DIVERSITY, EQUITY AND INCLUSION IN THE BOARD ROOM

Nasdaq Proposes New Board Diversity Requirements

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Building on the momentum surrounding diversity and inclusion initiatives which has been evident throughout 2020, in December, Nasdaq submitted a proposal (the "Proposal") to the Securities and Exchange Commission ("SEC") that would require most listed companies to meet certain board diversity metrics in accordance with specific timelines. The SEC responded by issuing a Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, summarizing the Proposal and outlining next steps (the "Notice," available here).

According to Nasdaq, while some companies have already taken significant steps to voluntarily diversify their boardrooms, the national market system and the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional board diversification. Nasdaq also submits that, in its current form, reporting of board diversity data does not happen in a consistent manner or on a sufficiently widespread basis, thereby limiting the ability of investors to meaningfully evaluate such information. In support of the Proposal, Nasdaq refers to a growing body of academic research, presented in further detail in the Notice, suggesting a positive correlation between board diversity and shareholder value, investor protection, and decision making.

The Proposal requires most Nasdaq-listed company boards to have, at a minimum, one director who self-identifies as female and one director who self-identifies 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, or as LGBTQ+. If listed companies do not meet these minimum requirements, they would be required to explain why these metrics have not been met. Similar, though slightly less stringent, requirements would apply to smaller reporting companies and foreign issuers.

The Proposal also requires listed companies to provide, in a proposed uniform format, certain statistical information on the company's board of directors related to a director's self-identification with respect to gender, race, and LGBTQ+ status on a going-forward basis (the "Statistical Information").

Recognizing that the Proposal does place additional burdens on companies, the Proposal contemplates a phase-in period over several years. After the first year, com-

panies must disclose their board composition, consistent with the required format of the Statistical Information. After the second year, companies must have, or explain why they do not have, at least one diverse director, and after four years (five years for Nasdaq Capital Market companies), companies must have, or explain why they do not have, at least two diverse directors.

While it is the first of its kind on a national scale, the Proposal is reminiscent of similar requirements that have gone into effect in recent years in California and, to a lesser extent, Illinois. Specifically, each publicly traded company incorporated in California must have on its board at least one female director and one director from an underrepresented community. Illinois requires public companies incorporated in Illinois to make annual disclosures with respect to board composition and diversity, although, Illinois currently stops short of requiring particular board composition.

Currently, fewer than 25% of Nasdaq companies satisfy the diversity requirements of the Proposal. Corporate diversity advocates point to similarly low statistics in California prior to the adoption of board diversity requirements in that state and note that the percentage of California boards with diverse members has increased significantly following the implementation of those requirements. Nasdaq is hopeful that the Proposal, if adopted, would yield similar results on a national scale.

The SEC held a period of public comment on the Proposal that concluded on March 11, 2021. All comments are available to view on the SEC's website (see here). Following the conclusion of this comment period, the SEC will approve or disapprove of the Proposal, or institute additional proceedings to determine how to move forward.

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