

Nasdaq board diversity rules approved by SEC

August 11, 2021 | Client Update | 7-minute read

Nasdaq's new board diversity rules, approved by the SEC on August 6, will require listed companies to have diverse board members or explain why they do not. In addition, the rules will require all companies to disclose information regarding the diversity of their boards. Unlike many Nasdaq corporate governance rules, these requirements will apply to foreign private issuers as well as domestic companies.

On August 6, the Securities and Exchange Commission (SEC) approved Nasdaq's proposed diversity rules. While the new rules do not include a mandate to include diverse members on Nasdaq-listed company boards, they will require companies to disclose information regarding the diversity of their boards, including reasons why a listed company's board composition has not met Nasdaq's diversity objectives. The "comply or disclose" approach is one that the SEC, Nasdaq and the NYSE have adopted for other rules, such as those requiring an audit committee financial expert and code of conduct, with the expectation that a potentially awkward disclosure requirement will encourage companies to comply. In a break from customary practice, Nasdaq will impose these requirements on foreign private issuers, rather than giving them exemption as is the case with most Nasdaq board governance requirements. The new rules will also provide companies with access to a complimentary board recruiting service to provide access to diverse board candidates.

Effective dates:

- August 2022: Requirement to disclose information board diversity matrix (described below)
- August 2023: Have, or explain why company doesn't have, at least one diverse director
- August 2025: Have, or explain why company doesn't have, at least two diverse directors

General board diversity rules

Under the new rules, all Nasdaq-listed operating companies must:

- have, or explain why they do not have, the requisite number of "diverse" board directors; and
- publish board level diversity statistics annually using a prescribed matrix

Companies subject to the new rules

The new diversity objectives depend on the type company:

- U.S. companies must have *two* diverse directors, of which (i) at least one is female; and (ii) at least one is an "underrepresented minority" or LGBTQ+.

- Foreign issuers, including foreign private issuers and foreign issuers with principal executive offices located outside the U.S., must have at least *two* board members who are female or have (i) one female director and (ii) one director is LGBTQ+ or an “underrepresented individual” in their home country jurisdiction.
- Companies with five or fewer board members must have at least one member of its board of directors who is diverse. If a company with five board members adds a sixth director who is diverse to satisfy the diversity requirement *before* becoming subject to the new rules, it will not be required to comply with the diversity objectives of having two diverse directors that applies to companies with larger boards. However, companies that expand their boards to more than five members *after* the implementation of the rules would be subject to the rules requiring two diverse directors on their boards.

Diverse definitions

The new rules define “diverse” as an individual who self-identifies as: (i) female, (ii) an “underrepresented minority,” or (iii) LGBTQ+.

- “Female” means an individual who self-identifies as a woman, without regard to the individual’s designated sex at birth.
- “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.
- “Underrepresented Minority” means 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” (meaning a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander.)
- “Underrepresented Individual” for foreign issuers means an individual who self-identifies as such based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company’s principal executive offices.

Disclosure of non-diverse boards

Companies that meet the diversity disclosure objectives listed above will not need to disclose compliance. A company that does not meet the board diversity objectives will be required to: (i) specify the requirements of the rule that are applicable and (ii) explain the reasons why it does not. This disclosure must be provided in any proxy statement or information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F). Alternatively, the information may be provided on the company’s website, provided the company posts the disclosure concurrently with its annual SEC filing and submits a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

Compliance phase-in

Companies in The Nasdaq Global Select and The Nasdaq Global Market must have, or explain why they do not have, *one* diverse director by the later of August 7, 2023 or the date the company files its annual report during that calendar year. Those same companies must have, or explain why they not have, *two* diverse directors by the later of August 6, 2025 or the date the company files its annual report during that calendar year. A newly listed company, including one formed through a combination with a SPAC, may phase in those same requirements within one or two years of its listing date, respectively, or the filing of its proxy or annual report for those years, whichever is later.

A company with a board of five or fewer members must have, or explain why it does not have, at least one member of its board of directors who is diverse by the later of August 7, 2023 or the date the company files its proxy statement or its annual report during that calendar year.

Board diversity matrix

In addition to the disclosure regarding diversity objectives described above, the new rules will require all companies subject to the rules to publicly disclose information on the directors’ voluntary self-identified gender and racial characteristics, and LGBTQ+ status. The board diversity matrix disclosure will be required for *all* listed companies subject

to the new rules, including those that do not have the requisite number of diverse directors.

Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the matrix. If the company published the matrix on its website, the disclosure must remain accessible on the website for the required period. The information in the matrix must be available as searchable text or in a searchable table.

Matrix for U.S. companies

U.S. companies will be required to disclose information in a format substantially similar to the following matrix:

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#	#	#	#
Did Not Disclose Demographic Background	#			

Matrix for certain foreign companies

Foreign private issuers and other foreign companies whose principal executive offices are located outside of the United States will be allowed to use the following modified version of the matrix:

Board Diversity Matrix (As of [DATE])				
Country of Principal Executive Offices	[Insert Country Name]			
Foreign Private Issuer	Yes/No			
Disclosure Prohibited under Home Country Law	Yes/No			
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
Underrepresented Individual in Home Country Jurisdiction	#			
LGBTQ+	#			

Did Not Disclose Demographic Background	#
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Effective Date

The new rule requiring disclosure of statistical information in the matrix forms will become effective on August 8, 2022 (the Matrix Effective Date). The rule will require a company to provide the disclosure by the later of the Matrix Effective Date or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Matrix Effective Date.

A company newly listing on Nasdaq that was not previously subject to a substantially similar requirement of another national securities exchange will be required to satisfy the board diversity matrix requirements within one year of listing, but no earlier than the Matrix Effective date.

Exempt companies

Exempt companies include limited partnerships, asset backed companies and SPACs. With respect to SPACs, any post-business combination entity will have at least two years after it completes a business combination to comply with the new rules.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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