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Media Inquiries: Judy Pino, 202-869-5218

NCLA and NCPPR Team up to Sue SEC over Unauthorized and Unlawful Nasdaq Board Diversity Rules

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

Washington, DC (December 21, 2021) – The Securities and Exchange Commission (SEC) lacks the authority to approve Nasdaq Stock Market LLC’s new [Board Diversity Rules](#) concerning the race, gender, and sexual preference of members of corporate boards of directors. An [opening brief](#) filed Monday in the U.S. Court of Appeals for the Fifth Circuit by the New Civil Liberties Alliance in *National Center for Public Policy Research v. Securities and Exchange Commission* says SEC’s “comply or report” Rules are unlawful and unconstitutional.

On August 6, 2021, SEC narrowly approved a Rule requiring disclosure of the aggregate race, gender, and sexual preference of Nasdaq-listed companies, with two of five Commissioners dissenting. The Board Diversity Rule subjects Nasdaq-listed companies to the following requirements: (a) they must disclose information about their board’s self-identified gender, race, and sexual preference; and (b) either (i) meet minimum quotas of individuals of a certain gender, racial, and sexual preference, or (ii) publicly explain why the board does not meet such quotas.

SEC approved Nasdaq’s proposed quota and disclosure requirements even though it rejected Nasdaq’s claim, for insufficient evidence, that diversity along race, gender, and sexuality somehow improves corporate governance. Under a second rule, Nasdaq will provide listed companies that do not comply with the quota requirements “access to a network of board-ready diverse candidates.” SEC approved this Board Recruiting Service without providing any information regarding which candidates will be selected for inclusion in such a network, who at Nasdaq will select them, or how Nasdaq plans to determine whether they are “board ready.”

The 1934 Securities Exchange Act specifies that Nasdaq’s rules must be designed “to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and . . . in general, to protect investors and the public interest.” In approving the Board Diversity Rules, SEC did not identify any provision of the ’34 Act that would override this prohibition or otherwise authorize SEC to regulate the race, gender, or sexual preference of corporate directors. Indeed, the ’34 Act explicitly forbids entities like Nasdaq from adopting rules that “regulate by virtue of any authority conferred by [the Act] matters not related to the purposes of [the Act].” SEC nonetheless somehow concluded the Board Diversity Rules are “consistent with the requirements of the [Exchange] Act.”

The Rules further impermissibly require companies to call into question *their own integrity* by requiring them, at the risk of being delisted by Nasdaq, to publicly admit to their perceived shortcomings in failing to fill board seats with people whose immutable characteristics are irrelevant to board service.

The Exchange Act empowers SEC to regulate securities to ensure honest markets and enforce federal laws that punish fraud. The Board Diversity Rules fall outside of the agency’s regulatory authority. Congress has not and cannot divest its lawmaking power to an administrative agency working with a quasi-public exchange to exercise such power. The Fifth Circuit should hold that SEC’s Order and Nasdaq’s Rules are unconstitutional and were issued without statutory authority.

NCLA released the following statements:

“The separation of powers in the Constitution vests all legislative power in Congress and further guarantees the Equal Protection of law to all. These provisions protect the civil liberties of all Americans. SEC, a mere administrative agency of the Executive Branch which has no lawmaking power, cannot evade these constitutional constraints by arrogating power to itself or delegating power to Nasdaq to accomplish indirectly what Congress itself cannot do directly.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“SEC approved quotas and mandatory disclosure requirements regarding race, gender, and sexuality even after it explicitly acknowledged that evidence does not show any connection between such surface-level diversity and investor interests. In doing so, SEC essentially admits to performing social engineering that falls far outside of the bounds of its enabling statute.”

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

“The new SEC commissioners, like Chairman Gary Gensler, have shown every intention of overstepping their regulatory authority to politicize the SEC and corporate America. This is illegal and deeply irresponsible behavior. A clear ruling now that keeps the SEC to its statutory tasks will preserve business as a neutral—and productive and profitable—sector.”

— **Scott Shepard, Free Enterprise Project Director, National Center for Public Policy Research**

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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