

CLIENT ALERT

Navigating Compensation Governance

Nasdaq Board Diversity Rule Struck Down by Federal Court

On December 13, 2024, the Fifth Circuit Court of Appeals (en banc) held that the SEC exceeded its authority when it approved Nasdaq's board diversity rule.

The case was decided by a 9-8 vote, and the Court's action overrules a Fifth Circuit panel's prior decision upholding the rule.

As a result, Nasdaq listed companies will not be required to comply with the board diversity mandate or disclose board diversity statistics (absent a successful appeal to the U.S. Supreme Court, which appears unlikely).

Background on Nasdaq Board Diversity Rule

In August 2021, the SEC approved Nasdaq's proposed rule which requires each Nasdaq-listed company (subject to certain exceptions) to meet the following requirements:

- Publicly disclose board-level diversity statistics in a prescribed format in the company's annual proxy statement (or similar filing) or on the company's website, and
- Include at least two diverse directors by a specified date, based on the company's listing tier, or publicly disclose and explain its noncompliance with the board diversity requirement.

Generally, a listed company would meet the diversity requirement if its board included both: (i) a director who self-identifies as female, and (ii) a director who self-identifies as either LGBTQ+ or an underrepresented minority.¹

Federal Court Rulings

On October 18, 2023, a three-judge panel on the Fifth Circuit of the U.S. Court of Appeals upheld Nasdaq's board diversity rule on constitutional grounds and found the SEC did not

¹ Refer to [Meridian Client Update dated August 19, 2021](#) for more details on the Nasdaq board diversity rule.

exceed its authority in approving the rule. The plaintiffs asked for *en banc* rehearing – meaning that the entire Fifth Circuit which is comprised of 17 judges would hear the appeal of the prior panel decision. The rehearing was granted.

On December 13, 2024, the Fifth Circuit (en banc) overturned the prior ruling upholding Nasdaq's diversity rule. In overturning the prior ruling, the Court concluded that the SEC lacked the statutory authority to authorize Nasdaq's rule due to the lack of a clear Congressional directive. The SEC and Nasdaq argued that the SEC had broad authority to adopt a board diversity disclosure requirement because "full disclosure" was central to the Securities Exchange Act. However, the Court disagreed and concluded that the board diversity rule was "far removed" from the purposes of the Exchange Act.

According to a [Bloomberg Law article](#) on the decision, Nasdaq does not plan to appeal the ruling, while the SEC is "reviewing the decision and will determine next steps as appropriate."

Given its focus on deregulation, the incoming Trump administration would appear likely to let the Fifth Circuit's decision stand.

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The **Client Alert** is prepared by Meridian Compensation Partners' Governance and Regulatory Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-347-2524.

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