Newsflash | US Public Company Advisory

Nasdaq Board Diversity Disclosure Rules No Longer in Effect After Overturning by Court

December 13, 2024

On December 11, 2024, the United States Court of Appeals for the Fifth Circuit, in a 9-8 vote, struck down The Nasdaq Stock Market's ("Nasdaq") board diversity rules, holding that the Securities and Exchange Commission (the "SEC") exceeded its statutory authority when it approved the rules.[1] As a result of the ruling, effective immediately, public companies no longer need to comply with Nasdaq's board diversity rule requirements.

The now-vacated rules, which went effective starting with Nasdaq-listed companies' 2022 public disclosures, required that Nasdaq-listed companies have — or explain why they do not have — at least one female director and at least one director who self-identifies as an underrepresented minority or LGBTQ+, and to disclose director diversity information annually in a board diversity matrix.[2]

The court concluded that the SEC's actions implicated the "major questions" doctrine, and that, absent a clear Congressional directive, the agency lacked the statutory authority to authorize the rule. The SEC and Nasdaq argued, among other things, that because "full disclosure" was central to the Securities Exchange Act of 1934 (the "Exchange Act"), the SEC had broad authority to adopt a board diversity disclosure requirement. The Court disagreed, stating that "disclosure is not an end in itself but rather serves other purposes…[A] disclosure rule is related to the purposes of the [Exchange Act] only if it is related to the elimination of fraud, speculation, or some other Exchange Act–related harm."

Nasdaq notified listed companies that it respects the court's decision and does not intend to seek further review. The SEC has stated that it is reviewing the ruling, although this announcement from Nasdaq signals that companies are no longer required to comply with the rules and may choose to remove their Nasdaq-specific diversity matrices from their websites, proxy statements and/or Form 20-Fs.

While disclosure under Nasdaq's diversity rules is no longer required, companies should continue to be mindful of the diversity disclosure and board composition policies of proxy advisory firms and institutional investors. Depending on a company's investor base, these policies may be a reason, among others, for continuing to publicly disclose certain aspects of board diversity and/or to seek diverse board composition. For a summary of the proxy advisory and institutional investor policies applicable to US issuers, see Appendix A, and for those applicable to foreign private issuers, see Appendix B.

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1 A discussion of the rules can be found in our previous alerts: Key Considerations for the 2023 Annual Reporting and Proxy Season Part II: Proxy Statement and Key Considerations for the 2023 Annual Reporting Season: Form 20-F and other FPI-Specific Considerations.

2 The requirements phased-in over time and differed slightly for foreign private issuers.

Appendix A

Board Diversity Policies Applicable to US Companies

Institution	Policy	Definition of "Diverse"
Institutional Investor Services (ISS)	*Race/ethnicity:* For Russell 3000 or S&P 1500 companies, will generally recommend against the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members. *Gender:* For all companies, will generally recommend voting against the chair of the nominating committee (or other directors on a case-by-case basis) where there are no women on the company's board.	• Female • Asian (excluding Indian/South Asian) • Black/African American • Hispanic/Latin American • Indian/South Asian • Middle Eastern/North African • Native American/Alaskan Native • Native Hawaiian/Other Pacific Islander
Glass Lewis	*Race/ethnicity:* For Russell 1000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board with fewer than one director from an underrepresented community. *Gender:* For Russell 3000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board that is less than 30% gender diverse, or the entire nominating committee of a board with no gender diverse directors. For companies outside the Russell 3000, and all boards with six or fewer total directors, will generally recommend voting against the chair of the nominating and/or governance committee of a board with no gender diverse directors.	• Female • "Underrepresented community director" is an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as a member of the LGBTQIA+ community. • Will recommend in accordance with *mandatory* board composition requirements set forth in applicable state laws when they come into effect.
BlackRock	No specific policy. Interested in a variety of experiences, perspectives, and skillsets in the boardroom. Case-by-case assessment of board composition, based on board size, business model, strategy, location and market capitalization. Looks for companies to explain how their approach to board composition supports the company's governance practices.	

State Street	*Race/ethnicity: For* S&P 500 companies, will vote against the chair of the nominating committee if the company does not disclose the board's racial and ethnic composition or if there are no directors from an underrepresented racial or ethnic community. For S&P 500 companies, will also vote against the chair of the compensation committee if the company does not disclose its EEO-1 report.
	
	Gender: Expects boards of all companies to have at least one female director, and boards of Russell 3000 companies to have at least 30% percent women directors. If not, may vote against the chair of the nominating committee or board leader in the absence of a nominating committee, but may waive the policy if a company engages with SSGA and provides a specific, time-bound plan for reaching 30% representation of women directors.
		• Female
		• Underrepresented community – based on:
		    • Race
		    • Ethnicity

Vanguard	Expects boards to reflect diversity of personal characteristics (such as gender, race, age, and ethnicity). Believes that boards should determine the composition best suited to their company while considering market best practices, expectations, and risks, and should publish their perspectives on diversity so that shareholders can better understand how a board considers diversity in its composition. Board diversity disclosure should at least include the genders, races, ethnicities, tenures, skills, and experience that are represented on the board. Disclosure of personal characteristics (such as race and ethnicity) should be on a self-identified basis and may occur at an aggregate level or at the director level.	• Gender • Race • Age • Ethnicity
Fidelity	*Race/Ethnicity:* Will vote against boards that have no racially or ethnically diverse members. *Gender:* Fidelity will vote against boards that have no gender diversity, or if a board of ten or more directors has fewer than two gender diverse directors.	• Female

Appendix B

Board Diversity Policies Applicable to Foreign Private Issuers

Institution	Policy
Institutional Investor Services (ISS)	FPIs in US Tax Havens: ISS's policy for FPIs in US tax havens requires at least one female director (see America's regional voting guidelines here). FPIs in Other Countries: ISS policies on board diversity are region and/or country specific. For the currently applicable policies, see ISS's current voting policies.
Glass Lewis	Glass Lewis policies on board diversity are region and/or country specific. For the currently applicable policies, see Glass Lewis's current voting policies.
Blackrock	BlackRock maintains region/country-specific market guidelines, which can be found here. BlackRock notes that, "to ensure there is appropriate diversity of perspectives, we look to boards to be representative of the company's key stakeholders, with an approach to diversity that is aligned with any market-level standards or initiatives designed to support diversity (particularly gender and ethnic diversity) among board members." BlackRock also notes that this complements its "general view" it is looking for "all boards to be taking steps towards at least 30 percent of their members being comprised of the under-represented gender," which general view it says should be read in conjunction with applicable country-specific guidelines. BlackRock asks companies, consistent with local law, "to provide sufficient information on each director/candidate and in aggregate so that shareholders can understand how diversity (covering professional characteristics, such as a director's industry experience, specialist areas of expertise, and geographic location; as well as demographic characteristics such as gender, ethnicity, and age) has been accounted for within the proposed board composition. These disclosures should cover how diversity has been accounted for in the appointment of members to key leadership roles, such as board chair, senior/lead independent director and committee chairs."[3]
State Street	State Street's published guidelines state that it expects boards of companies in all markets and indices to have at least one female board member. It may waive the policy if a company engages with State Street and provides a specific, timebound plan for adding at least one woman to the board. State Street also expects companies in the Russell 3000, TSX, FTSE 350, STOXX 600 and ASX 300 indices to have boards comprised of at least 30 percent women directors. State Street may waive the policy if a company engages with SSGA and provides a specific, time-bound plan for reaching 30 percent representation of women directors. If a company fails to meet any of these expectations outlined above, State Street may vote

3 *See* BlackRock Investment Stewardship Proxy voting guidelines for European, Middle Eastern, and African securities.

	against the Chair of the Nominating Committee or the board leader in the absence of a Nominating Committee, if necessary. Additionally, if a company fails to meet this expectation for three consecutive years, State Street may vote against all incumbent members of the Nominating Committee, or those persons deemed responsible for the nomination process. For more information, see State Street's State Street's Global Proxy Voting and Engagement Policy.

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