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Nasdaq Announces Diversity Requirements

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On December 1, 2020, Nasdaq introduced new listing rules aimed at increasing diversity among directors at companies listed on its exchange. In particular, under its proposal, companies listed on the Nasdaq would be required to either have, or explain why they do not have, at least two diverse directors and to publish diversity statistics on an annual basis about their board of directors. The proposed new rules would be the first federal rules that are targeted at mandating diverse board members.

The diversity objectives include at least one director who "self-identifies as female" and another who "self-identifies as either an underrepresented minority or LGBTQ." Foreign and smaller companies will have some flexibility in satisfying the requirement by retaining a minimum of two female directors. Once approved by the SEC, businesses must have one diverse director within two years.

The proposal comes at a time of increasing focus on board diversity among companies, investors, state legislatures, and other stakeholders. In a response to a recent opinion piece published in the *Wall Street Journal* critical of the new rules as adding an additional "bureaucratic disincentive that makes public listing unattractive to young companies," Nasdaq pointed out that the proposed new rules would add additional "transparency for shareholders." In particular, Nasdaq president Nelson Griggs, in a letter published in the *Wall Street Journal* on December 9, 2020, laid out the exchange's reasoning as follows:

> "Investors increasingly care about diversity and governance……Nasdaq is required by the SEC to protect investors and promote the public interest. While capitalism has shown that it can improve the lives of billions, trust and support for the markets will only be maintained if its workings and results are shared by all of society. We hope our proposal, which aims to increase transparency about diversity in corporate America, can be part of the solution."

After the SEC publishes the proposed rule in the Federal Register, the public will have an opportunity to provide comments, and the SEC will have a maximum of 240 days to approve the proposal from the date of publication.

Given the trend for greater board diversity and related disclosure in American society, it is likely that there will be additional mandates for diversity in the management of companies from federal and state authorities. Companies may want to get ahead of this trend and address potential obligations under the anticipated rules by adopting diversity targets voluntarily.