Securities Regulation Daily Wrap Up, TOP STORY—Nasdaq proposes board diversity disclosure for listed companies, (Dec. 2, 2020)

Securities Regulation Daily Wrap Up

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The exchange asked the SEC to approve a comply-or-explain rule change that would push listed companies to have at least two diverse directors on the board.

The Nasdaq Stock Market LLC is joining the call for more diversity on corporate boards by proposing a rule change that would require listed companies to have, or explain why they do not have, at least one or two diverse directors. The move is unusual in that it would impose a disclosure requirement beyond what is required under the federal securities laws and regulations. Nasdaq believes that the rule would improve the information available to investors and could encourage boards to consider a wider range of candidates in the nomination process, including candidates without ties to the current board.

Requirements and timing. If the SEC approves the rule, all listed companies will be required to publicly disclose board-level diversity statistics within one year. Companies will also be subject to the comply-or-explain board composition requirement depending on their listing tier. At a minimum, all companies will be expected to have one diverse director within two years. Companies listed on the Nasdaq Global Select Market and Nasdaq Global Market should have two diverse directors within four years, while those on the Nasdaq Capital Market should have two diverse directors within five years.

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+. For listed companies expected to have two diverse directors, this means at least one director from each of the two foregoing categories. However, foreign companies and smaller reporting companies can satisfy the requirement with two female directors.

Companies will not be delisted if they publicly explain their reasons for not meeting the diversity objectives. There is a one-year phase-in for newly listed companies or those that cease to be a foreign issuer, smaller reporting company, or exempt company.

Method of disclosure. Under the proposal, all listed companies would disclose unbundled, consistent data using a uniform framework on their website or in their proxy statement. Similarly, if the company does not have the suggested number of diverse directors, it must explain why not via disclosure either in its proxy statement or on its website. Nasdaq will not assess the substance of the explanation, but only verify that the company has provided one.

Nasdaq designed the proposal to avoid conflicting with Regulation S-K's existing disclosure requirement and to reduce the burden on companies by allowing their choice of disclosure medium (website/proxy). To promote consistency and comparability, disclosure would use the existing categories collected by the EEOC via the EEO-1 form, with an additional reporting category for LGBTQ+ status. There is an "undisclosed" option in each demographic category for directors who choose not to disclose their demographic information. Nasdaq also offers a separate disclosure matrix for foreign issuers in recognition of foreign privacy laws and differences in demographic composition.

Need for rule. After conducting an internal study of Nasdaq-listed companies, Nasdaq found that current reporting of board diversity data is not widespread or consistent enough to allow for investors to compare different companies' diversity statistics. Nasdaq also concluded from a review of third-party research and interviews that boards have diversified gradually and that the U.S. still lags behind other jurisdictions with diversity requirements. According to the proposal, "an extensive body of academic research demonstrates that diverse boards are positively associated with improved corporate governance and financial performance."

"Nasdaq's purpose is to champion inclusive growth and prosperity to power stronger economies," said Adena Friedman, president and CEO, Nasdaq. Nelson Griggs, president of Nasdaq Stock Exchange, said that diversity "opens up a clear path to innovation and growth. We are inspired by the support from our issuers and the financial community with this effort and look forward to working together with companies of all sizes to create stronger and more inclusive boards." Friedman told the *New York Times DealBook* that ideally the SEC would mandate diversity disclosure for all companies. "They could actually apply it to public and private companies because they oversee the private equity industry as well," she observed.

Finally, Nasdaq also announced that it had partnered with Equilar to help companies access a larger community of diverse, board-ready candidates.

Comments on the proposal are due within 21 days after publication in the *Federal Register.*

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