



## Client Alert: Nasdaq Board Diversity Disclosure Obligations Overturned

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The United States Court of Appeals for the Fifth Circuit (“5<sup>th</sup> Circuit”) held by a 9-8 vote last week that the Securities and Exchange Commission (the “SEC”) exceeded its authority in approving the Nasdaq listing exchange’s rules related to board diversity (“Diversity Rules”).

The SEC enacted disclosure rules in effect for Nasdaq-listed companies beginning in 2022. The Diversity Rules are comprised of two main components. The first was a diversity objective instituted through a “comply or explain” framework, where companies that did not comply with certain minimum diversity objectives needed to disclose why they did not so comply. The second component of the Diversity Rules was the requirement of annual disclosures of board diversity statistics through a board diversity matrix setting forth directors’ self-identified diversity characteristics.

The 5<sup>th</sup> Circuit’s decision in *Alliance for Fair Board Recruitment v. SEC* overruled a 5<sup>th</sup> Circuit panel decision from October 2023 that upheld the Diversity Rules. The basis for the 5<sup>th</sup> Circuit vacating the SEC enactment of the Diversity Rules was that the SEC exceeded its authority. The 5<sup>th</sup> Circuit did not agree with the SEC’s argument that the Diversity Rules were related to the purposes of the Securities and Exchange Act of 1934 (the “Exchange Act”). The court found the Diversity Rules far removed from the Exchange Act’s mandate that securities exchange rules “promote just and equitable principles of trade” and further not related to promoting free and open markets. The 5<sup>th</sup> Circuit also rejected the argument that the Diversity Rules were related to the enumerated provisions of the Exchange Act to “protect investors and the public interest” from harms explicitly contemplated by the Exchange Act, namely speculation, manipulation, fraud and anti-competitive behavior. In addition, the 5<sup>th</sup> Circuit found that disclosures pertained to social justice issues outside of the scope of the SEC’s ordinary regulatory domain.

The SEC has not yet signaled any intent to appeal the decision.

### Practical Considerations

The takeaway is that Nasdaq-listed companies no longer have mandatory disclosure obligations regarding the diversity of its board of directors. Nonetheless, many companies may continue to share their board diversity data, particularly since institutional shareholders and proxy advisory firms consider this information and since the mechanisms for gathering and reporting such information are already in place for most companies for the last two proxy season cycles. Going forward, the decision to provide such disclosures and the manner in which they are made will be voluntary.



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