

Nasdaq's Board Diversity Proposal

January 19, 2021



Nasdaq's Board Diversity Proposal

OVERVIEW

- **What is the proposal and what would it require?**

- In December 2020, Nasdaq submitted a proposal to the SEC to adopt new listing rules* relating to board diversity and disclosure
- If approved, the new listing rules would require most Nasdaq-listed companies to have, or explain why they do not have, at least **2 “diverse” directors**, including one who self-identifies as female and one who self-identifies as either an “underrepresented minority” or LGBTQ+
- The rules would also require most companies listed on its U.S. exchange to disclose annually board-level diversity data using a Nasdaq standardized disclosure matrix in either their annual meeting proxy statements or information statements, or on their websites

- **Are there different requirements for different types of issuers?**

- Foreign private issuers, or FPIs, may satisfy the second director component with either
 - another female;
 - an individual who self-identifies as LGBTQ+; or
 - an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction
- Smaller reporting companies may satisfy the board diversity component with 2 female directors

* Securities Exchange Act Release No. 90574 (Dec. 4, 2020), 85 FR 80472 (Dec. 11, 2020). Nasdaq filed proposal with the SEC on Dec. 1, 2020

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- **Are any entities exempt?**

- SPACs are exempt from both requirements until 1 year after completion of their business combination
- Fully exempt companies include asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies, issuers of non-voting preferred securities, debt securities and derivative securities, and issuers of securities listed under the Rule 5700 Series

- **What are the timeframes for compliance?**

- Subject to the previously listed exemptions, Nasdaq-listed companies would be required to disclose board diversity statistics via Nasdaq's standard matrix within 1 year of rule approval

- **Where to disclose?**

- Public disclosure in accordance with the proposal may be included in a proxy statement or information statement for an annual shareholder meeting, or the company's website
- If website, must provide Nasdaq the URL link within 15 days following annual shareholder meeting

- **Will it be approved and when?**

- The proposal requires SEC approval. Nasdaq has recently consented to allow the SEC to extend its comment and approval period
- While it is unclear if or when a final rule will be approved, and in what form, particularly in light of the change of Administration and if there are further extensions, the SEC is now currently expected to decide **in or before mid-August 2021**

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U.S. COMPANIES

Diverse Board Representation (Proposed Rule 5605(f)) – **Subject U.S. Companies**

- Comply or Explain:
 - Compliance – **at least 2** “diverse” directors
 - 1 who self-identifies as a female; and
 - 1 who self-identifies as an “underrepresented minority” or LGBTQ+; **or**
 - Explain – specify unmet requirement and give reason for noncompliance
- Additional option for **smaller reporting companies**: Diversity requirement can be met with **2 female directors**
- “**Underrepresented minority**” means Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities
- “**LGBTQ+**” means lesbian, gay, bisexual, transgender or a member of the queer community

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FOREIGN PRIVATE ISSUERS

FPIs Have More Flexibility Than U.S. Companies

- May comply with the diversity requirement with **2 female directors** and definition of “**diverse**” is broader
 - “**Diverse**” means an individual who self-identifies as one or more of the following: **female, LGBTQ+ or an underrepresented individual**; and
 - “**Underrepresented individuals**” are based on **national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the FPI’s home jurisdiction**
- Nasdaq’s proposed disclosure template for FPIs includes “underrepresented individuals” metric
- **Comply or Explain Standard In Practice**
 - Full compliance – **at least 2** “diverse” directors
 - 1 who self-identifies as a female and
 - 1 who self-identifies as one or more of the following: female, LGBTQ+ or an “underrepresented individual” as defined by the issuer’s home jurisdiction; **or**
 - Explain – specify unmet requirement and give reason for noncompliance

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TIMING

For Both U.S. Companies and Foreign Private Issuers – Diverse Board Representation

Cure Period

- If Nasdaq notifies company for failure to “comply or explain,” company must cure the deficiency by its next annual shareholder meeting or 180 days from the event that caused the deficiency, whichever is later

Transition Period (time period before 2 “diverse” directors are required)

<u>Market Tier</u>	<u>Diverse Directors Required</u>	<u>Compliance Deadline Following Date SEC Approves Rule</u>
○ Nasdaq Global Select or	1	2 years
○ Nasdaq Global Market	2	4 years
○ Nasdaq Capital Market	1	2 years
	2	5 years

Phase-In Period for IPOs, Direct Listings, Transfers from Other Exchanges and SPACS

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| <ul style="list-style-type: none"> ○ Applies to new listings including IPOs, direct listings, transfers from over-the-counter market or another exchange, and SPACs in connection with their business combination <ul style="list-style-type: none"> • <u>Unless</u> previously subject to substantially similar diversity requirements of another national securities exchange | <p>Compliance Deadline: 1 year from the date of listing or compliance within Transition Period above, whichever is later</p> |
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BOARD DIVERSITY DISCLOSURE MATRIX – U.S. COMPANIES

Board Diversity Disclosure

(Proposed Rule 5606)

- Board Diversity Matrix
 - Annual disclosure related to self-identifying characteristics voluntarily provided by the company's directors
 - Directors who decline to respond can be marked as "undisclosed" or "gender undisclosed," as applicable
- Reporting
 - Current-year data must be disclosed **within 1st year of the rule's approval** in Nasdaq's proposed format (or substantially similar), and **following the 1st year of disclosure, company would disclose data of the current year and the immediately preceding year**
 - Phase-in for certain newly listed companies – must comply within the 1st year of listing

Board Diversity Matrix (As of [DATE])

Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Undisclosed	#			

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BOARD DIVERSITY DISCLOSURE MATRIX – FOREIGN PRIVATE ISSUERS

Board Diversity Disclosure

(Proposed Rule 5606)

• Board Diversity Matrix

- Annual disclosure reflecting self-identifying characteristics voluntarily provided by directors
- Directors who decline to respond can be marked as “undisclosed” or “gender undisclosed,” as applicable
- Differs from U.S. company matrix: Includes “underrepresented individuals” based on FPI’s home country jurisdiction rather than “underrepresented minorities,” which term includes terms/definitions based on U.S. EEO-1 Report

• Reporting

- Current-year data must be disclosed **within 1st year of the rule’s approval** in Nasdaq’s proposed format (or substantially similar), and **following the 1st year of disclosure, FPI would disclose data of the current year and the immediately preceding year**
- Phase-in for certain newly listed companies – must comply within the 1st year of listing

Board Diversity Matrix (As of [DATE]) Foreign Issuer under Rule 5605(f)(1)*

Country of Incorporation	[Insert Country Name]			
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
LGBTQ+	#			
Underrepresented Individual in Home Country Jurisdiction	#			
Undisclosed	#			

* The proposal’s definition of “Foreign Issuer” includes FPIs

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NASDAQ PROPOSAL VS. CURRENT STATE REQUIREMENTS

	Nasdaq Proposal	California	Washington State
Applicable U.S. Entities	<ul style="list-style-type: none"> All listed companies, with limited exceptions 	<ul style="list-style-type: none"> Public companies with principal executive offices in the state 	<ul style="list-style-type: none"> Public companies headquartered in the state, with limited exceptions
U.S. Quantitative Requirement	<ul style="list-style-type: none"> 2 “Diverse” directors; one must be a female by Effective Date below For U.S. companies, “diverse” is defined as “an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+ <ul style="list-style-type: none"> “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community “Underrepresented Minority” means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities 	<ul style="list-style-type: none"> Current minimum: 1 female today and by end of 2021, 1 member of “underrepresented community” Thereafter, depends on board size <ul style="list-style-type: none"> At least 1 female director by close of 2019. Thereafter, must have at least 1 if company has 4 or fewer directors By close of 2021, if the company has 5 or fewer directors, min. of 2 women, and if the company has 6 or more directors then min. of 3 women <ul style="list-style-type: none"> “Female” defined as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth” At least 1 member of underrepresented community by close of 2021. Thereafter, must have at least 1 if company has 4 or fewer directors By close of 2022, if the company has 5 to 8 directors, then min. of 2 members of underrepresented community required and if the company has 9 or more directors then min. of 3 <ul style="list-style-type: none"> Meaning individuals who self-identify “as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender” 	<ul style="list-style-type: none"> Board must be a quarter female by 1/1/22 <ul style="list-style-type: none"> Must have at least 25% directors who self-identify as women by January 1, 2022
Effective Date	<ul style="list-style-type: none"> 1 director within 2 years of rule approval 2 directors within 4 years of rule approval 	<ul style="list-style-type: none"> Gender diversity: In effect since end of 2019 Member of Underrepresented Community: Compliance Required by end of 2021 	<ul style="list-style-type: none"> By January 1, 2022
Failure to Comply	<ul style="list-style-type: none"> None, if the issuer explains why If company neither complies nor explains, could potentially lead to de-listing 	<ul style="list-style-type: none"> Monetary fine If company has a female or member of underrepresented community who holds a seat for at least a portion of the year, rule satisfied for the year 	<ul style="list-style-type: none"> If failed, must prepare board diversity discussion and analysis on developing or maintaining diversity for proxy statement or website
Main Provisions	<ul style="list-style-type: none"> Proposed Rule 5605(f) 	<ul style="list-style-type: none"> Gender Diversity – Cal. S.B. 826 (Sept. 30, 2018) Underrepresented Community – Cal. A.B. 979 (Sept. 30, 2020) 	<ul style="list-style-type: none"> Wash. Subst. S.B. 6037 (June 11, 2020)

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