SEC Approves New Board Diversity Rules for Nasdaq-Listed Companies

By Kathleen A. Mills, CPA, Senior Manager and Jonathan Zuckerman, CPA, Partner

The Securities and Exchange Commission (SEC) recently approved new listing rules that will require Nasdaq-listed companies with six or more directors to have, or explain why they do not have, at least two diverse directors. Of the two self-identified diverse directors:

- at least one director must self-identify as female, and
- at least one director must self-identify as an underrepresented minority and/or LGBTQ+.

Nasdaq-listed companies with five or fewer directors must have at least one diverse director.

An underrepresented minority is defined as an individual who self-identifies as one or more of the following: 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. LGBTQ+ is defined as an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

In order to help companies comply with the new rules, the SEC also approved the implementation of a board recruiting service portal that will allow for a limited time certain Nasdaq-listed companies to access a network of diverse candidates.

Disclosure Requirements and Timeframes

The new rules will also require companies to disclose statistical information regarding the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+. This disclosure must be done in either their annual meeting proxy statements, information statements (or Form 10-K or 20-F), or on their websites in a board diversity matrix.

All Nasdaq-listed companies will be required to disclose board diversity statistics by the later of August 8, 2022, or the date the company files its next proxy statement for its annual meeting. Newly-listed companies on Nasdaq must satisfy the disclosure requirements within one year of listing.

In the event a company is unable to meet the minimum diversity rules within the required timeframes, they will not be subject to delisting if they provide a public disclosure explaining why they were not able to meet the minimum diversity objectives. While Nasdaq will verify that the company has provided an explanation that satisfies the new rules, it will not assess the substance of the company's explanation.

A company's Nasdaq tier will dictate the required timeline for compliance with the new rules as follows:

- Companies listed on The Nasdaq Global Market (NGM) or the Nasdaq Global Select Market (NGS) should have one diverse director by August 7, 2023, and two diverse directors by August 6, 2025. Newly-listed companies on the NGM or the NGS should have one diverse director upon the later of one year from the date of listing or the date of filing its proxy statement for its first annual meeting following listing and two diverse directors upon the later of two years from the date of listing or the date of filing its proxy statement for its second annual meeting following listing.

- Companies listed on The Nasdaq Capital Market (NCM) should have one diverse director by August 7, 2023, and two diverse directors by August 6, 2026. Newly-listed companies on the NCM are only required to meet the diversity objective of two diverse directors upon the later of two years from the date of listing or the date of filing its proxy statement for its second annual meeting following listing.

- Companies with five or fewer directors only need to have one diverse director by August 7, 2023.

Newly-listed companies with five or fewer directors should have one diverse director two years from the date of listing or the date of filing its proxy or information statement for its second annual meeting following listing.

Smaller reporting companies and Foreign Issuers can meet the diversity objective by having two female directors as an alternative to having one female director and one underrepresented minority or LGBTQ+ director.

SPACs, asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies, and issuers of certain specified securities are exempt from the board diversity objectives and disclosure requirements under the new listing rules.

Compliance

If a company fails to meet the new requirements within the specified timeline, they will be notified of their non-compliance by Nasdaq and will be allowed 45 days to submit a plan to regain compliance and, thereafter, Nasdaq may provide the company with up to 180 days to regain compliance. If the company does not submit a plan or regain compliance, Nasdaq will issue a Staff Delisting Determination.

A company that is unable to maintain compliance with the new diversity rules due to a board vacancy will have until the later of one year from the date of vacancy or the date it files its annual proxy statement in the calendar year following the year of the vacancy to have the required number of diverse directors or explain their failure to do so.

Consider Now

Nasdaq-listed companies should begin to consider what steps they can take now to address their obligations under the new listing rules. Board composition and diversity should be reviewed and companies should consider any changes they would like to make and anticipate what the new listing rules will require to be disclosed.

Contact Us

For more information on diverse directorships, please contact your PKF O’Connor Davies engagement partner or Kathleen A. Mills, CPA, Senior Manager at kmills@pkfod.com or Jonathan Zuckerman, CPA, Partner at jzuckerman@pkfod.com.