

[Securities Regulation Daily Wrap Up, TOP STORY—CII, Chamber's CCMC comment on Nasdaq board diversity proposal, \(Jan. 6, 2021\)](#)

Securities Regulation Daily Wrap Up

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CII and the Center for Capital Markets Competitiveness highlighted the importance of board diversity in comments on Nasdaq's proposed comply-or-explain rule change that would push listed companies to have at least two diverse directors.

The Council of Institutional Investors and the Chamber of Commerce's Center for Capital Markets Competitiveness both expressed some agreement with Nasdaq's [proposal](#) to require listed companies to have, or explain why they do not have, at least one or two diverse directors. CII [said](#) that Nasdaq's definition of diversity is narrower than CII's own diversity policy but the proposal would improve transparency and comparability of disclosures. The CCMC praised the goals of the proposal but [said](#) that emerging growth companies and startups should retain the flexibility to retain founders and entrepreneurs with specific expertise.

Nasdaq rule. If the SEC approves Nasdaq's proposal, all listed companies will be required to publicly disclose board-level diversity statistics within one year. Depending on their listing tier, companies will have to have one or two diverse directors or explain why they do not. A diverse director is one who (a) self-identifies as female or (b) self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+. Companies will not be delisted as long as they publicly explain their reasons for not meeting the diversity objectives.

CCMC comment. The CCMC said that the proposal will encourage companies to think critically about how to improve diversity, a goal the group shares. CCMC's comment letter touts its own Equality of Opportunity Initiative and its support for federal legislation requiring disclosure of diversity statistics. In contrast to its support for disclosure, the CCMC opposes quotas, saying that the private sector is "particularly apt to respond to the diversity imperative" and that businesses should retain the discretion to consider how to find candidates that will promote long-term corporate performance.

The CCMC said Nasdaq's proposal "rightfully acknowledges that not all businesses may be able to meet listing standards on the same timetable." However, the group urged careful assessment of the proposal's effect on emerging growth companies, as well as its potential impact on IPOs. EGCs and startups should have similar flexibility under the proposal as they have under the JOBS Act, the CCMC wrote, to allow them "the flexibility needed to tap specific founder and entrepreneur expertise."

CII agreement. CII also voiced its preference for disclosure over quotas, saying the latter "may result in 'check-the-box' diversity." CII supports Nasdaq's comply-or-explain model for providing a framework to disclose board composition while allowing flexibility when the proposed standards cannot be met.

CII structured its comment letter by comparing the proposal to the four factors contained in CII's own disclosure policy. First, the group said that the proposal's requirements are material to investment and voting decisions. It agreed with remarks by SEC Commissioner Allison Herren Lee that improving disclosure gives investors the information they need while also driving corporate behavior. CII also quoted the Office of the Investor Advocate as stating that listing standards could go further than voluntary disclosures towards ensuring that more companies provide investors with insight into board diversity.

Furthermore, CII agreed with Nasdaq that empirical evidence demonstrates a positive correlation between diversity and performance. CII believes that the burden the proposal places on companies is counterbalanced by the benefits disclosure will provide to investors. The group stressed that companies will have four years to satisfy

the comply-or-explain provisions and Nasdaq is offering listed companies free access to a network of diverse board-ready candidates. Finally, the proposal supports CII's policy of improving transparency, comparability, reliability and accuracy in disclosures. While Nasdaq's definition of diversity is narrower than CII's own, CII agrees that the narrower definition will promote the public interest in transparency and comparability.

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