

SEC Approves Nasdaq Board Diversity Rules

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As if issuers needed a reminder that it's always the right time to be thinking about board composition, earlier this month, the SEC approved new Nasdaq rules that will require companies listed on that exchange to collect and report information about the diversity of their boards of directors. Under new Nasdaq Listing Rules 5605(f) and 5606, Nasdaq-listed companies will be required to publicly disclose on their websites or in their annual reports or proxy statements board-level diversity statistics using a template promulgated by Nasdaq and to explain why they do not have at least two (or one in the case of a company with five or fewer directors) diverse directors.

The required diversity statistics for U.S. companies consist of the number of directors that self-identity as each of:

- Female, male or non-binary,
- African American or Black, Alaskan Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White or Two or More Races or Ethnicities, and
- LGBTQ+.

Foreign issuers are required to make similar disclosures, though racial and ethnic disclosures are to be based on underrepresented categories in the country of their principal executive offices. Both U.S. companies and foreign issuers must also report the number of directors who declined to disclose their demographic background or gender.

Nasdaq-listed companies that do not meet specified diversity thresholds must explain the reason why the thresholds were not met in their proxy or information statement (or 10-K or 20-F for issuers that do not file a proxy) or on their website. The applicable diversity thresholds are:

- Domestic companies other than smaller reporting companies must have at least one director who self-identifies as Female and at least one other director who self-identifies as an Underrepresented Minority or LGBTQ+;
- Domestic companies that are smaller reporting companies must have at least one director who self-identifies as Female and at least one other director who self-identifies as Female, an Underrepresented Minority or LGBTQ+;
- Foreign issuers must have at least one director who self-identifies as Female and at least one other director who self-identifies as Female, LGBTQ+ or an underrepresented individual base on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the county in which the foreign issuer's principal executive offices are located; and
- Any company with five or fewer directors must have at least one director who self-identifies as Female, an Underrepresented Minority or LGBTQ+

For purposes of the Nasdaq diversity rules,

- Female means an individual who self-identifies as a woman, without regard to her sex designated at birth;
- an Underrepresented Minority, means an individual who self-identifies as Black or African-American, Hispanic or Latinx, Asian, Native American or Alaskan Native, Native Hawaiian or Pacific Islander, and or Two or More Races or Ethnicities (meaning that the individual identifies with more than one of White (not Hispanic or Latinx) or any of the foregoing categories);
- LGBTQ+, means an individual who self identifies as lesbian, gay, bisexual, transgender, or as a member of the queer community; and

- Foreign issuer means (a) a foreign private issuer or (b) a foreign issuer (as defined in Exchange Act Rule 3b-4) that has its principals executive offices located outside the United States.

For currently listed companies, the diversity rules will phase-in in two steps, the timing of which will depend on the issuer's listing tier.

- Companies listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have or explain why they do not have
 - ▶ at least one diverse director by the later of August 7, 2023 or the date the Company files its proxy statement (or annual report on Form 10-K or 20-F for companies that do not file a proxy) for the company's annual meeting for 2023 and
 - ▶ at least one diverse director by the later of August 7, 2023 or the date the Company files its proxy statement (or annual report on Form 10-K or 20-F for companies that do not file a proxy) for the company's annual meeting for 2023 and at least two diverse directors by the later of August 6, 2025 or the date the Company files its proxy statement (or annual report on Form 10-K or 20-F for companies that do not file a proxy) for the company's annual meeting for 2025.
- Companies listed on The Nasdaq Capital Market must have or explain why they do not have
 - ▶ at least one diverse director by the later of August 7, 2023 or the date the Company files its proxy statement (or annual report on Form 10-K or 20-F for companies that do not file a proxy) for the company's annual meeting for 2023 and
 - ▶ at least two diverse directors by the later of August 6, 2026 or the date the Company files its proxy statement (or annual report on Form 10-K or 20-F for companies that do not file a proxy) for the company's annual meeting for 2026.

Companies that are initially listing on Nasdaq will be subject to analogous phase-in requirements. These phase-in periods are generous, but thoughtful and careful board recruitment efforts cannot be rushed. Accordingly boards of Nasdaq-listed companies should begin considering how these rules will impact them sooner rather than later.

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