

## Fifth Circuit Vacates Nasdaq Diversity Rules

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December 19, 2024 Bruce Newsome, Matthew Fry, Maya Thomas

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On December 11, 2024, the U.S. Court of Appeals for the Fifth Circuit (the “Fifth Circuit”), in a 9-8 decision, held that the U.S. Securities and Exchange Commission (the “SEC”) erred in approving the board diversity objective rules of the Nasdaq Stock Market, LLC (“Nasdaq”), striking down the rules and any requirements for company compliance.

The Nasdaq rules in question mandated that Nasdaq-listed companies (1) annually disclose diversity-related statistics regarding their boards in a board diversity matrix and (2) have, or explain why they do not have, at least one diverse director on their board by December 31, 2023 and at least two diverse directors on their board by December 31, 2025. As noted in our previous client alert available [here](#), the SEC initially approved Nasdaq’s diversity rules in 2021.

Following the SEC’s approval of the Nasdaq diversity rules, the Alliance for Fair Board Recruiting and the National Center for Public Policy Research challenged the SEC’s decision in the Fifth Circuit, arguing that the SEC overstepped its statutory authority under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and that the Nasdaq diversity rules were unconstitutional. Initially, a three-judge panel dismissed the challenges to the diversity rules and affirmed their validity. However, upon further review in an en banc rehearing, the majority determined that the SEC had exceeded its traditional regulatory authority in approving the Nasdaq diversity rules and that the SEC’s approval of the rules was inconsistent with the primary objective of the Exchange Act, which aims to prevent market abuses such as speculation, manipulation, and fraud.

In light of the Fifth Circuit’s ruling, Nasdaq stated that it does not plan to appeal the decision. Meanwhile, the SEC has indicated that it is evaluating the ruling and considering its options, which may include an appeal to the U.S. Supreme Court. Therefore, Nasdaq reporting companies are not presently required (1) to include the board diversity matrix in their proxy statement or on their website or (2) to have or explain why they do not have diverse directors on their board. However, companies may consider whether to continue to voluntarily disclose self-identified diversity-related information in light of any investor expectations or voting policies of institutional investors or proxy advisory firms.

For further information, please contact a member of the Haynes Boone [Capital Markets and Securities Practice Group](#).