

Nasdaq Proposes New Board Diversity Listing Requirements

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On December 1, 2020, Nasdaq submitted a proposal to the SEC to adopt new listing rules related to board diversity and disclosure.¹ If approved by the SEC, the new listing rules would require most Nasdaq-listed companies to have, or *explain why they do not have*, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority² or LGBTQ+. In addition, the new listing rules would require all companies listed on Nasdaq's US exchange to publicly disclose "consistent, transparent diversity statistics regarding their board of directors" using a standardized disclosure matrix template either in their annual meeting proxy statements or on their websites.³

Timeframes for Compliance

The two main aspects of the proposed new listing rules are as follows:

1. Disclosure of Board-Level Diversity Statistics

Under the proposal, all Nasdaq-listed companies (other than exempt companies, as described below) would be required to publicly disclose board-level diversity statistics through Nasdaq's proposed disclosure framework within one calendar year of the SEC's approval of the listing rule.

Once applicable, companies would be required to annually disclose board-level diversity data using the [matrix](#) provided by Nasdaq (or a substantially similar format) in the company's proxy or information statement for its annual meeting, or on the company's website. Both the current year and immediately prior year's board diversity statistics would be required in each matrix disclosure.

If a company elects to disclose the information on its website, the company must also submit such disclosure and a URL link to such disclosure through the Nasdaq Listing Center within 15 calendar days of the company's annual

¹ The proposal is available [here](#). Nasdaq's FAQs are available [here](#).

² Defined as "an individual who self-identifies in one or more of the following groups: 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."

³ See Nasdaq's press release, available [here](#).

shareholders meeting. Companies that elect to include the board diversity disclosure matrix in their proxy or information statement for their annual meeting would not need to provide a separate copy to Nasdaq.

2. Board Diversity Composition Requirements for Operating Companies

In addition to public disclosure, the proposed rules would also require Nasdaq-listed companies to meet specified board diversity composition expectations as follows:

- All operating companies would be expected to have one diverse director within two calendar years of the SEC's approval of the listing rule.
- Companies listed on the Nasdaq Global Select Market and Nasdaq Global Market would be expected to have a second diverse director within four calendar years of the SEC's approval.
- Companies listed on the Nasdaq Capital Market would be expected to have a second diverse director within five calendar years of the SEC's approval.

Companies that are not in a position to meet the board composition objectives within the required timeframes would not be subject to delisting *if* they provide a public explanation of their reasons for not meeting the objectives. Such an explanation for a non-diverse board would need to be provided in a company's annual meeting proxy statement or on the company's website (however, if provided on the website, the company would need to notify Nasdaq of the location where the information is available, as specified in the proposed rule).

Exemptions and Phase-Ins for Newly Listed Companies

The proposed rules provide the following exemptions and phase-in periods for certain companies:

Companies Exempt from Both the Board Diversity Disclosure and Composition Rule Proposals ("Exempt Companies")

- Special purpose acquisition companies ("SPACs") listed under IM-5101-2 would be exempt from the proposed board diversity and disclosure rules until one year following the completion of their business combination. In addition, the following companies would be exempt from both of the proposed rule requirements: asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series.

Partial Exemption from Board Diversity Composition Proposal for Smaller Reporting Companies and Foreign Issuers

- Smaller reporting companies would be permitted to satisfy the board diversity composition objective in the proposed rules by having two female directors (instead of one female director and one who self-identifies as either an underrepresented minority or LGBTQ+, as required for other issuers).
- Foreign issuers (which include foreign private issuers and certain other foreign companies)⁴ could satisfy the second director objective by including either another female director, 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.

⁴ Under the proposed rule, a "Foreign Issuer" means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act and (ii) has its principal executive offices located outside of the United States.

- Both smaller reporting companies and foreign issuers would be required to provide the board diversity disclosure under the proposed rule. However, foreign issuers would also be able to elect to satisfy the board composition disclosure requirement through an [alternative disclosure matrix template](#).

Phase-In Periods for Newly Listed Companies and Certain Other Companies

- Newly listed companies would have one year from the date of listing to satisfy both the proposed board diversity disclosure and composition rule requirements.
- Any company that ceases to be a foreign issuer, a smaller reporting company or an exempt company would have one year from the date that it no longer qualifies as such to satisfy the board diversity composition rule requirements.

Public Comment Period

The proposal will be open for a public comment period of a minimum of 21 days from the time the proposed rules are published in the Federal Register. After publication in the Federal Register, the SEC has 30 to 240 calendar days to approve the rule proposal.

Nasdaq will be hosting a webinar on December 9, 2020, where it will provide details on the proposal and answer questions from the issuer community.

Text of Proposed Nasdaq Listing Rules

Set forth below in Appendix A is the text of the proposed rule change and the Board Diversity Matrix form for disclosing diversity statistics annually to Nasdaq.

Appendix A

“5605. Board of Directors and Committees

(a) – (e) No change.

(f) Diverse Board Representation

(1) Definitions For purposes of this Rule 5605(f):

“Diverse” means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+.

“Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

“Foreign Issuer” means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a “foreign issuer” under Rule 3b-4(b) under the Act and (ii) has its principal executive offices located outside of the United States.

“LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or as a member of the queer community.

“Approval Date” means the date that the Commission issues an order granting the approval of this proposed Rule 5605(f).

“Smaller Reporting Company” has the definition set forth in Rule 12b-2 under the Act.

“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.

(2) Diversity Requirement

(A) General Requirement

Each Company, except as described below in (B) or (C), must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.

(B) Foreign Issuers

- (i) In the case of a Foreign Issuer, in lieu of the definition in Rule 5605(f)(1), Diverse means an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the Company’s home country jurisdiction.
- (ii) Each Foreign Issuer must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the Company’s home country jurisdiction.

(C) Smaller Reporting Companies

Each Smaller Reporting Company must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Minority.

(3) Public Disclosure of Non-Diverse Board

If a Company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not have two Diverse directors, the Company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable; and (ii) explain the reasons why it does not have two Diverse directors. Such disclosure must be provided: (i) in the Company’s proxy statement or information statement for its annual meeting of shareholders; or (ii) on the Company’s website. If the Company provides such disclosure on its website, the Company must also notify Nasdaq of the location where the information is available by submitting the URL link through the Nasdaq Listing Center no later than 15 calendar days after the Company’s annual shareholders meeting.

(4) Exempt Companies

The following types of companies are exempt from the requirements of this Rule 5605(f) (“Exempt Companies”): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of nonvoting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series.

(5) Phase-in Period

(A) Any Company newly listing on Nasdaq that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted one year from the date of listing to satisfy the requirements of Rule 5605(f). This phase-in period will apply after the end of the transition periods provided in Rule 5605(f)(7).

(B) Any Company that ceases to be a Foreign Issuer, a Smaller Reporting Company or an Exempt Company shall be permitted one year from the date that the Company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively, to satisfy the requirements of Rule 5605(f).

(6) Cure Period

If a Company does not have at least two Diverse directors as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), the Listing Qualifications Department will promptly notify the Company and inform it that it has until the latter of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

(7) Effective Dates/Transition

Each Company listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least one Diverse director no later than two calendar years after the Approval Date and at least two Diverse directors no later than four calendar years after the Approval Date. Each Company listed on The Nasdaq Capital Market must have, or explain why it does not have, at least one Diverse director no later than two calendar years after the Approval Date and at least two Diverse directors no later than five calendar years after the Approval Date. Notwithstanding the foregoing, a Company is not required to comply with the requirements of this Rule 5605(f) prior to the end of the phase-in period described in Rule 5605(f)(5), if applicable. A company listing after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must satisfy the requirements of this Rule 5605(f) by the latter of the periods set forth in this subparagraph (7) or one year from the date of listing.

5606. Board Diversity Disclosure

(a) Each Company must annually disclose, to the extent permitted by applicable law, information on each director’s voluntary self-identified characteristics in substantially the format below. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

Board Diversity Matrix (As of [DATE])				
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Undisclosed Gender
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	#			

However, a Company that qualifies as a Foreign Issuer under Rule 5605(f)(1) may elect to use the format below:

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	Undisclosed Gender
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	#			

(b) The disclosure required by this Rule 5606 must be provided (i) in the Company’s proxy statement or information statement for its annual meeting of shareholders or (ii) on the Company’s website. If the Company provides such disclosure on its website, the Company must also submit such disclosure and include a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the Company’s annual shareholders meeting.

(c) This Rule 5606 shall not apply to Exempt Companies as defined in Rule 5605(f)(4).

(d) A Company newly listing on Nasdaq, including a company listing in connection with a business combination under IM-5101-2, must satisfy the requirement of this Rule 5606 within one year of listing.

(e) This Rule 5606 will be operative one year after the date that the Commission issues an order granting the approval of this proposed Rule 5606.”

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