Proskauer

Nasdaq Proposes New Board Diversity Requirements for Listed Companies

December 3, 2020

On December 1, 2020, Nasdaq proposed new listing rules that, if approved by the SEC following a public comment period,[1] would require Nasdaq-listed companies either to have, or explain why they do not have, at least two diverse directors and disclose information about the diversity of their directors on an annual basis. The new rules, if adopted, would be the first federal rules that effectively require companies to retain diverse board members.[2] The release filed with the SEC is available here.

Specifically, Nasdaq-listed companies would be required to

- have at least one director who self-identifies as a female, and at least one director who self-identifies as an underrepresented minority (which means Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities), or as LGBTQ+; or
- explain, in either the company's annual meeting proxy statement or on the company's website, why the company does not have two diverse directors.

If approved by the SEC without modification, the new requirements would be phased in over a two to five-year period following SEC approval as follows:

- within two calendar years, every Nasdaq-listed company must have, or explain why it does not have, one diverse director;
- within four calendar years, each company listed on the Nasdaq Global Select or Global Market tiers must have, or explain why it does not have, two diverse directors; and
- within five calendar years, each company listed on the Nasdaq Capital Market tier must have, or explain why it does not have, two diverse directors.

As proposed, this rule is subject to certain exceptions, including:

- following the transition period described above, newly listed companies, including IPOs, will have one year from the listing date to comply;

- smaller reporting companies can satisfy the requirement to have two diverse directors by having two female directors; and
- foreign issuers can satisfy the second diverse director requirement by having a second female director, an individual who self-identifies as LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction.

Nasdaq also proposed a new listing rule that would require listed companies, within one year following SEC approval of the rule, to disclose statistical information in a uniform format about the self-identified gender, race and LGBTQ+ status of their directors in either the company's annual meeting proxy statement or on the company's website. Implementation of this listing rule would require more detailed diversity information than what is required under existing SEC rules, which only address how diversity is considered in identifying board nominees.[3]

The proposal comes at a time of increasing focus on board diversity among companies, investors, state legislatures, and other stakeholders, and more broadly we expect the discussion of diversity, ESG, and human capital to intensify under the new Administration. We expect the SEC to address this proposal following the appointment of a new SEC Chairman.

If you have questions about these new proposed rules, please contact your Proskauer attorney or one of the capital markets attorneys listed on this alert.

[1] According to Nasdaq, the SEC will provide a minimum of 21 days from the time the proposed rule changes are published in the Federal Register for the public (including investors, companies, and their representatives) to have an opportunity to comment on the proposal, and the SEC will have 30 to 240 calendar days to approve the proposal.

[2] To date, eleven states have passed or proposed legislation related to board diversity. For example, California requires companies headquartered in the state to have at least one director who self-identifies as a female and at least one director from an underrepresented community. See Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020).

[3] Pursuant to Item 407(c)(2)(vi) of Regulation S-K, companies must describe how the nominating committee (or the board) considers diversity in identifying nominees for director (including information about any related policies). However, the Regulation S-K Compliance & Disclosure Interpretations (Question 116.11) state the SEC staff's "expectation" that self-identified diversity characteristics of a director relevant to the director's qualifications or experience would, with the director's consent, be disclosed.

Related Professionals

- **Peter Castellon**
  Partner
- **Ben D. Orlanski**
  Partner
- **Antonio N. Piccirillo**
  Partner
- **Fabio A. Yamada**
  Partner
- **Frank Zarb**
  Partner
- **Louis Rambo**
  Partner