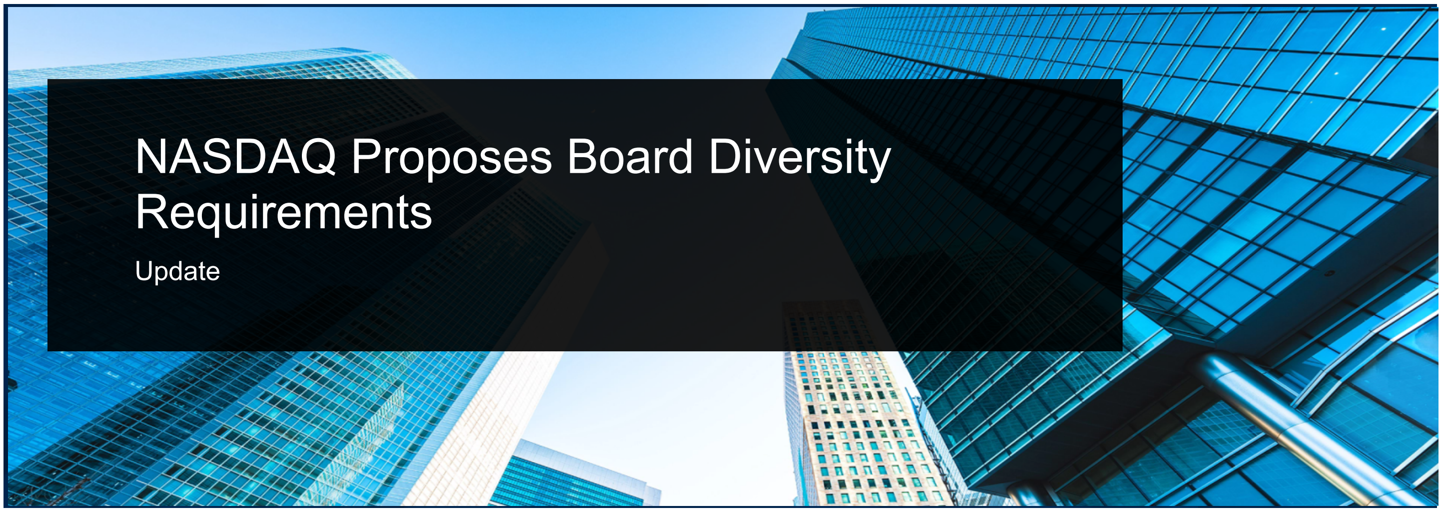

NASDAQ Proposes Board Diversity Requirements

Update

December 02, 2020 | 3 minute read

On December 1, 2020, the NASDAQ Stock Market LLC filed with the Securities and Exchange Commission a proposal to adopt rules that would require Nasdaq-listed companies, subject to certain exceptions, to (1) have at least two diverse directors, including one director who self-identifies as a female and one director who self-identifies as an underrepresented minority or as LGBTQ+, or to explain why the company does not have at least two directors on its board that self-identify in such a way, and (2) disclose information in a matrix format related to each director's self-identified gender, race, and self-identification as LGBTQ+. The proposed rules, which are subject to public comment and must be approved by the SEC, would be subject to phase-in periods. The New York Stock Exchange has not yet proposed a similar rule.

The full text of the proposal can be found here.

Diversity Requirement

Subject to the phase-in described under "Effective Dates" below, the proposed rules would require Nasdaq-listed companies to either (1) have at least two diverse directors, including one director who self-identifies as female and one director who self-identifies as an underrepresented minority or LGBTQ+, or (2) disclose in the proxy statement for its annual meeting of shareholders or on its website that the Nasdaq requirement applies to the company and provide an explanation of why the company does not have the requisite number of diverse directors.

The proposed rules define "diverse" as including individuals who self-identify as female, as an underrepresented minority or as LGBTQ+.

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“Underrepresented minority” is defined as an individual who self-identifies 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. The proposed rules further define each of these categories.

“LGBTQ+” is defined as an individual who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.

The proposed rules provide some flexibility for Smaller Reporting Companies and foreign issuers. Consistent with existing exemptions from certain of Nasdaq’s corporate governance standards related to board composition, the proposed rules exempt certain types of companies, such as asset-backed issuers and other passive issuers, cooperatives, limited partnerships and management investment companies. Where a company chooses to satisfy the requirement by explaining why it does not have two diverse directors, Nasdaq would not consider the substance of a company’s explanation, so long as one is provided.

Diversity Matrix Disclosure

The proposed rules also would require each listed company to annually disclose in the proxy statement for its annual shareholder meeting or on its website information on each director’s self-identified characteristics using a matrix or grid format that includes columns showing the total number of directors that self-identify as male, female, non-binary or undisclosed gender, with each column divided into rows showing the number of directors in each column that self-identify 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, LGBTQ+ or undisclosed.

Each year following the first year a company publishes the board diversity matrix, the company would be required to publish its data for the current and immediately prior years, providing investors the information necessary to track changes in a board’s diversity.

Effective Dates

Under the proposed rules, a Nasdaq-listed company would be required to have, or explain why it does not have, one diverse director no later than two calendar years after the date of SEC approval of the proposed rules, and two diverse directors no later than (1) four calendar years after the approval date for companies listed on the Nasdaq Global Select (NGS) or Global Market (NGM) tiers, or (2) five calendar years after the approval date for companies listed on the Nasdaq Capital Market (NCM) tier. For example, if the approval date is

March 10, 2021, a listed company would be required to have, or explain why it does not have, one diverse director by March 10, 2023 and two diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies). Newly listed companies not previously subject to a substantially similar requirement and companies that cease to qualify as exempt companies will have at least one year to comply with the requirement.

Disclosure of the board diversity matrix would be required beginning one year after the date of SEC approval.