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Nasdaq Amends Proposed Rules on Board Diversity

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As we previously reported, Nasdaq proposed listing rules in December that would have required all Nasdaq-listed companies to have at least two diverse directors (or explain why they didn't) and to disclose board diversity statistics, subject to certain exceptions. Click here for our recent client alert on the initial proposal.

Although the proposed rules have been widely lauded as a step forward in bringing diversity to the corporate boardroom, there has been some vocal criticism of the proposal. In particular, on February 12, 12 Republican members of the Senate Banking Committee sent a letter to Acting SEC Chair Allison Herren Lee urging the SEC to reject the proposal. In response to this criticism and a number of other comments, Nasdaq has submitted a revised proposal that would provide companies with more flexibility in achieving compliance with the proposed rule changes. Nasdaq also has clarified that the proposal is a disclosure-based framework, not a mandate, by changing references from "diversity requirement" to "diversity objective" in the revised proposal.

Smaller Boards. The amendment would allow a listed company with a board of five or fewer directors to meet the diversity objective by having one diverse director, instead of two.

Grace Period for Board Vacancies. The amendment provides a one-year grace period for a listed company that no longer meets the diversity objective due to a vacancy on its board of directors, such as when a diverse director falls ill or resigns.

Aligning Disclosure Requirements with Annual Meetings. The initial proposal keyed each specified transition period for satisfying the disclosure requirements based solely on the period of time passed since the proposal's approval. The revised proposal would align disclosure with the timing of other governance-related disclosures by allowing a company to provide such disclosure in its proxy statement for that year.

Longer Phase-In Period for Newly Listed Companies. The revised proposal would extend the phase-in period for newly listed companies to meet the diversity objective from one year to two years from listing. However, the phase-in period for a newly listed company to satisfy the requirement to annually disclose board diversity statistics would remain one year from listing.

Location of Disclosure. Under the revised proposal, companies can satisfy their board diversity disclosure requirements on their websites, in their proxy statements, or if they do not file a proxy, in their Forms 10-K or 20-F.

There continues to be a significant push by multiple constituencies to increase diversity in the corporate boardroom. Large investors and proxy advisory firms have made diversity a key issue. Public companies should continue to look for opportunities to add diverse directors to their boards.

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