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# Fifth Circuit Strikes Down Nasdaq Board Diversity Disclosure Requirements

On December 11, 2024, in [Alliance for Fair Board Recruitment v. SEC](#), the Fifth Circuit struck down Nasdaq's board diversity disclosure requirements, holding *en banc* that the SEC had exceeded its authority in approving them. The challenge was initially unsuccessful, with a Fifth Circuit panel upholding the requirements in 2023. Nasdaq has communicated to listed companies that it does not plan to appeal the ruling, although it is reported that the SEC is "reviewing the decision and will determine next steps as appropriate."

As a result, Nasdaq-listed companies will no longer be required to comply with the vacated rules, which had mandated them to (i) disclose the voluntarily self-identified diversity characteristics of their board members and (ii) have, or explain why they do not have, at least one director who self-identified as a female, an underrepresented minority or LGBTQ+ and, beginning in 2025, at least two self-identified diverse directors.

The Fifth Circuit's ruling may foreshadow a future circuit split on issues related to corporate board diversity and related disclosure requirements.

## **Background**

In December 2020, Nasdaq submitted to the SEC proposed rule changes addressing the board diversity of companies listed on its exchange. Following a public comment period, the rules were approved by a divided SEC in August 2021.

Two non-profit organizations—the Alliance for Fair Board Recruitment and the National Center for Public Policy Research—challenged the SEC's approval, arguing that the rules impose a quota in violation of the Fourteenth Amendment's equal protection clause and violate the First Amendment's prohibition against compelled speech. Petitioners also argued that, in approving the rules, the SEC had exceeded its statutory authority under the Securities Exchange Act of 1934 (the "Exchange Act") and had acted "arbitrarily and capriciously" in violation of the Administrative Procedure Act. Petitioners additionally claimed that, under the "major questions" doctrine recently articulated by the U.S. Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the SEC did not have authority to approve the board diversity disclosure rules absent express authorization from Congress.

In October 2023, a unanimous three-judge panel rejected petitioners' claims, upholding the SEC's approval of Nasdaq's board diversity disclosure rules. *First*, the Court reasoned that Nasdaq was not a state actor subject to constitutional claims, and did not become one simply because it is heavily regulated. *Second*, the Court found that the SEC's actions were within its statutory authority under the Exchange Act, as disclosure of board diversity information would inform investors' market behavior, and the Administrative Procedures Act, as the benefits of increased transparency and board-standardized information would outweigh

any burdens to Nasdaq-listed companies. *Finally*, the Court explained that this was not a “major questions” case, as the board diversity disclosure rules were not “economically and politically significant enough” to trigger that doctrine.

Petitioners sought rehearing *en banc*, arguing that the panel had erred in concluding (i) that the Nasdaq rules were not subject to constitutional challenges, (ii) that the rules were within the SEC’s authority and that (iii) the “major questions” doctrine did not apply. Petitioners contended that, under the panel’s holding, “anything and everything is fair game for mandatory disclosures.”

The Fifth Circuit granted petitioners’ request for rehearing and subsequently reversed the panel’s ruling, concluding that the SEC had exceeded its authority in permitting the Nasdaq rule changes. Specifically, the Court found that the SEC is empowered to approve disclosure requirements only to the extent related to the “actual, enumerated purpose[s]” of the Exchange Act—i.e., protecting investors and the American economy from speculative, manipulative and fraudulent practices, and removing barriers to the development of a national market system.

The Court explained that the proposed rule requiring the disclosure of diversity statistics was not connected to the Exchange Act’s enumerated purposes. The Court also found that the proposed rule changes were in fact economically and politically significant enough to implicate the “major questions” doctrine, owing to their impact on “the internal structure of many of the largest corporations in the world” and the divisiveness of the underlying political issues, and that the lack of antecedent SEC authority demonstrated that the proposed changes fell outside the SEC’s regulatory powers, intruding into an area that is the domain of state law.

### **Looking Ahead**

The Fifth Circuit’s ruling vacates the 2021 Nasdaq rule changes, eliminating the board diversity disclosure requirements. This may not have a significant impact on board diversity in practice, which had been on the rise before Nasdaq proposed the requirements. According to a Conference Board survey, in 2023, 21% of Russell 3000 directors were racially or ethnically diverse, 54% of Russell 3000 companies had three or more female directors, and male-only boards had decreased to 1.6% (down from 21% in five years). So long as board diversity remains an important priority for investors – institutional and others – as well as ISS, Glass Lewis and other stakeholders, we expect it will remain an important part of public company governance.

We will continue to monitor this issue for future developments, including a possible circuit split on issues related to corporate board diversity and disclosure requirements.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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