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January 6, 2021

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090
Email: rule-comments@sec.gov

Re: **File Number SR-NASDAQ-2020-081**
Proposed Rule Change to Adopt Listing Rules Related to Board Diversity

Dear Ms. Countryman:

Olshan Frome Wolosky LLP ("Olshan") is pleased to submit its comments to the Securities and Exchange Commission ("SEC") regarding The Nasdaq Stock Market LLC's ("Nasdaq") proposed listing rules related to board diversity set forth in proposed Nasdaq Rules 5605(f) (Diverse Board Representation) and 5606 (Board Diversity Disclosure) (the "Proposed Rules"). Olshan supports the Proposed Rules given its strong belief that the investment community and public interest as a whole would be best served by a national market system such as Nasdaq encouraging meaningful and broad diversity on public company boards while requiring companies to provide uniform and transparent statistical information regarding diversity among its board members.

Olshan Shareholder Activism Practice

Olshan's Shareholder Activism Practice Group is widely recognized as the nation's premier legal practice in representing activist investors in contested solicitations. We have vast experience counseling clients on a wide variety of activist strategies, from election contests, consent solicitations and hostile takeovers to letter writing campaigns and behind-the-scenes discussions with management and boards of directors. We are consistently ranked as the leading legal advisor to activist investors by various publications that cover shareholder activism, including Activist Insight Monthly, The Deal Activism League Table, FactSet SharkRepellent, The Legal 500 United States Guide and Refinitiv Global Shareholder Activism Scorecard. Notably, our clients have been responsible for the replacement and appointment of more than 1,000 public company directors across the globe over the past decade, giving us a unique perspective on the diversity profiles of boards that have been subject to activist campaigns as well as the director candidates these activists have enlisted to replace incumbent directors.

Overview of Proposed Rules

If approved by the SEC, Proposed Rule 5605(f) would require all Nasdaq-listed companies to include a minimum number of individuals on their boards of directors who self-identify in one or more of the following "Diverse" categories: female, underrepresented minority or LGBTQ+. Specifically, Nasdaq-listed companies, subject to certain exceptions, would be required within the time frame set forth below (A) 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 (B) to explain why the company does not have at least two directors on its board who self-identify in the Diverse categories listed above. Each company, subject to certain exceptions, listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least one such Diverse director no later than two calendar years after Proposed Rule 5605(f) is approved by the SEC and at least two Diverse directors no later than four calendar years after such approval date. Each company, subject to certain exceptions, listed on The Nasdaq Capital Market must have, or explain why it does not have, at least one Diverse director no later than two calendar years after such approval date and at least two Diverse directors no later than five calendar years after such approval date.

Proposed Rule 5606 would require all 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+.

Olshan Strongly Supports Proposed Rules

Volumes of empirical studies have shown a correlation between diverse boards and improved results and outcomes that benefit shareholders, employees and other stakeholders. Specifically, diverse voices within boardrooms promote the exchange of fresh and unique perspectives and a more creative and dynamic approach to addressing complex issues and strategic decision-making, which in turn lead to improved operational, financial and corporate governance performance.

We agree with Nasdaq that the growing "heightened focus" on board diversity by institutional shareholders such as BlackRock, Vanguard and State Street who have been extremely vocal about their board diversity expectations, proxy advisory firms such as Institutional Shareholder Services and Glass Lewis who have built specific board diversity criteria into their voting guidelines and state legislatures such as California and Washington who have recently enacted board diversity and disclosure requirements for companies headquartered in their respective states "demonstrates that investor confidence is enhanced when boardrooms are comprised of more than one demographic group."

From our own perspective representing shareholder activists who, by their very nature, engage in extensive discourse with public company boards, we have seen first-hand how diverse boards generally take a more constructive and thoughtful approach in their interaction with shareholders. Based on our experience, diverse boards tend to exhibit a lower propensity to engage in entrenchment and other value-destroying tactics and are more receptive to outside views on ways to maximize shareholder value.

Accordingly, although companies have been making commendable strides bringing members of underrepresented communities into the boardroom (in large part due to the efforts of shareholder activists), we support Nasdaq's view that through the Proposed Rules "the national market system and the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards." Furthermore, we generally believe the tiered phase-in period during which companies will be required to have two Diverse directors under Proposed Rule 5605(f) is generous and will not be unreasonably burdensome to companies. In fact, we believe it would be appropriate for the proposed phase-in period to be compressed by one year (*i.e.*, companies listed on The Nasdaq Global Select Market or The Nasdaq Global Market would need to have, or explain why they do not have, at least one Diverse director within one year (instead of two years) and at least two Diverse directors no later than three years (instead of four years) and companies listed on The Nasdaq Capital Market would need to have, or explain why they do not have, at least one Diverse director no later than one year (instead of two years) and at least two Diverse directors no later than four years (instead of five years) after the approval date). During the 2019 and 2020 proxy seasons, our shareholder activist clients were responsible for the appointment of approximately 85 diverse director candidates to public company boards. We believe these numbers further reinforce the notion discussed by Nasdaq that "if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand."

We also agree with Nasdaq that public companies do not provide consistent disclosure of board diversity data on a "sufficiently widespread basis" and, as a result, investors do not have the ability to easily analyze and compare company boards from a diversity profile standpoint. Especially during this day and age of heightened investor focus on board diversity and inclusion efforts as critical components of the investment decision making process, we believe investors should have access to more robust and uniform data regarding a company's board diversity. As Nasdaq cogently observes, "investor confidence is undermined" when boardrooms are "homogeneous" and when "transparency about such [inclusion] efforts is lacking."

We believe the statistical information regarding the race, ethnicity and gender identity among company directors will have the desired effect of improving transparency and allowing investors to make more informed investment decisions while allowing

Nasdaq to assess whether the diversity objectives of Proposed Rule 5605(f) have been met. The Board Diversity Matrix disclosure format that would be required by the rule is relatively simple and straightforward and should not be overly burdensome for companies to prepare. Notably, Nasdaq exhibits sensitivity towards the likelihood that some directors may prefer not to disclose particular diversity identifiers by building in "Undisclosed" categories within the proposed matrix.

Critics of the Proposed Rules have asserted that Nasdaq is attempting to force its own politics upon its membership through these requirements and should not be involved in a company's personnel decisions. We agree with Nasdaq's public response that such criticism is misguided. The Proposed Rules would not impose diversity quotas on company boards, as alleged by these critics, but instead would enhance transparency to shareholders. As stated clearly in the Proposed Rules release, a company that chooses not to have one or two diverse directors on its board within the applicable timeframe (*e.g.*, because the board's philosophy regarding diversity differs from the diversity objectives set forth in the rule) would have the option of explaining its decision, thus "preserv[ing] each company's decision-making authority over its board while advancing an important dialogue among its shareholders."

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We appreciate the opportunity to share our perspectives on the Proposed Rules. Please feel free to contact Steve Wolosky, Andrew Freedman, Elizabeth Gonzalez-Sussman or Ron S. Berenblat at (212) 451-2300 if you would like to discuss any of the foregoing in further detail.

Very truly yours,

Olshan Shareholder Activism Group