

Chairman Jay Clayton  
Securities and Exchange Commission (SEC)  
Washington, D.C. 20549

Sent by email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)  
[chairmanoffice@sec.gov](mailto:chairmanoffice@sec.gov)

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Reference: NASDAQ Listing Requirements on Board Diversity (SR-NASDAQ-2020-081)

Dear Chairman Clayton:

1. I strongly **OPPOSE** the referenced listing requirements for board diversity for Nasdaq-listed firms and encourage the SEC to **DISAPPROVE** it.
2. Further, I encourage the SEC's Office of Equal Employment Opportunity to immediate **OPEN AN INVESTIGATION** into the attempt by NASDAQ to implement listing requirements that encourage violation of Federal law.<sup>1</sup>
3. Additionally, you are **ENCOURAGED TO NOTIFY REGULATED FIRMS** of their obligation to conduct non-discriminatory employment practices<sup>2</sup> -- including selection of board of director members.

## Discussion

U.S. law prohibits employment discrimination based on race, color, religion, sex, and national origin. This categorical prohibition includes, to some extent, disabilities, sexual orientation, and veteran status. This is a carefully tuned set of laws, implementing the policy formed publicly through our representative legislative bodies, our society, and business environments.

Consequently, the SEC has no lawful or moral authority to authorize NASDAQ and associated organizations and firms to discriminate in employment practices – especially in the regulated field of securities and exchanges. Indeed, the SEC has a positive obligation, under law, to investigate and root-out instances where exchanges and individual firms conspire, attempt, or engage in discriminatory

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<sup>1</sup> Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

<sup>2</sup> The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amend several sections of Title VII. In addition, section 102 of the CRA amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973.

activities. The NASDAQ Listing Requirements on Board Diversity (SR-NASDAQ-2020-081) seek such prohibited discrimination.

U.S. Law prohibits employment discrimination, which is advocated by the NASDAQ proposal. The NASDAQ proposal seeks to overturn the half-century of progress our Country has made toward a non-discriminatory society. The NASDAQ proposal appears to be a manifestation of identity politics: Where ways of thinking and merit are assumed based on amorphous group categories. Identity politics is both unscientific and irrational.

In opposition to identity politics, the essence of American liberty is that persons are to be treated as individuals, and not as part of an abstract, cannot-be-defined group imposed by others. This is why the NASDAQ proposal should not be permitted.

There may be exchanges and securities firms who, for their own pecuniary goals or ingrained racial attitudes, seek to provide a pathway to more employment discrimination. Despite those firms' desire to choose a retrograde, invidious path, the SEC cannot abrogate U.S. law and the settled anti-discrimination policy of the American people. The SEC cannot and should not approve the SR-NASDAQ-2020-081 proposal and encourage another pathway to discrimination.

The NASDAQ proposal does highlight the hurry-up, irrational behavior present in the current NASDAQ leadership and its member firms: Those organization should be encouraged by the SEC to renew their efforts toward non-discrimination in hiring and retention – beginning with excluding race, color, religion, sex, and national origin from employment and board qualifications.

I look forward to the rapid **DISAPPROVAL** of the NASDAQ Listing Requirements on Board Diversity (SR-NASDAQ-2020-081); and the **OPENING OF A VIGOROUS INVESTIGATION** of the NASDAQ and associated organizations/firms, domestic and international, by the Office of Equal Employment Opportunity.

Sincerely,

Eugene F. Kelly

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