

APPROVED NASDAQ BOARD DIVERSITY RULES

25 AUGUST 2021 • ARTICLE



In late 2020, Nasdaq filed a proposal with the U.S. Securities and Exchange Commission (SEC) to adopt new listing rules relating to board diversity and disclosure. WFW previously authored this article on that draft. On August 6, 2021, the SEC approved Nasdaq's proposal in a similar, but not identical, form to what was initially proposed.

"The rules 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."

The new listing rules 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 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 of two or more races or ethnicities).

FOREIGN PRIVATE ISSUERS, SMALLER REPORTING COMPANIES, AND COMPANIES WITH SMALL BOARDS

Foreign private issuers (companies 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, foreign private issuers will not be exempted from these new board diversity requirements, although they will have some limited flexibility in how they may comply with the requirements. Foreign private issuers, along with other foreign companies that have their principal executive office outside of the US, will be permitted to satisfy the board diversity requirement with two female directors (or explain why they do not have them). In addition, rather than having a second director that self-identifies as an underrepresented minority, a foreign private issuer will be able to satisfy the requirement with an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identities relevant in the jurisdiction in which it has its principal executive offices.

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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 those relating 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 will have a different type of disclosure format for its diversity statistics.

Smaller reporting companies and companies with small boards will also have additional flexibility in satisfying the general requirement. Smaller reporting companies may satisfy the requirement (or explain why they do not) with two female directors, and all companies with five or fewer directors may satisfy the

requirement with one diverse director.

TIMING OF APPLICATION OF PROPOSAL

Companies have until the later of August 8, 2022, or the date it files its proxy or information statement (or, if the company does not file either a proxy or information statement, in its Form 10-K or 20-F) for its 2022 annual shareholder meeting to publicly disclose director self-identified board-level diversity statistics using a standardized disclosure matrix template.

Companies have a transition period to meet their diversity objectives or explain why they have not. All Nasdaq-listed companies must have, or explain why they do not have, at least one diverse director by the later of August 7, 2023 or the date it files its proxy or information statement (or in its Form 10-K or 20-F as above) for the annual shareholder meeting that year. Companies listed on the Nasdaq Global Select Market and Nasdaq Global Market must have, or explain why they do not have, two diverse directors by August 6, 2025. Companies listed on the Nasdaq Capital Market must have, or explain why they do not have, two diverse directors by August 6, 2026.

"Nasdaq has established partnerships with Equilar, Athena Alliance, and the Boardlist to aid Nasdaq-listed companies in their search for diverse board candidates."

ADDITIONAL INFORMATION

An overview of these rules prepared by Nasdaq can be found [here](#). Important information for Nasdaq-listed companies can be found [here](#). Nasdaq has also created a FAQ page [here](#).

Additionally, Nasdaq has established partnerships with Equilar, Athena Alliance, and the Boardlist to aid Nasdaq-listed companies in their search for diverse board candidates.

The full text of the SEC approval order can be found [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 Steven Hollander, Will Vogel or any other member of the WFW Capital Markets team.

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