

Client Alert

August 2021

SEC Approves Nasdaq's New Listing Rules Designed to Advance Greater Boardroom Diversity

On August 6, 2021, the Securities and Exchange Commission ("SEC") approved new listing rules proposed by The Nasdaq Stock Market LLC ("Nasdaq") requiring each Nasdaq-listed company to disclose certain information about the diversity of its board of directors.

New Rule 5605(f) will require each Nasdaq-listed company (subject to certain exceptions, as discussed below) to have, or explain why it does not have, at least two members of its board of directors who are "Diverse," including at least one individual who self-identifies as a female and at least one individual who self-identifies as either an "Underrepresented Minority" (e.g., 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 "LGBTQ+" (e.g., lesbian, gay, bisexual, transgender, or a member of the queer community).

Each company, subject to certain exceptions, listed on The Nasdaq Global Select Market and The Nasdaq Global Market must have, or explain why it does not have, at least (A) one such Diverse director by the later of (x) August 7, 2023 or (y) the date the company files its proxy statement or information statement (or Form 10-K/20-F if the company does not file such statement) for its annual meeting of shareholders in that year and (B) two Diverse directors by the later of (x) August 6, 2025 or (y) the date the company files its proxy statement or information statement (or Form 10-K/20-F if the company does not file such statement) for its annual meeting of shareholders in that year. Each company listed on The Nasdaq Capital Market, subject to certain exceptions, will be required to follow the same listing requirements described above except that each such company will have an additional year, until August 6, 2026, to satisfy the requirements to include at least two Diverse directors on its board or explain why it does not have such Diverse members.

For foreign issuers (as defined under the rule), the term "Diverse" is defined slightly differently to include an individual who self-identifies as one or more of the following: female, LGBTQ+, or an underrepresented

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individual based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity in the country of the company’s principal executive offices.

The new rules also provide flexibility for foreign issuers and smaller reporting companies (as defined under the rule), other than companies with a smaller board, to meet the foregoing diversity objectives by including two female directors on their boards, as opposed to one female and one member from a different Diverse category.

For companies with a board of five or fewer members (a “company with a smaller board”), the new rules require each such company to only have, or explain why it does not have, at least one member of its board of directors who is Diverse by the later of (x) August 7, 2023 or (y) the date the company files its proxy statement or information statement (or Form 10-K/20-F if the company does not file such statement) for its annual meeting of shareholders in that year. A company with a smaller board who adds a sixth member to satisfy the new listing rules would not be required to add a second Diverse director until it subsequently expands its board.

New Rule 5606 also requires all Nasdaq-listed companies, subject to certain exceptions, to disclose information annually, in a Board Diversity Matrix, on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company’s board of directors. Companies will need to comply with this disclosure requirement by the later of (x) August 6, 2022 or (y) the date the company files its proxy statement or information statement (or Form 10-K/20-F if the company does not file such statement) for its annual meeting of shareholders during 2022.

Newly listed Nasdaq companies will be required to comply with the new diversity disclosure rules by the end of specified phase-in periods from the date of listing.

In connection with new Rules 5605(f) and 5606, the SEC also approved Nasdaq’s proposal to provide certain Nasdaq-listed companies with one year of complimentary access for two users to a board recruiting service, which would provide access to a network of board-ready Diverse candidates for companies to identify and evaluate.

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Nasdaq originally proposed these new listing rules on December 1, 2020. After the SEC received over 200 comment letters from various interested parties, including a comment letter from this firm that can be found [here](#), Nasdaq responded to the comments and announced certain modifications to the proposed rules in a letter to the SEC dated February 26, 2021. In its letter, Nasdaq quoted Olshan’s comment letter regarding the availability of qualified Diverse candidates, noting that “. . . [d]uring the 2019 and 2020 proxy seasons, our shareholder activist clients were responsible for the

appointment of approximately 85 diverse director candidates to public company boards.”

We reaffirm our support for the new Nasdaq rules and are gratified to have played a small role in their adoption.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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