TRENDS IN INVESTOR COMMUNICATIONS

Nasdaq and Other Board Diversity Rules

IN THIS THOUGHT PIECE

In this thought piece we explore Nasdaq's new Board Diversity Rules, similar Board diversity recommendations and requirements in the United States (U.S.), and examples of Board diversity disclosures in 2021 proxy statements.

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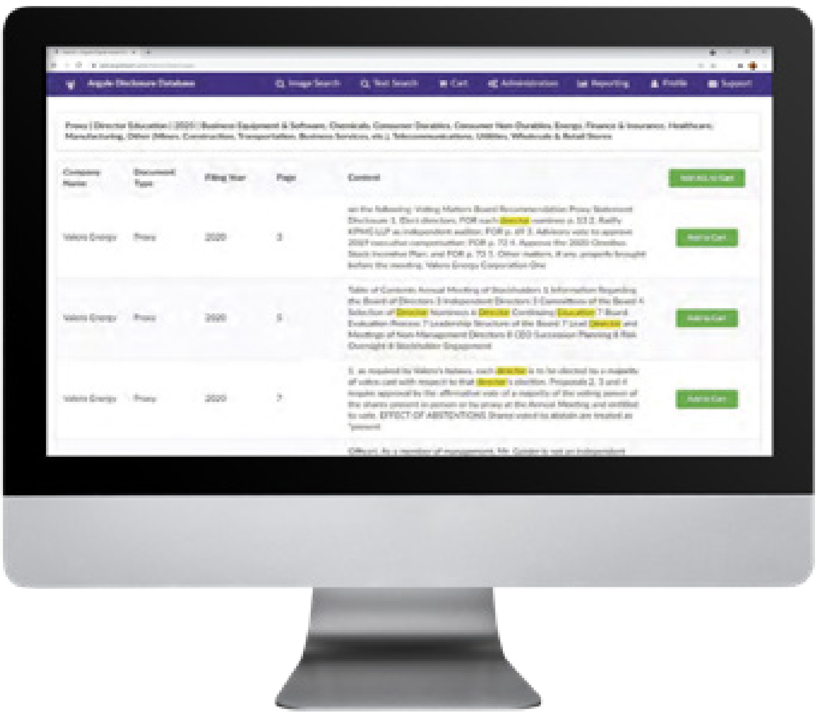

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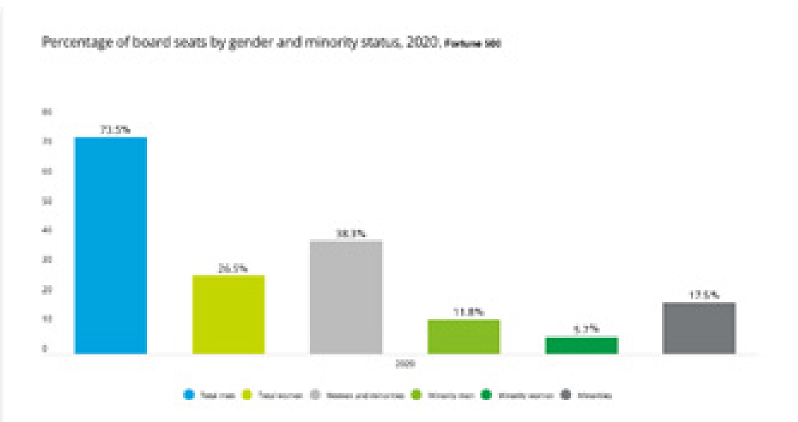
Introduction

In August 2021, the U.S. Securities and Exchange Commission (SEC) approved new Board diversity listing rules submit by The Nasdaq Stock Market LLC (Nasdaq).

According to Nasdaq, who proposed the new listing rules in December 2020, their goal is to increase the transparency of board diversity statistics from listed companies in response to investor demand for readily accessible, consistent and comparable information. As clarified in a September 2021 piece from the Global Association of Risk Professionals (GARP):[1]

Investment management and shareholder advisory firms are increasingly backing diversity initiatives as a prerequisite for doing certain kinds of business or in proxy voting related to nominating and governance committees… [In] August, a Nasdaq proposal setting criteria to be met for public listing was approved by the Securities and Exchange Commission, with agency chair Gary Gensler stating, "These rules reflect calls from investors for greater transparency about the people who lead public companies, and a broad cross-section of commenters supported the proposed board diversity disclosure rule.

Deloitte and the Alliance for Board Diversity found that between 2018 and 2020, board seats at Fortune 500 companies occupied by women and minorities rose from 34% to 38.3% while those held by men fell from 77.5% to 73.5%. Still, as of June 2020, 82.5% of Board members at Fortune 500 companies self-identified as white in comparison to African American/Black (8.7%), Asian/Pacific Islander (4.6%), Hispanic/Latino(a) (4.1%), or other (0.1%).[2]



[1] Winkour, L.A. (September 17, 2021). Boardroom Diversity Directions: Window Dressing, or Potentially World-Changing? Global Association of Risk Professionals (GARP).

[2] Data and chart adapted from Deloitte and the Alliance for Board Diversity. (2021). Missing Pieces Report: The Board Diversity Census of Women and Minorities on Fortune 500 Boards, 6th edition.

Nasdaq Board Diversity Disclosure and Objective Rule

As Nasdaq and the SEC have explained in response to public comments, "the rules do not mandate a specific number of diverse directors: they establish a disclosure requirement. Companies may choose not to comply with the diversity objective and instead explain their reasons for non-compliance."[3]

To meet the new "disclose or explain" requirement, Nasdaq requires that companies it lists:

- **Publicly disclose board-level diversity statistics using a standardized template (Board Diversity Disclosure Rule).** Specifically, Nasdaq asks companies to disclose annually aggregated information about Board members' voluntarily given and self-identified gender, racial and sexual orientation (i.e., lesbian, gay, bisexual, transgender and queer or LGBTQ+) characteristics in a "Board Diversity Matrix" for the current year and (after the first year of disclosure) the prior year.
- **Have or explain why they do not have at least two diverse directors (Board Diversity Objective Rule).** Of the two self-identified diverse directors, at least one must self-identify as female and at least one must self-identify as an underrepresented minority and/or LGBTQ+.

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
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	#			

Listed companies must provide their Board statistics in "a searchable format (1) in the company's proxy statement or information statement for its annual meeting of shareholders ("Proxy Materials"), (2) in an Annual Report on Form 10-K or Form 20-F ("Annual Report"), or (3) on the company's website. If provided on its website, the company must also submit the disclosure to the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholders meeting."[4] If a listed company fails to comply with the Board Diversity Disclosure Rule, it will have 45 days after notification of non-compliance to submit a plan to regain compliance. Based on that plan, Nasdaq could provide the company with up to 180 days to regain compliance.

The Board Diversity Disclosure Rule begins in 2022, while the Board Diversity Objective Rule begins in 2023. Phase-in-periods for companies newly listed on Nasdaq are available if companies have not been subject to similar requirements from other national securities exchanges. Outside the U.S., companies listed on the Nasdaq Global Select Market or Nasdaq Global Market and having over five directors have until 2025 to comply, while companies listed on the Nasdaq Capital Market and having over five directors have until 2026.

3. Cruz Sroufe, Evelyn. (October 4, 2021.) Nasdaq's Board Diversity Rules: Four Rebuttals to the Opposition. Perkins Coie.
4. https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf

To assist listed companies, Nasdaq:

- Specifies that small companies and foreign issuers may meet the Board Diversity Objective Rule with two female directors (with companies having five or fewer directors requiring one diverse director).
- Does not evaluate the substance or merits of explanations as to why a listed company does not meet the Diversity Objective Rule. But companies must provide details as to why they do not have the applicable number of diverse directors and not merely state that they do not comply.
- Offers certain listed companies that do not have a specified number of diverse directors access to a complimentary and voluntary board recruiting service, including a network of board-ready diverse candidates.
- Provides a grace period for companies that fall out of compliance due to a board vacancy: 180 days post-vacancy or by the time of the next annual shareholders meeting, whichever comes later.
- Allows companies to share optional Board diversity characteristics, such military service, disability status, language and/or culture.

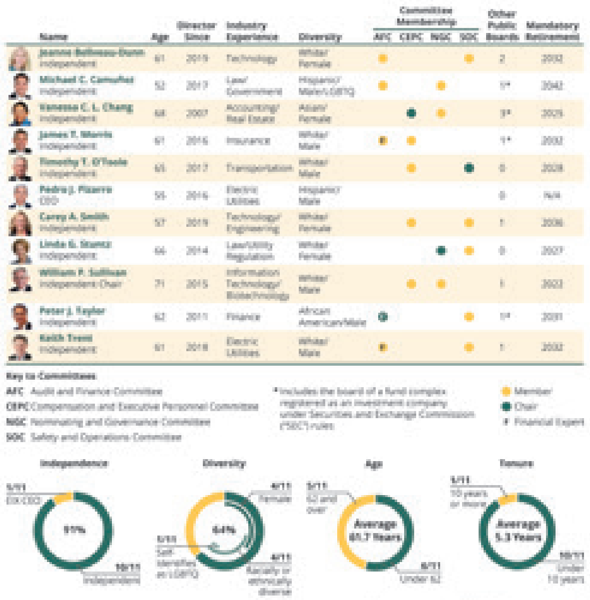
Beyond Nasdaq: Other Board Diversity Requirements

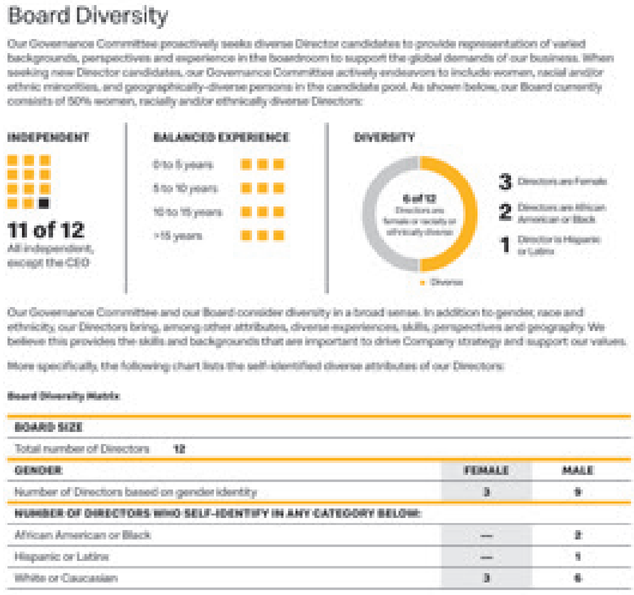
Others have Board diversity disclosure and objective requirements similar to Nasdaq's.

	Date Adopted	Stance on Board Diversity
BlackRock	March 2021	• Encourages listed companies in the U.S., Canada, Latin America and Europe to have at least two women on their boards. • Encourages disclosure of demographics related to board diversity, including but not limited to gender, ethnicity, race, age and geographic location, in addition to measurable milestones to achieve racial, ethnic and gender diversity • May vote against directors on the nominating committee (or equivalent) for an apparent lack of commitment to fostering board effectiveness if there is insufficient progress on enhancing board diversity within a reasonable timeframe.
Fidelity Investments	July 2021	• Will consider voting against management in most developed markets that don't have at least 30% female representation on their boards. • In markets where standards on diversity are still developing, will have an initial threshold of 15% female representation.
Goldman Sachs	February 2020	• Requires that listed companies have at least two diverse directors, including one woman.
Institutional Shareholder Services	November 2020 (for shareholder meetings February 2022 and later)	• For companies in the Russell 3000 or S&P 1500 index, will recommend a vote "against" or "withhold" from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members. • Mitigating factors include the presence of a racial and/or ethnic minority on the board at the preceding annual meeting and a firm commitment to appoint at least one racially and/or ethnically diverse board member.
New York State Common Retirement Fund (Fund)	February 2021	• Will file shareholder proposals seeking increased board diversity and expand votes against board members at companies whose boards do not include underrepresented racial minorities and companies that refuse to embed diversity in their search for new board directors.
State Street Global Advisors	January 2021	• If a company in the S&P 500 or FTSE 100 does not disclose the racial and ethnic diversity of its Board and does not have at least one director from an underrepresented group will vote against the Chair of the Nominating & Governance Committee.
Nasdaq	August 2021	• Publicly disclose board-level diversity statistics using a standardized template. • Have or explain why they do not have at least two diverse directors. • Of the two self-identified diverse directors, at least one must self-identify as female and at least one must self-identify as an underrepresented minority and/or LGBTQ+.
Vanguard	December 2020	• Vote against a U.S. or European company's nominating and/or governance committee chair (or any other director if needed) if the company's board has made insufficient progress on board diversity or board diversity-related disclosure.

Examples of Board Diversity in Proxy Statements

Disclosing statistics on Board member characteristics – along with their independence, experience and skills – is not new to companies. Many are already sharing diversity statistics in their proxy statements.





Board Diversity Matrix (As of April 29, 2021)

Board Size:				
Total Number of Directors		12		
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	7	5	0	0
Number of directors who identify in any of the categories below:				
African American or Black	1	1	0	0
Alaskan Native or American Indian	0	0	0	0
Asian	0	0	0	0
Hispanic or Latinx	0	1	0	0
Native Hawaiian or Pacific Islander	0	0	0	0
White	6	5	0	0
Two or More Races or Ethnicities	0	2	0	0
LGBTQ+		1		
Undisclosed		0		

Left to right, top to bottom: Examples of Board diversity disclosures from the 2021 proxy statements of Edison International, McDonald's, and United Therapeutics.

Going Forward

California was the first state to enact board diversity requirements for publicly held companies with principal executive offices in the state. In 2018, the state mandated that companies of a certain size must have up to three female directors by the end of 2021 and up to three directors from an "underrepresented community" by the end of 2022 or face fines. As of May 2020, 11 other states had enacted or were considering similar board diversity legislation or resolutions – Colorado, Hawaii, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania and Washington.[5]

Though there is not agreement among current SEC Commissioners if the agency should require Board diversity disclosures, given recent statements by SEC Chairman Gary Gensler and Commissioners Allison Herren Lee and Caroline Crenshaw in support of such disclosures, there is a possibility that the SEC may propose diversity and inclusion-focused rules for public companies and the asset management industry soon.[6]

5 Hatcher, Michael, Latham, Weldon, and Lewis, Jackson. (May 12, 2020). States are Leading the Charge to Corporate Boards: Diversity! Harvard Law School Forum on Corporate Governance.

6 Williamson, Gwen. (August 18, 2021). D&I Developments at the SEC – Part 2 of 2. Perkin Coie.

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