

[SEC Approves NASDAQ Board Diversity Rules](#)



On August 6, 2021, the U.S. Securities and Exchange Commission [approved](#) Nasdaq's [Board Diversity Rules](#) (the "Rules"). The Rules require Nasdaq-listed companies to have or explain why they do not have at least two diverse directors. Companies are also required to annually disclose statistical information on board diversity using a standardized [board diversity matrix](#). To assist companies in identifying diverse directors, the SEC also approved [rules](#) that provide Nasdaq-listed companies with free access to a variety of board recruiting services. The Rules apply to nearly all Nasdaq-listed companies, including Smaller Reporting Companies and, with some accommodations for home country requirements, Foreign Private Issuers. The requirement to have or explain the lack of diverse directors becomes effective in two steps that will affect proxy statements for annual meetings of calendar year-end companies in 2023 and 2025 (2023 and 2026 for companies listed on The Nasdaq Capital Market). The requirement to disclose board diversity factors using the Nasdaq [matrix](#) will apply to proxy statements for annual meetings of calendar year-end companies starting in 2022.

Read the full insight [here](#).

Goodwin previewed the now approved Nasdaq Board Diversity Rules in its December 2020 ["Nasdaq Takes a Stand: Board Diversity is Good Corporate Governance, Not a Trend"](#) blog post.

[SEC Chairman's Comments Signal Likely Changes to Rule 10b5-1 Trading Plans](#)

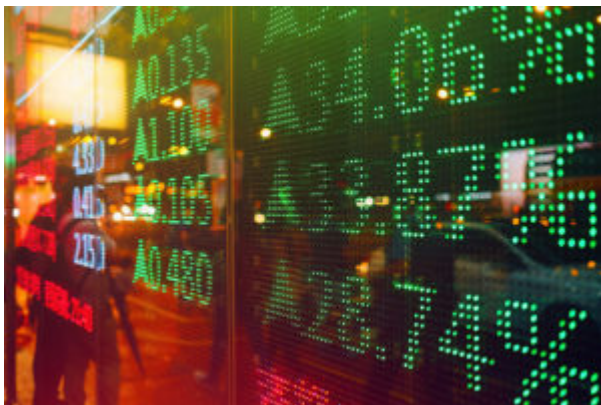


Rule 10b5-1 trading plans have faced increased scrutiny since the onset of the COVID-19 pandemic and the corresponding public focus on stock sales by executives of public [life sciences companies](#). On June 7, 2021, SEC Chairman Gary Gensler continued that scrutiny when he delivered prepared [remarks](#) to the *Wall Street Journal's* CFO Network Summit concerning Rule 10b5-1 trading plans and his view that "these plans have led to real cracks in our

insider trading regime.” Mr. Gensler outlined four potential reforms that the SEC staff is considering to address those “cracks”.

Read the full insight [here](#).

Nasdaq Takes a Stand: Board Diversity is Good Corporate Governance, Not a Trend



On December 1, 2020, Nasdaq filed a proposal with the SEC to adopt new listing rules relating to board diversity and heightened disclosure. Nasdaq’s position is clear – “diversity in the boardroom is good corporate governance.” Citing the recent social justice movement and a wide range of studies linking board diversity to improved corporate governance and financial performance, Nasdaq’s proposal highlights the role of national exchanges in providing a regulatory push for companies to embrace meaningful board diversification.

The [proposal](#), if adopted, would require Nasdaq-listed companies, subject to certain exceptions, to have at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+. Listed companies would also be required to disclose statistical information on board diversity and, if applicable, their rationale for not meeting the diversity objectives. Smaller reporting companies and foreign private issuers could satisfy the requirement with two female directors.

Progress on board diversity has been slow, especially with respect to underrepresented racial and ethnic groups. Under the phase-in provisions of the proposal, companies would have to comply with the statistical disclosure requirement within one year of SEC approval and have at least one diverse director within two years, or explain their rationale for not meeting the objective. Full compliance would be required within four or five years depending on the company’s listing tier.

While the phase-in provisions of the rule won’t radically transform the public company board landscape any time soon, the disclosure requirements are potentially significant. If investors have clear and consistent information on board diversity, they can exert pressure on companies to accelerate their diversification efforts. Kudos to Nasdaq and its President and CEO Adena Friedman for pushing its over 3,250 listed companies to embrace board diversity as a rule rather than an

exception.

Think Your Drug is Safe and Effective? Not So, Says the SEC



For life sciences companies who are or are looking to become publicly traded in the U.S., one of the most frequent comments that we see from the SEC as part of their review process is the following:

You make several assertions regarding the safety and efficacy of certain of your product candidates. Safety and efficacy determinations are solely within the authority of the FDA (or applicable foreign regulators). Please revise these statements to remove statements/inferences that your product candidates are safe and/or effective. We will not object to a discussion of whether your product candidates were well-tolerated or discussion of whether trial endpoints were met.

Given the frequency with which verbiage such as “safety data” or “efficacy data” is used among drug developers, investors and even the FDA itself, this position by the SEC often catches companies by surprise. However, the SEC has consistently taken the view that such references are not appropriate in companies’ SEC disclosures. Importantly, even oblique references to “safety” or “efficacy” (for instance, forward-looking statements regarding the expected safety profile of a product candidate) will often draw an SEC comment.

Fortunately, there are typically relatively straightforward ways to resolve this comment. For instance, rather than referring to a drug’s efficacy, companies can instead refer to whether it met trial endpoints or demonstrated activity. Similarly, in lieu of referring to a drug’s safety, companies can refer to its tolerability or its adverse event profile observed to date.

While this topic is typically a point of emphasis in the IPO process, we often find that companies become less vigilant about avoiding “safety” and “efficacy” references in their subsequent Exchange Act periodic reports (not to mention their press releases and investor presentations). However, we frequently see this comment come up in SEC reviews of public company periodic reports, and proactively steering away from references to “safety” and “efficacy” can be a useful way to remove some low-hanging fruit that might otherwise draw an SEC comment.