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D&I Developments at the SEC - Part 2 of 2

In Part 1 of this post, we focused on the July 7, 2021, recommendations for funds and advisers from the Diversity and Inclusion (D&I) Subcommittee of the SEC's Asset Management Advisory Committee (AMAC). Here we cover the August 6, 2021, SEC order approving diversity disclosure rules proposed by The Nasdaq Stock Market LLC (Nasdaq) and the public responses of SEC Commissioners. Suffice it to say, the Commission is not of one mind. **Nasdaq Board Diversity Rules** The Nasdaq rules that have been approved by the SEC aim to increase the diversity of corporate boards by offering Nasdaq-listed companies, for a period of time, free access to recruiting services with "a network of board-ready diverse candidates" and requiring Nasdaq-listed companies to:

- Publicly disclose aggregated data on voluntarily self-identified gender and racial characteristics and LGBTQ+ status of board members; and
- Have at least two diverse board members (or explain why they don't), including at least one who self-identifies as female and one who self-identifies as an "underrepresented minority" or LGBTQ+.

A company's noncompliance with the new rules could result in it being delisted from Nasdaq. For more details, check out "5 Things to Know About Nasdaq's Board Diversity Disclosure Requirement" at our blog, *Public Chatter*. **A Diversity of Views** Commissioners Allison Herren Lee and Caroline Crenshaw released a joint statement expressing support for the new Nasdaq rules as "a step forward for investors on board diversity" that will "improve the quality of information available to investors for making investment and voting decisions." Both Commissioners have been vocal in their support of human capital disclosure initiatives in the past. Earlier this summer, Commissioner Herren Lee encouraged boards of public companies to, among other ESG-related measures, make their boards more diverse, and tie executive compensation to ESG metrics. She has repeatedly called for the SEC to strengthen its guidance and engage in rulemaking around public company diversity disclosure, including in a September 2020 speech in which she emphasized research showing that board diversity corresponds "to lower stock volatility due to the adoption of less risky financial policies" and that firms with more diverse boards invest more in research and development that fosters innovation. While applauding Nasdaq's "goal of having more diverse and inclusive boards of directors," Commissioner Elad Roisman said he did not believe the SEC had, as required in evaluating rules proposed by self-regulatory organizations, conducted a sufficient independent analysis to support its conclusion that the rules "promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest." Similarly, Commissioner Hester Peirce opposed the SEC's order, asserting that the Nasdaq rules were not designed to achieve the purposes of, and in fact went beyond the scope of, the Exchange Act. Commissioner Peirce has consistently resisted this year's wave of ESG disclosure initiatives at the SEC. Speaking to the Brookings Institution in July, she explained why, detailing her theses on ESG disclosure, including that: "Many ESG issues lack a clear tie to financial materiality and therefore do not warrant inclusion in SEC-mandated disclosure. . . . [e]motions around ESG issues may push us to write rules outside our area of authority. . . . ESG issues are inherently political, which means that an ESG rulemaking could drag the SEC and issuers into territory that is best left to political and civil society institutions. . . . [and] [a]n ESG rulemaking could play a role in undermining financial and economic stability." In response to the Nasdaq rules, Commissioner Peirce posed important questions, some regarding Nasdaq's selection of diversity characteristics, and argued that the rules harm market integrity, do not protect investors, and are contrary to the public interest and in conflict with the U.S. Constitution. For his part, SEC Chairman Gary Gensler's ESG-oriented public statements have mostly revolved around climate-related disclosure matters. In introducing the newly approved Nasdaq rules, he noted broad industry support for them and said he believes that "our markets work best when investors have access to such information." **Conclusion** The SEC is likely to propose D&I-focused disclosure rules for public companies and asset management industry players. Some commissioners have long advocated for it and are now bolstered by the AMAC's approval of the D&I Subcommittee's recommendations and the SEC's approval of Nasdaq's board diversity disclosure rules. We will keep you posted as the SEC's regulatory agenda, which includes disclosure and other rules relating to human capital, ESG investment funds, and shareholder democracy, unfolds.

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