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## **NCLA Challenges SEC's Power to Authorize Nasdaq's Board of Directors Diversity Rules**

*National Center for Public Policy Research v. Securities and Exchange Commission*

**Washington, DC (October 5, 2021)** – The U.S. Securities and Exchange Commission (SEC) is receiving pushback over its recent [approval](#) of Nasdaq's Board Diversity Rules, which require all companies listed on the exchange to not only publicly disclose board diversity statistics but also explain failures to meet new diversity requirements. Today, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [Petition for Review](#) in the U.S. Court of Appeals for the Third Circuit on behalf of the National Center for Public Policy Research. NCLA's client, which owns shares in many Nasdaq companies, argues that SEC has no power to regulate in this field because the rules have nothing to do with fraud or honest markets.

The diversity rules fall outside of SEC's regulatory authority under the 1934 Securities and Exchange Act, which empowered SEC to regulate securities to ensure honest markets and enforce federal laws that punish fraud. These longstanding laws are being misinterpreted today by SEC to allow the agency, working with Nasdaq, to impose a "meet quota, explain why, or get delisted" regime.

On August 6, 2021, SEC approved [Nasdaq Stock Market LLC Rules 5605\(f\) and 5606](#). The rules require that listed companies (a) must disclose information about their board's self-identified gender, race, and sexuality; and (b) either (i) include on their board minimum quotas of individuals of a certain gender, racial, and sexual identity or (ii) publicly explain why the board does not meet such quotas. Nasdaq offers companies access to a list of "board-ready diverse candidates" who could meet the quotas. The ultimate enforcement mechanism for failing to adhere to the rules is delisting the company from Nasdaq.

Congress has not and cannot divest its lawmaking power to an administrative agency working with a quasi-public exchange to govern how boards of directors are constituted. These rules plainly violate the due process and equal protection rights of Americans. The rules further compel speech, in violation of the First Amendment, give SEC suspending and dispensing powers, and constitute prerogative warrants and orders in violation of the U.S. Constitution. Additionally, SEC should not be given *Chevron* or any other kind of deference in interpreting its own regulatory authority.

### **NCLA released the following statements:**

"SEC does not have the power to dictate board diversity requirements on Nasdaq-listed companies. Congress could not constitutionally confer this power on any administrative agency. And the government may not collaborate with Nasdaq to effectuate something it is prohibited by the Constitution to do itself. Threatening to delist companies whose boards fail to conform with the government's notion of diversity is downright dangerous."  
— **Peggy Little, Senior Litigation Counsel, NCLA**

“Enforcing diversity through top-down regulation is a sure recipe for conformity. SEC’s misguided attempt to impose its narrow conception of diversity on Nasdaq companies merely betrays the Commission’s profound ignorance about the meaning of that term.”

— **Sheng Li, Litigation Counsel, NCLA**

For more information visit the case page [here](#).

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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