



**National
Urban League**

*Empowering Communities.
Changing Lives.*

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January 4, 2021

By email: rule-comments@sec.gov

Re: File Number SR-NASDAQ-2020-081

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Mr. Jeffrey S. Davis
Senior Vice President, Senior Deputy General Counsel
Nasdaq, Inc.
One Liberty Plaza
165 Broadway
New York, New York 10006

Re: The National Urban League's Comments on Nasdaq's Proposed Rule 5605(f) to Increase Board Diversity of NASDAQ Listed Firms

Dear Ms. Countryman and Mr. Davis:

I write on behalf of the National Urban League ("NUL"), the country's foremost business advocacy organization representing African Americans. Founded in 1910, NUL represents hundreds of thousands of African Americans through 90 national affiliates, serving over 300 communities. NUL advocates the closure of the equity gap facing African Americans in every aspect of economic life. We seek social parity, economic self-reliance, and empowerment of African Americans in all significant aspects of American society. Central to our work are the developments in corporate America, including proposed rules such as Rule 5605(f), which implicate African American representation in leadership positions. NUL has taken a keen interest in matters involving racial equity in corporate America, and we invite the opportunity to comment on proposed SRO and SEC rules and regulations during their investigative phase. We thank you for the opportunity to offer our views, and we ask that you consider our comments herein.

Nasdaq filed proposed Rule 5605(f), and supporting documentation, with the Securities and Exchange Commission about December 1, 2020 (the "Submission") pursuant to Rule 19b-4 of the Securities Exchange Act of 1934.¹ The stated purpose of the proposed

¹ The proposed Rule 5605(f) (Diverse Board Representation):

(i) would require Nasdaq-listed companies, subject to certain exceptions, (A) to have at least one director who self-identifies as a female, and (B) to have at least one director who self-identifies as Black or African American, Hispanic or Latinx Asian, Native American of Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or

diversity rule is laudable. It seeks to enable previously underrepresented groups (i.e., Blacks, ethnic minorities, and members of the LGBTQ+ community) to participate at the highest level of industry. Yet, implementation of the proposed Rule, troublingly minimizes the opportunity for African American representation on public company boards. As noted below, this is a deep policy flaw in the proposed Rule, and it should be eliminated.

I. The Proposed Rule Misconstrues the Meaning of Diversity for African Americans and Distressingly Pits African Americans Board Representation against Other Underrepresented Groups

The proposed Rule requires at least two diverse board members. One is based on gender and must be female. The Submission spends a great deal of time detailing the benefits of diverse female board representation. And the Submission notes that, by one metric, over 95% of such women are Caucasian. See Submission, pp. 33-34 ("Women and minority directors combined accounted for 34% of Fortune 500 board seats in 2018. While women of color represent 18% of the U.S. population, they help only 4.6% of Fortune 500 board seats in 2018. Male underrepresented minorities held 11.5% of board seats at Fortune 500 companies in 2018, compared to 66% of board seats held by Caucasian/White men. Overall, in 2018, 83.9% of board seats among Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of the U.S. population) and 3.7% of Asian/Pacific Islander individuals (who represent 6% of the U.S. population.") (Citations omitted.) The Submission acknowledges that historically female board membership is an almost exclusively Caucasian club similar to Caucasian male board membership.

The proposed Rule requires the second director to be *either* a member of the LGBTQ community or a racial minority – Black or African American, Hispanic or Latinx, Asian, Native American, or Alaska Native, Native Hawaiian or Pacific Islander, or a person who is of two or more races like Vice-President Elect Kamala Harris. The proposed Rule uses the term Underrepresented Minority. We understand that Nasdaq listed firms located outside the United States would customize their racial diversity selections based on local circumstances and demographics and limit our comments to U.S. based companies.

All diversity is important, but not necessarily equivalent. African Americans, descended from slaves, have been a disfavored group since being involuntarily brought to the shores of America in 1619. Until *Brown v Bd. of Education* in 1954, Black citizens had been legally

as LGBTQ+, or (C) to explain why the company does not have at least two directors on its board who self-identify in the categories listed above; [and]

(ii) to adopt Rule 5606 (Board Diversity Disclosure), which would require Nasdaq-listed companies, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+

excluded from equal participation in American institutions and corporate life. And to this day custom and other vestiges of slavery have perpetuated Black American inequality. Despite *Brown* and its progeny, and the Civil Rights Acts of 1964 and 1965, Black people have struggled to gain a foothold in corporate institutions despite our gains in education, medicine, industry, and law, among other professions.

The Submission makes clear that, of all the underrepresented groups, Caucasian women have made the greatest advances on corporate boards. Yet, under the proposed Rule, one diverse person must be female. The second diverse member need not be an African American person, nor a person of color. The second diverse person may be a Caucasian member of the LGBTQ+ community. And so, the proposed Rule, by its terms, permits a formulation of American diversity that is all White. As such, the proposed Rule reinforces a racial exclusion that is at least as old as the nation. The Nasdaq and the SEC should not be in the business of perpetuating such an anti-American policy.

By its operation, the proposed Rule equates LGBTQ diversity with racial/ethnic diversity, as if they are equivalent substitutes. This is not the case. Pointedly, and excluding issues of intersectionality, the corporate and real-world experiences that might be brought to a board by a Caucasian member of the LGBTQ community and an African American director are vastly different. This is true even where their education and professional accomplishments are equivalent. It is the differences in perspectives, networks, skills, expertise and lived experiences fostered by diversity that makes American institutions more successful.

The Submission reviews many academic papers demonstrating the benefits of female and racial/ethnic diversity on boards but proffers no evidence regarding LGBTQ+ board diversity (See Submission, p. 19, finding “that there is a lack of published research on the issue of LGBTQ+ representation on boards.”). Nasdaq elaborates on this statement at pages 211-212 of the Submission, Exhibit 1, by acknowledging “that there also is a lack of published research on the issue of LGBTQ+ representation on boards. This may be due to a lack of consistent, transparent data on broader diverse attributes, or because there are no voluntary self-disclosure workforce reporting requirements for LGBTQ+ status, such as EEO-1 reporting framework for race, ethnicity, and gender. In any event, it is evident that while ‘[b]oardroom diversity is a topic that has gained significant traction ... LGBTQ+ diversity, however, has largely been left out of the conversation.’” (Citations omitted.)

The National Urban League supports societal diversity, including within the LGBTQ+ community. However, we find it deeply troubling that Nasdaq’s proposed diversity Rule permits LGBTQ+ board representation to potentially displace African American representation when there is no evidence to support the corporate benefits of such displacement. As written, the proposed Rule could result in only Caucasian women and Caucasian LGBTQ+ directors being added to the boards of Nasdaq listed firms. The possibility of this circumstance, and the policy implications that diversity is a homogeneous substitutable quality across different diverse communities, should be avoided by entities as important to American life as the SEC and Nasdaq.

Nasdaq indirectly acknowledges this possibility in reference to other “diverse” groups. In its Submission Nasdaq states that it decided to exclude other diverse groups defined by veteran status, disability, age, education, or board tenure. *Id.*, pp. 209-210. Nasdaq’s stated reasons include a “dearth of empirical analysis on the relationship between investor protection or company performance” (*Id.*, p. 211) and “that broader definitions of diversity ... may result in diverse candidates being overlooked,” *Id.*, p. 210. Unfortunately, as currently drafted Nasdaq’s proposed Rule continues to visit these negative circumstances on potential African American board members.

II. The Diversity Requirement Should Be Mandatory and Enforceable

A benefit of certain state board diversity laws is that they are mandatory, not merely suggestive. California’s Assembly Bill 979 mandates inclusion of a director from an underrepresented community on corporate boards of companies headquartered in that state. “Director from an underrepresented community” means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender. Assembly Bill 979 contains disclosure requirements and penalties for non-compliance, including a \$100,000 fine for failure to file board member information, and up to \$300,000 for failure to have a director seat held by a member of an underrepresented group for at least part of the calendar year. Colorado, Maryland, Illinois, and New York have enacted diversity-related measures, but those initiatives have focused on *disclosure* of gender representation. Hawaii, Massachusetts, Michigan, New Jersey, and Washington have each *considered* mandatory board diversity legislation that mandate a minimum number of female directors, deadlines for implementation, and penalties for non-compliance.

Currently, proposed Rule 5605(f) is woefully lacking. Based on the data included in the Submission, the proposed Rule elevates and protects gender (typically Caucasian women) by separately mandating their inclusion on public-company boards, but then dilutes “underrepresented communities” by lumping them together and using the disjunctive “or” to allow competition among them. These facts are concerning for several reasons. Foremost is the implication that competent non-Caucasian directors cannot be found, and that board diversity is more wished for than willed. It strains credulity to believe that firms run by some of the brightest and most efficacious people in the world cannot find non-White colleagues to serve with them, and on behalf of their shareholders.

The proposed Rule should be modified to require the addition of *both* an African American board member (or another racial/ethnic minority) *and* a member of the LGBTQ community, one of which might also be female. As noted throughout the Submission, diverse board recruitment is most often hindered by the insularity of the search process. See, e.g., Submission, pp. 35-37. Very recently Black directors have successfully been installed when there is the will to do so. *Id.*, p. 37 (“Investors have begun calling for greater transparency surrounding ethnic diversity on company boards, and in the past several

months as the U.S. has seen an uprising in the racial justice movement, there has been an increase in the number of African Americans appointed to Russell 3000 corporate boards. In a five-month span, 130 directors appointed were African American, in comparison to the 38 African Americans who were appointed in the preceding five months.”) (citations omitted). We wish to see this trend of African American board representation extended by any Nasdaq diversity rule approved by the SEC.

Given the range of accomplished and diverse professionals, each Nasdaq listed companies should be able to identify diverse candidates that fit their company's board culture, as well as providing complementary skills. The National Urban League does understand that even this proposal might, theoretically, yield no additional Black or African American board members, as other racial minorities might fill all such positions. And of course, there are meaningful and nuanced distinctions among racial minorities in the way each has experienced discrimination in this country. However, eliminating the structural "competition" between racial minorities and the LGBTQ community that is now baked into the proposed Rule is much preferable, and increases the probability that Black candidates will be selected.

Moreover, the proposed Rule must have an enforcement mechanism. The proposed Rule adopts a disclosure approach (perhaps to avoid litigation advancing specious arguments that a mandate is an impermissible quota). Each company can simply *explain* why it was unable to meet the mark and there is no penalty for non-compliance. And once an explanation is proffered, Nasdaq will not review it substantively.

The disclosure approach is useful, but ultimately weak. It may help consumers and stakeholders who are committed to diversity to receive uniform data regarding each public company's efforts toward diversity and inclusion and allows each of them to decide how to invest capital, conduct business, or purchase their products or services. But absent actual penalties imposed by Nasdaq or the Commission, reliance on “the market” to impose accountability will yield fragmented and diffuse results. Further, it is not sufficient to say that the proposed Rule does nothing “adverse” to Nasdaq listed companies. We strongly recommend that Nasdaq revisit the proposed rule and adopt a bold stance toward diversity and inclusiveness of public company boards.

III. The Timeframes for Achieving Enhanced Board Diversity Are Too Long

The phrase "all deliberate speed" comes to mind when reviewing the length of time proposed for Nasdaq firms to integrate their boards. The proposed Rule permits four years from approval for The Nasdaq Global and Global Select Markets listed companies to add diverse board members (or simply explain why they could not); and five years for companies listed on The Nasdaq Capital Market. In our view two years is sufficient, with at least one new board member added within a year or when the next board opening becomes available.



IV. The National Urban League as a Resource for Locating Diverse Board Members

We applaud Nasdaq's partnership with Equilar and its BoardEdge platform to assist listed companies locate diverse board members. In addition, the National Urban League is happy to serve as a referral source for Nasdaq listed companies who want to identify Black board members. These include people who have special expertise in law, finance, banking, marketing, data protection and security, public relations, and academia, as noted at page 37 of the Submission; as well as those who have led major cities, are former legislators, or have led major non-profits. Our network is vast and any listed company that seeks African American board representation should simply contact me.

V. Conclusion

Again, the National Urban League applauds the goals of the Nasdaq's proposed board diversity Rule. However, we sincerely believe that more should be done (and more quickly) to achieve more racially diverse corporate boards for Nasdaq listed companies. It is our hope that Nasdaq's efforts will prompt other exchanges to embrace greater racial diversity within their organizations. As the Submission concludes, such diversity benefits shareholders.

Respectfully submitted,

Marc H. Morial
President and CEO
National Urban League