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Nasdaq Proposes New Listing Rules on Board Diversity

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Momentum continues to build to mandate diversity on corporate boards. A new proposal by Nasdaq will require all Nasdaq-listed companies to have at least two diverse directors (or explain the reasons why they do not) and disclose board diversity statistics, subject to certain exceptions. This comes on the heels of the California law adopted in October that mandates boards of public companies, including foreign corporations with principal executive offices in California, to include specified numbers of directors from "underrepresented communities."

Disclosure Requirement. Within one year of the SEC's approval of the proposed listing rules, each Nasdaq-listed company must annually disclose board diversity data on its website or in its proxy or information statement for its annual meeting of shareholders. Each company must disclose the number of directors based on the directors' self-identified gender, race, and LGBTQ+ status, respectively, in a format proposed by Nasdaq. Any director who chooses not to self-identify will be counted in an "Undisclosed" category. Companies that fail to comply with the disclosure requirement could be delisted if they fail to regain compliance within a cure period of up to 180 days.

Diversity Requirement. In addition, Nasdaq-listed companies must meet minimum board diversity requirements within specified transition periods based on the company's listing tier. All companies must have at least one diverse director within two years of the proposal's approval. Companies listed on the Nasdaq Global Select Market or the Nasdaq Global Market must have at least two diverse directors (including one self-identified as female and one self-identified as underrepresented minority or LGBTQ+) within four years of the proposal's approval, while companies listed on the Nasdaq Capital Market will have five years to meet this requirement. Foreign issuers and smaller reporting companies can satisfy this requirement with two female directors. However, a company that cannot meet the diversity requirement will not be subject to delisting if it explains the reasons for not doing so on its website or in its proxy or information statement for its annual meeting of shareholders. If a company fails to provide an explanation, it will have until the later of its next annual shareholder meeting or 180 days from the event that caused the deficiency to cure the deficiency, either by nominating additional diverse directors or by providing the required disclosures.

Phase-in Periods. A company newly listed on Nasdaq, including a company listing through a reverse merger with a special purpose acquisition company (SPAC), will have a phase-in period of one year from its Nasdaq listing to satisfy the disclosure requirement. These companies will also have a phase-in period of one year from listing to satisfy the diversity requirement following the transition periods described above.

Exempt Companies. Certain types of companies, such as SPACs, asset-backed issuers, and other passive issuers and limited partnerships, will be exempt from both the disclosure requirement and the diversity requirement.

Given the current political climate in Washington and the open question of who will lead the SEC in 2021, it is uncertain when/if the SEC will approve the Nasdaq proposal. However, all public companies — whether listed on Nasdaq, the NYSE, or another exchange — should continue to focus on board diversity and look for opportunities to add diverse directors to their boards.

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