
En Banc Fifth Circuit Vacates SEC's Approval of Nasdaq Board Diversity Rules

Date: 02/14/25

On December 11, 2024, a narrowly split 9-8 *en banc* United States Court of Appeals for the Fifth Circuit vacated the approval of the Securities and Exchange Commission (SEC) of three rules proposed by Nasdaq that would have required listed companies to disclose certain board diversity metrics and to have at least two “diverse” directors or to explain why the company does not.

Diverging from a Fifth Circuit panel that had upheld the SEC's rule approval in October 2023, in *Alliance for Fair Board Recruitment v. SEC*, an *en banc* Fifth Circuit held that the SEC's approval of the proposed rules violated the Securities Exchange Act of 1934 and the Administrative Procedure Act (APA). The court held that the rules were not sufficiently related to the Securities Exchange Act's purpose, as required under 15 U.S.C. § 78f(b), and therefore the SEC's approval of the rules was “arbitrary and capricious” under the APA. *Alliance* marks yet another significant holding from the Fifth Circuit curtailing perceived SEC overreach.

Attorneys

- Joel Kurtzberg
- John MacGregor
- Jason D. Rozbruch
- Jessica N. Uργο