BCLP. Client Intelligent

BCLPSecCorpGov.com

NASDAQ AMENDS ITS BOARD DIVERSITY PROPOSAL

Mar 01, 2021

On Friday, Nasdaq submitted a revised proposal that addresses board diversity membership for listed companies. As discussed in our prior alert, Nasdaq had originally called for public companies – over a two-to-four year phase-in period – to include two diverse directors on their boards and to disclose in a "diversity matrix" certain anonymous aggregate data regarding gender identity, race, ethnicity and sexual orientation.

Based on comments, Nasdaq has modified the proposal in a variety of areas:

- *Smaller boards.* Companies with five or fewer directors would only need to include one diverse director, instead of two.
- *Grace period for vacancies.* A one-year grace period would be provided for companies that no longer meet the diversity objective as a result of a vacancy on the board.
- *Timing of disclosure.* Diversity information would need to be made publicly available before annual shareholder meetings, to align with disclosures for other proxy-related governance matters.
- *Extra time for newly-listed companies.* Newly-listed companies that become listed after the phase-in period for the new rules ends would have an additional two-year period after the phase-in period to fully meet the diversity objective.
- *Trigger date.* The operative date for disclosure would be the later of (1) one calendar year from the date of SEC approval of the revised proposal or (2) the date the proxy statement is filed for a company's annual meeting during the calendar year of such SEC approval date.
- *Location of disclosure.* Companies could choose to disclose the diversity matrix on their websites, in their proxy statements or in their Forms 10-K or 20-F. The information should be published in a searchable format.
- *Additional disclosures permitted.* Companies would be permitted to include more detailed information, including on a director-by-director basis, if they choose.

- *No verification by Nasdaq.* Nasdaq would not judge the accuracy of a director's self-identification, and believes that his or her response will not subject the company to greater liability than other matters covered in D&O questionnaires.

Nasdaq's submission to the SEC addressed several issues that it described as "common misperceptions", explaining that, in its view:

- *No quota.* The proposal does not establish quotas, as the new rules would allow the option for companies to explain why they choose not to meet (or do not meet) the diversity objective.
- *No change in director qualifications.* The proposal would not force companies to appoint unqualified directors, as Nasdaq believes "there is a sufficient community of available and qualified diverse candidates."
- *Delisting avoidable.* Companies would not be delisted solely for not meeting the diversity objective, as they would have the option to provide an explanation instead.
- *No conflicts of interest with Equilar arrangement.* Nasdaq's relationship with Equilar – whose services would be made available on a complementary basis by Nasdaq to listed companies to help them meet the diversity objective – neither generates revenue for Nasdaq nor creates a conflict of interest.
    - The service, which companies could use (or not use) at their discretion, would provide access to a network of "board-ready diverse candidates."

Nasdaq also highlighted several points that some commentators challenged, including, among others, its belief that:

- *Empirical evidence.* The weight of empirical evidence supports its view that board diversity is positively associated with enhanced company performance, investor protection and/or decision-making.
- *Materiality.* Input from investors demonstrates that diversity disclosures are material to voting and investment decisions, even if research studies do not show a statistically significant causal relationship with company performance.
- *Reduction in information costs for investors.* The disclosures would reduce costs for both retail and institutional investors by making diversity information readily available, and level the playing field for smaller investors.
- *Comparability of diversity data.* The categories of diversity are consistent with those reported to the EEOC and help establish disclosure of consistent, comparable data across companies.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM

R. Randall Wang

St. Louis

randy.wang@bclplaw.com
+1 314 259 2149