Nasdaq Board Diversity Disclosure Rules No Longer in Effect After Overturning by Court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[3]

Institution	Policy	Definition of "Diverse"
Institutional Investor Services (ISS)	Will no longer consider the gender and racial and/or ethnic diversity of a company's board when making voting recommendations with respect to director elections.	
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	No specific policy. Believes that effective board oversight of a company's long-term business strategy necessitates a diversity of backgrounds, experiences, and perspectives, which may include a range of characteristics such as skills, gender, race, ethnicity, and age. By having a critical mass of diverse perspectives, boards could experience the benefits that may lead to innovative ideas and foster more robust conversations about a company's strategy. Many factors may influence board composition, including board size, geographic location, and local regulations, among others. Believes nominating committees are best placed to determine the most effective board composition and encourages	

[3] Updated as of March 19, 2025.

	companies to ensure that there are sufficient levels of diverse experiences and perspectives represented in the boardroom.	
Vanguard	Looks for boards to be fit for purpose by reflecting sufficient breadth of skills, experience, perspective, and personal characteristics (such as age, gender, and/or race/ethnicity) resulting in cognitive diversity that enables effective, independent oversight on behalf of all shareholders. The appropriate mix of skills, experience, perspectives, and personal characteristics is unique to each board and should reflect expertise related to the company's strategy and material risks from a variety of vantage points. Looks for a board's composition to comply with requirements set by relevant market-specific governance frameworks (e.g., listing standards, governance codes, laws, regulations, etc.) and be consistent with market norms in the markets in which the company is listed. If it is not, looks at the board's rationale for such differences (and any anticipated actions) to be explained in the company's public disclosures, and may vote against the nomination/governance committee chair if, based on research and/or engagement, a company's board composition and/or related disclosure is inconsistent with relevant market-specific governance frameworks or market norms.	
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."[4]
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

4 *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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