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NCLA Asks en Banc Fifth Circuit to Overturn Nasdaq Board Diversity Rules as Unauthorized by Statute

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

Washington, DC (November 27, 2023) – The Securities and Exchange Commission-approved “Board Diversity Rules” impose race, gender and sexual orientation-based quotas on the corporate boards of companies listed on the Nasdaq stock exchange. Today, the New Civil Liberties Alliance [petitioned](#) the U.S. Court of Appeals for the Fifth Circuit for *en banc* rehearing of its *National Center for Public Policy Research v. SEC* lawsuit against these rules including one in which SEC furnishes lists of quota-satisfying names to companies unable to meet such quotas on their own. These rules must be set aside, as SEC has no statutory authority to promulgate them.

Nasdaq reported a wave of investor interest in discriminating against some companies and in favor of others based on the gender, race, and sexual orientation of those companies’ directors. It responded by proposing a set of rules to SEC that would help investors discriminate in this way. One Rule forces every Nasdaq-listed company to either include on its board minimum quotas of individuals of a certain gender, race, and sexual orientation, or else to explain why the board does not meet such quotas. The Rules also require the companies to publicly disclose information about their directors’ self-identified gender, race, and sexuality. These measures compel speech in defiance of the First Amendment and further violate Americans’ rights to due process and equal protection under the law.

The 1934 Exchange Act explicitly forbids SEC from approving Nasdaq rules that regulate matters unrelated to the Act’s purposes. Gender, race, and sexual orientation fall outside the Act’s purposes because SEC itself determined these demographic characteristics have no rational relationship to corporate performance and investor returns. SEC nonetheless approved these rules by concluding that compelled explanations and disclosures regarding gender, race, and sexual orientation promote “fair and orderly markets” by giving certain investors the information they need to engage in discrimination based on those characteristics. The Fifth Circuit panel in this case deferred to that flawed reasoning and upheld these rules without addressing the statutory prohibitions.

That reasoning is nonsensical. It treats irrational, invidious discrimination based on gender, race, and sexual orientation as regulatory objectives of the Exchange Act. The panel decision’s reasoning lacks any limiting principle, allowing SEC to approve the mandatory explanation and disclosure of any matter that some investors claim to want, even if the information is extremely private (such as sexual orientation) and has nothing to do with fair and orderly markets. Under this non-standard, nothing would be off the table, including how companies’ officers vote, their religious faiths, or any other data irrelevant to the Exchange Act’s actual purpose of investor protection. The panel also declined to decide the merits of NCLA’s compelled speech argument, erroneously deciding that the rules and SEC’s approval of them were not state actions subject to constitutional scrutiny. NCLA urges the *en banc* Fifth Circuit to correct all of these errors and set the rules aside.

NCLA released the following statements:

“The SEC’s approval of Nasdaq’s rules requiring companies listed on the exchange to disclose the race, gender or sexual orientation of company board members violates specific laws enacted by Congress that expressly prohibit SEC from approving rules ‘not designed’ to further fair and open markets or that impose burdens not necessary or appropriate to the 1934 Exchange Act. The panel decision fails to address this flat prohibition and if not reheard, leaves the agency free to regulate what it will with no limiting principle. The full Fifth Circuit should move quickly to correct this violation of law and return SEC to its regulatory lane.”

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

“Some activist investors apparently want to make their investment decisions based on the gender, race, and sexual orientation of companies’ directors, even though such characteristics are not rationally related to corporate performance and investor returns. The panel decision deferred to SEC’s conclusion that helping these investors engage in irrational, invidious discrimination somehow serves the Exchange Act’s limited purpose of maintaining ‘fair and orderly markets.’ The *en banc* Court should correct this grievous error and confirm that facilitating discrimination falls outside the Exchange Act’s statutory purposes.”

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

For more information visit the case page [here](#) and watch the case video [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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