
March 5, 2021

Nasdaq Amends Its Board Diversity Proposals

On February 26, 2021, Nasdaq filed an amendment with the SEC (available [here](#)) to the board diversity and disclosure requirements it first proposed in December 2020 (the “Amendment”).¹ That initial proposal garnered over 200 comment letters to the SEC from listed companies, investors and other stakeholders, including asset managers, legislators, advocacy organizations, law firms and directors.² The overwhelming majority of commenters supported the proposal, but many suggested various grace periods and flexibility for smaller boards. The Amendment responds to those concerns, adapting the requirements for smaller boards, adding a grace period for companies that fall out of compliance and extending time periods for compliance for newly listed companies.

Nasdaq’s proposal is now with the SEC, which must determine whether to approve the Amendment by March 11, 2021 (unless extended again). While it is not yet certain that this amended proposal will be approved, the Biden administration and senior SEC personnel have indicated their support of ESG initiatives, including requiring additional diversity disclosure. Acting SEC Chair Allison Herren Lee has repeatedly highlighted diversity as a subject important to investors. Further, Gary Gensler, President Biden’s SEC Chair nominee, when asked about this proposal at his nomination hearing, expressed his personal belief in the value of diversity among boards and senior leadership and its benefits to decision-making.

Nasdaq’s Original Proposals

Nasdaq’s board diversity proposals introduced two new disclosure rules for Nasdaq-listed companies:

- the *Diverse Board Representation* rule, which adopts a “comply or explain” approach and would require companies to have two “Diverse” directors, at least one of whom self-identifies as female and at least one of whom 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 these board diversity objectives; and

¹ For more detail on Nasdaq’s original proposals, see our prior client memorandum entitled “Nasdaq Proposes Board Diversity Requirements for Listed Companies” (available [here](#)).

² Concurrently with the filing of the Amendment, Nasdaq submitted a response letter to the SEC (available [here](#)) addressing those comments.

- the *Board Diversity Disclosure* rule, which requires companies to provide statistical disclosures regarding the self-identified diversity characteristics of its board members in a prescribed Board Diversity Matrix format.

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

- within *one year*: companies would be required to provide the statistical board diversity disclosure;
- 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 the Nasdaq Global Select or Nasdaq Global Markets tier listings) or *five years* (for the Nasdaq Capital Market tier 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).

Substantive Amendments

The Amendment includes the following three substantive revisions to Nasdaq's original proposals:

- *Flexibility for companies with small boards* – a company with a board of directors consisting of five or fewer members (a “small board”) would only need to demonstrate that it has at least one (as opposed to two) Diverse directors. Moreover, a company that had a small board prior to becoming subject to the board diversity objectives may add a sixth director who is Diverse in order to meet this reduced board diversity objective without becoming subject to the requirement to have, or explain why it does not have, at least two Diverse directors. However, such company would be required to have at least two Diverse directors if it subsequently expands its board.
- *One-year grace period for failure to meet applicable 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) would have until the later of (a) one year from the date of the vacancy or (b) 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) (its “Annual Meeting Filing”) for its annual meeting of shareholders (“Annual Meeting”) in the calendar year *after* the year in which the vacancy occurs, to satisfy the applicable board diversity objectives. During this period, the company would publicly disclose that it is relying on the grace period, instead of explaining why it does not meet the board diversity objectives.
- *Extended phase-in periods*:
 - Any company that ceases to be a foreign issuer, a smaller reporting company or an exempt company would be permitted to satisfy the applicable board diversity objectives by the later of (a) one year from the date the company no longer qualifies as such or (b) the date the company makes its Annual

Meeting Filing for its Annual Meeting during the calendar year following such event (increased from one year from the date it no longer qualifies). There are no exemptions for controlled companies.

- Newly listed companies would be permitted to satisfy the applicable board diversity objectives based on a one-year or two-year phase-in (an increase from one year), depending on the specific Nasdaq market tier, in each case ending the later of (a) one year or two years from the date of listing or (b) the date the Annual Meeting Filing is made for their first or second Annual Meeting after the listing:
 - Nasdaq Global Select or Nasdaq Global Market companies would have *one year* to comply with the requirement to have at least one Diverse director and *two years* to comply with the requirement to have at least *two* Diverse directors (or, in each case, explain why they do not);
 - Nasdaq Capital Market companies would have *two years* to comply with the requirement to have at least *two* Diverse directors (or explain why they do not); and
 - Companies with a small board listing on any Nasdaq tier would have *two years* to comply with the requirement to have at least *one* Diverse director (or explain why they do not).

Technical Amendments

The Amendment also reflects various technical revisions, including the following:

- Instructions to the Board Diversity Matrix have been modified to clarify that a company may include supplemental data in addition to the information required by the Matrix (for example, information on a director-by-director basis or additional information on skills, experience and attributes of each of the directors). Companies, however, may not substantially alter the Matrix, and all information in the Matrix must be disclosed in a searchable format.
- The Amendment clarifies that the newly listed companies that could avail themselves of a one-year phase-in period for the Board Diversity Matrix disclosure include those listed through an initial public offering, direct listing, transfer from over-the-counter market or another exchange, in connection with a spin-off or carve-out or through a merger with a SPAC.
- The Amendment extends each of the operative dates of the new requirements from the applicable anniversary of the SEC's approval of the rule to the later of (a) such anniversary or (b) the date a company makes its Annual Meeting Filing for the Annual Meeting during the calendar year of that anniversary.

Nasdaq has emphasized throughout the Amendment that the proposed rules are a disclosure-based framework and not a mandate. In its letter to the SEC, Nasdaq further explained that the proposals are not a quota or numeric mandate and companies can elect to meet the board diversity objectives or explain why they do not meet it and include a description of a different approach.

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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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