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Nasdaq Proposes Board Diversity Requirements for Listed Companies

In a watershed moment for corporate governance in the United States, Nasdaq has proposed board diversity and disclosure requirements as a condition to continued listing (available [here](#)). This is the latest in a series of developments spotlighting board diversity, including the enactment of quotas for female and diversity board membership for California-based companies and diversity disclosure requirements in other jurisdictions. Further, the adoption of voting policies by proxy advisory firms ISS and Glass Lewis will effectively push larger public companies to have at least one racially or ethnically diverse director, and two female directors, respectively, on their boards by the 2022 proxy season. The proposed rule changes are subject to public comment and SEC approval.

The proposal would create new Rule 5605(f), *Diverse Board Representation*, and new Rule 5606, *Board Diversity Disclosure*, which together would:

- prescribe a standardized format for companies to provide required statistical disclosures regarding the self-identified diversity of its board members;
- adopt a “comply or disclose” approach to encourage greater board diversity, under which companies would need to:
 - have at least one director who self-identifies as female; and
 - have 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 as LGBTQ+; or
 - alternatively, explain why the company does not meet the board diversity requirements listed above.

To give companies enough time to implement these changes, the listing requirements would take staggered effect after SEC approval:

- within *one* year: companies would be required to provide the statistical board diversity information;
- within *two* years: companies would be required to have at least *one* director who self-identifies as diverse in accordance with the requirements (or explain why they do not); and

- within *four* (for Nasdaq Global Select or Global Markets listings) or *five* years (for Nasdaq Capital Market listings): companies would be required to have at least two directors who self-identify as diverse in accordance with the requirements (or explain why they do not).

These proposed listing requirements would apply to foreign issuers (including foreign private issuers) and smaller-reporting companies, though they would be permitted to satisfy the board diversity requirements with two directors who self-identify as female, and, in the case of foreign issuers, would have more flexibility to identify appropriate and applicable diversity categories reflective of the demography of their principal jurisdictions.

Definition of Diversity

Under the proposed requirements, a board member would be considered “Diverse” if they self-identify in one or more of the following categories:

- **Female** – based on self-identification as a woman, without regard to designated sex at birth;
- **Underrepresented Minority** – based on self-identification as one or more of the following: 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; or
- **LGBTQ+** – based on self-identification as lesbian, gay, bisexual, transgender or as a member of the queer community.

Because most companies are familiar with existing EEO-1 reporting categories of the Equal Employment Opportunity Commission, Nasdaq deliberately proposed these same categories in its definition of Underrepresented Minority in order to ease the identification, collection and reporting of this data.

Companies may pursue and promote additional diverse attributes in their board composition (*e.g.*, nationality, disability, veteran status), though these efforts would be supplementary to (and not in substitution of) the Nasdaq disclosure requirements.

Statistical Board Diversity Disclosure

To improve the consistency and comparability of board diversity disclosures, Nasdaq would mandate a prescribed format for the disclosure of statistical board diversity data in accordance with the definitions above. Please see [Annex A, Proposed Form of Board Diversity Disclosure Matrix](#). Companies may also include information related to additional diverse attributes of board members if they feel it would benefit investors.

This disclosure would need to be provided within one year of SEC approval of the proposed listing requirements. After the first year, companies would need to present this statistical diversity disclosure for both the current and immediately prior year.

Companies would be required to include the statistical diversity disclosure in their proxy statement or information statement for their annual meeting, or on their website. If a company elects to post the disclosure on its website, it would also need to submit the disclosures, with a URL, to the Nasdaq Listing Center within 15 calendar days after its annual shareholder meeting.

Board Diversity Requirements

To break the cycle of board underrepresentation (often due to over-reliance and over-emphasis on traditional candidates and networking), the proposed Nasdaq rules would require each listed company to have at least two board members who are Diverse (or explain why it does not):

- at least one of whom self-identifies as a Female; and
- at least one of whom self-identifies as an Underrepresented Minority or as LGBTQ+.

Companies would need to have at least one Diverse director within two years of the SEC approval of the listing requirements, and fully comply with these requirements within four years (if listed on the Nasdaq Global Select or Global Markets) or five years (if listed on the Nasdaq Capital Market).

If the statistical diversity disclosures (described above) reflect that a company meets the applicable board diversity requirements, no further disclosure would be required.

If the statistical diversity disclosures reflect that a company is not in compliance with applicable board diversity requirements, that company would need to include additional disclosure (i) specifying the applicable requirements and (ii) explaining why it has not complied with them.

Like the statistical diversity disclosures, the explanatory statement would need to be included in the company's proxy statement or information statement for its annual meeting, or on its website. If a company elected to post the disclosure on its website, it would also need to submit the disclosures, with a URL, to the Nasdaq Listing Center within 15 calendar days after its annual shareholder meeting. Foreign private issuers would rely on website postings as they are not subject to the SEC proxy rules.

Resources for Companies

To assist companies with enhancing their board diversity and complying with the proposed requirements, Nasdaq has stated it will provide companies with free access to a network of board-ready diverse candidates

and a tool to support board evaluation, benchmarking and refreshment. Nasdaq will also publish FAQs and provide companies with a dedicated and monitored email for questions.

Consequences of Failure to Provide Disclosures

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

Foreign Issuers

Even though foreign private issuers are generally permitted to follow home country corporate governance practices in lieu of Nasdaq-mandated corporate governance rules, “foreign issuers”¹ (including foreign private issuers) would be subject to these proposed listing requirements. However, 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 (please see [Annex B, Proposed 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 their home country jurisdiction; or
- satisfy the board diversity requirement by having two Female directors.

Although foreign issuers cannot simply rely on home country practices, such issuers that 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, may satisfy the proposed listing requirements by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

¹ In the proposed listing 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.

A company that ceases to be a foreign issuer will have one year (from the date it no longer qualifies as a foreign issuer) to meet the requirements applicable to domestic companies.

Smaller-Reporting Companies

Smaller-reporting companies would also be subject to these requirements, though, like foreign issuers, they would be eligible to satisfy the board diversity requirement by having two Female directors. If a company ceases to be a smaller-reporting company, it would have one year to meet the applicable requirements from the date it no longer qualifies as a smaller-reporting company.

Newly Listed Companies

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 or through a business combination with a SPAC) would be required to satisfy the applicable requirements within one year of listing.

Exempt Companies

Consistent with Nasdaq's approach to permit exemptions from its corporate governance standards, the following companies would be 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 would have one year to meet the requirements from the date it no longer qualifies as an exempt company.

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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

Proposed Form of Board Diversity Disclosure Matrix

Board Diversity Matrix (As of [Date])				
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Undisclosed	#			

Annex B**Proposed Form of Board Diversity Disclosure Matrix for Foreign Issuers**

Board Diversity Matrix (As of [Date])				
Foreign Issuer Under Rule 5605(f)(1)				
Country of Incorporation	[Insert Country Name]			
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
LGBTQ+	#			
Underrepresented Individual in Home Country Jurisdiction	#			
Undisclosed	#			