National Investor Relations Institute

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December 30, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (Release No. 34-90574; File No. SR-NASDAQ-2020-081)

Dear Ms. Countryman:

The National Investor Relations Institute (NIRI) submits this comment letter to express support for the goals of the proposed listing standards on board diversity submitted by the Nasdaq Stock Market LLC.

Founded in 1969, NIRI is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. Our more than 3,000 members represent over 1,600 publicly held companies and $9 trillion in stock market capitalization. Our members play a vital role in engaging with institutional investors on proxy voting matters, including on shareholder proposals that seek more board diversity.

NIRI's Support for Diversity Disclosure

NIRI has long recognized the importance of diversity in helping companies, their management, and board teams better understand the needs of their investors, customers, employees, community members, and other stakeholders. When compared to most other corporate positions, women have been statistically well-represented within the investor relations (IR) profession (accounting for approximately 45 percent of respondents in NIRI's surveys of corporate IR practitioners since 2008).

Nonetheless, we believe that greater racial and ethnic diversity is warranted in U.S. public companies, including in IR positions, and we agree that public companies need to do a much better job in recruiting candidates from underrepresented minority groups to serve in corporate leadership positions and on public company boards.

In March 2019, NIRI signed a joint letter led by the National Association of Manufacturers that expressed support for the Equality Act, which would amend Title VII of the Civil Rights Act to provide employment non-discrimination protections based on sexual orientation and gender identity. A year later, NIRI's Board of Directors adopted a goal of creating a "welcoming environment" for all IR professionals. In June 2020, NIRI's Board created a Diversity & Inclusion Task Force to advance that goal within NIRI.

In July 2020, NIRI signed a joint letter led by the U.S. Chamber of Commerce that asked the U.S. Senate to pass H.R. 5084, the "Improving Corporate Governance through Diversity Act of 2019," which would require corporate disclosure of the racial, ethnic, gender, and veteran status for executive officers and directors.

Obviously, more needs to be done to promote greater diversity within the senior leadership and boards of public companies, and we welcome Nasdaq's efforts to develop a market-based approach to encourage more corporate disclosure on diversity and the appointment of additional diverse candidates. [1] We fully agree with Nasdaq's observation that public companies would benefit from "an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls."[2] [3]

As Nasdaq observes in its proposal, there have been growing demands from institutional investors for more standardized disclosure from companies on board diversity. Nasdaq cites the voting policies of Vanguard, BlackRock, State Street, and the New York City Comptroller as well as a September 2020 survey by Institutional Shareholder Services (ISS). In that ISS survey, almost 60 percent of institutional investor respondents said boards "should aim to reflect the

[1] NIRI also believes that IR profession is a great source of potential candidates to help companies diversify their boards. For instance, within NIRI's Senior Roundtable group or the list of past recipients of NIRI's Fellows recognition, there are many well-qualified female IR professionals who would be a great asset to a corporate board, but they have been overlooked by director search firms because they do not currently serve on a corporate board. Likewise, we encourage search firms to reach out to other professional organizations, such as the Executive Leadership Council, to learn about additional qualified candidates from diverse backgrounds.

[2] In support of its proposal, Nasdaq cites academic studies that demonstrate how diversity contributes favorably to shareholder value, investor protection, and better decision-making. Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, at 14-30, available at: https://www.sec.gov/rules/sro/nasdaq/2020/34-90574.pdf.

[3] In its comment letter, FCLT Global, a proponent of long-term investing, concludes: "Our research confirms Nasdaq's assertion that 'there is a compelling body of credible research on the association between economic performance and board diversity.'" See FCLT Global, Comment Letter, December 18, 2020, available at: https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8159463-226899.pdf.

company's customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups."[4]

NIRI's Views on Nasdaq's Proposal

NIRI, like other representatives of the business community, traditionally has been skeptical about "one size fits all" disclosure mandates or overly prescriptive SEC rules that try to address societal problems, such as the "conflict minerals" disclosure mandate and the CEO pay ratio rule that were required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

NIRI generally favors principles-based disclosure rules that allow for flexibility to account for industry differences and seek to reduce compliance burdens for smaller companies. We are pleased to see that Nasdaq has taken this approach with its diversity disclosure proposal. While some news media reports have labeled Nasdaq's proposal as a diversity mandate, Nasdaq describes its proposed Rule 5605(f)(2) as a "have or explain" listing standard that will help improve disclosure and engagement. As Nasdaq explains in a summary of its proposal:

> *The goal of the proposal is to provide stakeholders with a better understanding of a company's current board composition and enhance investor confidence that our listed companies are considering diversity in the context of selecting directors, either by including at least two diverse directors on their boards or by explaining their rationale for not meeting that standard.*[5]

It is worth noting several key points about Nasdaq's diversity disclosure proposal:

1. The primary intent of Nasdaq's proposal is to promote better disclosure. Under proposed Rule 5606, companies would disclose their diversity data in aggregate form through a Board Diversity Matrix[6] within one year of SEC approval of Nasdaq's proposal. No individual directors would be identified as members of a particular "underrepresented minority" group or as LGBTQ+, which should help address privacy concerns.
2. No listed company would be required to change its board composition under Nasdaq's "have or explain" approach. Issuers would have the option of providing their own explanation on their website (or in a proxy filing) if they decide not to appoint at least two diverse directors. For instance, a company could simply state that it uses a different

[4] ISS, "Americas: Proxy Voting Guidelines Updates for 2021" (November 12, 2020), at 6, available at: https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

[5] Nasdaq, "Board Diversity Disclosure: What Nasdaq-Listed Companies Should Know," December 11, 2020, available at: https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf.

[6] Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Exhibit 3, at 259-261, available at: https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Matrix.pdf.

definition of diversity than Nasdaq or considers other characteristics when recruiting board members. Nasdaq, which provides several examples of such explanations in its online Listing Center FAQs on its proposal, said it "will not assess the substance of the company's explanation but will verify that the company has provided one."[7]

3. The Nasdaq proposal provides companies more flexibility than the voting policies adopted by the two major U.S. proxy advisory firms[8] [9] or the requirements of California's board diversity laws.[10] Under Nasdaq's proposal, most companies would have **four years** (from the date of SEC approval) to appoint at least two diverse directors or publicly disclose their reasons for not doing so. Companies listed on Nasdaq's Capital Market would receive an additional year. Unlike Nasdaq, California and the proxy advisors do not provide an "explain" option for companies.
4. The Nasdaq proposal provides additional flexibility for smaller reporting companies and foreign issuers, which could appoint two female directors (or one female and one director who self-identifies as an "underrepresented minority" or LGBTQ+) or disclose their reasons for not doing so.
5. Nasdaq said it plans to aid listed companies with their board composition planning objectives through a partnership with Equilar, a corporate leadership data provider.

While some companies may question the feasibility of meeting Nasdaq's diversity goals (or explaining their board selection policies) or believe that diversity should not be part of an exchange listing standard, we believe that the potential benefits from Nasdaq's proposal would outweigh these concerns.[11]

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[7] *See* Nasdaq, Listing Center FAQs on Nasdaq's Board Diversity Rule Proposal, Identification #1771, available at: https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ&cid=157&sub_cid=&years=2020&criteria=1&materials#.

[8] ISS recently adopted a new proxy voting policy, which takes effect in 2022, that calls for generally recommending against nominating committee chairs at U.S. public companies that have no apparent racial or ethnic diversity on their boards. ISS also plans to recommend against nominating committee chairs at companies that have no female board members in 2021. *See* ISS, "Americas: Proxy Voting Guidelines Updates for 2021," at 5-9.

[9] Glass Lewis, which already recommends against nominating committee chairs on U.S. corporate boards with no women, plans to "note as a concern" those companies that do not have at least two female board members in 2021 and then generally recommend against nominating committee chairs at those companies in 2022. *See* Glass Lewis, "2021 Proxy Paper, Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice," at 26-27, available at: https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf.

[10] Under laws adopted by California in 2018 (SB 826) and 2020 (AB 979), public companies headquartered in the state must have at least two female board members and one director from an "underrepresented community" by the end of 2021. The standards are stricter for companies with larger boards. *See* Fenwick & West LLP, "New Law Requires Diversity on Boards of California-Based Companies," *Harvard Law School Forum on Corporate Governance*, October 10, 2020, available at: https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/.

[11] However, NIRI has concerns that the "overboarding" voting policies of some institutional investors and the proxy advisors (which limit directors to a certain number of public company board seats) will make it more challenging to

Thank you for your consideration of our views on this matter.

Sincerely,

Gary A. LaBranche, FASAE, CAE
President & CEO
National Investor Relations Institute

improve board diversity, as there will be more issuers trying to recruit female and diverse candidates from the current pool of board directors. Over time, board search firms will identify additional diverse candidates who would be first-time directors, but that process may take several years to meet the recruitment demands of U.S. public companies. NIRI encourages institutional investors to make exceptions to their “overboarding” policies when voting on diverse directors who join the boards of Nasdaq-listed companies over the next four years.