

Nasdaq’s new progressive board diversity listing requirement

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Boards of directors of most Nasdaq issuers, including Canadian issuers listed on Nasdaq, will be required to include at least two diverse directors, at least one of whom must be female, under bold new rules approved by the SEC on August 6, 2021. Nasdaq becomes the first regulator in the world to mandate diversity beyond gender on public company boards with its requirement that U.S. issuers must have at least one director who is from an underrepresented minority.

On August 6, 2021, a majority of SEC Commissioners approved Nasdaq proposals to introduce new listing rules regarding board diversity for its listed issuers. The new rules require prescribed disclosure regarding the gender composition of the board and the demographic background of board members (Board Composition Disclosure) and establish a disclosure-based framework, not a mandate or quota. These requirements are being introduced on a staggered basis over the next four years and Nasdaq is providing additional support to enable issuers to recruit qualified diverse directors to their boards. Certain compliance dates were revised by an amendment made December 12, 2022, which became operative January 11, 2023.

Board Diversity Listing Requirements	
Application	The new rules apply to all Nasdaq issuers other than • special purpose acquisition companies (SPACs) • asset-backed issuers and other passive issuers • cooperatives • limited partnerships • management investment companies • issuers of non-voting preferred securities, debt securities and derivative securities that do not have equity securities listed on Nasdaq • issuers of securities listed under Nasdaq’s Rule 5700 Series

Foreign Issuers and Smaller Reporting Companies	Additional flexibility is provided to “Foreign Issuers” and “Smaller Reporting Companies” to comply with the new requirements. A “Foreign Issuer” is a company incorporated or organized under the laws of any country outside of the United States and the principal executive offices of which are located outside of the United States. A “Smaller Reporting Company” is defined with reference to Rule 12b-2 under the Securities Exchange Act of 1934, which generally defines a Smaller Reporting Company as an issuer that has (1) a public float of less than US\$250 million; or (2) annual revenues of less than US\$100 million and either: (i) no public float; or (ii) a public float of less than US\$700 million.
Board Composition Disclosure	Issuers must annually disclose information on the self-identified characteristics of its directors in a prescribed matrix format. Disclosure is to be based solely on self-identification. Foreign Issuers are also required to identify the country of their principal executive officers, whether or not they are a foreign private issuer, whether or not diversity disclosure is prohibited under their home country law and the total number of directors on their board. In 2022, an issuer can choose either to • include the diversity matrix in its proxy circular for its 2022 annual shareholders meeting (or, if it does not file a proxy circular, in its Form 10-K or 20-F^[1]); or • post the diversity matrix on its website and file a short form thorough the Nasdaq Listing Center that includes the URL link to the disclosure within one business day after such posting The deadline for disclosure in 2022 is the later of August 8, 2022, or the date the issuer files its proxy circular for its 2022 annual meeting. In 2023 and subsequent years, the deadline is the date the issuer files its proxy circular for its annual shareholders meeting (or, if it does not file a proxy circular, in its Form 10-K or 20-F). In addition, diversity disclosure in such years must include not only current gender and demographic data, but also comparative data from the prior year.
Gender Diversity Disclosure	Issuers (including Foreign Issuers) must disclose the number of directors who • self-identify as female • self-identify as male • self-identify as non-binary • do not wish to disclose their gender

Demographic Disclosure	For issuers other than Foreign Issuers For each of the foregoing categories, the issuer must also disclose the number of directors in each of the following categories based on self-identification: • African American or Black • Alaskan Native or Native American • Asian • Hispanic or Latinx • Native Hawaiian or Pacific Islander • White • Two or more races or ethnicities • LGBTQ+ • Did not disclose demographic background The racial or ethnic categories are consistent with the categories reported to the Equal Employment Opportunity Commission in the U.S. through the Employer Information Report EEO-1 Form and the proposed definition of LGBTQ+ is similar to the identities defined under California law except that it has been expanded to include the queer community. Issuers must include these categories, but can add additional categories (such as disability) if they wish. For Foreign Issuers Disclosure of demographic information is not required to be broken down for each of the gender categories. The Foreign Issuer must disclose the number of directors in each of the following categories based on self-identification: • LGBTQ+ • underrepresented minority based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the issuer’s principal executive offices • did not disclose demographic background Nasdaq does not provide further clarity to Foreign Issuers on what constitutes an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity. Issuers must include these categories, but can add additional categories if they wish. For example, issuers subject to diversity disclosure requirements under the <i>Canada Business Corporations Act</i> can separately break out the underrepresented minority category to address separate identification of the number of directors on the board who are visible minorities and Indigenous peoples and can add a row to the chart setting out the number of directors who are persons with disabilities.
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Diverse Director Requirement	Issuers must satisfy the applicable minimum diverse directors composition requirement or disclose why they do not. The requirements apply on a staggered basis. • By December 31, 2023, the board must include at least one “diverse” director, being a director who self-identifies as either female, LGBTQ+ or an underrepresented minority, or the issuer must explain why it does not. • By December 31, 2025, the board must satisfy the minimum diverse directors composition requirement, or the issuer must explain why it does not. For issuers listed on Nasdaq’s Capital Market, the board must include the second diverse director by December 31, 2026, or the issuer must explain why it does not. If in any calendar year an explanation as to why the board does not satisfy the minimum diverse directors composition requirement is needed, the issuer can choose either • to include the disclosure in its proxy circular for that calendar year (or, if it does not file a proxy circular, in its Form 10-K or 20-F); or • to post the disclosure on its website and provide a URL link to the disclosure through the Nasdaq Listing Center within one business day after posting Nasdaq will assess whether an issuer has a board that satisfied the applicable minimum diverse directors composition requirement or provided disclosure as to why it does not. However, Nasdaq will not assess the merits of any explanation provided.
Minimum Diverse Directors Composition Requirement	For issuers other than Foreign Issuers If there are six or more board members, the issuer must disclose whether the board has • at least one director who self-identifies as female; and • at least one director who self-identifies as being an underrepresented minority or LGBTQ+ For Foreign Issuers If there are six or more board members, the issuer must disclose whether the board has • at least one director who self-identifies as female; and • at least one director who self-identifies as female, an underrepresented minority or LGBTQ+ For Smaller Reporting Companies Smaller Reporting Companies must disclose whether the board has at least two members who are diverse, including at least one diverse director who self-identifies as female. The second diverse director may include an individual who self-identifies as one or more of female, LGBTQ+ or an underrepresented minority. For smaller boards If there are five or fewer board members, the issuer must disclose whether the board has at least one director who self-identifies as female, an underrepresented minority or LGBTQ+. Meaning of “underrepresented minority” For issuers that are not Foreign Issuers, underrepresented minority means a director who self-identifies as one or more of the following: 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.

Cure Period for Board Turnover	If an issuer ceases to satisfy the Minimum Diverse Directors Composition Requirement due to a vacancy on its board of directors, the issuer has a cure period until the later of one year from the date of vacancy or the date the issuer files its proxy circular for its annual shareholders meeting (or, if it does not file a proxy circular, its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy to satisfy the requirement. During this period, an issuer relying on the cure period may — and must prior to the date following the vacancy it next files its proxy circular for an annual shareholders meeting (or, if it does not file a proxy circular, in its Form 10-K or 20-F) — publicly disclose that it is relying on the cure period relief. Such disclosure may be provided in any proxy circular (or, if the issuer does not file a proxy circular, in its Form 10-K or 20-F) or by posting the disclosure on the issuer's website and providing a URL link to the disclosure through the Nasdaq Listing Center within one business day after such posting.
Newly Listed Issuers	An issuer that is newly listed on Nasdaq and not previously subject to board composition disclosure or a diverse director requirement that is substantially similar to Nasdaq's requirements must • satisfy the Board Composition Disclosure requirement within one year of listing on Nasdaq (other than issuers listing on Nasdaq's Capital Market); and • satisfy the Diverse Director Requirement on a staggered basis as follows: - by the later of one year from the date of its listing on Nasdaq or the date the issuer files its proxy circular for the first annual meeting (or, if it does not file a proxy circular, in its Form 10-K or 20-F) following its listing, have at least one "diverse" director, being a director who self-identifies as either female, LGBTQ+ or an underrepresented minority, or explain why it does not - by the later of two years from the date of its listing on Nasdaq or the date the issuer files its proxy circular for the second annual meeting (or, if it does not file a proxy circular, in its Form 10-K or 20-F) following its listing, comply with the Diverse Director Requirement or explain why it does not

As Nasdaq's new board diversity listing requirements will be a significant step-up in corporate governance for some issuers, the exchange has taken several affirmative steps to help issuers prepare for and comply with the new requirements. Issuers have access to free board recruiting services through partnerships Nasdaq has established with Equilar, Athena Alliance and the Boardlist to help their search for highly qualified, diverse, board-ready candidates. Issuers also have access to a list of frequently asked questions through [the Nasdaq Listing Center website](#). Specific questions may be submitted to a dedicated mailbox at drivingdiversity@nasdaq.com.

The new board diversity listing requirements further the trend begun in Canada ([see our earlier Osler Update](#) on the topic) and continued in California of requiring diversity disclosure covering not only gender but other diversity characteristics. It reinforces the importance of encouraging diversity across multiple dimensions as a fundamental principle of good corporate governance.

[1] For Canadian Nasdaq-listed issuers that rely on the U.S.-Canada Multijurisdictional Disclosure System, we presume that the disclosure can be provided in the Form 40-F.