

Fifth Circuit Upholds Nasdaq Board Diversity Rule

October 20, 2023

On October 18, 2023, the Fifth Circuit, in *Alliance for Fair Board Recruitment v. SEC*, upheld Nasdaq's board diversity rule.¹

The rule, approved by the Securities and Exchange Commission in August 2021, requires Nasdaq-listed companies to disclose board-level diversity statistics and to have diverse directors or explain why they do not. For operating companies with boards of more than five members (other than small operating companies and foreign issuers), this requires having one director who identifies as female, a member of an underrepresented racial or ethnic minority or LGBTQ+. The requirement increases to two diverse directors by 2026. Companies must also disclose annually the race, gender and sexual orientation of their board members, although individuals can decline to answer. For more information about Nasdaq's board diversity rule, please see our Governance Update [here](#).

The National Center for Public Policy Research and the Alliance for Fair Board Recruitment sued the SEC, arguing that the rule is unconstitutional under the Fifth Amendment's equal protection clause and the First Amendment's freedom of expression clause. The petitioners also argued that the SEC exceeded its authority under the Securities Exchange Act of 1934 and the Administrative Procedure Act in approving the rule.

Upholding the rule, the Fifth Circuit found that Nasdaq is not a state actor and the rule is not a state action subject to such constitutional challenges and that the SEC did not exceed its authority in approving the rule.

The petitioners have said they intend to appeal the ruling to the U.S. Supreme Court. We will continue to monitor the case.

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Please do not hesitate to contact us with any questions.

¹ *Alliance for Fair Board Recruitment v. SEC*, No. 21-60626 (5th Cir. Oct 18, 2023).



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