

# Nasdaq Board Diversity Rule Vacated by Fifth Circuit

December 13, 2024

The U.S. Court of Appeals for the Fifth Circuit has issued a majority opinion vacating the U.S. Securities and Exchange Commission's (the "SEC") order approving Nasdaq's board diversity listing rule (the "rule").<sup>1</sup> The opinion means that Nasdaq-listed companies do not need to comply with the rule, which required all companies listed on Nasdaq's U.S. exchange, including foreign private issuers, to publicly disclose diversity statistics regarding their boards of directors and to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an "underrepresented minority" or "LGBTQ+."

The rule was challenged by several conservative groups, including the Alliance for Fair Board Recruitment and the National Center for Public Policy Research who argued, among other things, that it violated federal securities law.

The court held that the SEC failed to justify its determination that the rule was consistent with the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which it must do before approving a proposed exchange regulation. The SEC argued that the rule furthered the purposes of the Exchange Act (in particular, (1) promoting just and equitable principles of trade, (2) removing impediments to and perfecting the mechanism of a free and open market and a national market system and (3) protecting investors and the public interest) "because it will make available the information that some investors want." Those purposes, the court concluded, "bear no relationship to the disclosure of information about the racial, gender, and sexual characteristics of the directors of public companies."

The court's opinion also relied on the major questions doctrine, a judicially created doctrine according to which courts should be "skeptical" of agency efforts to regulate matters of "vast economic and political significance." According to the major questions doctrine, if such a major question is involved, courts should require that the agency point to "clear congressional authorization" of the proposed regulation. The court concluded in this case that "no part of the Exchange Act even hints at [the] SEC's

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<sup>1</sup> *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir. 2024).

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purported power to remake corporate boards using diversity factors” and that the SEC’s approval of the rule had “intruded into territory far outside its ordinary domain.”

The court’s opinion wades into the hotly debated topic of diversity, equity and inclusion (“DEI”) initiatives at a time when many public companies are navigating the attention that DEI commitments are drawing from activists and shareholders. As the court noted, nothing prevents companies from voluntarily disclosing—or even advertising—their directors’ social, demographic, political, or any other characteristics if they believe that shareholders want that information.

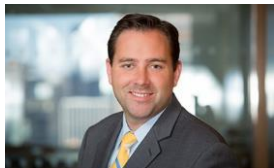
The decision places Nasdaq and NYSE-listed companies back on the same playing field—both without diversity disclosure requirements. However, in response to proxy advisor guidelines and institutional shareholder interest, many public companies have begun providing voluntary disclosure relating to board diversity. As such, the practical impact of the court’s decision on DEI disclosure remains to be seen.

The Fifth Circuit’s opinion is available [here](#).

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Please do not hesitate to contact us with any questions.



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