December 4, 2020

NASDAQ PROPOSES NEW BOARD DIVERSITY RULES

To Our Clients and Friends:

On December 1, 2020, The Nasdaq Stock Market LLC ("Nasdaq") announced that it filed with the U.S. Securities and Exchange Commission (the "SEC") a proposal to advance board diversity and enhance transparency of board diversity statistics through new listing requirements. This client alert provides a summary of the proposed rules and the rationale for the proposals. In summary, if approved by the SEC, the proposed rules would require certain Nasdaq-listed companies to: (A) annually disclose diversity statistics regarding their directors' voluntary self-identified characteristics in substantially the format proposed by Nasdaq for the current year and (after the first year of disclosure) the immediately prior year; and (B) include on their boards of directors at least two "Diverse" directors (as defined in the rules) or publicly disclose why their boards do not include such "Diverse" directors.

Nasdaq's Annual Board Diversity Disclosure Proposal

The proposed rules would require Nasdaq-listed companies, other than "Exempt Entities" (as defined below), to provide statistical information about each director's self-identified gender, race, and self-identification as LGBTQ+ in substantially the format proposed by Nasdaq under new proposed Rule 5606 (the "Board Diversity Matrix"), which is reproduced as Exhibit A below and is also available at the Nasdaq Listing Center here. Following the first year of disclosure, companies would be required to disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix or in a substantially similar format.

This statistical information disclosure would be required to be provided (A) in the company's proxy statement or information statement for its annual meeting of shareholders, or (B) on the company's website. If the company provides such disclosure on its website, the company must also submit such disclosure and include a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholders meeting.

The proposed diversity disclosure requirement is limited to the board of directors of the company, and does not require disclosure of diversity metrics for management and staff. Foreign Issuers may elect to satisfy the board composition disclosure requirement through an alternative disclosure matrix template. (*See* Nasdaq Identification Number 1761).

Include Diverse Directors or Explain

The proposed listing rule would require most Nasdaq-listed companies, other than "Exempt Entities" (as defined below), to:

(A) have at least two members of its board of directors who are "Diverse," which includes:

(1) at least one director who self-identifies her gender as female, without regard to the individual's designated sex at birth ("Female"); and

(2) at least one director who self-identifies as one or more of the following:

(i) 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 ("Underrepresented Minority"); or

(ii) as lesbian, gay, bisexual, transgender or a member of the queer community ("LGBTQ+"); or

(B) explain why the company does not have at least two directors on its board who self-identify as "Diverse."

For the purposes of the proposed rule described above, the term "Diverse" means an individual who self-identifies in one or more of the following categories defined above: Female, Underrepresented Minority or LGBTQ+.

Foreign Issuers (including Foreign Private Issuers) and Smaller Reporting Companies would have more flexibility to satisfy the requirement for two Diverse directors by having two Female directors. In the case of a Foreign Issuer, in lieu of the definition above, "Diverse" means an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction.

While Nasdaq's definition of a "Diverse" director is substantially aligned with California's Board Gender Diversity Mandate, there are some key differences, which are highlighted by Nasdaq here. Also, according to Nasdaq, the proposed rule "would exclude emeritus directors, retired directors and members of an advisory board. The diversity requirements of the proposed rule would only be satisfied by Diverse directors actually sitting on the board of directors of the company." (*See* Nasdaq Identification Number 1770).

The definition of "Underrepresented Minority" is consistent with the categories reported to the U.S. Equal Employment Opportunity Commission through the Employer Information Report EEO-1 Form.

Exempt Entities

The following entities are exempt from the requirements described under "Nasdaq's Annual Board Diversity Disclosure Proposal" and "Include Diverse Directors or Explain" above (the "Exempt Entities"):

- acquisition companies listed under IM-5101-2 (*Listing of Companies Whose Business Plan is to Complete One or More Acquisitions*);
- asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1) (*Asset-backed Issuers and Other Passive Issuers*));
- cooperatives (as set forth in Rule 5615(a)(2) (*Cooperatives*));
- limited partnerships (as set forth in Rule 5615(a)(4) (*Limited Partnerships*));
- management investment companies (as set forth in Rule 5615(a)(5) (*Management Investment Companies*));
- issuers of nonvoting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6) (*Issuers of Non-Voting Preferred Securities, Debt Securities and Derivative Securities*)); and
- issuers of securities listed under the Rule 5700 Series (*Other Securities*).

Compliance Period

Annual Board Diversity Disclosure Proposal

Each Nasdaq-listed company would have one calendar year from the date the SEC approves the Nasdaq rules (the "Approval Date") to comply with the board diversity disclosure requirement. Each company newly listing on Nasdaq, including any Special Purpose Acquisition Company ("SPAC") listed or listing in connection with a business combination under Nasdaq's IM-5101-2, would be require to comply with the board diversity requirement within one year of listing, subject to the conditions further discussed under "Phase-in Period" below.

Board Diversity Rule Proposal

Each Nasdaq-listed company would have two calendar years from the Approval Date to have, or explain why it does not have, at least one Diverse director. Further, Nasdaq proposes for each company to have, or explain why it does not have, two diverse directors no later than: (i) four calendar years after the Approval Date, for companies listed on the Nasdaq Global Select or Nasdaq Global Market; or (ii) five calendar years after the Approval Date, for companies listed on the Nasdaq Capital Market. A company listing after the Approval Date, but prior to the end of the periods set forth in this paragraph, must satisfy the Diverse directors requirements by the latter of the periods set forth in this paragraph or one year from the date of listing. A SPAC "would be exempt from the proposed board diversity and disclosure rules until one year following the completion of [the SPAC's] business combination." (*See* Nasdaq Identification Number 1762).

Phase-in Period

Any company newly listing on Nasdaq will be permitted one year from the date of listing on Nasdaq to satisfy the requirements of Diverse directors, as long as such company was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, or through a merger with an acquisition company listed under Nasdaq's IM-5101-2. This phase-in period will apply after the end of the transition periods described under "Compliance Period" above.

Cure Period

If a company does not have at least two Diverse directors and fails to provide the required disclosure, the Nasdaq's Listing Qualifications Department will notify the company that it has until the later of the company's next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

Rationale

The proposed requirements are an extension of Nasdaq's (and other securities exchanges') use of the listing rules to improve listed companies' corporate governance (e.g., the requirement of independent committees). The proposed disclosure requirements build on the SEC Division of Corporation Finance's Compliance and Disclosure Interpretations 116.11 and 133.13, issued on February 6, 2019, regarding director and director nominee diversity disclosure under Items 401 and 407 of Regulation S-K, and reflect similar movement in the market (*e.g.*, Goldman Sachs's new standard requirement to have at least one diverse board member on companies it helps take public in 2020 and two in 2021). However, according to the New York Times, "[o]ver the past six months, Nasdaq found that more than 75 percent of its listed companies did not meet its proposed diversity requirements."

Nasdaq's proposal cited studies about the positive correlation of diversity and shareholder value, investor protection, decision making and monitoring management. In connection with the proposed rules, Nasdaq also announced that it "conducted an internal study of the current state of board diversity among Nasdaq-listed companies based on public disclosures, and found that while some companies already have made laudable progress in diversifying 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 diversification of their boards."

Additional Information

Nasdaq has provided additional information through a summary and Frequently Asked Questions available on Nasdaq's Reference Library Advanced Search, in Identification Numbers 1745 through 1777.

Nasdaq also announced a partnership with Equilar, Inc., a provider of corporate leadership data solutions, to aid Nasdaq-listed companies with board composition planning challenges and allowing Nasdaq-listed companies, through the Equilar BoardEdge platform, to have access to diverse board candidates to amplify director search efforts.

Next Steps

The proposed rules will be published in the Federal Register and subject to public comment. Comments to the proposed rules should be submitted to the SEC within 21 days of their publication in the Federal Register.

The approval period may take as little as **30 calendar days** and as long as **240 calendar days** from the date of publication of the proposed rules in the Federal Register (as described in further detail below). If approved by the SEC, the "Compliance Period" discussed above would begin.

- Section 19(b)(2)(C)(iii) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), provides that the SEC may not approve a proposed rule change earlier than **30 days** after the date of publication of the proposed rules in the Federal Register, unless the SEC finds good cause for so doing and publishes the reason for the finding.

- Under Section 19(b)(2)(A)(i) of the Exchange Act, within **45 days** of the date of publication of the proposed rules in the Federal Register, the SEC may approve or disapprove the proposed rule change by order or, under Section 19(b)(2)(A)(ii) of the Exchange Act, extend the period by not more than an additional 45 days (to a total of **90 days**).

- However, if the SEC does not approve or disapprove the proposed rule change, Section 19(b)(2)(B)(i)(II) of the Exchange Act allows the SEC the opportunity for hearings to be concluded no later than 180 days after the notice of the proposed rule change (which can be extended by not more than 60 days (to a total of **240 days**), pursuant to Section under Section 19(b)(2)(B)(ii)(II) of the Exchange Act).

Exhibit A

Board Disclosure Format

Board Diversity Matrix (As of [DATE])				
Board Size:				
Total Number of Directors	#			
Gender:	**Male**	**Female**	**Non-Binary**	**Gender Undisclosed**
Number of directors based on gender identity	#	#	#	#

Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Undisclosed	#			

Board Diversity Matrix (As of [DATE]) Foreign Issuer under Rule 5605(f)(1)				
Country of Incorporation:	[Insert Country Name]			
Board Size:				
Total Number of Directors	#			
Gender:	**Male**	**Female**	**Non-Binary**	**Gender Undisclosed**
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
LGBTQ+	#			
Underrepresented Individual in Home Country Jurisdiction	#			
Undisclosed	#			

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any lawyer in the firm's Securities Regulation and Corporate Governance and Capital Markets practice groups, or the authors:

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