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Watch: SEC’s “Comply or Report” Rules Pushing Diversity Quotas on Nasdaq Corporate Boards Face NCLA Challenge

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



Photo: Scott Shepard, Director, Free Enterprise Project at NCPPR

Washington, DC (October 5, 2022) – The U.S. Securities and Exchange Commission (SEC) approved Nasdaq Stock Market LLC’s listing rules requiring most companies in the stock exchange to meet quotas for race, gender, and sexual preference in corporate board membership. A new [video](#) released by the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, explains why these [Board Diversity Rules](#) fall outside of the agency’s regulatory authority. The Securities and Exchange Act does not empower SEC to supervise the demographic composition of corporate boards. NCLA represents the National Center for Public Policy Research, based in Washington, DC, in its case against SEC’s unconstitutional and unlawful actions.

Approved by SEC on August 6, 2021, the Board Diversity Rules require most Nasdaq listed companies to comply or explain why they failed to satisfy the requirement that corporate boards include at least one director who self-identifies as a woman and at least one director who self-identifies as “Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities,” or as LGBTQ+. The companies must also publicly disclose diversity statistics about their boards annually or face severe penalties including delisting.

In approving the Board Diversity Rules, SEC did not identify any provision of the Exchange Act that authorizes SEC to regulate the composition of corporate boards according to race, gender, or sexual orientation. The Exchange Act empowers SEC to regulate securities to ensure honest markets and enforce federal laws that punish fraud. Congress has not and cannot divest its lawmaking power to an administrative agency working with a quasi-public exchange to exercise such power. 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 persons whose immutable characteristics are irrelevant to board service—a subtle form of state-compelled self-condemnation. This compelled speech is a violation of the First and Fifth Amendments of the U.S. Constitution.

NCLA presented oral argument before the U.S. Court of Appeals for the Fifth Circuit on June 7, 2022.

Excerpts from the video:

“Diversity quotas are unquestionably illegal. Establishing quotas for the minimum number of employees on the basis of race, sex, orientation— that’s all, super illegal. ... We all have not only civil rights, but the same civil rights, and that means no discrimination. Full stop.”

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

“NCPFR is challenging the SEC board diversity rules because there is no law or statute that gives the SEC authority to tell American companies who should be on their boards of directors. ... SEC cannot evade these constitutional constraints by arrogating power to itself or by delegating power to Nasdaq to accomplish indirectly what Congress itself cannot do directly.”

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

“SEC is essentially admitting to social engineering, which falls outside of the scope of its enabling statute. ... Enforcing diversity through top-down regulation is a sure recipe for conformity.”

— **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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