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December 28, 2020

Vanessa Countryman  
Secretary  
Securities and Exchange Commission,  
100 F Street, NE  
Washington, DC 20549-1090

Via e-mail: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re: The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity  
File Number SR-NASDAQ-2020-081 (the “Proposal”)**

Ms. Countryman:

I appreciate the opportunity to comment on the Nasdaq Stock Market LLC (“**NASDAQ**”)’s recent proposed rule change to adopt listing rules relating to board diversity (the “**Proposed Rule**”). I am a United States citizen, investor and a managing director of a well-known, large, global financial services company.<sup>1</sup> I strongly oppose the Proposed Rule and urge the Securities and Exchange Commission (“**SEC**” or the “**Commission**”) to deny NASDAQ’s application.

While I personally share the NASDAQ’s goal of ensuring that women and underrepresented minorities are provided with equal opportunities to join and participate on corporate boards, I strongly believe the Proposed Rule will do more harm than good; both to the cause of diversity and to the markets as a whole. As discussed in more detail below, I am concerned that the Proposed Rule is unnecessary, outside of the authority of the NASDAQ, subject to legitimate Constitutional challenges and ultimately a bad social idea. I am further concerned that adopting the Proposed Rule will create litigation and disputes that will distract companies and regulators from taking actions that could have real and lasting impacts with respect to corporate diversity.

### **Background**

The NASDAQ Proposed Rule is comprised of two primary elements. First, amendments to Rule 5605 would adopt new paragraph (f) imposing a new diversity requirement. Under proposed rule 5605(f), issuers listed on the NASDAQ would be required to appoint one director who self-identifies as female and at least one director who self-identifies as one of the acceptable racial or

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<sup>1</sup> I write anonymously because I fear that my opposition to the Proposed Rule will adversely impact my career. In US financial services firms, especially investment advisory arms, the promotion of diversity and environmentally, social and governance (“**ESG**”) goals have become an undeniable religion. Those who do not agree that we should use capital markets to impose a social or political agenda are quietly excluded from key meetings, committees and groups or suddenly find the need to pursue “other opportunities.”

sexual classifications (the “**Diversity Mandate**”).<sup>2</sup> Alternatively, issuers may explain non-compliance with the Diversity Mandate through disclosure. The second element is the adoption of new Rule 5606, which requires NASDAQ listed companies to provide statistical information on the self-identified racial, gender and sexual-orientation of the members of the boards in a uniform format.

## **The Proposed Rule is Unnecessary**

### *Diversity is Already Coming to Corporate Boards*

In its application, the NASDAQ asserts that “the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards,”<sup>3</sup> while at the same time acknowledging the positive trends towards increasing corporate board diversity. The NASDAQ notes that “some companies have made laudable progress in diversifying their boardrooms.”<sup>4</sup> Later in the release, NASDAQ more honestly concedes that “a supermajority [not just ‘some’] of listed companies have made notable strides to improve gender diversity in the boardroom ... [and] listed companies are diligently working to add directors with other diverse attributes.”<sup>5</sup>

Thus, NASDAQ concedes that the goal of their regulation, i.e., “meaningful and multi-dimensional diversification of their boards” is already occurring. As of May 31, 2019, the percentage of women joining boards reached a record high with 45% of new board seats filled by women (with 19% of board seats overall held by women).<sup>6</sup> Ethnic diversity reached a record high as well, with 21.1% of new directors in S&P500 companies being ethnically diverse (versus only 12.4% in 2009).<sup>7</sup> This process is accelerating in 2020, with 59% of board appointments in 2020 going to women and minority men, resulting in all constituents in the S&P500 having at least one woman on their boards of directors.<sup>8</sup>

These numbers show that boards are already moving to become more diverse without the “additional regulatory impetus.” In other words, these proposed listing standards are unnecessary to achieve the desired goal of promoting diversity on boards – the market is already doing this. And the market is doing this for the right reasons: because public issuers recognize

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<sup>2</sup> The acceptable categories are: “Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+”. Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, SEC Rel. No 34-90574 (Dec. 4, 2020) (the “**Rule Proposal**”) at 1.

<sup>3</sup> Rule Proposal at 4.

<sup>4</sup> Id.

<sup>5</sup> Id. At 7 and 33.

<sup>6</sup> Papadopoulos, Kosmas. U.S. Board Diversity Trends in 2019. ISS Analytics Whitepaper, May 31, 2019. (“**ISS Whitepaper**”)

<sup>7</sup> Id.

<sup>8</sup> Connely, Courtney. “For the first time in over 20 years, all S&P 500 boards have at least one woman”, CNBC.com. Dec. 15, 2020 (available at: <https://www.cnbc.com/2020/12/15/all-sp-500-boards-have-at-least-1-woman-first-time-in-over-20-years.html>)

that women and underrepresented individuals should be considered for seats on corporate boards because they add value, not because they are necessary to meet a regulatory quota.

*The Appearance of Investor Demand is Likely Overstated ... and Irrelevant*

The NASDAQ also claims that it is responding to investor demand, stating that “investors are calling in greater numbers for diversification in boardrooms.”<sup>9</sup> This perceived investor demand for diverse boardrooms and information on board diversity is most likely overstated. As an (anonymous) insider in a large, global financial services firm, I can report that diversity and other social goals are priorities only for the marketing and sales departments, or within the dedicated “sustainability” or “corporate engagement” groups. The individuals who actually make investment decisions are not full-throated supporters of these initiatives, are not sold on the body of academic literature and, much to the dismay of these marketing, sales and sustainability teams, do not make investment decisions informed by factors such as the gender composition of a board. In fact, special coaching is often given to professionals prior to meeting with clients to ensure they can describe the services provided to these clients in terms of ESG and diversity factors that are not as wholly embedded in these products. To these men and women, who are white and non-white, these factors simply do not matter to the generation of investment performance.

But, individuals at financial services firms are afraid to voice their opposition to the diversity and ESG juggernaut. I can say from experience that the marketing and sustainability teams at these firms are frustrated with the lack of practical uptake of their zeal to, in the words of one of my colleagues (slightly modified to preserve anonymity) “use the power of the capital markets to effect social change,” and seek to find every way to “move the needle” in their direction. Those in my firm and other firms who dare raise questions about the orthodoxy of diversity do so at great personal peril (hence this anonymous letter). In the words of one of my investor colleagues (paraphrased to preserve anonymity), “I’ll ‘consider’ diversity and ESG factors when making investment decisions because I’m supposed to, but I’m not going to change an investment decision based on those factors. I’m also not going to express that view here, because it would be very bad for my career.”

In short, the investors who are calling in greater numbers for diversification are probably not representative of the views of those who are actually doing the investing. Those investors would more likely agree with the view, as discussed below, that the racial and gender composition of a board is irrelevant to an issuer’s performance.

Further, even if investors are demanding more disclosure and more diverse boards, the NASDAQ should not be proposing new listing standards in response to investor demand for better corporate governance and performance. These demands are being made by investors to issuers. If investors require diversified boardrooms as a condition to investing, then issuers who do not deliver on that demand will see that reflected in reduced demand for their securities as these investors put their money in companies that do meet their demands. Investors also demand

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<sup>9</sup> Rule Proposal at 8.

that issuers make more money while reducing expenses, yet it is patently obvious that the NASDAQ should not respond to this demand through its rulemaking authority.

### **The Proposed Rule is Outside the Authority of NASDAQ**

#### *The Exchange Act Permits Exchanges to Adopt Rules only in Furtherance of the Goals of the Exchange Act*

Even if the Proposed Rule was necessary to promote diversity in the boardroom, NASDAQ lacks the regulatory authority to adopt it. As a national securities exchange, NASDAQ's rules must comply with the requirements of Section 6(b)(5) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). This section requires that an exchange's rules be, in relevant part, "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 a national market system, and, in general, to protect investors and the public interest."<sup>10</sup> In addition, the rules may not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers" or "regulate ... matters not related to the purposes of this chapter or the administration of the exchange."<sup>11</sup>

Pausing on that last prohibition for a moment, Section 2 of the Exchange Act sets forth the "purposes of [the] chapter" as, again in relevant part, to: "require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System."

#### *The Proposed Rule is not Permitted under the Exchange Act*

Conspicuously absent from the stated purposes of the Exchange Act is anything related to imposing "regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards." Thus Section 6(b)(5) does not provide the NASDAQ or the SEC with any authority to impose the Proposed Rule.

The NASDAQ, aware of this deficiency, seeks to recharacterize their stated goal within their own rule proposal. Contradicting the original statement of purpose, the Proposed Rule is later described as an effort designed to "remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest."<sup>12</sup> This thesis is based on academic research that seeks to conclude that diverse boards enhance the quality of a company's financial reporting, internal controls, public disclosures and management oversight. In addition, these

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<sup>10</sup> Section 6(b)(5) of the Exchange Act

<sup>11</sup> Id.

<sup>12</sup> See, e.g., Rule Proposal at 6.

studies are intended to show that diverse boards engage in less fraud. As discussed in more detail below, these studies fail to actually demonstrate any causal nexus between board diversity and corporate performance, much less any of the specific regulatory goals the NASDAQ purports to meet with the Proposed Rule.

*The Academic Research on the Benefits of Diversity is Inconclusive*

The NASDAQ lays out a body of academic and consultant research that tends to show a correlation between corporate performance and board diversity. These studies, in the NASDAQ's view, show that diverse boards improve corporate performance on a number of factors, including transparency of disclosure and fraud reduction. If this view is in fact correct then the corollary view must also be correct, i.e., that white, cisgendered males, when unfettered by the presence of diverse board members, will engage in poor decision-making, mislead investors through non-transparent financial reporting and ultimately engage in securities fraud. If this is true, then surely the protection of investor demands not only should the NASDAQ and the SEC adopt rules mandating diverse boards, but they should also adopt rule that would prohibited these incompetent and potentially criminal people from obtaining board representation altogether.

However, the NASDAQ's research does not actually support this conclusion. The studies cited by the NASDAQ in the Rule Proposal show positive *correlations* between diversity and positive corporate performance – not causation. For example, the NASDAQ cites the following studies or research:

a 2020 study by the Carlyle Group that shows that “companies with diverse boards [defined as Black, female, Hispanic or Asian] generate earnings growth that’s five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth.”;<sup>13</sup>

In a 2019 report, FCLT Global found that “the most diverse boards [diversity here is based on age and gender, not race as implied in the Rule Proposal] added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers (bottom 20 percent)”;<sup>14</sup>

Reaching back to 2003, an academic study by Carter, Simkins and Simpson found that “After controlling for size, industry, and other corporate governance measures, we find statistically significant positive relationships between the presence of women or

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<sup>13</sup> See Jason M. Thomas and Megan Starr, The Carlyle Group, Global Insights: From Impact Investing to Investing for Impact 5 (Feb. 24, 2020), available at: [https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact\\_022420.pdf](https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf) (analyzing Carlyle U.S. portfolio company data, February 2020)

<sup>14</sup> FCLTGlobal, The Long-term Habits of a Highly Effective Corporate Board (March 2019), available at: <https://www.fcltglobal.org/wp-content/uploads/long-termhabits-of-highly-effective-corporate-boards.pdf> (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data).

minorities [defined as African Americans, Asians, and Hispanics] on the board and firm value, as measured by Tobin's Q."<sup>15</sup>

The NASDAQ includes additional examples of research and studies that also show a positive correlation; **however, there is no evidence in any study cited by NASDAQ or any that I could find independently, that showed any causal link between board diversity and performance.** As of the date of this letter, the comment file for the Proposed Rule is similarly lacking.<sup>16</sup> If board diversity, on its own, contributed to financial returns, then a simple study of corporate performance of companies who add diverse members to the boards should show statistically significant improvements to company performance resulting from the addition of such board members. The absence of this data or any research showing a causal nexus between board racial and gender diversity and corporate performance is glaring, especially considering how relatively simple such data would be to obtain.

The NASDAQ admits that the research is mixed.<sup>17</sup> Contrary to the research cited by the NASDAQ, other studies have not even found the same positive correlation. For example, recent meta-studies that have reviewed the evidence and research on the benefits of gender diversity and have found no positive correlation.<sup>18</sup> Providing a possible explanation for this lack of correlation, Katherine Klein, a management professor at the Wharton School notes, "the women named to corporate boards may not in fact differ very much in their values, experiences, and knowledge from the men who already serve on these boards."<sup>19</sup>

Further, there is no research at all extending the above cited research (each of which uses varying definitions of "diversity")<sup>20</sup> to LBGTQ+ board representation, one of the Underrepresented Minorities as defined in the Proposed Rule. Here, the lack of research is not problematic for the

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<sup>15</sup> David A. Carter et al., Corporate Governance, Board Diversity, and Firm Value. 38(1) Fin. Rev. 33 (2003).

<sup>16</sup> The comment letters (to date) that support the Proposed Rule do so citing the moral purposes of the rule (e.g., "it's the right thing to do"), support for the axiomatic benefits of "diversity" (e.g., "diverse perspectives are good") or generic support for disclosure of diversity characteristics. None have provided any support for the Diversity Mandate in particular beyond citing the same lacking research as the NASDAQ.

<sup>17</sup> Rule Proposal at 19. Here the NASDAQ asserts that the "overwhelming majority of studies . . . present a compelling case," but notes that "some other studies on gender diversity are mixed." Without the NASDAQ providing numbers, I dispute the assertion that the "overwhelming majority of studies" support the conclusion that diversity (and diversity alone) yields better management.

<sup>18</sup> Corinne Post and Kris Byron. Women on Boards and Firm Financial Performance: A Meta-Analysis. Academy of Management Journal Vol. 58, No. 5 7 Nov 2014 available at:

<https://doi.org/10.5465/amj.2013.0319>;

Pletzer JL, Nikolova R, Kedzior KK, Voelpel SC (2015) Does gender matter? Female representation on corporate boards and firm financial performance-a meta-analysis. PLoS ONE 10(6): e0130005 available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4473005/>

<sup>19</sup> Klein, Katherine. "Does Gender Diversity on Boards Really Boost Company Performance?" Knowledge@Wharton (May 18, 2017). Available at: <https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/> (accessed 12/18/2020).

<sup>20</sup> The lack of consistency in definitions among the studies further decreases their reliability as indicators of corporate performance. NASDAQ cited not a single study that utilized the definitions provided in this Proposed Rule. This alone should render the academic research irrelevant for the purposes of evaluating whether this Proposed Rule is necessary under the federal securities laws.

NASDAQ, as they are content to establish an appropriate regulatory purpose based only on an unfounded conjecture by an organization whose mission is to increase LGBTQ+ representation on corporate boards.<sup>21</sup>

So, the research underpinning the NASDAQ's claims that board diversity is necessary to meet the permitted purposes for exchange rules under the Exchange Act is sorely lacking. In fact, a more plausible (and less racist / sexist) explanation for the positive correlations shown in the cited studies readily presents itself: Successful and well-run companies are just better able to attract diverse candidates, who are actually in higher demand than white, cisgendered males.<sup>22</sup>

The NASDAQ effectively concedes this point by noting that "at a minimum ... the studies support that board diversity does not have adverse effects on company financial performance."<sup>23</sup> While this statement is much more likely to be true, it is insufficient to establish that the Proposed Rule is within the purposes of the Exchange Act, as required under Section 6(b)(5). A rule that imposes a requirement merely because the requirement will not have adverse effects should be dismissed out of hand.

*The Proposed Rule would Not Achieve the Cited Benefits*

In addition, the Proposed Rule, as drafted, would not deliver on its goal of providing diversity across corporate boards. It would provide, as suggested, a "regulatory impetus" for issuers to appoint more individuals who self-identify as female or Underrepresented Minorities, but the Diversity Mandate would not uniformly result in diverse board membership. Nothing in the Proposed Rule would require a board with all women or Underrepresented Minorities to seek out white, cisgendered males to join their board or to include an explanation as to why they failed to do so. Implicit in the NASDAQ's proposal is the premise that the white, cisgendered male's perspective should not be welcome in the boardroom – perhaps due to their racial and gender-oriented propensity to defraud investors through inaccurate financial statements.

In addition, the Proposed Rule does not fully address diversity because it is incomplete. It does not account for other categorizations that could also increase diversity of a board (e.g., veteran status, disability status, experience in other industries / regions / etc.). By way of example, current board composition also does not reflect the general population in terms of age. In 2017, the average age of a board director was 63, and only 6% of the board seats of S&P500 companies were occupied by individuals under 50, with over half of companies having no such

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<sup>21</sup> Quorum, Out Leadership's LGBTQ+ Board Diversity and Disclosure Guidelines (2019), available at: <https://outleadership.com/content/uploads/2019/01/OL-LGBTBoard-Diversity-Guidelines.pdf>. ("While the precise reason for the positive correlation between gender diversity and better corporate performance is unknown, many of the reasons that gender diversity is considered beneficial are also applicable to LGBTQ+ diversity. LGBTQ+ diversity in the boardroom may create a dynamic that enables better decisionmaking, and it brings to the boardroom the perspective of a community that is a critical component of the company's consumer population and organizational talent.")

<sup>22</sup> While only anecdotal, I have been personally told several times in connection with multiple board searches that white male executives need not apply.

<sup>23</sup> Rule Proposal at 21.

directors.<sup>24</sup> Using the same rationale as that underpins the NASDAQ’s Proposed Rule, PwC conjectured that, “Boards that have added younger directors find that they bring new skills and perspectives,” and went on to note that younger directors bring new skills, are more actively connected to the business world in ways older directors are not, and they increase board diversity, because the younger workforce is itself more diverse.<sup>25</sup> Even the NASDAQ recognized this lack of age diversity in its own article in 2019, noting “[as] corporate boards seek to become more diverse, multiple factors, including gender, race and experience, are considered, yet there is lack of diversity of age in boardrooms with few directors under the age of 50.”<sup>26</sup> Thus, age diversity should also be considered as a relevant factor for improving board performance.

Despite this recognition that younger professionals are underrepresented on corporate boards and would add diverse perspectives that should improve decision-making and therefore corporate performance, the Proposed Rule lacks and requirement to appoint directors of younger age groups or explain why they have not. This is most likely because, in the words of the Jeff Thomas, Senior Vice President of NASDAQ corporate services, “the more inclusive you try to make your diversity policies, then frankly, sometimes they don’t have the same impact.”<sup>27</sup> These omissions however belie the fact that the NASDAQ’s goal with the Proposed Rule is not to achieve the benefits of a better functioning board or address anything in the goals of the Exchange Act, but rather to achieve a social equity goal for certain identity groups by establishing a “regulatory impetus”.

Further, and as suggested by Professor Klein, the Proposed Rule will not produce actual diversity, but instead will simply require the appointment of people who “self-identify” as women, a designated minority, or gay or transgender, when in reality, these individuals will more likely than not carry with them substantially similar experiences as the white male cisgendered board members they are intended to replace.<sup>28</sup> They will have been educated in the same handful of schools and come from the same backgrounds as most existing directors.

All of this shows that the NASDAQ’s goal with this Proposed Rule is not diversity to improve corporate governance and investor protection or to “remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.” Instead, the NASDAQ is seeking to accomplish a social justice cause through the application of racial, gender and sexual orientation quotas to require issuers to add women and underrepresented

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<sup>24</sup> PWC White Paper. “Age Diversity in the Boardroom” (2018). Available at: <https://www.pwc.com/us/en/services/governance-insights-center/library/younger-directors-bring-boardroom-age-diversity.html>

<sup>25</sup> Id.

<sup>26</sup> NASDAQ. “Addressing Age Diversity on Corporate Boards. (Jun 5, 2019). Available at: <https://www.nasdaq.com/articles/addressing-age-diversity-corporate-boards-2019-06-05>

<sup>27</sup> Axios podcast. “Nasdaq exec Jeff Thomas on new diversity rules for listed companies.” Dec. 1, 2020. Available at: <https://www.axios.com/nasdaq-jeff-thomas-diversity-rules-listed-companies-cbf245b3-2888-49bf-b8e9-7f3ea388cb0a.html>

<sup>28</sup> See note 13 above.

minorities to their boards. While this may be a laudable goal, it is not included within the purposes of the Exchange Act and therefore not an eligible basis for a rule.

### **The Diversity Mandate is Subject to Constitutional Challenges**

The Proposed Rule, especially the Diversity Mandate, also likely runs afoul of the United States Constitution. The U.S Supreme Court has struck down university admissions programs that are based on quotas as being in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>29</sup> In that case, the Supreme Court noted that racial distinctions are inherently suspect, and require that the state action be necessary and narrowly tailored to achieve a compelling goal.<sup>30</sup>

Here, the NASDAQ is proposing just such a quota in the form of the Diversity Mandate. While the Supreme Court’s decision was made in the context of university admissions, there is no reason to believe that nomination to corporate boards should be treated differently under the U.S. Constitution. The NASDAQ has attempted recharacterize the Diversity Mandate as a disclosure requirement, no doubt in order to address this issue, but the structure of the Proposed Rule confirms that the Diversity Mandate is intended as a requirement. Proposed Section (f)(2)(A) reads:

“Each Company, except as described below in (B) or (C), **must have**, or explain why it does not have, at least two members of its board of directors who are Diverse...”  
(emphasis added)<sup>31</sup>

The plain language shows that the Diversity Mandate is indeed a mandate. Disclosure regulation is not written in terms of “must have”. Instead, disclosure regulation is drafted as “must disclose”. The NASDAQ is aware of this distinction, and utilizes the appropriate language in its proposed new Section 5606, which reads:

“Each Company **must annually disclose**, to the extent permitted by applicable law, information on each director’s voluntary self-identified characteristics in substantially the format below....” (emphasis added)<sup>32</sup>

Thus, the NASDAQ indicates, even in this Rule Proposal, that it is aware of how disclosure requirements work. When coupled with the discussion in the Rule Proposal regarding the purposes and rationale behind the Proposed Rule, it is inescapable that the NASDAQ intends the Diversity Mandate to be a requirement, or, “a regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards.”<sup>33</sup>

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<sup>29</sup> Regents of the University of California v. Bakke, 438 US 265 (1978).

<sup>30</sup> Id.

<sup>31</sup> Section 5605(f)(2) of the Proposed Rule.

<sup>32</sup> Proposed Section 5606

<sup>33</sup> NASDAQ Press Release. “Nasdaq to Advance Diversity through New Proposed Listing Requirements”. Available at: <https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01>

The “or explain why it does not have” prong of the Diversity Mandate is not sufficient to transform this requirement from a mandate to merely a disclosure requirement. It is clear that the NASDAQ’s intention is to, in the words of Nelson Griggs, President of the NASDAQ Stock Exchange, “give[] companies an opportunity to make progress toward increasing representation of women, underrepresented minorities and the LGBTQ+ community on their boards”. This “opportunity” is the application of the Diversity Mandate.

Thus, the Diversity Mandate will likely be viewed as a racially-based quota prohibited under the U.S. Constitution. Even if the Diversity Mandate is view differently, the Constitution requires that any laws that discriminate on race or gender be necessary and narrowly tailored to accomplish a compelling state interest that is not merely a “generalized assertion” of policy.<sup>34</sup> While equal opportunity for women and underrepresented minorities to join and participate in corporate boards is indeed a compelling goal, the fact that the markets are already providing that opportunity is evidence enough that the goal is being met and that the proposed state action is not “necessary” to achieve that goal. Further, given that the data and research that NASDAQ provides as supporting the Proposed Rule fails to actually provide that support (given the lack of a causal nexus), the remaining motivation for the rule is a generalized assertion of past wrongs, specifically prohibited under the United States Constitution.<sup>35</sup>

Further, the requirement that board members publicly self-identify their race, gender or sexual orientation raises Constitutional issues with respect to the right to privacy outside the scope of my experience, so I will not attempt to address those here.

### **Bad Policy**

In addition to the Proposed Rule being unnecessary, outside the scope of the NASDAQ’s authority and most likely prohibited by the United States Constitution, the Proposed Rule is also simply bad policy.

First, the rule pressures directors to self-identify as a group, but makes no account for the director who does not want to publicly announce their gender, race or sexual orientation. Imagine the pressure that this rule would create on a LBGTQ+ director who does not want to announce their sexual orientation publicly to nonetheless make public disclosure of their sexual preference do so in order to satisfy the Diversity Mandate.

Second, the Proposed Rule is bad for women and minorities in that it creates the presumption that they achieved their seat only to meet the requirement, not because their contributions were welcome. Many boards already today limit searches for new directors to minority and women

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<sup>34</sup> City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989) (“To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”)

<sup>35</sup> See, e.g. the Rule Proposal at 34-35 (asserting that established networks of professionals create barriers to woman being appointed to boards).

candidates, not because they value the perspectives of these individuals, but rather to “check the box” of diversity.<sup>36</sup> In my experience with board searches, I can offer that every search starts with a request made in hushed tones that the issuer “of course would prefer a woman or minority.” This is tokenism of the highest order, and otherwise qualified candidates are being excluded from these board searches already, based solely on their race or gender. The Proposed Rule would only cement this tokenism as a matter of law, stripping away the credibility of board members who are women and people from under-represented groups.

I will also note that the Proposed Rule will do nothing to help the systemic issues relating to race and gender that face our society today. The individuals who would benefit from appointments to corporate boards are not the individuals who need our attention and assistance. The pool of potential directors is comprised of people who already have achieved significant measures of success in their careers, and are, frankly, not the subject of discrimination by any reasonable operating company. The Proposed Rule might make its authors and supporters feel good, but it will do precious little to help the vast majority of underrepresented individuals succeed or help promote the structural changes in our society that actually yield underrepresentation of certain groups in corporate boards.

David Burton and Mike Gonzalez provide the best summary of why this policy is so bad. Writing for the Washington Examiner, they note:

Morally, [the Proposed Rule] represents a marked step backward. It is a rejection of the principle that people should be judged on the content of their character and their individual achievement rather than their sex, race, national origin, ethnicity, or sexual preference. It is a rejection of the principle of equal protection under the law (or, in this case, regulations promulgated under law). Legal discrimination or quotas on the basis of race or sex should be a relic of the past.<sup>37</sup>

## Conclusion

For the reasons set forth above, I urge the SEC to reject the Proposed Rule. It is not necessary to achieve the goals of the NASDAQ, and it is not in the interests of our markets, our country or the moral fabric of our nation. The Proposed Rule is not authorized by the relevant enabling statutes in the Exchange Act and is not permissible under the United States Constitution. More critically, adopting the Proposed Rule will yield years of litigation and dispute that will distract from the goal of improving equal access to opportunities for women and Underrepresented Minorities.

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<sup>36</sup> Creary, Ghai, and Scruggs. “When and Why Diversity Improves Your Board’s Performance”. Harvard Business Review, March 27, 2019. Available at: <https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance> (“[Interviewees] raised concerns with what they referred to as “checking the box” initiatives and “tokenism” for the sake of board diversity. One interviewee revealed how she turned down a board position because she felt that the interviewing board members were not able to comment on her expertise — only their desire to have gender diversity on the board.”)

<sup>37</sup> Burton, David R. and Gonzales, Mike. “Nasdaq's diversity rule is discriminatory and immoral.” Washington Examiner, December 14, 2020. Available at: <https://www.washingtonexaminer.com/opinion/nasdaqs-diversity-rule-is-discriminatory-and-immoral>

Instead of creating a flashpoint with this Proposed Rule that will generate years of protracted litigation and cost millions of dollars, let's instead redirect those resources into early education and community development initiatives where we create real change for an entire generation of people.

In our zeal to correct past wrongs and provide better lives to everyone, let's not lose sight of the overriding goal of full equality for all. As Dr. Martin Luther King, Jr. said in his iconic speech:

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.<sup>38</sup>

Racial, gender and sexual orientation-based quotas make it impossible to judge people only by the content of their character. In this way, the Proposed Rule is an anathema to truly becoming a post-racial society, inclusive of everyone.

I urge the SEC not to adopt this Proposed Rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'Publius Oeconomicus', is centered on the page. The signature is written in a cursive, flowing style.

Publius Oeconomicus  
(pseudonym)

P.S.:

I do not envy the responsibility that lies on the Commission and its staff in evaluating this Proposed Rule. Race and gender are incredibly sensitive issues that invoke fierce passions, and I urge the Commission and staff (unlike the industry you regulate) to take special efforts to ensure that the individuals deliberating the merits of the Proposed Rule feel safe to express views for or against the Proposed Rule.

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<sup>38</sup> King, Martin Luther. "I Have a Dream by Martin Luther King, Jr; August 28, 1963." *The Avalon Project*, Yale Law School, [http://avalon.law.yale.edu/20th\\_century/mlk01.asp](http://avalon.law.yale.edu/20th_century/mlk01.asp)