

**MEMO# 35953**

December 12, 2024

# **Court of Appeals Vacates SEC Order on Nasdaq Diversity Listing Rules**

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TO: ICI Members  
Investment Company Directors  
Diversity and Inclusion Committee  
Equity Markets Advisory Committee  
ESG Advisory Group  
Investment Advisers Committee  
SEC Rules Committee SUBJECTS: ESG  
Fund Governance RE: Court of Appeals Vacates SEC Order on Nasdaq Diversity Listing Rules

The United States Court of Appeals for the Fifth Circuit vacated the order of the Securities and Exchange Commission ("SEC") approving Nasdaq's Board Diversity Proposal.[\[1\]](#) Nasdaq had proposed rules that compel the companies listed on its exchange to disclose information about the racial, gender, and sexual characteristics of their directors, and to have (or explain why they do not have) at least two directors who meet Nasdaq's definition of "diverse." The SEC had approved those rules, but the Court held that the diversity rules "cannot be squared with" the Securities Exchange Act of 1934 ("Act").

The Court held that the SEC could not "conclude that a proposed exchange rule is related to the purposes of the Act simply because it would compel disclosure of information about exchange-listed companies." It found that "a disclosure rule is related to the purposes of Act if and only if it has some connection to the aims Congress designed the Act to eradicate." The opinion noted that Congress "vested SEC with a limited power to compel disclosure of basic corporate and financial information" consisting only of "the kinds of information that are most likely to eliminate fraudulent and speculative behavior."

The opinion noted that the Court's "review of the Act's history makes clear that disclosure of any and all information about listed companies is not" among the purposes of the Act. It further stated that it is "not aware of any established rule or custom of the securities trade that saddles companies with an obligation to explain why their boards of directors do not have as much racial, gender, or sexual orientation diversity as Nasdaq would prefer." The opinion observed that "Nasdaq offered little support for its assertion that there is an empirically established—or even logical—link between the racial, gender, and sexual composition of a company's board and the quality of its governance." The Court stated that

it "may be true that an exchange need not produce conclusive empirical evidence to show that a proposed rule is related to the purpose of investor protection, but SEC cannot approve a rule simply because an exchange declared the existence of some fact."

In reasoning that the "SEC's exercise of purported authority presents a major question," the Court observed that the "SEC has intruded into territory far outside its ordinary domain." The Court held that "no part of the Exchange Act even hints at SEC's purported power to remake corporate boards using diversity factors" and found that the "SEC failed to justify its determination that Nasdaq's Board Diversity Proposal is consistent with the requirements of the Exchange Act."

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Associate General Counsel, Securities Regulation

#### **Notes**

[1] See Alliance for Fair Board Recruitment; National Center for Public Policy Research, vs. Securities and Exchange Commission, No. 21-60626 (December 11, 2024), available at <https://www.ca5.uscourts.gov/opinions/pub/21/21-60626-CV0.pdf>. ICI's summary of the SEC's Order on Nasdaq Diversity Listing Rules can be found at <https://www.ici.org/memo33721>.

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