5 Things to Know About Nasdaq’s Board Diversity Disclosure Requirement

On Friday, the SEC issued this **82-page Order** approving both Nasdaq's proposed board diversity disclosure requirement and a proposed board recruiting service proposal. Both of these proposals were originally proposed last December and then amended in February. The Nasdaq also updated this three-pager about what listed companies should know. The amendments included several practical changes to the proposed rules, including providing a different standard for companies with boards of five or fewer directors and incorporating grace periods and phase-in periods. **Nasdaq's letter to the SEC** regarding the amendments also responded to many of the comments received on the original proposal. Unlike regulations proposed by the SEC, the SEC can only approve or reject proposed rules for self-regulatory organizations like Nasdaq, and cannot make changes. These amendments were an important avenue for Nasdaq to respond to many of the initial comments submitted to the SEC regarding the proposed rules, and the letter accompanying the amendments is cited repeatedly in the Order. **Nasdaq characterizes its new rules as a disclosure-based framework, not a mandate.** These new Nasdaq rules do three things for a Nasdaq-listed company (all of which are subject to certain exceptions or more limited requirements for certain types of companies):

1. Disclose diversity of board composition in a matrix - Require it to disclose - in an aggregated matrix form, to the extent permitted by applicable law - the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board. This is Rule 5606.
2. Minimum two diverse directors - Require it to have - or explain why it does not have - at least two members of its board who are diverse, including at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority (a defined term) or LGBTQ+. This is Rule 5605(f).
3. One year of free director recruiting - Provide a company that does not have at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+ one year of complimentary access for two users to a board recruiting solution from a third party service provider, which would provide access to a network of board-ready diverse board candidates.

Here are five things to know about these new Nasdaq rules: 1.Rules will be phased in - Under Rule 5606(e), the diversity matrix requirement will be effective as of August 6, 2022, and companies must comply by the later of that date or the date the company files its proxy or information statement (or Form 10-K if it does not file a proxy or information statement) during 2022. As explained in #6 in the Nasdaq's updated guidance, the diversity requirement will be phased in over time, with all listed companies required to have (or explain why it does not have) at least one diverse director by the later of August 7, 2023 or the date the company files it proxy or information statement (or Form 10-K if it does not file a proxy or information statement) during 2023. The compliance date for a second diverse director will be in 2025 or 2026, depending on which Nasdaq market tier level the company is listed. Newly-listed companies benefit from phase-in periods for both requirements. And companies have a grace period if they are in compliance with the diversity objectives, but cease to meet those diversity objectives due to a vacancy on the board. 2. Matrix disclosure required - The board composition diversity disclosure must be made in a substantially similar format of a "board diversity matrix," under Rule 5606(a). See pages 328-329 of the **amended proposed rule.** This matrix would include (1) the number of directors based on gender identity (female, male, or non-binary) and the number of directors who did not disclose gender; (2) the number of directors based on race and ethnicity (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), disaggregated by gender identity (or did not disclose gender); (3) the number of directors who self-identify as LGBTQ+; and (4) the number of directors who did not disclose a demographic background under item (2) or (3) above. Failure to provide this disclosure would result in Nasdaq notifying the company it's not in compliance, which starts a 45-calendar day clock for the company to submit a plan to regain compliance. 3. Disclosure location can be the proxy statement or a corporate website - The disclosure of both the diversity matrix and any explanation why the company does not meet the diversity objectives of the rule can either be made in the company's proxy statement or on the company's website. If website disclosure is the option selected, it must be posted before – or when – the proxy is filed and a link to the disclosure must be submitted within a business day to the Nasdaq Listing Center. See footnote 30 on page 10 of the Order. 4. Nasdaq won't evaluate reasons disclosed for not having two diverse directors - There is no regulatory penalty for not meeting Nasdaq's "minimum two diverse directors" requirement. Meaning that if the company explains the reasons why it doesn't have the two diverse directors, it has met the rule's "comply or explain" standard. Nasdaq says it won't evaluate the merits of a company's reasons (see page 10 of the Order). However, a company in this position likely would attract the attention of proxy advisors and some investors. 5. Failure to comply can result in delisting - If a company doesn't comply with Rule 5605(f), Nasdaq's Listing Qualifications Department will notify the company and give it until the later of the next annual shareholders meeting or 180 days from the event that caused the deficiency to cure that deficiency. See page 10-11 of the Order. So a company can be delisted for a deficiency if it's not timely cured – the deficiency being that a company didn't even bother to disclose the reasons why it isn't as diverse as Nasdaq hopes a company's board will become. Again, the new rules don't mandate diversity, they require "comply or explain" disclosure.

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