



Nasdaq Board Diversity Rules Struck Down by the Fifth Circuit

On December 11, 2024, the U.S. Court of Appeals for the Fifth Circuit issued a majority opinion (available [here](#)), striking down the Nasdaq board diversity rules (the “Diversity Rules”) that were previously approved by the U.S. Securities and Exchange Commission (the “SEC”). The court’s decision held that the SEC failed to establish that the Diversity Rules were consistent with the requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

Lauded by some and loathed by others, the Diversity Rules mandated that Nasdaq-listed companies publicly disclose diversity metrics for their boards of directors (including, gender, race, and sexual orientation) and have a minimum number of diverse directors (subject to the size of a particular board) or publicly explain why they do not have the requisite number of diverse directors.

The court’s opinion addressed the SEC’s rationale that the Diversity Rules related to and were in furtherance of the purposes of the Exchange Act. Specifically, the SEC argued the Diversity Rules: (1) promote just and equitable principles of trade, (2) are designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and (3) protect investors and the public interest.

The court was unpersuaded, noting that those purposes “bear no relationship to the disclosure of information about the racial, gender, and sexual characteristics of the directors of public companies.” In its rebuke of the Diversity Rules, the court explained that the Exchange Act “exists to protect investors and the macroeconomy from speculative, manipulative, and fraudulent practices, and to promote competition in the market for securities transactions.” Absent some connective tissue between the purposes of the Exchange Act and disclosure objectives of the Diversity Rules, the court found that the SEC’s approval of the Diversity Rules was inconsistent with the requirements of the Exchange Act and was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

In the wake of the court’s decision, Nasdaq released a statement that the exchange does not intend to appeal. Although the SEC is reviewing the court’s decision, given the imminent changes to the SEC’s leadership with the incoming presidential administration, it seems unlikely that the SEC will challenge the decision.

While Nasdaq-listed companies are no longer required to comply with the Diversity Rules, they maintain the option to disclose board diversity metrics and related policies (including those adopted by major institutional investors and proxy advisory firms).

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