
Nasdaq Responds to Comments on Board Diversity Rule Request with Explanations and a Few Modifications

On February 26, 2021, Nasdaq submitted a response (the “Response”)¹ to comments received by the Securities and Exchange Commission (the “Commission”) on Nasdaq’s December 1, 2020 rule request (the “Proposal”) regarding board diversity.² The Commission received over 200 letters regarding the Proposal from Nasdaq-listed issuers, institutional investors, asset managers, legislators at both the state and federal levels, advocacy organizations, law firms, board members and other individuals. In the Response, Nasdaq describes the overwhelming majority of commenters as supporting the goals of the Proposal, recognizing that some supportive commenters recommended modifications or clarifications and other commenters opposed the Proposal. The Response offers further insight into Nasdaq’s rationale for the Proposal and its intended effect and makes proposed modifications and clarifications to the Proposal.³ The proposed modifications and clarifications are designed to offer more flexibility to companies with smaller boards, provide a one year grace period for newly listed companies, align disclosure requirements with annual meetings, and provide companies listing on Nasdaq after the new rules’ phase-in period two years to meet the board diversity requirements.⁴

Nasdaq has explained that “the goal of the Proposal is to provide stakeholders with a better understanding of a company’s current board composition and enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two Diverse⁵ directors on its board (or at least one Diverse director for boards with five or fewer members) or by explaining its rationale for not having two Diverse directors.”⁶ Additionally, Nasdaq reiterated that it “continues to believe that the diversity objectives for its listed

¹ Nasdaq, Response to Comments and Notice of Filing of Amendment No.1 of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (File No. SR-Nasdaq-2020-081) (Feb. 26, 2021) <https://listingcenter.nasdaq.com/assets/Response%20to%20Comments%20Letter.pdf>.

² The Proposal in its original form can be found [here](#), and our memorandum discussing the Proposal in its original form is available [here](#).

³ Response, p. 1.

⁴ Nasdaq, NASDAQ’S PROPOSAL TO ADOPT LISTING REQUIREMENTS FOR BOARD DIVERSITY (Feb. 26, 2021) <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>, p. 1.

⁵ Diverse is defined as (i) female, (ii) Underrepresented Minority or (iii) LGBTQ+. The definition of “Underrepresented Minority” is consistent with the categories that companies are required to report to the EEOC, and is defined as “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.”

⁶ FAQ, Nasdaq’s Board Diversity Rule Proposal https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ&cid=157&sub_cid=&years=2020&criteria=1&materials (“FAQ”), Identification Number 1747.

companies will promote board diversity and thus enhance corporate governance and strengthen the integrity of the market by building investor confidence, and enhancing capital formation, efficiency and competition.”⁷ Nasdaq emphasized that the Proposal is a disclosure requirement, not a mandate.⁸

Nasdaq categorizes the changes to the Proposal included in the Response as either “material” or “technical.” The first material change to the Proposal creates more flexibility for boards with five or fewer directors, which will have the ability to achieve the diversity objective by having one diverse director instead of two, and a board with five directors may add a diverse director (for a total of six) in order to comply with the Proposal without being subjected to compliance requirements for boards greater than five. This change allows small boards to comply by adding a new director but lets them avoid a higher threshold of compliance which applies to boards with more than five directors. The second material change gives newly listed companies that were not previously subject to a substantially similar requirement additional time to comply. Newly listed companies will have until (1) the later of one year from the date of listing or the date the company files its proxy or information statement to add one diverse director, and (2) the later of two years from the date of listing or the date the company files its proxy or information statement for the company’s second annual shareholders meeting to add a second diverse board member. If they do not add a diverse board member by these deadlines, they will be required to explain why they have not. Finally, a company that met the diversity objectives of the Proposal within the specified timeframes but no longer meets them due to a vacancy on its board will have until the later of one year from the date of vacancy or the date the company files its proxy or information statement in the calendar year following the year in which the vacancy first occurred.⁹

The proposed technical amendments would (1) allow companies the flexibility of providing disclosures in any proxy or information statement or on the company’s website, (2) clarify the Board Diversity Matrix Instructions to allow a company to include supplemental data, (3) change the reference from “home country jurisdiction” to “country of the Company’s principal executive offices”, (4) provide a definition for non-binary, (5) clarify types of new listed companies, and (6) make the Proposal operative for listed companies by the later of one year from the effective date or the date the company files its proxy or information statement for its annual shareholders meeting.¹⁰ Nasdaq has created a FAQ section on its webpage to answer common questions that companies may have about the Proposal.¹¹

Nasdaq’s Proposal has been compared to the Improving Corporate Governance Through Diversity Act of 2019 (the “Meeks Bill”), which was passed by the U.S. House of Representatives on November 19, 2019. Although not taken up by the U.S. Senate at that time, the bill was reintroduced by Senator Bob Menendez of New Jersey on February 23, 2021. The proposed legislation would require companies to disclose diversity data annually for its board and executive officers and to adopt a diversity plan for the company. It would also direct the Commission’s Office of Minority and Women Inclusion to publish best practices for compliance with the bill and to establish an advisory council. Both the Meeks Bill and the Nasdaq’s Proposal require annual and standardized diversity disclosures for members of a company’s board.

⁷ Response, p. 1.

⁸ Nasdaq, SR-NASDAQ-2020-081 Amendment 1 (File No. SR-Nasdaq-2020-081) (Feb. 26, 2021) https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081_Amendment_1.pdf, (“Amendment 1”), p. 6.

⁹ Amendment 1, p. 88,89.

¹⁰ Amendment 1, p. 6.

¹¹ FAQ, available [here](#).

Although similar, the Meeks Bill and the Proposal have key differences identified by Nasdaq.¹² The Meeks Bill does not require boards to have a minimum number of diverse directors, and it does not specify racial or ethnic categories. Unlike the Meeks Bill, the Proposal does not require the implementation or disclosure of any diversity plans or policies. Both the Proposal and the Meeks Bill include racial, ethnic, and gender identities in their definition of diverse board members. However, only the Proposal includes LGBTQ+ identities and only the Meeks Bill includes veterans. Notably, Representatives Meeks and Maloney, the sponsors of the original bill, have publicly urged the Commission to approve the Nasdaq Proposal.¹³

At this time, it is not clear when the Commission will take action to approve or deny Nasdaq's Proposal. The amended Proposal will remain open to comment for the required 21 days from the date the Commission publishes the amended proposal in the Federal Register. The Commission has up to 240 calendar days from the date of original publication in the Federal Register (i.e., until August 8) to approve the Proposal and any accompanying amendments.¹⁴

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene R. Banks (partner) at 212.701.3439 or hbanks@cahill.com; or Elizabeth Sweeny (associate) at 212.701.3106 or esweeny@cahill.com; or email publications@cahill.com

¹² FAQ, Identification Number 1782.

¹³ Maloney, Meeks Urge SEC to Adopt Nasdaq Board Diversity Proposal (Feb. 22, 2021) <https://maloney.house.gov/media-center/press-releases/maloney-meeks-urge-sec-to-adopt-nasdaq-board-diversity-proposal>.

¹⁴ FAQ, Identification Number 1746.

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