Cahill

February 8, 2023

Nasdaq Amends Compliance Deadlines for Board Diversity Rules

In December of 2022, the Nasdaq Stock Market LLC ("Nasdaq") filed immediately effective amendments to its board diversity rules that were originally approved by the Securities and Exchange Commission in August of 2021. The amendments are intended to simplify compliance by revising certain deadlines to align them with year-end dates.

Board Diversity Matrix

Under Rule 5606, Nasdaq-listed companies must disclose demographic information about their board members in an annual board diversity matrix. For most companies, the deadline for their initial board diversity matrix disclosures has passed.[1] Previously, Rule 5606 did not provide a specific deadline for subsequent annual disclosures. Now, under Rule 5606(e) as amended, Nasdaq has clarified that companies have until December 31 of each year to make their subsequent annual board diversity matrix disclosures. In other words, companies that posted their initial board diversity matrix in 2022 will have until December 31, 2023 to post their updated matrix.

The rule also simplifies compliance for companies that wish to post their matrix disclosure on their website by allowing them to satisfy the Nasdaq notice requirement by submitting a URL link to their matrix disclosure via email to drivingdiversity@nasdaq.com.

Board Diversity Objective

Under Rule 5605(f), Nasdaq-listed companies generally must have at least two diverse directors, including (i) at least one director who self-identifies as Female and (ii) at least one director who self-identifies as an Underrepresented Minority or LGBTQ+, in each case as defined by the rule, or explain why they do not.

As part of the phase-in of the new requirements, Rule 5605(f) as originally adopted required listed companies to have at least one diverse director by August 7, 2023 or explain why they do not. Under the amended rule, this deadline is changed to December 31, 2023.

For purposes of achieving full compliance, Nasdaq-listed companies fall into one of two tiers: (1) the Nasdaq Global Select Market or Nasdaq Global Market ("NGS/NGM") tier and (2) the Nasdaq Capital Market ("NCM") tier. Previously, companies in the NGS/NGM tier and NCM tier had until August 6, 2025 and August 6, 2026, respectively, to be in full compliance (*i.e.*, to have at least two diverse directors or explain why they do not). Under the amended rules, these deadlines are extended to December 31, 2025 and December 31, 2026, respectively.

[1] Under Rule 5606(e), companies had to begin reporting their board diversity matrix by the later of (i) August 8, 2022 or (ii) the date the company filed its proxy or information statement for its next annual meeting of shareholders (or, if the company does not file these documents, the date that it filed its next Annual Report on Form 10-K or 20-F, as applicable) following the original adoption of the rules. Under Rule 5606(d), newly-listed companies have a one-year grace period after listing to comply with Rule 5606. The amendments do not affect this requirement.

The rule change has no impact on the nature of the diversity requirements or the content of the disclosures. Accordingly, foreign issuers, smaller reporting companies and companies whose boards do not exceed five members may continue to benefit from reduced board diversity requirements.[2] Additionally, the rule change has no impact on the application of the board diversity rules to newly-listed companies on Nasdaq.[3]

Practical Impact

Importantly, companies should note that despite the December 31 deadlines, the Nasdaq rules require each company to make these disclosures in its proxy or information statement for its next annual meeting of shareholders (or, if the company does not file these documents, by the date that it files its next Annual Report on Form 10-K or 20-F, as applicable). Further if the company chooses to disclose via its website, the website posting must be made at the same time as the relevant filing. Therefore, practically speaking, the deadline for required disclosures generally is when a company files its proxy or information statement for its next annual meeting of shareholders (or, if the company does not file these documents, the date that it files its next Form 10-K or 20-F).

* * *

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 Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Sarah L. Hernandez (attorney) at 212.701.3231 or shernandez@cahill.com; or Kai B. Glick (associate) at 212.701.3255 or kglick@cahill.com or email publications@cahill.com.

[2] Under Rule 5605(f)(2)(B), the following exceptions to Rule 5605(f) apply: (1) companies with five or fewer board members will need to have only one diverse director, and (2) foreign issuers (issuers organized outside of the U.S.) and smaller reporting companies (as defined in Rule 12b-2 under the Securities Exchange Act of 1934) are able to satisfy the board diversity objective by having two Female directors or one Female director and one director who self-identifies as an Underrepresented Minority (or in the case of a foreign issuer an Underrepresented Individual in Home Country Jurisdiction) or as LGBTQ+, in each case as defined by the rule.

[3] Under Rules 5605(f)(5)(A) and 5605(f)(5)(B), the compliance period for newly-listed companies are as follows: A newly-listed company in the NGS/NGM tier must have one diverse director or explain why they do not by the later of (1) one year from the date of listing or (2) the date of filing its proxy or information statement for its first annual meeting following listing. A newly-listed company in the NGS/NGM tier must fully comply or explain why they do not by the later of (1) two years from the date of listing or (2) the date of filing its proxy or information statement for its second annual meeting following listing. Companies in the NCM tier must have two diverse directors and be in full compliance or explain why they are not by the later of (1) two years from the date of listing or (2) the date of filing its proxy or information statement for its second annual meeting following listing. The amendments do not affect these requirements.