

Board Diversity – The State of Play In 2025

Specific Standards No Longer Required for Nasdaq Listing

Late last year, the U.S. Court of Appeals for the Fifth Circuit vacated the Securities and Exchange Commission's order approving the Nasdaq Stock Market's board of directors' diversity rules, finding that the SEC had exceeded its authority by requiring disclosure that was inconsistent with the purposes of the Securities Exchange Act of 1934. While Nasdaq had announced that it did not intend to appeal the Fifth Circuit's decision, the SEC's intentions remained unclear in view of the pending change in Administrations. This week, however, the matter was put to rest as the SEC approved Nasdaq's proposal to remove the relevant board diversity provisions from its listing standards.

In 2021, to encourage the inclusion of both females and individuals from historically underrepresented communities on the boards of listed companies, the SEC approved new Nasdaq listing standards establishing "aspirational" director diversity objectives (a so-called "diversify or disclose" rule). Generally, these standards compelled Nasdaq-listed companies to disclose whether they had attained the exchange's applicable goal (based on their listing tier) for females (or gender diverse members) and racially or ethnically diverse members on their boards or explain why not. In addition, Nasdaq companies were required to make prescribed tabular disclosure about their board diversity characteristics.

The Fifth Circuit's ruling means that Nasdaq-listed companies are not required to comply with the "diversify or disclose" requirement. Nor are they required to include the board diversity matrix in their proxy statement.

Diversity's Continuing Role in Board Composition

While the Fifth Circuit decision follows recent state and federal decisions in California successfully challenging laws seeking to diversify corporate boards on constitutional grounds, nonetheless exchange-listed companies will want to proceed carefully in evaluating how these developments should be factored into their director refreshment practices. Both ISS and Glass Lewis & Co. continue to assess board diversity and related disclosure in formulating their stockholder voting recommendations (including director reelection support). And some large investment advisors, as well as other institutional stockholders, have demonstrated their support for such goals.

In view of the current judicial environment, we suspect that further revisiting of board diversity policies may be on the agenda of many institutional investors, although policy changes may be largely semantic rather than a change in viewpoint. For example, BlackRock recently updated its Voting Benchmark Policies to eliminate its aspirational board diversity targets (that is, a 30% threshold for board diversity and at least two female directors). Given the widespread

attainment of this goal by virtually all of the Standard & Poor's 500, BlackRock plans to evaluate companies (and whether to vote against members of the nominating and governance committee) on a case-by-case basis for consistency with "market norms," which we suspect it may view as the aspirational 30% threshold.

In the case of privately-held companies considering an IPO, under its board diversity initiative Goldman Sachs continues to only underwrite a U.S. public offering if the company has at least two diverse directors. Consequently, in view of the ongoing public interest in this subject we expect that diversity considerations will continue to play a meaningful role in the composition and refreshment of corporate boards.

Ongoing Disclosure Obligations

As a reminder, the SEC's current disclosure rules require companies to disclose whether, and how, their board of directors consider diversity in nominating new directors (although such rules largely leave to companies to decide how they define "diversity" and take it into consideration in the nomination process). In addition, companies that have already achieved, or are in the process of satisfying, the Nasdaq diversity objectives may face stockholder pressure to maintain these board composition levels, including providing the standardized diversity disclosure matrix that is now found in the proxy statements of Nasdaq-listed companies, among many others. With the Nasdaq rules no longer effective, however, companies will have more latitude in the format for such disclosure.

Going Forward

As they continue to prepare for the 2025 proxy season, companies should consider taking some or all of the following steps in response to these developments:

- Review the relevant SEC Staff guidance suggesting that, to the extent a board of directors has considered an individual's self-identified diversity characteristics, the company's discussion of the director's qualifications should include identifying those characteristics, how they were considered, and the effectiveness of any current policy;
- Review the board diversity policies of ISS and Glass Lewis to determine how they may be applied to your company's existing board composition;
- Become familiar with the board diversity policies and expectations of your company's largest institutional stockholders;
- Continue to collect diversity data for the current year;

- Understand your company's director nominee evaluation process and verify that it is accurately reflected in the corporate governance disclosure about your Nominating and Governance Committee; and
- Consult your company's legal counsel to:
 - determine whether the officer and director questionnaires used to collect information about individual directors for proxy disclosure purposes has been updated or revised; and
 - assess whether support for incentive compensation metrics reflecting aspirational representation diversity targets may be eroding and more problematic in the future.

Need Assistance?

Compensia has extensive experience in helping companies review their executive compensation and corporate governance policies and practices and developing disclosure of such practices in their proxy materials taking into consideration SEC disclosure requirements, proxy advisory firm policies, and investor expectations. If you would like assistance with or if you have any questions on the subjects addressed in this Thoughtful Pay Alert, please contact your regular Compensia team members or the authors of this Alert:

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