

MARCH 10, 2025

THE FUTURE OF BOARD DIVERSITY DISCLOSURES

The current proxy season presents new challenges and opportunities for U.S. companies as they face shifting expectations regarding board diversity. There are a number of notable developments. The Fifth Circuit Court of Appeals decision to vacate the Nasdaq diversity rules, which required Nasdaq-listed companies to disclose board diversity statistics and have a minimum number of diverse directors, was the first. This ruling, along with recent updates to the proxy voting guidelines of proxy advisory firms and institutional investors, has created uncertainty and variability in the board diversity landscape. Moreover, recent presidential executive orders have put increased scrutiny on such initiatives. In this Legal Update, we discuss these developments and highlight some practical considerations for U.S. companies preparing for this proxy season.

FIFTH CIRCUIT VACATES NASDAQ DIVERSITY RULES

On December 11, 2024, the U.S. Court of Appeals for the Fifth Circuit (“Fifth Circuit”) vacated the SEC’s 2021 approval of rules adopted by The Nasdaq Stock Exchange (“Nasdaq”) to promote more diverse board membership at Nasdaq-listed companies. The Fifth Circuit held that the SEC did not have the statutory authority to approve Nasdaq’s adoption of such rules. As a result, Nasdaq-listed companies no longer must disclose board diversity statistics under Nasdaq Rule 5606 or comply with the minimum board diversity requirements under Nasdaq Rule 5605(f). This puts Nasdaq-listed companies in the same position as companies listed on the New York Stock Exchange, which never adopted similar board diversity rules.

FIFTH CIRCUIT’S RATIONALE

In a 9-8 en banc decision in the case of *Alliance for Fair Board Recruitment v. SEC*, the Fifth Circuit overturned its earlier ruling by a three-judge panel that upheld the SEC’s 2021 approval of the Nasdaq diversity rules. In this ruling, the Fifth Circuit held that the SEC’s approval of the Nasdaq diversity rules was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” because the SEC failed to justify its determination that such rules were consistent with the requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The SEC argued that the Nasdaq diversity rules “related to” the purpose of the Exchange Act, stating that any disclosure-based rule is “related to, and designed to promote, the Exchange Act’s core disclosure purpose.” However, the Fifth Circuit disagreed, stating that the legislative history of the Exchange Act makes it clear that it is “primarily about limiting speculation, manipulation, and fraud, and removing barriers to exchange competition.” The Court explained that while there are other ancillary purposes to the Exchange Act, “disclosure of any and all information about the listed companies is not among them” and that a disclosure rule is related to

the purposes of the Exchange Act “if and only if it has some connection to the ills Congress designed the [Exchange] Act to eradicate.” Accordingly, although the Exchange Act requires companies listed on a registered stock exchange to comply with SEC disclosure regulations, the Fifth Circuit stated that Congress did not authorize the SEC to mandate disclosure of information that does not have “some connection to an actual, enumerated purpose of the [Exchange] Act”; rather, the Exchange Act vested the SEC with only a limited power to compel disclosure of basic corporate and financial information and “the kinds of information that are most likely to eliminate fraudulent and speculative behavior.” In coming to this conclusion, the Fifth Circuit explained that while “[e]quipping investors to make investment and voting decisions might be a good idea, [] it has nothing to do with the execution of securities transactions” and therefore with the Exchange Act’s purpose of protecting investors or the public “from the kinds of harms the Exchange Act explicitly lists as its targets– that is, speculation, manipulation, fraud, anticompetitive exchange behavior, etc.” The Fifth Circuit cited the “major questions” doctrine, which presumes that Congress does not delegate issues of major political or economic significance to administrative agencies, such as the SEC, without clear congressional authorization. The Fifth Circuit found that the Nasdaq rules were “far removed” from and in no way “related to” the mandates of the Exchange Act.

Following the Fifth Circuit’s decision, a Nasdaq representative stated that while Nasdaq disagrees with the decision, it does not plan to appeal the ruling. In addition, since the recent and upcoming leadership changes at the SEC, it is unlikely that the SEC will challenge the decision either. The full decision is available [here](#).

RECENT DEVELOPMENTS

Since the Fifth Circuit’s ruling, there have been a number of developments shifting the landscape of board diversity disclosure and voting recommendations:

- Since taking office on January 20, 2025, President Trump has issued a series of executive orders aimed at eliminating DEI programs across the federal government and the private sector. Upon the swearing in of US Attorney General Pamela Bondi on February 5, 2025, the DOJ issued a memorandum that, among other things, charts a path to investigate and eliminate purportedly illegal DEI programs in the private sector in conjunction with these executive orders. Since then, numerous U.S. corporations have publicly suspended or curbed their DEI efforts. The memorandum stated that the DOJ would issue a report containing the specifics on how it intends to discourage private sector DEI efforts. However, as of the date of this alert, the details of such report have not been publicly released. The DOJ memo is available [here](#).
- On January 23, 2025, attorney generals from 10 states, led by Texas AG Ken Paxton, issued a letter to Bank of America, BlackRock, Citigroup, Goldman Sachs, JPMorgan Chase and Morgan Stanley, warning them that their DEI policies and their commitment to diversity based on race and gender could violate state or federal laws. The letters asked each of the six financial institutions to explain how they planned to meet their DEI goals, including more information regarding their “discriminatory board quotas,” among other things. The full letter is available [here](#).

- On February 11, 2025, Institutional Shareholder Services (“ISS”) announced the indefinite suspension of racial, ethnic and gender diversity factors in making voting recommendations with respect to director elections. ISS cited the recent presidential executive orders related to DEI in its announcement. The ISS announcement is available [here](#) and its 2025 proxy voting guidelines for U.S. companies are available [here](#). See [Appendix A](#) for a comparison chart of the benchmarking guidelines of proxy advisory firms and institutional investors.
- In contrast, on March 4, 2025, as reported by Reuters,¹ Glass Lewis notified its clients that it intends to stand by its 2025 benchmark guidelines as originally published, which recommend that shareholders vote against certain directors of boards that lack diversity. Glass Lewis noted that when giving any voting recommendation against a director in connection with diversity, it plans to flag counter arguments and other information that could support alternative votes in order to help clients avoid political risks. This communication was made following a public announcement by Glass Lewis on February 19, 2025, that it too was reviewing its stance on DEI policies, noting that it was gathering input from clients on any potential changes and would provide further guidance after the DOJ report on how it intends to discourage private-sector DEI efforts becomes available. The Glass Lewis 2025 proxy voting guidelines for U.S. companies are available [here](#). See also, [Appendix A](#).
- Also since the Fifth Circuit’s ruling, BlackRock, Vanguard and State Street have updated their voting guidelines to wordsmith and lessen any focus on racial, ethnic or gender diversity. While these updated guidelines suggest a potentially relaxed approach to board diversity, in general, they preserve flexibility for engagement and negative votes when companies are outliers relative to market practice or otherwise have boards not well-suited to the company’s business and long-term strategy. The 2025 BlackRock Investment Stewardship guidelines are available [here](#), the 2025 Vanguard Proxy Voting Policy for U.S. Portfolio Companies is available [here](#), and the 2025 State Street Global Proxy Voting and Engagement Policy is available [here](#). See also, [Appendix A](#).

TRENDS RELATED TO ANTI-DEI SHAREHOLDER PROPOSALS

Although pro-DEI shareholder proposals continue to outnumber anti-DEI shareholder proposals, in recent years, anti-DEI shareholder proposals have surged. Such proposals typically ask companies to scrutinize their DEI policies for legal, financial or reputational risks. In 2024, there were 13 anti-DEI shareholder proposals at Russell 3000 companies, which is more than triple the number in 2020 according to Axios by the Conference Board. However, support for such proposals remained minimal (1.7% approval according to the Conference Board). Companies targeted by such anti-DEI shareholder proposals, such as Alphabet, Boeing, Disney and Goldman Sachs, have all announced in recent months that they are dismantling their DEI programs, and this list of companies continues to grow. However, not all companies are abandoning DEI. For example, on February 26, 2025, shareholders of Apple rejected a proposal to abolish its DEI

¹ <https://www.reuters.com/sustainability/boards-policy-regulation/proxy-adviser-glass-lewis-sticks-with-diversity-guidance-will-flag-risks-2025-03-04/>

initiatives after its board of directors defended its DEI programs, arguing that abandoning such programs would “restrict Apple’s ability to manage its own ordinary business operations, people and teams, and business strategies.”

PRACTICAL IMPLICATIONS

THE IMPACT OF THE FIFTH CIRCUIT’S DECISION ON NASDAQ-LISTED COMPANIES

The Fifth Circuit’s decision means that Nasdaq-listed companies are no longer required to provide annual disclosures on board diversity statistics, or have a minimum number of diverse directors (or publicly disclose why they don’t). However, companies may still voluntarily disclose such information if they believe it is relevant to their investors, stakeholders or business strategy. In light of the updates to the proxy advisory and institutional investor guidelines discussed above, companies should be prepared for varying levels of scrutiny and expectations from proxy advisors and institutional investors regarding board diversity. In preparation for this year’s proxy season, companies should carefully review the updated voting guidelines of ISS, Glass Lewis and the major institutional investors to understand how they may affect their director elections. Companies should also engage proactively with their shareholders and other stakeholders on their board composition, nomination process and diversity initiatives, and explain how they align with their long-term strategy and performance. Companies should also consider disclosing any challenges or barriers they face in achieving their board diversity goals and how they plan to address them.

HOW TO ENHANCE AND MAINTAIN BOARD DIVERSITY PRACTICES

In spite of recent developments, companies may want to continue evaluating their board composition and refreshment practices and ensure that they have a diverse and qualified pool of candidates for board vacancies. Board diversity is not only a matter of compliance or reputation, but can also implicate good governance and business performance as multiple studies have shown that diverse boards can enhance decision-making, innovation, risk management stakeholder engagement, and financial results. Companies may view board diversity as a strategic priority and a competitive advantage. To this end, companies may want to consider enhancing their board diversity policies to facilitate the identification and recruitment of diverse candidates. Tools like a board skills matrix can assist companies in mapping the current and desired skills, experiences and attributes of existing board members and identify any skill gaps or needs to refine their search criteria, diversify their sources of talent and assess their candidates objectively and holistically.

HOW TO MANAGE THE LEGAL AND REGULATORY RISKS OF DEI PROGRAMS

Companies should also be prepared for the potential legal and regulatory risks that may arise from their DEI programs, especially in light of the presidential executive orders and any subsequent actions or investigations that may target private sector DEI programs. Companies should review their existing DEI policies and practices and assess whether they are consistent with the applicable legal framework and

their business objectives. Companies may want to consult with their legal counsel and other advisors on how to mitigate any potential legal or reputational risks associated with their DEI programs.

This proxy season will be a critical time for U.S. companies to consider and address their board diversity and DEI efforts and to respond to changing expectations. Companies should be proactive and strategic in their board diversity disclosures and practices, and be prepared to address any legal or regulatory challenges that may arise.



The Free Writings & Perspectives, or FW&Ps, blog provides news and views on securities regulation and capital formation. The blog provides up-to-the-minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or “late stage” private placements, PIPE transactions, IPOs and the IPO market, new financial products and any other securities-related topics that pique our and our readers’ interest. Our blog is available at: www.freewritings.law.

CONTACTS

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

GABRIELLE LEVIN

+1 202 506 2229

GLEVIN@MAYERBROWN.COM

ALI PERRY

+1 212 506 2514

AKPERRY@MAYERBROWN.COM

ANNA PINEDO

+1 212 506 2275

APINEDO@MAYERBROWN.COM

JENNIFER ZEPRALKA

+1 202 263 3446

JZEPRALKA@MAYERBROWN.COM

RUTH ZADIKANY

+1 213 621 3916

RZADIKANY@MAYERBROWN.COM

APPENDIX A

RECENT AMENDMENTS TO DIVERSITY CRITERIA IN VOTING GUIDELINES BY PROXY ADVISORY FIRMS AND INSTITUTIONAL INVESTORS

| INSTITUTION | PRIOR REQUIREMENTS/GUIDELINES | NEW REQUIREMENTS/GUIDELINES |
|--------------------|---|--|
| ISS | <p>Race/Ethnicity: For Russell 3000 or S&P 1500 companies, will generally recommend against the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members.</p> <p>Gender: For all companies, will generally recommend voting against the chair of the nominating committee (or other directors on a case-by-case basis) where there are no women on the company’s board.</p> | <p>Race/Ethnicity: effective February 25, 2025, consideration of racial and/or ethnic diversity indefinitely halted.</p> <p>Gender: effective February 25, 2025, consideration of gender diversity indefinitely halted</p> |
| Glass Lewis | <p>Race/Ethnicity: For Russell 1000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board with fewer than one director from an underrepresented community.</p> <p>Gender: For Russell 3000 companies, will generally recommend voting against the chair of the nominating and/or governance committee of a board that is less than 30% gender diverse, or the entire nominating committee of a board with no gender diverse directors. For companies outside of the Russell 3000, will generally recommend voting against the chair of the nominating and/or governance committee of a board with no gender diverse directors.</p> <p>Disclosure of Director Diversity and Skills: Evaluates the quality of diversity disclosures in proxy statements, including the board’s racial/ethnic diversity percentage, diversity definitions, whether there are policies requiring women and minorities to be included in the initial pool</p> | No change. |

| INSTITUTION | PRIOR REQUIREMENTS/GUIDELINES | NEW REQUIREMENTS/GUIDELINES |
|-------------------------|---|--|
| | <p>of candidates when selecting new director nominees, and board skills disclosure. Lack of disclosure for companies in the Russell 1000 index may lead to recommendations against the chair of the nominating and/or governance committee.</p> | |
| <p>BlackRock</p> | <p>Race/Ethnicity/Gender: A numerical diversity target of at least 30% diversity target for S&P 500 companies (including at least two women and a director from an underrepresented group).</p> <p>Disclosure of Director Diversity and Skills: The voting guidelines indicated its preference for companies to disclose the process by which candidates for board positions are identified; BlackRock had a disclosure-based voting policy and would consider taking voting action if a company did not adequately explain its approach to board diversity.</p> | <p>Previous numerical diversity target removed. In addition, the guidelines no longer explicitly ask boards to consider gender, race and ethnicity of their members in evaluating board composition. Instead, the only mention of gender, race and ethnicity is footnote for the definition of “personal characteristics,” for use in determining overall board diversity. The guidelines also removed the disclosure-based voting policy. Nevertheless, BlackRock may consider taking voting action if an S&P 500 board is an outlier relative to market norms, noting that 98% of S&P 500 have diverse representation of 30% or greater.</p> |
| <p>Vanguard</p> | <p>Race/Ethnicity/Gender: Boards should reflect diversity of personal characteristics (such as gender, race, age and ethnicity). Absent a compelling reason, Vanguard would recommend a vote against the nominating and/or governance committee chair, if a company’s board was not taking action to achieve board composition in line with the expectations outlined in the voting guidelines including, at minimum, “diversity of personal characteristics, inclusive of at least diversity in gender, race, and ethnicity on the board.”</p> <p>Disclosure of Director Diversity and Skills: Disclosure of directors’ personal characteristics (such as race and ethnicity) were to be included on a self-identified</p> | <p>Removed language providing for negative votes against nominating and governance committee chairs for insufficient action to achieve appropriately representative board composition. Instead focus is on “cognitive diversity” and “fit for purpose” which includes personal characteristics such as gender, age and race/ethnicity. Nonetheless, the guidelines provide for potential negative votes against nominating and/or governance committee chairs if board composition or related disclosure is inconsistent with relevant “market-specific governance frameworks or market norms.”</p> |

| INSTITUTION | PRIOR REQUIREMENTS/GUIDELINES | NEW REQUIREMENTS/GUIDELINES |
|---------------------|---|--|
| | basis at either an aggregate level or individual director level. | |
| State Street | <p>Race/Ethnicity: For S&P 500 companies, will vote against the chair of the nominating committee if the company does not disclose the board’s racial and ethnic composition or if there are no directors from an underrepresented racial or ethnic community. For S&P 500 companies, will also vote against the chair of the compensation committee if the company does not disclose its workforce demographics under an EEO-1 report.</p> <p>Gender: Expects boards of all companies to have at least one female director, and boards of Russell 3000 companies to have at least 30% percent women directors. If not, may vote against the chair of the nominating committee or board leader in the absence of a nominating committee, but may waive the policy if a company engages with State Street and provides a specific, time-bound plan for reaching 30% representation of women directors.</p> | Previous racial, ethnic and gender targets have been eliminated. Instead, the guidelines note that “effective board oversight of a company’s long-term business strategy necessitates a diversity of backgrounds, experiences, and perspectives, which may include a range of characteristics such as skills, gender, race, ethnicity, and age.” |

Mayer Brown is a leading international law firm positioned to represent the world’s major corporations, funds and financial institutions in their most important and complex transactions and disputes. Please visit www.mayerbrown.com for comprehensive contact information for all our offices. This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein. Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England & Wales), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) and non-legal service providers, which provide consultancy services (collectively, the “Mayer Brown Practices”). The Mayer Brown Practices are established in various jurisdictions and may be a legal person or a partnership. PK Wong & Nair LLC (“PKWN”) is the constituent Singapore law practice of our licensed joint law venture in Singapore, Mayer Brown PK Wong & Nair Pte. Ltd. Details of the individual Mayer Brown Practices and PKWN can be found in the Legal Notices section of our website. “Mayer Brown” and the Mayer Brown logo are the trademarks of Mayer Brown.