Nasdaq’s new board diversity rules—the shape of things to come?

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On August 6, the Securities and Exchange Commission approved Nasdaq’s new board diversity rules. After the rules are phased in, most operating companies listed on the Nasdaq Stock Market will be required to:

- publish annual board-level diversity characteristics using a standardized template and ensure that the information is searchable; and
- have (or explain why they do not have) at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority (i.e., 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) or LGBTQ+[1].

These rules will also apply to foreign issuers, including Canadian issuers eligible to use the Multijurisdictional Disclosure System (MJDS), subject to certain modifications.

What you need to know

- Generally, companies will have to comply with the annual disclosure requirements by August 8, 2022 and have (or explain why they do not have) at least one diverse director by August 7, 2023[2]. Depending on their listing tier, companies that are required to have (or explain why they do not have) at least two diverse directors will have an additional two or three years to meet this objective[3].
- Smaller reporting companies[4] and eligible foreign issuers (including foreign private issuers)[5] will be able to meet the diversity objectives by having (or explaining why they do not have) at least one director who self-identifies as female and at least one other director who self-identifies as female, an underrepresented minority or LGBTQ+. Eligible foreign issuers may also use a definition of “underrepresented individual” based on the national, racial, cultural, Indigenous, religious or linguistic identity in the country of the company’s principal executive offices. Although there are no MJDS-specific exemptions in Nasdaq’s board diversity rules, all MJDS issuers are foreign private issuers and will be able to rely on the modifications available for foreign issuers.
- To facilitate comparability, Nasdaq will require its listed companies to use a prescribed board

diversity matrix. Nasdaq-listed companies that wish to, or are required by another authority to, disclose additional diversity data will have to provide such information either below the prescribed matrix or in a separate table.

- Although Nasdaq didn't go so far as to mandate quotas for diverse directors, we expect the new rules will influence the development of a minimum market standard for board diversity for U.S. public companies.
- Although currently there is no indication that the NYSE, the TSX or any other North American stock exchange is considering adopting similar rules, the SEC is expected to make diversity a priority in its rule-making and Canadian securities regulators are consulting with stakeholders regarding disclosure requirements that go beyond gender. We expect that regulators in both countries will pay close attention to the market's reaction to Nasdaq's rules, as they consider whether or not to introduce similar requirements.
- As regulatory requirements evolve, we expect there will be jurisdictional differences that may result in more complex and harder-to-compare disclosures.

Limited exceptions to the rules

A limited number of entities are exempt from the rules, such as investment companies, limited partnerships, asset-backed issuers, companies that do not have boards, and companies that do not have listed, voting equity securities. Special purpose acquisition companies (SPACs) will be exempt from the rules until they complete their first acquisition.

Newly listed companies will have to comply with the disclosure requirements within a year of their listing date. Companies listing on Nasdaq before the end of the phase-in period for the rules will have the remainder of the applicable initial phase-in period or two years from the date of listing, whichever is longer, to satisfy (or explain why they do not satisfy) the diversity objective.

A company that ceases to be an eligible foreign issuer, smaller reporting company or exempt company will have to comply with the diversity objective by the later of one year from the date it loses such status and the date it files its proxy/information statement (or Form 10-K or 20-F if it does not file a proxy) for its next annual meeting of shareholders. A company with a smaller board that expands to six members in order to have at least one diverse director will not become subject at that time to the requirement to have two diverse directors. However, any company with a smaller board that expands to seven or more members will have to start complying with the objective to have (or explain why it does not have) at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+.

Board diversity disclosures

Non-exempt Nasdaq-listed companies will have to provide the required disclosures by the later of August 8, 2022 and the date the company files its proxy/information statement (or if the company does not file a proxy, the date it files its Form 10-K or 20-F) for the 2022 calendar year. The disclosure must be provided in the company's proxy/information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) or on its website[6]. Companies should, if necessary, amend director questionnaires or similar documents to ensure they obtain the information needed to comply with the disclosure requirements for the 2022 disclosure cycle.

Companies will have to provide the required disclosures at least once per year[7]. Following the first year that a company discloses its board diversity matrix, it must include the current year and prior year diversity statistics in its disclosure.

To enhance comparability of disclosures, Nasdaq companies will have to use a prescribed matrix or a substantially similar format and ensure that the information is searchable. Eligible foreign issuers can opt to use Nasdaq's matrix designed for them [8]. One key difference between the two prescribed formats is that the standard matrix requires companies to report the total number of directors for each sub-category within the definition of "underrepresented minority", while the matrix that an eligible foreign issuer may use requires it report an aggregate number for all directors who self-identify as underrepresented individuals. A company may not substantially alter either matrix. However, it may supplement its disclosure by providing additional information about its directors, either below the matrix or in a separate table.

Considerations for Canadian companies that are listed or considering a listing on Nasdaq

Disclosure requirements

Many publicly traded Canadian companies are already subject to requirements to disclose diversity data about their directors and senior management, but these requirements differ from Nasdaq's requirements and are less prescriptive regarding the disclosure format. For example:

- National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) requires TSX-listed reporting issuers in most Canadian jurisdictions to provide annual disclosure about, among other things, the number and percentage of women on their board of directors and in executive officer positions and whether there are targets for the number or percentage of women in these roles, unless an exception applies. The information must be included in the issuer's management information circular when management solicits proxies for the purpose of electing directors, but the format for the disclosure is not prescribed.

- Since January 2020, public CBCA corporations have been required to put before shareholders at every annual meeting information about, among other things, the number and percentage of women, visible minorities, Indigenous peoples, and people with disabilities (i) on the corporation's board of directors and (ii) among senior management. The format for such disclosures is not prescribed, but corporations are encouraged to present the information in a table.

In their most recent progress report on their 2019-2022 business plan, the Canadian Securities Administrators stated that they plan to consult with market participants to determine Canadian investors' evolving needs for disclosure relating to broader diversity in corporate leadership. They likely will consider the recommendations of Ontario's Modernization Taskforce (Taskforce) that all publicly listed issuers in Canada disclose annual data on the representation of people who self-identify as women, Black, Indigenous or people of colour (BIPOC), persons with disabilities, or LGBTQ+ on their boards of directors and in executive management[9].

The table below compares and contrasts the disclosure requirements applicable to a Nasdaq-listed Canadian company regarding the representation of diverse persons on boards and in senior management under NI 58-101, the CBCA and Nasdaq's listing rules as well as the Taskforce's recommendations, where the Canadian company uses Nasdaq's board diversity matrix for eligible foreign issuers[10].

Disclosure Requirement	Nasdaq	NI 58-101	CBCA	Taskforce
Number of female directors	•	•	•	•
Percentage of female directors		•	•	
Number women in senior management		•	•	•

Disclosure Requirement	Nasdaq	NI 58-101	CBCA	Taskforce
Percentage of women in senior management		•	•	
Number of male directors	•			
Number of non-binary directors[11]	•			
Number of directors who did not disclose their gender identify	•			
Number of directors who are LGBTQ+	•			•
Number of people in senior management who are LGBTQ+				•
Number and percentage of individuals who are Indigenous peoples: (i) on the board; and (ii) in senior management			•	
Number and percentage of individuals who are members of a visible minority (a term that does not include Indigenous peoples): (i) on the board; and (ii) in senior management			•	
Number of directors who are: (i) a member of an underrepresented minority in Canada (including	•			•

Disclosure Requirement	Nasdaq	NI 58-101	CBCA	Taskforce
Indigenous peoples and other visible minorities); or (ii) BIPOC (Taskforce)				
Number of individuals who are BIPOC in senior management				•
Number of directors who did not disclose demographic information	•			
Number and percentage of persons with disabilities: (i) on the board and (ii) in senior management			•	•

Because of these differences in requirements and because Nasdaq prohibits the inclusion of supplementary information in the prescribed diversity matrix, Canadian public companies subject to Nasdaq's disclosure requirements will have to present the information required by NI 58-101 or the CBCA, as applicable, separate from the information that Nasdaq requires to be included in its prescribed board diversity matrix.

Diversity objectives

Canadian companies that are already listed on Nasdaq or considering a Nasdaq listing should assess whether they currently meet Nasdaq's diversity objectives and, if not, consider taking steps to enhance the diversity of their boards. For example, a Canadian company that has six or more directors could meet the diversity objectives by:

- having at least two board members who self-identify as female;
- having at least one board member who self-identifies as female and at least one board member who self-identifies as an underrepresented individual taking into account Canada's national, racial, cultural, Indigenous, religious or linguistic identity; or

- having at least one board member who self-identifies as female and at least one board member who self-identifies as LGBTQ+.

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[1] Companies with smaller boards (i.e., five or fewer directors) may satisfy the diversity objective by having at least one diverse director (i.e., one individual who self-identifies as female, an underrepresented minority and/or LGBTQ+).

[2] Companies that file a proxy/information statement for an annual meeting after these dates (or a Form 10-K or 20-F if the company does not file a proxy) in the applicable calendar year will have until the date of that filing to comply with the applicable requirement.

[3] Companies listed on the Nasdaq Global Select Market or Nasdaq Global Market will have until August 6, 2025 to have, or explain why they do not have, at least two diverse directors. The deadline for companies listed on the Nasdaq Capital Market is August 6, 2026. These deadlines are subject to extension to the date of the company's annual proxy/information statement (or Form 10-K or 20-F, if the company does not file a proxy).

[4] A "smaller reporting company" is defined as an issuer that is not an investment company, asset-backed issuer, or majority-owned subsidiary of a parent that is not a smaller reporting company and that has: (i) a public float of less than US$250 million or (ii) annual revenues of less than US$100 million and either no public float or a public float of less than US$700 million.

[5] These options will be available for any company that: (i) is a "foreign private issuer" under the Securities Exchange Act of 1934 (Exchange Act) or (ii) is a "foreign issuer" under the Exchange Act and has its principal executive offices located outside the U.S.

[6] Although it is not mentioned in the rule, we assume that an MJDS issuer that does not file a proxy/information statement will have until the later of August 8, 2022 and the date it files its Form 40-F and that it will provide the required disclosure in its Form 40-F or on its website.

[7] If within the same year a company changes its board composition after it publishes its matrix, the company may publish its updated information but is not required to do so.

[8] The prescribed board diversity matrices can be seen here.

[9] See the Taskforce's final report, published in January 2021, here and Torys' bulletin about these recommendations here.

[10] To streamline the information in this table, the descriptions of disclosure requirements do not distinguish between requirements or recommendations that data be disclosed based on how people self-identify and requirements or recommendations that do not use this term. Also, although the terms “executive officer” (NI 58-101), “senior management” (CBCA) and “executive management” (Taskforce recommendation) have somewhat different meanings, the single term “senior management” is used in this table.

[11] Although the Nasdaq diversity matrix requires disclosure of the number of non-binary directors, they are not included in the definition of LGBTQ+ and therefore, are not considered to be diverse directors.

To discuss these issues, please contact the author(s).

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