULES

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General Requirement

"If approved, the new listing rules would require all companies listed on Nasdaq's U.S. exchange to publicly disclose consistent, transparent diversity statistics regarding their board of directors in a specific matrix format prescribed by Nasdaq."

On December 1, 2020, Nasdaq filed a proposal with the U.S. Securities and Exchange Commission (SEC) to adopt new listing rules related to board diversity and disclosure. If approved by the SEC, the new listing rules would require all companies listed on Nasdaq's U.S. exchange to publicly disclose consistent, transparent diversity statistics regarding their board of directors in a specific matrix format prescribed by Nasdaq. Additionally, the rules would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female (without regard to the individual's designated sex at birth) and one who self-identifies as either LGBTQ+ or an underrepresented minority (i.e., 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).

Foreign Private Issuers and Smaller Reporting Companies

Foreign private issuers (companies which are eligible to file annual reports with the SEC on Form 20-F) are exempt from many of the Nasdaq corporate governance requirements applicable to US domestic companies. However, Nasdaq has specifically proposed that foreign private issuers not be exempted from these proposed board diversity requirements, although they would have some limited flexibility in how they may comply with the requirements. As proposed by Nasdaq, foreign private issuers, along with other foreign companies that have their principal executive office outside of the United States, would be permitted to satisfy the board diversity requirement with two female directors. In addition, rather than having a second director that self-identifies as an underrepresented minority, a foreign private issuer would be able to satisfy the requirement with an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the jurisdiction in which the company is organized (or, if different, the foreign jurisdiction in which the company has its principal listing).

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Some foreign issuers may have their principal executive offices in jurisdictions that impose laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race, ethnicity or LGBTQ+ status. In such countries, a foreign issuer may be precluded by law from requesting diversity data from its directors. As a result, a foreign issuer would have a different type of disclosure format for its diversity statistics.

Smaller reporting companies would also have additional flexibility in satisfying the general requirement with two female directors.

Newly Listed Companies

Any newly listed companies that were not previously subject to a substantially similar requirement of another national securities exchange will be allowed one year from the date of listing to satisfy the proposed rules.

Timing of Application of Proposal

If approved by the SEC, Nasdaq-listed companies must (i) have at least one diverse director within two years, or otherwise explain why they do not have one diverse director, (ii) have at least two diverse directors within four-five years (depending on their Nasdaq listing tier), or otherwise explain why they do not have two diverse directors and (iii) within one year from the date that the SEC approves this proposal, comply with the requirement for statistical information regarding diversity.

Exempt from Proposal

Certain entities, such as limited partnerships, asset-backed issuers and other passive issuers, and issuers of non-voting preferred securities, debt securities and derivative securities are not subject to this proposal.

Shipping Companies

Many shipping companies are foreign private issuers and therefore, if this proposal is passed, would be required to comply to the extent explained above.

Additional Information

Additional information regarding instructions, diversity definitions, and board diversity matrices may be found [here](#). The full text of the proposed listing rules is available [here](#).

For advice on the selection of board members who would meet these proposed diversity requirements, as well as the existing requirements of the SEC and Nasdaq regarding director independence and committee service, please contact the authors or a member of the WFW Capital Markets team.

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