



Fifth Circuit Nullifies Nasdaq Board Diversity Rules

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On December 11, 2024, the Fifth Circuit Court of Appeals ruled, by a vote of 9 to 8, to block implementation of the Nasdaq board diversity rules. The court found that, in approving the rules, the Securities and Exchange Commission did not explain how the rules fall within the statutory purposes for securities exchange rules. The court noted that the primary purpose of the Securities Exchange Act is “to protect investors and the American economy from speculative, manipulative, and fraudulent practices.” It concluded, “No doubt the Act has ancillary purposes.... There may be other purposes buried in the Exchange Act’s voluminous text, but our review of the Act’s history makes clear that disclosure of any and all information about listed companies is not among them.”^[1] The plaintiffs also challenged the rules on constitutional grounds, but the court decided it did not need to consider the constitutionality issues because it resolved the case on statutory grounds.

As we previously reported ([SEC Approves Nasdaq’s Board Diversity Rule – Tucker Ellis LLP](#)), the rules would require a listed company to provide disclosure of self-identified gender and racial characteristics and LGBTQ+ status of the company’s board of directors. The rules also would require each Nasdaq-listed company, subject to certain exceptions, to have, or explain why it does not have, at least two members of its board of directors who are “diverse,” including at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+ as defined in the rule.

We do not know whether the SEC will seek review by the U.S. Supreme Court of the decision or what other action the SEC may take. What we do know is that, unless and until there is any further major development, companies do not need to comply with the rules.

[1] The court’s opinion also includes extensive discussion of the proper standards for court review of agency actions, which is beyond the scope of this Client Alert.

Additional Information

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