

[Securities Regulation Daily Wrap Up, TOP STORY—SEC approval of Nasdaq board diversity rule draws praise, opposition, \(Aug. 9, 2021\)](#)

Securities Regulation Daily Wrap Up

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Early reaction to SEC approval of a new Nasdaq rule on diversity requirements for listed company boards breaks down along party lines.

The SEC's approval of a new Nasdaq rule on board diversity is drawing support and opposition along party lines, reflecting a 3-2 split in the Commission itself. Senate Banking Committee Chair Sherrod Brown (D-Ohio) praised the rule, which imposes diversity-related board composition and reporting requirements, saying that Corporate America must do more to increase diversity in the boardroom. Ranking Member Pat Toomey (R-Pa) criticized the prescriptive nature of the requirements, saying they could harm economic growth and investors by pressuring companies to select directors from a narrower pool of candidates and discouraging others from going public.

Nasdaq rule. Nasdaq Stock Market LLC filed a [proposed rule](#) in December 2020 imposing certain board diversity requirements for its listed companies, then filed an [amended proposal](#) in March 2021. On August 6, 2021, the SEC [approved](#) the amended proposal.

The rule imposes two new sets of requirements for Nasdaq-listed companies:

First, companies must have at least two diverse directors, including one who self-identifies as, female and one who self-identifies as either an underrepresented minority or LGBTQ+, or explain why they do not.

In a [fact sheet](#), Nasdaq said the board composition requirement is not a mandate and does not set a hard target that companies must adhere to regardless of their circumstances. Further, a company's explanation can include a description of a different approach. Nasdaq said it will verify that the company has provided an explanation but will not assess the merits of the explanation, and there is no right or wrong reason that a company may give for not having at least two directors.

Second, companies must publicly disclose board-level diversity statistics using a standardized template, called the [Board Diversity Matrix](#).

Scope and timing. To allow flexibility and time in reaching compliance, the rule provides the following:

- Smaller reporting companies, foreign issuers, and companies with five or fewer directors have additional flexibility to meet the diversity objectives, as specified.
- SPACs are exempt from the rule. Following the business combination, timing requirements apply to reach compliance.
- The rule will be phased in over several years, with different deadlines for different groups.

Resources. Nasdaq announced a number of resources to help companies understand and comply with the new requirements:

- Free access to several board recruiting services;
- An [FAQ](#);
- [Examples](#) of acceptable and unacceptable disclosures;
- A dedicated mailbox for questions (drivingdiversity@nasdaq.com); and
- Live webinars to explain the requirements.

SEC approval. The Commission voted 3-2 to approve the Nasdaq rule.

- SEC Chair Gary Gensler [stated](#) that the rules are consistent with the requirements of the Exchange Act, and reflect calls from investors for greater transparency about the people who lead public companies.
- Commissioners Alison Herren Lee and Caroline Crenshaw [supported](#) the rule, calling it "a positive first step for investors" while cautioning there is more work to be done in improving both diversity and transparency at public companies and in capital markets more broadly.
- Commissioner [Hester Peirce](#) opposed the rule. In Peirce's view, the proposal is not designed to achieve the purposes of the Exchange Act because it does not protect investors, harms market integrity, and is contrary to the public interest. She also believes it addresses issues outside the scope and purposes of the Exchange Act and conflicts with core Constitutional principles.
- Commissioner Elad Roisman [opposed](#) the rule, finding the SEC's analysis insufficient to evaluate the merits of the proposal. He also believed the approval order should have included a more thorough discussion of whether the proposal could be considered state action, warranting analysis under the Constitutional standards of scrutiny.

Reaction. Senate Banking Committee Chair Sherrod Brown [praised](#) the move, saying he applauded the SEC and Nasdaq for recognizing the benefits to companies and shareholders of a more inclusive and equitable economy.

Senate Banking Committee Ranking Member Toomey [stated](#) that while he supports diversity, the requirements may ultimately harm economic growth and investors.

"By defining diversity by race, gender, and sexual orientation, NASDAQ's mandate will inevitably pressure companies to subordinate crucial factors such as knowledge, experience, and expertise when selecting board members," said Toomey.

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