



Nasdaq Won't Appeal After Court Strikes Down Board Diversity Rule **Pensions & Investments**

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A federal appeals court struck down the Securities and Exchange Commission's approval of Nasdaq's board diversity rule, and Nasdaq has no plans to appeal.

In a 9-8 decision, the 5th U.S. Circuit Court of Appeals in New Orleans on Dec. 11, ruled that the SEC exceeded its authority, writing that "the diversity rules cannot be squared with the Securities Exchange Act of 1934."

A Nasdaq spokesperson said in a statement, "We maintain that the rule simplified and standardized disclosure requirements to the benefit of both corporates and investors. That said, we respect the court's decision and do not intend to seek further review."

Nasdaq's decision not to appeal the decision is unsurprising given that the incoming Trump administration is unlikely to oppose the 5th Circuit's ruling and that the ruling itself appears consistent with recent U.S. Supreme Court decisions, according to Michael Gold, a partner at law firm Saul Ewing.

"With little chance of success, Nasdaq probably made the calculation that it was not worth expending more of its resources on this issue and it was better to move on," Gold said in an email.

Under the Nasdaq rule, which the SEC approved in 2021, companies without two diverse directors must explain why they do not meet the requirement. That includes "at least one director who self-identifies as female and at least one director who self-identifies as LGBTQ+ or an underrepresented minority," such as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, according to an [SEC order](#).

In October 2023, a three-judge panel at the 5th Circuit ruled that the SEC did not violate the Securities Exchange Act or the Administrative Procedure Act when it approved the Nasdaq rule.

Following the decision, the conservative groups that filed the lawsuit — the National Center for Public Policy Research and the Alliance for Fair Board Recruitment — each filed petitions requesting that the full court give its lawsuit another look. The conservative leaning 5th Circuit granted the appeal, and in May the entire court [heard oral arguments](#).

"It is obviously unethical to violate the law or to disregard a contractual promise," the court's majority opinion said in the Dec. 11 decision. "It is not unethical for a company to decline to disclose information about the racial, gender, and LGBTQ+ characteristics of its directors. We are 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.”

On the other side, the eight judges who voted to uphold the SEC’s approval wrote in their opinion that Nasdaq is a private company that updates its rules regularly, competing with other exchanges for listings.

“The Exchange Act requires that the SEC approve these exchange-proposed rules but encourages self-regulation by sharply limiting SEC review such that the SEC must approve rules if certain requirements are met,” the dissenting judges wrote. “Consistent with Congress’s scheme, the SEC’s authority to impose its own judgment on exchanges and the companies that list on them is, unlike that of the exchanges themselves, extremely limited.”

Sheng Li, litigation counsel at the New Civil Liberties Alliance, the group that represented the National Center for Public Policy Research in the lawsuit, welcomed the court’s decision and said in a statement that Nasdaq’s diversity rule strips “people of their individuality and force(s) companies to classify them based on gender, race, ethnicity and sexuality.”

The majority of the 5th Circuit “correctly recognized that neither SEC nor Nasdaq has any business regulating the composition of corporate boards along these controversial demographic dimensions,” Li added.

An SEC spokesperson said in an email that the agency is "reviewing the decision and will determine next steps as appropriate."