Nasdaq Proposes New Listing Rules Related to Board Diversity

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Editor's note: Ron S. Berenblat and Elizabeth Gonzalez-Sussman are partners at Olshan Frome Wolosky LLP. This post is based on their Olshan memorandum. Related research from the Program on Corporate Governance includes Politics and Gender in the Executive Suite by Alma Cohen, Moshe Hazan, and David Weiss (discussed on the Forum here).

On December 1, 2020, Nasdaq filed Proposed Rule 5605(f) with the U.S. Securities and Exchange Commission ("SEC") to adopt new listing rules related to board diversity. If approved by the SEC, Proposed Rule 5605(f) would require all companies listed on Nasdaq's U.S. exchange to publicly disclose their diversity statistics regarding their board of directors. Proposed Rule 5605(f) would also require all Nasdaq-listed companies to include a minimum number of individuals on their board of directors who self-identify in one or more of the following "Diverse" categories: female, underrepresented minority or LGBTQ+.

Specifically, all Nasdaq-listed companies, subject to certain exceptions, would be required by the time frame set forth below (A) to have at least one director who self-identifies as a female and at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+, or (B) to explain why the company does not have at least two directors on its board who self-identify in the Diverse categories listed above.

Each company, subject to certain exceptions, listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least one such Diverse director no later than two calendar years after Proposed Rule 5605(f) is approved by the SEC and at least two Diverse directors no later than four calendar years after such approval date. Each company, subject to certain exceptions, listed on The Nasdaq Capital Market must have, or explain why it does not have, at least one Diverse director no later than two calendar years after such approval date and at least two Diverse directors no later than five calendar years after such approval date.

Proposed Rule 5605(f) would also require all Nasdaq-listed companies, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+.

Smaller reporting companies as defined under the Securities Act of 1933, as amended, must have, or explain why they do not have, by the time frame set forth above, at least two members of their board of directors who are Diverse, including at least one director who self-identifies as female. The second Diverse director may include an individual who self-identifies as one or more of any Diverse category.

Proposed Rule 5605(f) comes on the heels of new legislation adopted in California (California's Assembly Bill (AB) 979) in September 2020, requiring each publicly held corporation whose principal executive offices are located in California to have a minimum of one director from an "underrepresented community" on its board of directors no later than December 31, 2021. The required minimum would increase to two directors from an underrepresented community for corporations with more than four but fewer than nine directors and three directors from an underrepresented community for corporations with nine or more directors by December 31, 2022. The California legislation defines "underrepresented community" to include any individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or who self identifies as gay, lesbian, bisexual or transgender.

Two years ago, California became the first state to enact legislation requiring public companies headquartered in the state to include a minimum number of females on their corporate boards. No later than December 31, 2019, publicly held corporations whose principal executive offices are located in California were to have at least one female director on its board of directors. By December 31, 2021, that minimum increases to two female directors if the corporation has five directors, and to three female directors if the corporation has six or more directors.

The SEC will solicit public comments before deciding how to proceed with respect to Proposed Rule 5605(f). Accordingly, we will continue to monitor developments relating to these new listing rules.