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CLIENT UPDATE



Nasdaq Board-Diversity Proposal - Foreign Issuer Implications

December 16, 2020

Overview

On December 1, 2020, The Nasdaq Stock Market ("Nasdaq") filed with the Securities and Exchange Commission ("SEC") a proposal to adopt new listing rules designed to encourage greater board diversity and enhanced diversity disclosures for Nasdaq-listed companies (the "Proposal").

If approved by the SEC, the new rules would require all companies listed on Nasdaq (subject to a very few exceptions), to have, at a minimum, two diverse board directors, or explain why the company does not have at least two diverse directors on its board. Furthermore, Nasdaq-listed companies would be required to publicly disclose certain diversity statistics regarding their board of directors on an annual basis.

Foreign issuers would be subject to the new rules, although they would have greater flexibility in terms of how they can comply due to a broader definition of diversity, as described below.

General Requirements Under the Proposed Rules

Under the proposed 'Diverse Board Representation' rule¹, Nasdaq-listed companies would be required to have, or explain why they do not have, two "Diverse" board members: one board member who self-identifies as female; and one who is either an "Underrepresented Minority"² or a member of the LGBTQ+ community.

If a company chooses to comply with the proposed rule by explaining why it does not have at least two diverse directors, that explanation would need to be published in the company's proxy statement for its annual meeting or on the company's website.

Under the proposed 'Board Diversity Disclosure' rule³, Nasdaq-listed companies would be required to annually disclose how their board members self-identify when it comes to gender, race and self-identification as a member of the LGBTQ+ community.

The above statistical information would be provided in a proposed uniform format ("Board Diversity Matrix") provided by Nasdaq. Listed companies would be required to publish the Board Diversity Matrix in the proxy statement for their annual meeting, or alternatively, on their company website.

The Proposal indicates that Nasdaq does not intend to obligate directors to self-identify in any of the categories related to gender identity, race, ethnicity and LGBTQ+. Rather it states that Nasdaq believes that a director should have autonomy to decide whether to provide such information to their company. Therefore, Nasdaq believes that it is reasonable and in the public interest to allow directors to opt out of disclosing the information required by proposed Rule 5606(a) by permitting a company to identify such directors in the "Undisclosed" category.

Foreign Issuers

In the case of a Foreign Issuer⁴, in lieu of the definition proposed in Rule 5605(f)(1) and referenced above, "Diverse" would mean an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity in the company's home country jurisdiction.

Accordingly, a Foreign Issuer would be required to have two diverse board members: at least one of whom identifies as female, while the other diverse board member may be either a second board member who identifies as female, or as any other one of the categories listed in the paragraph above.

A company that qualifies as a Foreign Issuer may elect to use a separate Board Diversity Matrix suggested by Nasdaq. The proposed Board Diversity Matrix proposed for Foreign Issuers enables such companies to apply the broader definition of diversity described above.

Nasdaq's proposal recognizes that certain Foreign Issuers may be precluded by law from requesting diversity data from its directors, if located in jurisdictions that impose laws limiting or prohibiting self-identification questionnaires. While Israeli law does not preclude a company from requesting diversity data from its directors or director candidates, this is obviously a sensitive area and companies should take care to inform directors or director candidates from whom they request such information that answering the question(s) is voluntary and they are not required to provide such information. Furthermore companies should ask directors and director candidates for their consent to publicly disclose the information they provide, including, without limitation, in the company's proxy statement, on its website or in response to inquiries from analysts, investors or the media.

Foreign Private Issuers must satisfy the requirements of Rule 5605(f) and 5606 and may not follow home country practices in lieu of such requirements. However, Foreign Private Issuers that elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, may satisfy the requirements of Rule 5605(f) by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

By way of example, the Proposal relates specifically to Israeli companies:

"[I]f, under Israeli law regarding board diversity, an Israeli company is required only to have a minimum of one woman on the board and such Israeli company chooses to comply with Israeli home country law in lieu of meeting the diversity objectives of Rule 5605(f)(2)(B), it may choose to disclose that "the Company is incorporated in Israel and required by Israeli law to have a minimum of one woman on the board, and satisfies home country requirements in lieu of Nasdaq Rule 5605(f)(2)(B), which requires each Foreign Issuer to have at least two Diverse directors."

Of course the advisability of utilizing this opt-out should be weighed against any potential impact with respect to other market participants including proxy advisory firms and institutional investors that may have their own policies and/or requirements with respect to board diversity.

Time Frame

For listed companies, the requirement to appoint diverse directors would be phased in over a two- to five-year period as of the SEC's approval, subject to the tier of Nasdaq on which the relevant company is listed.

For companies listing after the SEC's approval date, but prior to the end of the applicable phase-in period, the requirement to appoint diverse directors would need to be satisfied by the later of such phase-in period, or one year from the date of listing. Following the phase-in periods described above, any company newly listing on Nasdaq or any company that ceases to be a Foreign Issuer would have to satisfy the requirement to appoint diverse directors within one year from the date of listing.

Listed companies would have to comply with the requirement for statistical information regarding diversity disclosure within one year of the SEC's approval date. Similarly, a newly listed companies would have to comply within one year of listing.

[1] Proposed Rule # 5605(f)
[2] Per the proposed definition: "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latin, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities."
[3] Proposed Rule # 5606
[4] Nasdaq proposes to define a Foreign Issuer under Rule 5605(f)(1) as (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that: (i) is considered a "foreign issuer" under Rule 3b-4(b) under the U.S. Securities Exchange Act of 1934, as amended; and (ii) has its principal executive offices located outside of the United States. This definition will include all Foreign Private Issuers and any foreign issuers that are not foreign private issuers so long as they are also headquartered outside of the United States.

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