

David A. Bell  
Partner  
dbell@fenwick.com | 650.335.7130

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FILED ELECTRONICALLY

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

Re: Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Release No. 34-90574; File No. SR-NASDAQ-2020-081; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity

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Dear Ms. Countryman:

This letter is submitted on behalf of Fenwick & West LLP in response to the Commission's request for written comments on proposed rules filed by The Nasdaq Stock Market LLC ("Nasdaq") relating to board diversity (the "Proposal"). The Proposal is set forth in Release No. 34-90574; File No. SR-NASDAQ-2020-081. This letter recommends specific changes to the proposed rules to ensure more accurate disclosure, expand the categories of persons considered diverse and address privacy concerns.

Nasdaq is proposing to require each of its listed companies, subject to certain exceptions, to: (i) provide statistical information regarding diversity among the members of the company's board of directors under proposed Rule 5606; and (ii) have, or explain why it does not have, at least two "Diverse" directors on its board under proposed rule 5605(f)(2).

The proposed rules rely on racial and ethnic categories based on the definitions used by the Equal Employment Opportunity Commission ("EEOC") and reported on by companies through their Employer Information Report EEO-1 Form. The Proposal implies that Nasdaq chose to model its racial/ethnic categories in the proposed rules on the EEO-1 racial/ethnic categories because they would allow companies to provide consistent and comparable data using categories with which they were already familiar. The definitions for the racial/ethnic categories are included in the instructions for the Board Diversity Matrix required under proposed Rule 5606 (the "Board Diversity Matrix").

#### **I. The Definition of Diverse Should be Clarified**

As noted above, under proposed Rule 5605(f)(2), a listed company must have, or explain why it does not have, two or more directors who are Diverse. Proposed Rule 5605(f)(1), would define a "Diverse" individual as "an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+" and define "Underrepresented Minority" as "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx,

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Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.” Proposed Rule 5605(f)(1) does not define the enumerated racial/ethnic categories that qualify as an Underrepresented Minority. We assume that Nasdaq intends that the definitions for the racial/ethnic categories included in the proposed Board Diversity Matrix would apply.<sup>1</sup>

The Proposal states that Nasdaq considered state and federal legislation, stakeholder sentiments and academic studies in proposing its definition of “Diverse.” Nasdaq cites both California’s S.B. 826, which requires a minimum number of women on boards of companies headquartered in California, and A.B. 979, which mandates inclusion of directors from underrepresented communities on boards of California companies by the end of 2021, as examples of legislation mandating board diversity on which it modelled the proposed rules. A.B. 979 defines a “director from an underrepresented community” to include individuals who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender.

We note that the instructions to the proposed Board Diversity Matrix define “White” as a “person having origins in any of the original peoples of Europe, the Middle East, or North Africa.” The Proposal does not address how a director of Central Asian descent would be classified. As a result, the Proposal would, in the case of persons of North African or Middle Eastern descent and could in the case of persons of Central Asian descent, preclude them from being considered “Diverse.” We further note that under A.B. 979 any of such persons could potentially self-identify as Asian or African American. We do not believe that it is in the interests of diversity and inclusion that underlie the Proposal for such persons not to be considered Diverse. It is not clear as a policy matter, for example, why a person of Algerian, Iraqi or Uzbekistan should not be considered “underrepresented.”

Accordingly, we submit that Nasdaq should (i) explicitly state that the racial/ethnic category definitions contained in the instructions to the Board Diversity Matrix apply to the racial/ethnic categories contained in Rule 5605(f)(1)’s definition of “Diverse” and should harmonize the nomenclature used for the racial/ethnic categories, and (ii) create one or more racial/ethnic categories for directors of Middle Eastern, North African or Central Asian descent and remove reference to the “peoples of ... Middle East, or North Africa” from its definition “White.” While this change would cause the proposed rules’ racial/ethnic categories to differ from the categorization used by the EEOC, we believe that it would help to achieve a more accurate depiction of a board’s diversity. This would be consistent with the approach taken by Nasdaq to include members of the LGBTQ+ community in its definition of “Diverse” due to its belief that disclosing that information was in the public interest even though companies are not required to report on LGBTQ+ status in their EEO-1 reports.

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<sup>1</sup> In making the assumption regarding the application of the Board Diversity Matrix category definitions to proposed Rule 5605(f), we note that the Board Diversity Matrix uses the term “Alaskan Native or American Indian” while proposed Rule 5605(f)(1) uses “Native American or Alaska Native.”

## II. Board Diversity Matrix Format

We believe that the statistical disclosure required under proposed Rule 5606 could create privacy concerns for certain directors. The proposed format for the Board Diversity Matrix requires companies to provide information on each director's voluntary self-identified gender and racial/ethnic characteristics and LGBTQ+ status. However, because the gender information is also required for each racial/ethnic category there is the potential for an individual director's characteristics to be unintentionally identified through the Board Diversity Matrix, losing the anonymity afforded by aggregating such information. For example, if a company has one director who self identifies as Black and that director but does not wish to indicate a gender, that director's decision to not disclose a gender could be discerned if readers were familiar with the director's status as the one director who is Black.

To address this potential issue, we submit that Nasdaq should modify the Board Diversity Matrix so that the required statistical information can still be captured on an aggregated basis without compromising a director's wish for privacy. For example, instead of providing columns for each racial/ethnic category to disclose the number of directors based on gender identification, just the total number (regardless of gender category) can be included for each racial/ethnic category in the same way that LGBTQ+ is currently presented in the Board Diversity Matrix. Gender categories could then be presented separately showing the total number of men, women, non-binary and undisclosed, each in its own row in the Board Diversity Matrix.

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We appreciate the opportunity to comment on the Proposal and would be pleased to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to David Bell.

Sincerely,

FENWICK & WEST LLP



David A. Bell  
Co-Chair, Corporate Governance

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