

It's Really Time to Talk Diversity in D and O Questionnaires (with Updated Sample Question and Summary of Nasdaq's Proposed Rules)

December 2, 2020 – Governance & Compliance Insider

by Cam C. Hoang

On December 1, 2020, Nasdaq submitted [a proposal to the SEC seeking approval of new listing requirements for board diversity](#). The stated goal of the proposal is to provide stakeholders with a better understanding of a company's current board composition and enhance investor confidence that listed companies are considering diversity in the context of selecting directors, either by including at least two diverse directors on their boards or by explaining their rationale for not meeting that standard.

Nasdaq has provided [a summary of the top five things companies should know](#) and will update this document throughout the SEC review and approval process. There is also a related set of [FAQs](#).

Under proposed Rule 5606, Nasdaq proposes to provide each company with one calendar year from the date that the SEC approves this proposal (the "Approval Date") to comply with the requirement for statistical information regarding diversity, using a [standardized disclosure matrix template](#). For the first year a company is required to disclose board diversity statistics, the company would be required to publish board diversity statistics for the current year only. Each subsequent year, the company will be required to publish its data for the last two years.

Under proposed Rule 5605(f)(2), no later than two calendar years after the Approval Date, each company must have, or explain why it does not have, one Diverse director. Further, each company must have, or explain why it does not have, two Diverse (at least one Female director and at least one director who is either an Underrepresented Minority or LGBTQ+) directors no later than: (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select or Global Market tiers; or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market tier. Foreign issuers and smaller reporting companies, by contrast, have more flexibility and may satisfy the requirement by having two Female directors, or in the case of foreign issuers, one Female director and a director who is an underrepresented individual in their

Related People

- Cam C. Hoang

Related Capabilities

- Corporate Governance & Compliance
- Mergers & Acquisitions
- Government Enforcement & Corporate Investigations

home country jurisdiction.

The proposed rules currently exempt non-operating companies from proposed rule. Consistent with Nasdaq's corporate governance rules the following types of companies are exempt:

- acquisition companies listed under IM-5101-2;
- asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1));
- cooperatives (as set forth in Rule 5615(a)(2));
- limited partnerships (as set forth in Rule 5615(a)(4));
- management investment companies (as set forth in Rule 5615(a)(5));
- issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and
- issuers of securities listed under the Rule 5700 Series.

The FAQs are worth a read, as they provide additional color on the proposed rules. For companies who do not eventually meet the diversity requirements, they may provide an explanation as to why they do not meet the requirements. The following are several examples of such disclosure included in the rule filing for the proposed board diversity and disclosure rules:

- If 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."
- If a U.S. company had two Diverse directors but one resigned due to unforeseen circumstances, it could disclose, for example: "Due to the unexpected resignation of Ms. Smith this year, the Company does not have at least one director who self-identifies as Female and one director who self-identifies as an Underrepresented Minority or LGBTQ+. We intend to undertake reasonable efforts to meet the diversity objectives of Rule 5605(f)(2)(A) prior to our next annual meeting and have engaged a search firm to identify qualified Diverse candidates. However, due to unforeseen circumstances, we may not achieve this goal."
- Or a U.S. company may disclose that it chooses to define diversity more broadly than Nasdaq's definition by considering national origin, veteran status or individuals with disabilities when identifying nominees for director because it believes such diversity brings a wide range of perspectives and experiences to the board.

Timing for SEC approval is currently unclear, but could happen as early as the first half of 2021. The SEC will provide a minimum of 21 days from the time they publish the proposed rule changes in the Federal Register for the public (including investors, companies, and their representatives) to have an opportunity to comment on the proposals. After publication in the Federal Register, the SEC has 30 to 240 calendar days to approve the proposal.

Clients who do not currently meet these board diversity requirements are encouraged to start board-level conversations on board size, director succession planning and director

recruitment. As discussed [here](#), we also encourage companies to start gathering information on the demographics of their boards, for example, through the annual D&O questionnaire. We have updated our model question in light of the proposed Nasdaq rulemaking.

Corporate secretaries who choose to include a director diversity question should review it against any existing board diversity policies. They may also wish to provide directors with a supplemental explanation as to why they are being asked to self-identify and how the information will be used, particularly if it may be disclosed in the proxy statement and other media including the company website, responses to ESG surveys and the corporate responsibility report. Corporate secretaries may also choose to emphasize that responses are optional.

Sample Director Diversity Question:

We are planning to disclose director diversity information in our Proxy Statement. Please answer the following questions if you agree to inclusion of the information:

1. Gender (check one):

- ☐ Male
- ☐ Female
- ☐ Non-Binary
- ☐ Other: _____
- ☐ Prefer not to answer

2. LGBTQ+ (check one):

- ☐ Yes
- ☐ No
- ☐ Prefer not to answer

3. Ethnicity or Race (check one or more):

- ☐ White
- ☐ Hispanic, Latinx or Spanish Origin
- ☐ Black or African American
- ☐ American Indian or Alaska Native
- ☐ Asian
- ☐ Native Hawaiian or Other Pacific Islander
- ☐ Other: _____
- ☐ Prefer not to answer

Other Diversity Characteristics that You Wish to Identify (e.g., [underrepresented individual in home country jurisdiction][for foreign private issuers], religion, nationality, disability, military service or socio-economic or demographic characteristics):