

# Fifth Circuit Orders En Banc Rehearing of Rejected Challenge to Nasdaq's Board-Diversity Rules

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Well – this took four months. The U.S. Court of Appeals for the Fifth Circuit ordered *en banc* rehearing of an unsuccessful challenge to the Securities and Exchange Commission's approval of the Nasdaq Stock Market's rules concerning diversity of directors on boards of Nasdaq-listed companies. The rules – which a panel of the Fifth Circuit upheld in October 2023 – require listed companies to disclose director-diversity information and either to have a certain number of diverse directors or to explain why not. We blogged about that decision [here](#).

The *en banc* court's order in [Alliance for Fair Board Recruitment v. SEC](#) is perhaps not a surprise. The panel had consisted entirely of Democratic appointees, who constitute a relatively small minority of the full Fifth Circuit, and board diversity has become a highly politicized issue.

As we previously noted, Nasdaq's rules do not mandate board diversity and do not direct Nasdaq-listed companies to add diverse directors to their boards. They require only disclosures and explanations about board diversity (or lack of it).

As we also noted, Nasdaq does not view the explanation requirement as particularly onerous. Nasdaq listed various permissible explanations for any lack of diversity, such as “[t]he Company does not meet the diversity objectives . . . because it does not believe Nasdaq’s listing rule is appropriate,” “because it does not believe achieving Nasdaq’s diversity objectives [is] feasible given the company’s current circumstances,” “because the Nominating Committee considers a variety of [factors]” for director positions, or “because the Nominating Committee is committed to ensuring that the Board’s composition appropriately reflects the current and anticipated needs of the Board and the company.” The rules therefore require only an explanation, not a result.

However, as the SEC recognized, the disclosure rules “may have the effect of encouraging some Nasdaq-listed companies to increase diversity on their boards.” Thus, as a practical matter, the rules conceivably could affect board composition in the real world.

The *en banc* court directed the Clerk to set a schedule for supplemental briefing. We will continue to follow this case. Stay tuned.

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