December 30, 2020

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

Re: Proposed Rule Change SR-NASDAQ-2020-081

Dear Secretary Countryman,

The Latino Corporate Directors Association ("LCDA") is pleased to submit this comment letter in strong support of the NASDAQ Proposed Rule Change SR-NASDAQ-2020-081 ("Proposal" or "Rule"), which would require NASDAQ-listed companies, subject to certain exceptions, to have at least one director who self-identifies as a female, and at least one director who self-identifies as 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+, or to explain why the company does not meet this requirement. Additionally, this proposed change would require NASDAQ-listed companies to provide statistical information on the company's diversity on its board of directors.

LCDA is comprised of US Latinos[1] that serve on publicly traded company boards, large private companies, and C-level aspiring directors. LCDA's mission is to identify and increase the number of qualified US Latinos on corporate boards, and to help maintain a large pipeline of qualified Latinx people for boards and C-suite positions.

I. Composition of This Comment Letter

LCDA believes that the NASDAQ in its submission to the SEC in support of its Proposal has strongly substantiated the need, legal basis, authority, and precedent for the proposed Rule.

1. Latino and Latinx describes and encompasses the ethnic subgroups: Mexican, Puerto Rican, Cuban, Dominican, Central and South American and in the U.S., encompasses people of Mexican, Puerto Rican, Cuban, Dominican, Central and South American descent who have immigrated to or are born in the United States. Latino and Latinx are ethnic, rather than racial classifications and people who identify as Latino, Latinx or Hispanic can be indigenous, white, black, Asian and mixed race. *See for example* Luz E. Herrera and Pilar Margarita Hernandez Escontrias, *The Network for Justice: Pursuing a Latino Civil Rights Agenda*, 21 Harv. Latino L. Rev., 165, 176 (Spring 2018) (referring to Latinos as indigenous, black and white of both immigrant and US-born backgrounds).

Consequently, in this comment letter, LCDA only provides a short and succinct discussion of the underlying legal issues. See "Exhibit A," attached hereto[2].

In this comment letter, LCDA submits support for the following thesis: SEC rules have long permitted inadequate disclosure of directors' diversity backgrounds[3], in spite of investors' demands for full and complete disclosure. This regulatory indifference has helped sustain the exclusion of American Latinos and other racial and ethnic minorities from boards and the C-suite, despite the existence of an adequate pipeline of qualified candidates. The Proposal's new transparency will help remedy this significant problem and allow investors to compare companies' breadth of diversity (e.g., whether or not Latinos and other minorities are directors) as an important factor in assessing and predicting future overall board performance for NASDAQ companies.

II. Latinos Are Underrepresented on Boards Despite Abundance of Qualified Candidates and the Economic Importance of the Latino Community.

A. The Latino Gap

LCDA's members view the SEC's mission of protecting investors, maintaining the integrity and orderly working of the markets, and facilitating capital formation as aligned with the mission of LCDA. To that end, LCDA submits that the SEC's mission cannot be accomplished when a substantial part of the US population has been effectively excluded from participating in boardrooms and C-Suites. Currently, American Latinos, African-Americans, Asians, LGBTQ and

2. Clearly, the NASDAQ Proposal stands on firm ground since it does not impose mandates and provides for voluntary disclosure of directors' diversity characteristics, such as race, ethnicity, and sexual preference. The Proposal even offers suggestions for disclosure that maintains privacy. Moreover, the NASDAQ Proposal is constructed using a "disclose or explain" framework. The Proposal's goals of board diversity are essentially aspirational. If a company should miss the diversity goals in the timeline provided, the reasons can be "explained" in its filings, providing an avenue for completely avoiding sanctions, and allowing investors to assess the degree of diversity.. See Exhibit A, attached herein. In "Exhibit B," attached to this comment letter, LCDA also provides responses to general criticisms of the NASDAQ Proposal.

3. SEC S-K-Modernization of Regulation S-K Items 101, 103, and 105 – this regulation may actually discourage diversity in that it does not require a diversity policy to be adopted and instead provides an incentive not to adopt one, because if a diversity policy is adopted, then an explanation needs to be provided for how the board assesses diversity goals, creating an extra duty of disclosure that many companies simply choose to avoid. The subtle message to public companies from the S-K items is that diversity policies are not necessary in the eyes of the SEC and diversity information is a lower priority. *See for example,* Commissioner Allison Herren Lee, *S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), available at: https://www.sec.gov/news/public-statement/lee-regulation-sk-2020-08-26#_ftnref15, implying that the SEC has not gone far enough in requiring disclosure about diversity statistics, despite investor interest in the information.

other minorities constitute approximately 130 million or about 42% of the U.S. population and are not meaningfully represented on boards nor serve in meaningful numbers as senior executives. [4]

Although Latinos comprise about 18% of the US population (approximately 59 million), only about 3% of directors on Fortune 1000 Boards (comprising 10,166 board seats) are Latinx, and even less, under 2%, on the 1,000 largest NASDAQ-listed companies based on revenue, behind African-Americans and Asians.[5] A review of all NASDAQ-listed organizations show that Latinx individuals hold less than 0.8% of board seats, a number which is significantly less than any other index, including Russell 3000 where Latinx hold 2.2% of board seats.[6] The percentage of Latinx-held board seats at Fortune 500 companies largely reflect stagnation over the past five years, despite showing a moderate improvement over the years, reaching 3.6% of total seats.[7] Moreover, of those seats held by Latinx directors, less than one-third are held by Latinas, meaning that they currently fill only 0.85% of Fortune 1000 companies' board seats.[8]

Notably, the gap between the labor force and executive representation is widest among Latinx than any other underrepresented group.[9] This underrepresentation exists despite a viable pipeline of eligible Latinx executives with the necessary expertise and experience to assume these

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4. *See* U.S. Census Quick Facts, available at https://www.census.gov/quickfacts/fact/table/US/PST045219 (129,678,404, equivalent of 42.1% of the U.S. population is categorized as a minority (i.e., Black or African American, American Indian and Alaska Native, Asian, Native Hawaiian or Pacific Islander, Hispanic or Latino, or two or more races.

5. *See* PR Newswire, Latino Voices for Boardroom Equity Challenges Corporate America, stating "only 23.2% of the F1000 companies had one or more US Latinos on their boards, occupying only 2.7% of Fortune 1000 board seats," available at: https://www.prnewswire.com/news-releases/latino-voices-for-boardroom-equity-challenges-corporate-america-301133836 html; *See also* Latino Corporate Directors Association, LCDA Latino Board Tracker, http://www.latinoboardtracker.org/.

6. *See* KPMG, Latino Representation on Fortune 1000 Boards, available at: https://boardleadership kpmg.us/relevant-topics/articles/2019/latino-representation-on-fortune-1000-boards.html; *See also* Proposal at 33, stating: "over the past ten years, the percentage of African American/Black directors at Fortune 500 companies has remained between 7 and 9%, while the percentage of women directors has grown from 16 to 23%.88 In 2019, only 10% of board seats at Russell 3000 companies were held by racial minorities, reflecting an incremental increase from 8% in 2008."

7. *See* Victor Arias, *Diversifying Boards: Minimal Progress, But the Push for Change is Growing*, Latino Leaders, available at: https://www.latinoleadersmagazine.com/augustseptember-20/2020/10/7/augustseptember-2020.

8. *See* KPMG, *supra* note 6.In contrast the percentage of all women on Fortune 1000 boards was 26% in 2019, *See* Catalyst, *Women on Corporate Boards: Quick Take* (Mar. 13, 2020), available at: https://www.catalyst.org/research/women-on-corporate-boards/.

9. *See* JD Swerzenski et al, Fast Company, *This is Where There are the Most Hispanic Executives (and it's not where you think)*, Jan. 28, 2020, available at: https://www.fastcompany.com/90456329/this-is-where-there-are-the-most-hispanic-executives-and-its-not-where-you-think.

seats.[10] LCDA itself provides numerous Latino candidates for board vacancies when contacted by companies or recruiters. LCDA's own executive representation research reveals there are over 4,000 Latinx executives who currently occupy public corporate board seats or C-Suite public company positions and thousands more in private companies who can serve as the Latinx pipeline to reduce or eliminate the gap.[11]

Clearly, this is a self-sustaining negative loop. The fewer Latinos serving as directors and senior executives, the more likely that companies will exhibit a lack of understanding, both culturally and economically, of the fastest growing consumer segment in the United States.[12] This lack of understanding will predictably lead to a failure to market and service properly this Latino segment. The negative consequences include a substantial loss of revenue opportunities and ultimately lower returns to investors.

B. Latinos' Substantial Economic Contribution

Within the United States, the broad Latinx community has increasingly wielded significant importance, both in the economic and political sectors. A rapidly expanding group, Latinx are estimated at nearly 59 million, or 18% of the US population, and make up the largest non-white ethnic group in the country.[13] This population is set to continue to grow by 1.2 million people annually through 2060.[14] Economically, this translates currently to a Latinx-based gross domestic product of nearly $2.6 trillion, a significant level of purchasing power projected to continue its growth.[15]

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10. Data collected internally by LCDA using publicly available data from Institutional Shareholder Services (ISS), McKinsey, Equilar, BoardEx, and LinkedIn.

11. Data collected internally by LCDA using publicly available data from Institutional Shareholder Services (ISS), McKinsey, Equilar, BoardEx, and LinkedIn; *see also* Vivian Hunt et. al, *Delivering Through Diversity*, McKinsey & Co., Jan. 2018, *available at*: delivering-through-diversity_full-report.ashx.

12. *See* Victor Arias, *The Missing Pieces: Latinos in the Boardroom*, Latino Leaders, available at: https://www.latinoleadersmagazine.com/summer-2019/2019/12/5/the-missing-pieces-latinos-in-the-boardroom.

13. *See* LCDA Testimony Submitted to the Committee on Financial Services U.S. House of Representatives, Jun. 20, 2019, available at: https://www.congress.gov/116/meeting/house/109690/witnesses/HHRG-116-BA00-Wstate-MartinezRetV-20190620.pdf.

14. *Id*.

15. Sean Salas, Forbes, *The $2.6 Trillion U.S. Latino Market: The Largest And Fastest Growing Blindspot of the American Economy*, Forbes, Sept. 27, 2020, available at: https://www.forbes.com/sites/seansalas/2020/09/27/the-26-trillion-us-latino-market-the-largest-and-fastest-growing-blindspot-of-the-american-economy/?sh=1e0e1e169e62.

If the U.S. Latinx population were a country, the gross domestic product ("GDP") growth rate of this market would be the third-highest among all global economics.[16] In fact, the Latinx market is, "…growing GDP at 8.6%, faster than China, faster than India…"[17] Since 2010, product and service consumption among the U.S. Latinx community increased by 42%, which is 72% faster when compared to non-U.S. Latinx communities.[18] Underlining the importance of the Latinx community within the economy, from 2017 to 2018, studies found that had it not been for strong growth in the U.S. Latinx market, the U.S. economy could have experienced contraction.[19]

Further, Latinos are poised to account for 20% of the entire American workforce within 5 years, and over 30% by 2050.[20] The Latinx community accounted for 82% of the growth in the U.S. labor-force participation between 2010 and 2017.[21] By 2024, one in five U.S. workers will be Latinx and within eight years, more than 75% of labor force growth will represent the Latinx community. Over the next three decades, this could represent a contribution from the Latinx workforce of 0.21 percentage points to annual real GDP growth in the United States.[22]

Given the substantial economic performance and consumer spending generated by the American Latinx community, investors understandably are demanding diversity statistics that disclose Latino directors as an indicator to determine whether companies are appropriately focusing on this consumer segment. The largest U.S. retailers, for example, owe a substantial

16. *Id*.

17. *Id*.

18. Lee Vann, *2020 will be the Year of the Hispanic*, Hispanic Online Marketing, Jun. 30, 2020, available at: https://www.hispaniconlinemarketing.com/.

19. *See* The $2.6 Trillion Latino Market, *supra* note 13.

20. Mayra Rodriguez Valladares, *Hispanics, Not Trump, Are the Biggest Engine of U.S. Economic Growth*, Forbes, Feb. 11, 2020, available at: https://www forbes.com/sites/mayrarodriguezvalladares/2019/02/11/hispanics-not-trump-are-the-biggest-engine-of-u-s-economic-growth/?sh=696b4cc6e5e3.

21. *See* KPMG, *supra note* 6.

22. *See* Maya Rodriguez Valladares, *Hispanics, Not Trump Are the Biggest engine of U.S. Economic Growth, supra* note 20.

portion of their revenues to the Latino segment.[23] Social media companies as well as entertainment companies also have significant customers from the Latino segment. [24]

Certainly historical oppression and systemic racism has imposed barriers upon Latinos. [25] However, it is respectfully submitted that current regulation has shielded public companies from any adverse consequences for providing little or no disclosure of diversity backgrounds of directors, thereby obscuring whether Latinos serve as directors. Accordingly, this lack of transparency has contributed substantially to the exclusion of Latinos and other minorities from boards. The NASDQ Proposal's new disclosures will substantially improve the delivery of this important information to investors.

III. Disclosure of the Elements of Diversity on Boards Would Assist Investors.

The SEC has long supported the transparency and disclosure of material information by public companies to enable informed investor decision-making. The diversity of public company boards is a factor that many investors consider to be extremely important for their investment decisions. After all, the degree of board diversity may predict the quality of oversight and financial performance that a board will exhibit in navigating turbulent times and changing markets that are accompanied by the changing demographic composition of customers.

Latinos, with other minorities, are an essential component of board diversity and are properly included in the NASDAQ Proposal definition. However, investors today are unable to determine from most public company filings whether there are Latinx board members. For example, to evaluate a company's commitment to marketing to the Latinx community, who spend $2.6 trillion annually, investors need the diversity personal background details of race and ethnicity that will reveal Latino directors (assuming voluntary disclosure) that will be provided by the Proposal.

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23. Mark A. Browne, *Amazon-Wal-Mart Drawing the Largest Numbers of Hispanic Shoppers in US*, Portada Online, Jul. 18, 2018, available at https://www.portada-online.com/more-from-portada/amazon-wal-mart-drawing-the-largest-numbers-of-online-hispanic-shoppers-in-us/; Mary Hanbury, This is What the Average Wal-Mart Shopper Looks Like, Business Insider, Jan. 19, 2020, available at https://www.businessinsider.com/walmart-shopper-demographics-average-is-white-woman-2020-1 (noting that Latinos are the second largest shopper demographic behind white women).

24. *See* Digital Diversity: A Closer Look at US Hispanics, Facebook, Dec. 4, 2014, available at https://www.facebook.com/business/news/insights/digital-diversity-a-closer-look-at-us-hispanics; Richard Carufel, *Targeting U.S. Hispanics—what this influential audience wants from brands and content*, Agility PR Solutions, Jan. 31, 2020, available at https://www.agilitypr.com/pr-news/public-relations/targeting-u-s-hispanics-what-this-influential-audience-wants-from-brands-and-content/; Anna Marie de la Fuente, Disney Plus Rolls Out Hefty Latin American Slate, Variety, Nov. 30, 2020, available at https://variety.com/2020/tv/global/disney-plus-hefty-latin-american-slate-1234842502/.

25. *See for example*, Marie Arana, *A History of Anti-Hispanic Bigotry in the United States*, Washington Post, Aug. 9, 2019, available at https://www.washingtonpost.com/outlook/a-history-of-anti-hispanic-bigotry-in-the-united-states/2019/08/09/5ceaacba-b9f2-11e9-b3b4-2bb69e8c4e39_story html.

Information on diversity and inclusion is also vital to investors based on the impact it has on the performance of a company. Contrary to assertions that diversity has minimal impact on the financial success of a company, studies have shown a positive correlation between diversity in a company's boardroom and improved financial performance. Investors continue to seek every edge possible to improve the likelihood of high returns from the securities of a company in which they invest. In the view of many investors, such a competitive edge would be manifested by a corporate leadership team that exhibited broad gender, racial, and ethnic diversity.

In addition to financial performance, investors are also interested in diversity information to better assess a company's corporate governance and internal controls. Diversity in boardrooms results in stronger internal controls and the avoidance of one-dimensional decision-making. Consequently, diversity reduces the likelihood of group think, incidents of fraud, and inaccurate reporting. Given the significant impact that diversity has on corporate governance and internal controls, and consequently a company's performance, this provides an additional reason behind the importance and likely materiality of the information.

The inherent safeguards found within diverse boardrooms are likely a result of diverse backgrounds, achieved through race, ethnic, or gender perspectives, that provide the necessary insight to avoid certain regulatory pitfalls. A recent study, which sampled a set of non-Fortune 1000 companies found a significant association between the presence of diverse board members and a reduced likelihood of a material financial restatement.[26] A subsequent study in 2017 found that diverse boards generally committed fewer financial reporting mistakes and engaged in less fraud.[27] Although gender diversity appears to be the most impactful in preventing financial misconduct, studies have also showed that diversity in other forms, notably race, may also reduce fraud on board management and financial reporting.[28]

Diverse boards also play a critical role in influencing the management and decision-making of a company.[29] In 2009, the SEC, when discussing rules requiring proxy disclosure, noted that when corporate boards seek diversity and, consequently, identify and nominate directors who have fewer connections to the board or management, it creates a more independent boardroom.[30] A more independent boardroom will likely result in improved governance and decision-making by

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26. *See* Proposal at 100.

27. *See* Proposal at 153.

28. *See* Cumming, Douglas J. and Leung, Tak Yan and Rui, Oliver M., *Gender Diversity and Securities Fraud*, Academy of Management Journal, at 2 (Feb. 2, 2015), available at: https://ssrn.com/abstract=2562399.

29. *See* Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The Disclosure of Financial Forward Looking Information*, 34(2) Gender in Mgmt. 140, 142-44 (2019).

30. *See* Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009).

way of a broader range of views, opinions, and positions.[31] Notably, by embracing this type of diversity, studies have shown that companies are better able to assess different perspectives, consequences, and to avoid "group-think."[32] Another study found that a diverse boardroom "reduces stock return volatility, which is consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with "groupthink."[33]

A 2020 report from McKinsey found, "…a positive, statistically significant correlation between company financial outperformance and [board] diversity, on the dimensions of both gender and ethnicity." Notably, companies with significant gender diversity were, "…28% more likely than their peers to outperform financially."[34] A study by FCLT Global in 2019 found that the most diverse boards of companies, "…added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers."[35] More diverse boardrooms were also associated with companies that had, "…increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, and increased dividend payouts to shareholders, higher investment in R&D and better innovation."[36]

A. <u>Investors Are Demanding Diversity Information From Boards.</u>

Many major institutional investors, asset managers and proxy advisers are demanding this information. Several have indicated that they will challenge CGN Chairs who have not made commitments to improve diversity on their boards. Certain institutional investors have already created internal diversity policies and NASDAQ's proposal builds upon what investors are doing independently. BlackRock Inc ("BlackRock"), the world's largest asset manager is asking

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31. *See* Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009).

32. *See* Lynne L. Dallas, Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors, 76 Tul. L. Rev. 1363, 1391 (June 2002).

33. *See* Gennaro Bernile et al., Board Diversity, Firm Risk, and Corporate Policies (March 6, 2017), available at: https://ssrn.com/abstract=2733394, (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat and CRSP databases).

34. *See for example* McKinsey and Co., Diversity Wins: How Inclusion Matters Report, May 2020 states that the likelihood of financial outperformance increases by 36% when diversity occurs on executive teams, May 19, 2020 available at: https://www mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters.

35. *See* FCLT Global, *The Long-term Habits of a Highly Effective Corporate Board* at 11 (March 2019), available at: https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effectivecorporate-boards.pdf, (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data).

36. *See* Gennaro Bernile et al., Board Diversity, Firm Risk, and Corporate Policies, *supra* note 33.

companies to disclose the racial, ethnic and gender makeup of their employees and says it will vote against directors who fail to act.[37] Beginning in 2021, State Street Global Advisors ("State Street") will seek information and goals companies have for increasing racial diversity and metrics of the makeup of their boards.[38] Vanguard Group Inc. ("Vanguard") plans to vote against company directors who fail to push for greater racial on gender diversity on their boards.[39] Goldman Sachs also recently stated that it will not take companies public in the U.S. or Europe if it does not have diverse director in its boardroom.[40]

Other notable entities requesting racial and ethnic diversity data from companies are Institutional Shareholder Services ("ISS") and the Russell 3000 index.[41] All these entities have demanded more diversity information in order to make better investment decisions that encompass an analysis of racial and gender diversity within companies.

B. <u>No Accurate Disclosure of Board Diversity Exists.</u>

Exacerbating the lack of diversity and inclusion at the board level, there is no mechanism to accurately and regularly collect and disclose data in terms of race, ethnicity, or gender. Despite assertions by certain companies that this information is not requested, evidence has shown that investors have consistently sought out diversity statistics in connection to their internal assessments.

The Proposal will provide investors with additional transparency through disclosure of board composition and help investors ascertain underlying reasons for a lack of diversity. As noted by ISS, the objective of increased transparency related to diversity information is to assist investors in identifying companies when they decide to engage and foster dialogue and diversity. Diversity

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37. *See* Saijel Kishan, *BlackRock to Push Companies on Racial Diversity in 2021*, Bloomberg, Dec. 10, 2020, available at: https://www.bloomberg.com/news/articles/2020-12-10/blackrock-plans-to-push-companies-on-racial-.

38. *See* Saijel Kishan, State Street to Press Companies on Boosting Racial Diversity, Bloomberg, Aug. 27, 2020, available at: https://www.bloomberg.com/news/articles/2020-08-27/state-street-to-press-companies-on-boosting-racial-diversity.

39. *See* Saijel Kishan, *Vanguard to Push Companies on Diversity Next Year*, Bloomberg, Dec. 15, 2020, available at: https://www.bloomberg.com/news/articles/2020-12-15/vanguard-to-push-companies-on-racial-diversity-next-year.

40. *See* Jena McGregor, *Goldman Sachs CEO Says It Will Not Take a Company Public Without Diversity on its Board*, Washington Post, Jan. 23, 2020, available at: https://www.washingtonpost.com/business/2020/01/23/goldman-sachs-ceo-says-it-wont-take-companies-public-without-diverse-board-member/.

41. *See* Russell 300 Board Diversity Disclosure Initiative as summarized by the Office of the Illinois State Treasurer, available at: https://www.illinoistreasurer.gov/Financial_Institutions/Equity,_Diversity__Inclusion/Russell_300.

information is also important, as its disclosure will likely induce beneficial changes to the methodology behind selecting board members.[42] Clearly, since many investors consider diversity and inclusion statistics to be important in their decision making, such information should be disclosed.[43] As the NASDAQ Proposal noted, the heightened investor focus on diversity demonstrates that a company's homogenous boardroom is perceived as a competitive disadvantage.[44]

C. The Lack of Reliable Measures of Diversity Harms Latinos and other Minorities

Currently, a lack of reliable and consistent data makes the measurement of diversity at the board and C-Suite level difficult and often incomplete. For the Latinx community, the lack of transparent information on diversity is particularly problematic, as it impedes the candidacy of Latinos who are currently serving as directors and it leads to Latinos in general being ignored in the search for diversity by boards. Many board candidates are in fact recruited from other boards.

Unlike other underrepresented groups, Latinx individuals, given the wide scope of internal diversity within the community, are not easily accounted for or identified through SEC filings. Names and even photos are often not reliable in identifying Latinos. Latinos embody all races, often mixed, and there is not a uniform look or appearance. Investors and companies have often resorted to faulty methodologies like attempting to use last names as an indicator for Latino ethnicity when assessing board composition.[45] With the information to be provided through the NASDAQ Proposal, investors can more easily assess the implications of the company's breadth of diversity or lack thereof (e.g., the presence of Latinx and other minority directors) to future performance and to help inform their investment decision.

Disclosure may also spur companies to take action by not only seeking to diversify its boardroom, but by ensuring that Latinx candidates are part of the diversity recruitment that may be undertaken. Specific disclosures related to the diversity backgrounds of candidates will also produce better and more accurate data and analysis regarding underrepresented minorities within companies.[46]

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42. *See* Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 (Dec. 23, 2009).

43. U.S. Securities and Exchange Commission Staff Accounting Bulletin No. 99 – Materiality, 17 C.F.R. §211, Sbpt. B (Aug. 12, 1999) (per the SEC, companies must therefore disclose information that is material, which is any matter where there is a substantial likelihood that a reasonable person would consider it important).

44. *See* Proposal at 137.

45. A Hispanic last name like Garcia, for example, may be due to marriage.

46. SEC disclosure requirements have "led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. . . . And the current state of disclosure

NASDAQ's Proposal reflects the increasing need for information related to underrepresented minorities within corporate boardrooms. As Commissioner Allison Herren Lee recently noted, diversity correlates to enhanced performance of companies (by up to 36% in profitability), reduced reputational risks, and better return on investments.[47] Lower diversity results in higher stock volatility and riskier financial policies.[48]

Accordingly, lack of disclosure is one of the greatest barriers to increased boardroom diversity. The NASDAQ's Proposal is very much in line with a growing movement across the financial services sector to encourage companies to disclose diversity statistics. Recently, in response to investors, half of the largest 100 publicly traded companies in the United States have agreed to make publicly available data that is similar to the NASDAQ's disclosure: EEO-1 data information on racial, ethnic, and gender make-up of their workforce that is reported to the Equal Employment Opportunity Commission.[49]

IV. Conclusion

The Latinx community is the fastest growing labor and consumer force in the United States, yet severely underrepresented among Fortune 500 and 1000 boards and other public companies, and often forgotten when assessing director diversity. NASDAQ's Proposal will assist significantly in ensuring that diversity statistics are transparently disclosed and in providing extremely important information to inform all investors in their decision making. Additionally, for those corporations that seek to improve the quality of their board diversity with Latinx representation, the NASDAQ Proposal will assist in that goal being accomplished. Investors have often pointed out that the current disclosure standard is too vague to effectively assess diversity. Indeed, ascertaining diversity metrics today is very much unguided guesswork.

Accordingly, LCDA respectfully urges the SEC to approve the NASDAQ's Proposal. This Rule will benefit all investors, provide investor demanded transparency with respect to board diversity, and ultimately improve the functioning of the markets.

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reveals the shortcomings of a principles-based materiality regime in this area. (*See* Proposal at 172, comments of SEC Commissioner Lee).

47. *See* Proposal at 16-17.

48. *See* Commissioner Allison Herren Lee, *Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference* (September 22, 2020), available at: https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922.

49. *See* Leslie P. Norton, Barron's, *50 Percent of 100 Largest U.S. Public Companies Agree to Release Key Diversity Data*, Dec. 17, 2020, available at: https://www.barrons.com/articles/largest-public-companies-to-release-diversity-data-51608204600.

Respectfully Submitted,

Esther Aguilera

By: Esther Aguilera
President & CEO

[redacted]

Roel C Campos

By: Roel C. Campos
Chair of the Board
Former SEC Commissioner

Latino Corporate Directors Association
[redacted]

EXHIBIT A

I. The Authority of an Exchange to Impose Listing Requirements

NASDAQ is within its delegated authority to issue the proposed Rule.[50] NASDAQ has broad discretionary authority over the initial and continued listing of securities within the exchange in order to maintain quality and overall public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.[51]

As the Commission has previously noted, it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Securities Exchange Act that are designed to approve transparency and accountability into corporate decision-making and promote investor confidence in the integrity of the securities markets.[52]

It has long been established that an SRO like NASDAQ are authorized by Congress to "promulgate and enforce" rules governing the conduct of its members.[53] NASDAQ can enforce rules designed to "remove impediments to and perfect the mechanism" of a free and open market and a national market system.[54] NASDAQ asserts that Rule 5605(f) and 5606 are not designed to permit unfair discrimination between issuers, which would directly violate Section 6(b)(5) of the Securities Exchange Act.[55] SROs like NASDAQ have broadly delegated authority to create and enforce rules for its members where related to the function of the regulatory system, interpreting securities laws and monitoring compliance of members.[56]

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50. *See* Proposal at 48-50 and 84-86.

51. 15 U.S.C § 78(b)(1-8).

52. Order Granting Accelerated Approval of a Proposed Rule Change, 81 Fed. Reg. 44,400, 44,403 (July 7, 2016).

53. *See* Barbara *v. New York Stock Exchange Inc.* 99 F. 3d. 49, 51 (2nd. Cir. 1996).

54. 15 U.S.C § 78(b)(5).

55. *Id*.

56. *See for example In Re NYSE Specialists Securities Litigation*, 503 F. 3d 89 (2nd. Cir. 2007), holding that SROs "stand in the shoes" of the SEC in interpreting the securities laws for members and in monitoring compliance with these laws. *See also D'Alessio v. New York Stock Exchange, Inc.* 258 F. 3d 93, 105 (2d. Cir. 2001), holding that SROs effectively stand in for the SEC because they perform regulatory functions that would otherwise be performed by the SEC and as a result, SROs are rightly considered quasi-governmental organizations.

The Commission has encouraged exchanges to adopt stronger corporate governance listing standards in order to enhance investor confidence in the securities market.[57] While the SEC cannot mandate board diversity, in February 2019, the SEC demonstrated some concern with diversity and released two Compliance and Disclosure Interpretations guiding disclosure requirements where a director or board nominee self identifies as having a specific diverse background.[58] Previously, the Commission adopted a rule requiring companies to disclose whether their nominating committees consider diversity and if they have such a policy, how its effectiveness is assessed.[59] Former Commissioner White stated that companies reporting under the 2009 requirements were generally vague in their disclosures and little had changed in the seven years since the rule was enacted.[60] This indicates a strong need for exchanges like NASDQ to create concrete rules governing disclosure of diversity statistics for directors. As NASDAQ emphasized in its proposal, other SEC commissioners have stated recently that increased diversity disclosure is a key step in achieving greater board room diversity, especially for people of color.[61]

II. "Disclosure or Explain Standard"

Moreover, the Proposal avoids the imposition of mandates and employs the "disclose or explain" mechanism that the SEC has continuously sanctioned and used in issuing its own rules. Companies are required to disclose data utilizing a uniform, transparent framework
or in their proxy statement under Rule 5606.[62]

The Proposal alternatively allows companies to explain why they cannot meet diversity requirements and still continue to participate in the exchange and protects directors who do not wish to publicly self-identify, which suggests that the proposed rule is in no way a mandate for continued or new participation within the exchange.

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57. *See* Order Approving Proposed Rule Changes, 68 Fed. Reg. 64, 176 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SRNASD-2002-139, and SR-NASD-2002-141)

58. *See* Regulation S-K, Questions and Answers of General Applicability September 21, 2020, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#116-11. (Question 116.11 and 133.13).

59. *See* Statement of Mary Jo White, Keynote Address, International Corporate Governance Network Annual Conference: Focusing The Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP and Sustainability, June 27, 2016, available at https://www.sec.gov/news/speech/chair-white-icgn-speech html (referring to SK rule Release No. 33-10064 (Apr. 13, 2016)).

60. *Id*.

61. *See* Proposal at 48.

62. *See* Proposal at 50.

Indeed if a company's board does not believe diversity will improve its board's performance, or that it will take a longer period to achieve diversity goals, it can explain the basis of that position. Both the Exchange and investors could reasonably be persuaded.

EXHIBIT B

I. Criticism of the NASDAQ Proposal is not grounded in Fact.

Critics of the Proposal have argued that the new rules would be prohibitive to the majority of investors because there is no clear pipeline or pool of qualified minority executives that could serve as directors. This is an old excuse that simply indicates a lack of intentionality. With respect to Latinos, for example, LCDA's research found that there are approximately 3,800 qualified Latinx C-suite executives working in or recently retired from publicly traded or large publicly held companies.[63] Additionally, there are approximately 17,000 qualified Latinx individuals in executive positions in private companies.[64] Approximately 21,000 board seats are open today across U.S. publicly traded companies. Thus, there is arguably a qualified Latinx candidate for each of these open board seats. Further, under the Proposal, companies are given 2-5 years to prepare for disclosure requirements, thus have sufficient time to institute recruiting and preparing and adopting diversity policies and practices to comply with the proposed rules. We understand that a similar pipeline exists for African Americans and other minorities.

Sadly, the often heard refrain, "We would like to have Latinos or minorities on our board, but we just cannot find qualified minorities," is a cover-up for lack of intentionality. Recruiters are adept at finding diverse candidates when asked. Moreover, organizations such as LCDA and others are available to share and identify qualified candidates from their pipeline.

Others have argued that the Proposal is an internal push by NASDAQ that does not reflect the desires or needs of investors. To the contrary, investors desire the data because numerous studies referenced above have shown that diverse boards perform better. They better avoid group think, lessen the incidence of fraud, and help deliver better financial performance by their companies. Investors seek every edge possible to improve the likelihood of high returns from the securities of the companies in which they invest. This sentiment is echoed by the initiatives undertaken by major investors, as previously discussed, to ensure that this data is available to better assess prospective investment decisions.

Finally, certain critics believe that that the Proposal serves as an overreach by NASDAQ, which pushes a social agenda or attempts to engage in activism beyond its mandate to enforce

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63. Data collected internally by LCDA using publicly available data from Institutional Shareholder Services (ISS), McKinsey, Equilar, BoardEx, and LinkedIn.

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compliance with existing securities laws. However, NASDAQ is acting well within its authority under Section 6(b)(5) of the Securities Exchange Act. It is in no way attempting to manipulate competition or negatively impact capital formation among investors.[65] The Proposal is not a mandate that listed companies diversify their boards or face de-listing nor does it create a *de facto* quota system. Rather, the proposal merely requires companies to disclose information on its level of diversity or explain why it was unable to meet the aspirational goals in the Proposal.

The disclosure of skills, qualifications, and ethnic and racial composition has slowly become commonplace and is interconnected with the trends shaping business, including technology, globalization, consumer preferences, and business strategy. Moreover personal characteristics of race and ethnicity are on a voluntary basis by individual directors. As with environmental initiatives, cyber-security standards, and even safety protocols during the pandemic, having rules in place that ensure corporate action on diversity and inclusion to meet investor demands will serve to the long-term benefit of the market and society, as a whole. The continued efforts of both investors and companies to diversify its leadership, and to provide critical data to the market with respect to diversity and inclusion, is bolstered through this Proposal.

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65. *See* Proposal at 23.