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February 5, 2021

Via E-mail (rule-comments@sec.gov)

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

Re: The Nasdaq Stock Market LLC; Comments on 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:

Ballard Spahr LLP represents The Nasdaq Stock Market LLC ("Nasdaq," or the "Exchange"), and submits this letter on behalf of Nasdaq to address certain comments submitted to the Commission concerning Nasdaq's proposed listing Rules 5605(f) and 5606, and to update Rule 5615 and IM-5615-2 (Foreign Private Issuers) and Rule 5810(c) (Types of Deficiencies and Notifications) to incorporate references to the proposed rules related to board diversity (collectively, the "Proposed Rules").[1]

Specifically, as set forth in greater detail below:

(i) Title VII of the Civil Rights Act of 1964 ("Title VII") does not apply to the Proposed Rules because most directors of Nasdaq-listed companies are not employees, and even if Title VII did apply, the Proposed Rules do not discriminate or encourage discrimination because the proposed board diversity objectives are aspirational and not mandatory;

[1] The proposed rules were published for comment in the *Federal Register* on December 11, 2020. Securities Exchange Act Rel. No. 90574 (Dec. 4, 2020), 85 Fed. Reg. 80472 (Dec. 11, 2020) (the "Notice").

(ii) constitutional arguments against the proposed rule fail for the threshold reason that Nasdaq is not a state actor, and the Proposed Rules do not constitute state action subject to constitutional scrutiny; and

(iii) even were Nasdaq a state actor, the constitutional arguments raised by some commenters do not have merit in any event because:

a. the Proposed Rules meet any potentially applicable Equal Protection requirements and self-identification by individuals is voluntary; and

b. the Proposed Rules do not constitute compelled speech under the First Amendment because they serve a fundamentally commercial interest.

Nasdaq will address other comments concerning the Proposed Rules in a separate submission.

I. BACKGROUND

A. The Proposed Rules

Proposed Rule 5606 would require all Nasdaq-listed companies to disclose statistics regarding the diversity of their boards of directors. For the sake of consistency and comparability among all listed companies, the proposed rule sets forth a uniform definition of diversity and prescribes a template matrix for the disclosures.

In addition, proposed Rule 5605(f) would require most Nasdaq-listed companies to have, or explain why they do not have, at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority[2] or LGBTQ+.

To be clear, the Proposed Rules do not ***require*** any particular board composition. Rule 5605(f) sets forth aspirational diversity ***objectives*** – not quotas, mandates, or set asides. Companies that do not meet the diversity objectives need only explain why they do not. As set forth in Nasdaq's Notice, "Nasdaq would not assess the substance of the company's

[2] Proposed Rule 5605(f)(1) defines "underrepresented minority" as being "consistent with the categories reported to the Equal Employment Opportunity Commission ("EEOC") through the Employer Information Report EEO-1 Form ("EEO-1 Report"), an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities."

explanation, but would verify that the company has provided one."[3] Notice at 80488. By way of example, a company's explanation could include scenarios in which a diverse director resigned before their term expired; the listed company is subject to different state or local board diversity standards and has opted to or is obligated to follow those requirements; or the listed company would meet the diversity objectives based on a broader definition of diversity (*e.g.*, a definition that includes People with Disabilities or veterans).

The Proposed Rules do not require that a company select directors based on any criteria other than an individual's qualifications for the position. Indeed, there is no penalty for not achieving the diversity objectives. Rather, in recognition of the governance and performance benefits of board diversity, the Proposed Rules establish aspirational diversity objectives, and seek to strengthen the securities markets by empowering the investing public with consistent, readily accessible information about the diversity of Nasdaq-listed company boards.

B. The Public Comments

To date, 162 substantive comment letters have been filed concerning the Proposed Rule. Of them, the overwhelming majority (86%) of commenters – including Nasdaq-listed issuers and investors – have expressed support for the Proposed Rules. The supportive comments include the following:

- "Women, particularly women of color, remain woefully underrepresented on boards and in leadership. Research suggests that companies with greater diversity increase their ability to retain top talent, increase shareholder engagement, better serve their customer base by reflecting diverse perspectives, and enjoy higher levels of innovation, creativity, and effectiveness;"[4]

- "Initiatives like this can help increase disclosure and transparency around diversity numbers on corporate boards and provide investors with the

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[3] Proposed Rule 5605(f)(2) requires a company that does not meet the diversity objectives to specify the objectives from the rule and to provide some explanation. Thus, "it would not satisfy Rule 5605(f)(3) merely to state that 'the Company does not comply with Nasdaq's diversity rule.'" Notice at 80488.

[4] Comment, Lorraine Hariton, President & Chief Executive Officer, Catalyst, at 1 (Dec. 18, 2020).

necessary data they need to better integrate diversity in other engagement efforts;"[5]

- "We commend Nasdaq for providing companies with the opportunity to increase board diversity through this disclosure-based, business-driven approach rather than implementing a strict quota;"[6]

- "[W]e share the view that diverse boards tend to make better decisions and support better financial performance of the companies they govern. . . . [D]iverse boards help companies to be more aligned with, and relevant to, an increasingly diverse set of customers, employee and talent pools;"[7] and

- "As a Nasdaq-listed issuer, . . . [w]e believe that, by giving companies adequate time to phase in changes to their boards and applying a comply-or-explain framework . . . [the proposal] encourages companies to increase board diversity without mandating a one-size-fits-all approach. . . . [As a] global asset manager, . . . we have found that insufficient board diversity increases the risk that a company will become less competitive over time, which will impact performance. . . . [The proposal] would improve our ability, as an asset manager, to obtain and analyze board diversity data in a standardized format."[8]

This letter addresses the assertions of 17 commenters that the Proposed Rules raise constitutional or discrimination concerns.[9] Notably, only one such comment was submitted

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5 Comment, Fiona Reynolds, CEO, Principles for Responsible Investment, at 1 (Dec. 18, 2020).

6 Comment, Jay Huish, Executive Director, Mr. William J. Coaker Jr., Chief Investment Officer, San Francisco Employees' Retirement System, at 2 (Dec. 18, 2020).

7 Comment, Robert W. Lovelace, CEO, Capital Research and Management Company, at 2, 3 (Dec. 22, 2020).

8 Comment, William J. Stromberg, President & CEO, and David Oestreicher, General Counsel & Corporate Secretary, T. Rowe Price, at 1, 2 (Dec. 29, 2020).

9 A few commenters expressed a concern that the Proposed Rules create a risk of litigation initiated by: (i) listed companies, on the basis that the Proposed Rules will require them to engage in unlawful discrimination; (ii) investors in listed companies alleging that the Proposed Rules require the companies to engage in unlawful

by a Nasdaq-listed company that would be subject to the Proposed Rules.[10] The others were submitted by advocacy or other non-governmental organizations;[11] individuals;[12] and institutional investors.[13]

II. THE PROPOSED RULES DO NOT RUN AFOUL OF STATUTORY ANTI-DISCRIMINATION LAWS

A. Compliance with the Proposed Rules Would Not Violate Title VII

Certain commenters posit that the diversity objectives of the Proposed Rules would violate Title VII of the Civil Rights Act of 1964 ("Title VII"), or would encourage listed companies

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discrimination; or (iii) prospective directors who do not obtain board positions with listed companies and who might allege that the Proposed Rules prevented them from competing on equal footing with diverse candidates. *See* Comments from Justin Danhof & Scott Shepard, National Center for Public Policy Research, at 2 (Dec. 30, 2020) ("NCPLR Comment"); Thomas J. Fitton, President, Judicial Watch, Inc. at 2 (Dec. 29, 2020) ("Judicial Watch Comment"); Publius Oeconomicus, at 1, 11, 12 (Dec. 28, 2020) ("Publius Comment"). Nasdaq respectfully submits that concerns about such litigation risks should be assuaged by the analysis in this letter demonstrating that the theoretical claims contemplated by these comments would be without merit.

10 *See* Comment, Dennis E. Nixon, International Bancshares Corporation (dated Dec. 31, 2020) ("Nixon Comment").

11 *See* Comments from National Legal and Policy Center (Jan. 14, 2021) ("NLPC Comment"); David Burton, The Heritage Foundation (Jan. 4, 2021) ("Burton Comment"); Project on Fair Representation (Jan. 4, 2021) ("PFR Comment"); NCPLR Comment; Independent Women's Forum (Dec. 23, 2020) ("IWF Comment"); Judicial Watch Comment.

12 *See* comments from Leslye Killian (Jan. 6, 2021) ("Killian Comment"); Concerned America Executives (Jan. 2, 2021) ("CAE Comment"); Samuel Sloniker (Dec. 17, 2020) ("Sloniker Comment"); John Richter (Dec. 12, 2020) ("Richter Comment"); Walter Donnellan (Dec. 14, 2020) ("Donnellan Comment"); David Pusateri (Dec. 2, 2020) ("Pusateri Comment"); James Morgan (Dec. 4, 2020) ("Morgan Comment"); Eugene F. Kelly (Dec. 29, 2020) ("Kelly Comment").

13 *See* Comment, Matthew Glen (Dec. 31, 2020) ("Glen Comment"); Publius Comment.

to violate Title VII to remain on the Exchange.[14] Nasdaq respectfully disagrees for the reasons set forth below.

1. Title VII Is Inapplicable Because Most Directors Are Not Employees

As a threshold matter, Title VII – which protects employees against discrimination based on protected classifications, including race, color, religion, sex[15] and national origin – would not protect current or prospective ***independent*** directors because, by definition, they are not employees of the companies on whose boards they sit. *See* Nasdaq Rule 5605(a)(2) (excluding from the definition of "independent director" "an Executive Officer or employee of the Company"). *See also* EEOC, Section 2 Threshold Issues, "Partners, Officers, Members of Boards of Directors, and Major Shareholders," avail. at: https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-A-1-d ("In most circumstances, individuals who are . . . members of boards of directors . . . will not qualify as employees."). Case law has also examined whether, in the context of professional or closely held corporations, a large shareholder can be considered an employee, and applies a six-factor test for doing so.[16] *See Clackamas Gastroenterology Assocs, P.C. v. Wells*, 538 U.S. 440 (2003); *see also, e.g.*, *Mariotti v. Mariotti Bldg. Prods.*, 714 F.3d 761, 767-68 (3d Cir.

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[14] *See* Judicial Watch Comment at 2 n.4, 4; Kelly Comment at 1 n.1, 2; Richter Comment at 3; CAE Comment at 1; Nixon Comment at 3; Burton Comment at 2, 11, 14; NLPC Comment at 4-6. Certain other comments assert discrimination concerns without reference to Title VII. *See* Donnellan Comment; Pusateri Comment; Sloniker Comment; Killian Comment.

[15] For purposes of Title VII, "sex" includes sexual orientation and gender identity. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1743 (2020).

[16] These factors are: (i) whether the organization could hire or fire the individual or set the rules and regulations of the individual's work; (ii) whether and, if so, to what extent the organization supervised the individual's work; (iii) whether the individual reported to someone higher in the organization; (iv) whether and, if so, to what extent the individual was able to influence the organization; (v) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (vi) whether the individual shared in the profits, losses and liabilities of the organization. *Clackamas* applied these factors to a professional corporation.

2013); *De Jesus v. LTT Card Servs.*, 474 F.3d 16, 24 (1st Cir. 2007) (applying *Clackamas* to closely held corporations).[17]

The vast majority – 78% – of directors currently serving on the boards of Nasdaq-listed companies are independent, and companies would be free to meet proposed Rule 5605(f)'s diversity objectives solely with their current or additional independent directors, such that Title VII would never be at issue. *See also* Betty Moy Huber and Paula H. Simkins, Spencer Stuart Shows How Boards Are Transforming, Davis Polk Briefing: Governance (Oct. 30, 2019), avail. at: https://www.briefinggovernance.com/2019/10/spencer-stuart-shows-how-boards-are-transforming/ (independent directors occupied 85% of board seats at S&P 500 companies in 2019).

2. The Proposed Rules Do Not Violate or Encourage the Violation of Title VII

Even for the minority of directors who are not independent (*e.g.*, because they are company employees), and setting aside that any listed company could diversify its board through current or additional independent board member positions, the Proposed Rules would not, on their own, violate Title VII; nor would they encourage listed companies to engage in unlawful employment practices.[18] Again, nothing in proposed Rule 5605(f) mandates any particular composition of boards such that race, gender, ethnicity, or LGBTQ+ status dictates director selection. Indeed, there are no consequences for failing to comply with the diversity objectives of proposed Rule 5605(f). Instead, listed companies may disclose that their boards do not comply with the objectives and state why. As a result, compliance can be achieved even in the absence of any change to board composition. And even when companies do add one or more directors who meet the Proposed Rule's definition of diverse,

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17 While the governance structures of professional and closely-held corporations are generally quite different from those of public companies, application of the six *Clackamas* factors would, in any event, compel the conclusion that independent directors of public companies are not employees. Independent directors are not subject to their companies' employment policies; their removal is not governed by traditional employment standards or policies; the companies do not supervise their work – quite the contrary, they oversee the companies' management; they are expressly categorized as directors, not employees; and they typically do not share in the profits or losses of their companies.

18 As a practical matter, for the relatively small percentage of non-independent (and non-diverse) directors currently serving on boards, it is difficult to imagine how they would have a cause of action under Title VII given that the addition of a diverse director would in no way impact their current ability to serve.

such acts alone would not violate Title VII.[19] To the contrary, Title VII requires a plaintiff to prove that a company's decision not to extend a director position was "on account of" the plaintiff's race, color, religion, sex or national origin. *Bostock*, 140 S. Ct. at 1739 (finding that Title VII prohibits employers from taking certain actions "because of" or "on account of" someone's sex.). The non-mandatory nature of the Proposed rules puts that argument to rest, as does the fact that the majority of directors are not employees. Simply put, the plain text belies any suggestion that the Proposed Rules encourage discrimination.

In a similar vein, certain commenters posit that the Proposed Rules are a form of affirmative action and therefore discriminatory.[20] As a threshold matter, Nasdaq disagrees with the premise that the Proposed Rules are a form of affirmative action. The Proposed Rules are premised on the statistically-supported view that board diversity benefits companies and their shareholders. The Proposed Rules also identify diversity objectives that align with that premise. However, those facts alone do not convert the Proposed Rules into an affirmative action program. Rather, proposed Rule 5605(f) allows for explanation as a path to compliance, and, together with proposed Rule 5606's disclosure requirements, the Proposed Rules create a framework that provides the investing public with access to critical data and promotes an awareness of this important corporate governance issue. Nasdaq believes that this level of transparency will position companies better to prioritize the development of board-ready, diverse candidates for director positions. To that end, Nasdaq also is proposing to provide listed companies that have not yet met their diversity objectives with free access to a network of board-ready diverse candidates and related tools. Notice at 80475.

However, for the sake of responding to these comments, Nasdaq notes that affirmative action programs have long been held to be lawful when they are aspirational in nature – as are the diversity objectives of proposed Rule 5605(f). *See, e.g., Johnson v. Transp. Agency, Santa Clara Co.*, 480 U.S. 616, 626 (1987). Thus, while certain commenters argue that the Proposed Rules are discriminatory because they are akin to affirmative action programs, such a characterization, even if accurate, would not mean the Proposed Rules are unlawful.[21]

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19 Companies also may choose to expand the size of their boards to open greater opportunities to meet the diversity objectives of proposed Rule 5605(f).

20 *See* NLPC Comment at 5; Nixon Comment at 3; Richter Comment at 3; Judicial Watch Comment at 3.

21 Another commenter referred to 42 U.S.C. § 1981, which prohibits discrimination based on race and ethnicity in contracting. *See* Kelly Comment at 1 n.2. While not clear from the face of the comment, it appears that the concern is that the Proposed Rule could violate, or encourage listed companies to violate, Section 1981's prohibition against discrimination in contracting. Section 5605(f), however, in no

III. THE PROPOSED RULES ARE CONSTITUTIONAL

Certain comments raise constitutional issues of privacy and Equal Protection,[22] and one raises the issue of compelled speech.[23] This letter addresses the substance of those comments in turn. However, as a threshold matter, a reviewing court ought not reach the merits of such constitutional arguments because Nasdaq is not a state actor.

A. Nasdaq Is Not a State Actor

The Constitution regulates only the government, not private parties. *See, e.g.*, *Fabrikant v. French*, 691 F.3d 193, 206 (2d Cir. 2012). Thus, a plaintiff asserting a constitutional claim must first establish that the challenged conduct constitutes state action. *Id.* Well-developed case law establishes that self-regulatory organization rulemaking is not state action or fairly attributable to the state, absent specific compulsion or encouragement from the SEC that the SRO adopt the rule in question.

For an alleged constitutional deprivation to be state action, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Although some commenters suggest that Nasdaq is a state actor,[24] courts have

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way dictates with whom listed companies can contract for director positions. In any event, a plaintiff asserting a Section 1981 claim would also be obligated to prove that race was the "but-for cause" of the alleged injury – a very high burden, particularly because the Proposed Rules do not dictate that a listed company select any director based solely on their race. *See Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020).

22 For privacy arguments, *see* Publius Comment at 10; Donnellan Comment at 2; Richter Comment at 2; Nixon Comment at 5. For Equal Protection arguments, *see* NLPC Comment at 4-6; Burton Comment at 2-3, 12-16; PFR Comment at 13-15; Morgan Comment at 3; Judicial Watch Comment at 5-7; Publius Comment at 9-10.

23 *See* PFR Comment at 15-16.

24 *See, e.g.*, Burton Comment at 10 (stating, without authority, that "[m]any courts" have held that SROs are state actors). Mr. Burton cites an IRS memorandum concluding that a SRO is "a corporation serving as an agency or instrumentality of the government" within the meaning of Section 162 of the Internal Revenue Code. *See id*. at 12 (citing Internal Revenue Service, Memorandum No. 201623006, Office of Chief Counsel (June 3, 2016)). But whether an SRO is a state actor is a different question than whether it is an "agency" or "instrumentality" within the meaning of

uniformly concluded that SROs like Nasdaq are not state actors.[25] Because Nasdaq is not a state actor, the proposed rule cannot be not state action just because it is promulgated by Nasdaq in its capacity as a SRO.

One commenter suggests that SROs should be deemed state actors because SROs are afforded absolute immunity when they act consistently with their delegated quasi-governmental powers.[26] However, courts have concluded otherwise. For example, one court held that "it is by no means 'inconsistent' to find that, on the one hand, the [SRO] exercises insufficient state action to trigger constitutional protections in a case such as this, while nevertheless holding that the [SRO] is entitled to absolute immunity in the exercise of its quasi-public regulatory duties." *See Scher v. NASD*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005). Other courts have likewise decided that SROs are simultaneously not state actors for constitutional purposes and entitled to quasi-governmental immunity when facing claims for damages. *See Am. Benefits Group, Inc. v. NASD*, 1999 U.S. Dist. LEXIS 12321, at *23-25 (S.D.N.Y. Aug. 10, 1999) (dismissing constitutional claims against an SRO because it "is not a state actor in its role as a self-regulatory organization," while finding the SRO absolutely immune from a tortious interference claim arising from the SRO's exercise of its authority within the scope of its official duties); *Dobbins v. NASD*, 2007 U.S. Dist. LEXIS 61767 (N.D. Ohio Aug. 22, 2007) (holding that "[t]he absence of state action [by the SRO] requires dismissal of the constitutional claims" and that "NASD has absolute immunity for its regulatory acts and omissions"); *cf. Lowe v. Nat'l Ass'n of Sec. Dealers, Inc.*, 548 F.3d 110, 115 (D.C. Cir. 2008) (stating that the Exchange Act's structure "is suggestive both of an intent to create immunity for [delegated governmental] duties and of an intent to preempt state-law causes of action" against SROs). Thus, SRO immunity does not render Nasdaq a state actor.

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the tax code. *See Guardian Indus. Corp. v. Comm'r*, 143 T.C. 1, 12-19 (2014) (test for whether an entity is an "agency" or "instrumentality").

25 *See Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) ("NASD is a private actor, not a state actor"); *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (reciting the consensus that "the NASD itself is not a government functionary"); *United States v. Solomon*, 509 F.2d 863, 867-71 (2d Cir. 1975) (concluding that NYSE is not a state actor); *Santos-Buch v. Fin. Indus. Regulatory Auth., Inc*., 591 Fed. Appx. 32, 34 (2d Cir. 2015) (holding that an SRO "is not a state actor that can be held to constitutional standards"); *Marchiano v. NASD*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001) ("The court is aware of no case . . . in which NASD [d]efendants were found to be state actors . . . .").

26 *See* Burton Comment at 12.

B. The Proposed Rule Is Not Fairly Attributable to the State

Alternatively, private entities like Nasdaq may be held to constitutional standards if their actions are "fairly attributable" to the state. *See Lugar*, 457 U.S. at 937. Actions are fairly attributable to the state only if (i) there is "a sufficiently close nexus between the [s]tate and the challenged action," and (ii) the state has "exercised coercive power" or provided "such significant encouragement" that the choice must be "deemed to be that of the state." *Desiderio*, 191 F.3d at 206 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)).

SRO rulemaking, such as that at issue here, does not satisfy this test. The Second Circuit squarely considered this issue in *Desiderio*, in which the plaintiff challenged an arbitration clause contained in an NASD broker registration form as required by an SEC-approved NASD rule. Applying the *Blum* test, the court concluded that because there was no SEC rule or action encouraging the SRO to include an arbitration clause, there was no nexus between the state and the SRO's specific conduct. *Id.* at 207. The court also held that the SEC's approval of the registration form did not make the SRO's adoption of the form state action because "mere approval" of a private entity's action is not sufficient to justify holding the state responsible for that action. *Id*. (citing *Blum*, 457 U.S. at 1004). Along the same lines, a district court has held that the SEC's "role in reviewing exchange rules . . . does not make [those rules] the product of state action." *Cremin v. Merrill Lynch Pierce Fenner & Smith*, 957 F. Supp. 1460, 1468 (N.D. Ill. 1997). As was the case here, the SEC did not "encourage[] or coerce[] the exchanges to adopt" the rules challenged in *Cremin*. *Id.* Other courts have reached the same conclusion as to non-rulemaking SRO activity. *See, e.g.*, *Scher*, 386 F. Supp. 2d at 407-08 (an SRO "exercises insufficient state action to trigger constitutional protections"); *Meyers v. NASD*, 1996 U.S. Dist. LEXIS 6044, at *25-26 (E.D. Mich. Mar. 29, 1996) (rejecting proposed due process claim under 42 U.S.C. § 1983 on the grounds that "[t]he alleged conduct by the NASD . . . is not chargeable to any state").

Thus, the case law contradicts the commenters who argue that the "nature of the SEC's involvement in approving, superintending, and enforcing Nasdaq's exchange rules . . . make[s] SEC approval of the proposed rule state action."[27] As set forth above, the SEC's "mere approval" of a private entity's action like Nasdaq's proposed diversity listing rules does not convert the private entity's action into state action. *See Desiderio*, 191 F.3d at 207; *see also Cremin*, 957 F. Supp. at 1468. To establish state action, a plaintiff would have to show that the proposed rule is a choice that can be deemed that of the state. Here, as in *Desiderio*, there is no SEC rule or action requiring or encouraging Nasdaq to adopt the Proposed Rules beyond the generically applicable Exchange Act provisions with which all proposed SRO rules must be consistent. *See Desiderio*, 191 F.3d at 207. Thus, the Proposed Rules are not the product of state action.

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27 *See* PFR Comment at 12; *see also* Judicial Watch Comment at 5-6.

Certain commenters rely on a case holding that a rule promulgated by the Municipal Securities Rulemaking Board was "government action."[28] *Blount v. SEC*, 61 F.3d 938, 941 (D.C. Cir. 1995). That case is inapposite. In *Blount*, the court concluded that the rule in question was state action because it "operate[d] not as a private compact among brokers and dealers but as federal law," given that a violation of the MSRB rule by dealers could lead to revocation or suspension of their licenses to deal in securities, as well as federal criminal penalties.[29] *Id.* In contrast, Nasdaq's Proposed Rules are part of a private compact between Nasdaq and its listed companies. *See Graman v. NASD*, 1998 U.S. Dist. LEXIS 11624, at *10 (D.D.C. Apr. 24, 1998) (stating that *Blount* does not apply to SRO rules, which are a "private compact"). Companies that choose to be listed on Nasdaq agree to comply with its listing rules, which include corporate governance requirements like the proposed diversity rules.[30] In contrast to the consequences of a violation of the MSRB rule at issue in *Blount*, a company that fails to comply with Nasdaq's Proposed Rules here would not face federal criminal sanctions or any such penalties; rather, it would be provided an opportunity to cure the deficiency by the later of its next annual shareholders meeting or 180 days from the event that caused the deficiency. Notice at 80488.[31] Because the Proposed Rules are part of a private compact between private entities, *Blount* does not apply.[32]

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28 *See* Judicial Watch Comment at 5-6; PFR Comment at 11-12; NLPC Comment at 4.

29 It bears noting that the MSRB, unlike Nasdaq, was created by an act of Congress. *See* 15 U.S.C. § 78o-4(b). The *Blount* court thus considered it "questionable" whether the MSRB was a "purely private organization" at all. 61 F.3d at 941.

30 *See* Nasdaq Rules 5600, *et seq.*

31 "The company can cure the deficiency either by nominating additional directors so that it satisfies the Diversity requirement of proposed Rule 5605(f)(2) or by providing the disclosure required by proposed Rule 5605(f)(3). If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter. A company that receives a Staff Delisting Determination can appeal the determination to the Hearings Panel through the process set forth in Rule 5815." Notice at 80488

32 Judicial Watch also cites *N.Y. Republican State. Comm. v. SEC*, 927 F.3d 499 (D.C. Cir. 2019), for the proposition that the SEC's approval of the Proposed Rules would be state action. *See* Judicial Watch at 6. However, the rule at issue in that case was "identical in every constitutionally relevant way" to the MSRB rule in *Blount*. *See N.Y. Republican*, 927 F.2d at 510 (calling the two cases "indistinguishable"). *N.Y. Republican* is therefore inapposite for the same reasons as *Blount*.

In sum, arguments that the Proposed Rules are unconstitutional falter at the first hurdle: the Proposed Rules are not state action because Nasdaq is not a state actor, and the SEC's approval of the Proposed Rules would not convert them into state action.

C. The Self-Identification Aspects of the Proposed Rule Do Not Violate Constitutional Privacy Rights

Certain commenters assert "privacy" concerns associated with asking individuals to self-identify, with one commenter referring to self-disclosure as "bad policy" and "likely" unconstitutional.[33] However, the voluntary nature of the Proposed Rule allows any individual director to decline to self-identify, which would have no impact on a company's ability to comply. As set forth in the Notice, "Nasdaq does not intend to obligate directors to self-identify in any of the categories related to gender identity, race, ethnicity and LGBTQ+. Nasdaq believes that a director should have autonomy to decide whether to provide such information to their company. Therefore, Nasdaq believes that it is reasonable and in the public interest to allow directors to opt out of disclosing the information required by proposed Rule 5606(a) by permitting a company to identify such directors in the 'Undisclosed' category." Notice at 80495. In addition, "[a]ny director who chooses not to disclose a gender would be included under 'Gender Undisclosed' and any director who chooses not to identify as any race or not to identify as LGBTQ+ would be included in the 'Undisclosed' category at the bottom of the table." *Id.* at 80486.

For those who do elect to self-identify for one or more categories, their information would not be made public on an individual basis, but rather in the aggregate with the diversity characteristics of the entire board.

Moreover, voluntary self-disclosure is a regular practice in employment settings.[34] Since 1967, Title VII has mandated private employers with more than 100 employees to file with the EEOC an Employee Information Report (EEO-1), which is an annual compliance survey that provides a demographic breakdown of the employer's workforce by race/ethnicity, gender, and job category.[35] Employers subject to the EEO-1 requirement collect the information through self-identification by individual employees; however, if an employee

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33 *See* Publius Comment at 10; *see also* Donnellan Comment at 2; Richter Comment at 2; Nixon Comment at 5.

34 Public company directors are also accustomed to disclosing the personal information – including relevant family relationships, business experience, and involvement in certain legal proceedings – required by Item 401 of Regulation S-K. *See* 17 C.F.R. § 229.401.

35 Issued in 1965, Executive Order 11246 creates a similar construct for federal contractors.

declines to self-identify, there are no adverse consequences, and employers are directed that they may use observer identification.

The EEO-1 disclosure requirements do not violate constitutionally protected privacy interests. For example, in *EEOC v. Ass'n of Cmty. Orgs. for Reform Now*, No. 95-30347, 1996 U.S. App. LEXIS 44921, at *10 (5th Cir. Mar. 20, 1996), the Fifth Circuit held that the required use of the EEO-1 did not violate a non-profit organization's right to private association, right to expressive association, or organizational right to privacy. Specifically, the court relied on the fact that EEO-1 did not require the organization "to divulge the names, identities, or any other personal information about either its employees or members. Instead . . . the data comprise a statistical analysis of the racial and gender composition" of the workforce. *Id.* Like the longstanding EEO-1 program, Nasdaq's Proposed Rules allow for individual directors to decline to self-identify for one or more of the diversity categories, and do not ask companies to divulge, or even collect, the names, identities, or any other personal information about their directors. The disclosure requirements of the Proposed Rules do not give rise to any constitutional privacy infirmity.

D. The Proposed Rule Complies with the Fifth Amendment's Equal Protection Requirements

Certain commenters assert that the Proposed Rules are unconstitutional on Equal Protection grounds.[36] Many of them, however, mischaracterize the diversity objectives of proposed Rule 5605(f) as a "rigid racial quota" or "set aside."[37] To the contrary, and as discussed above, *see* § I.A, *supra*, the Proposed Rules do not mandate any particular number of diverse directors; instead, they provide aspirational goals. For companies that do not meet those objectives, their explanation for noncompliance (along with the disclosure required by proposed Rule 5606) will provide shareholders and other stakeholders with helpful information to assess a company's quantitative and qualitative approach to board diversity. Therefore, even if Nasdaq were found to be a state actor, the Proposed Rules would survive scrutiny under the Fifth Amendment's Equal Protection[38] requirements.

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36 *See* NLPC Comment at 4-6; Burton Comment at 2-3, 12-16; PFR Comment at 13-15; Morgan Comment at 3; Judicial Watch Comment at 5-7; Publius Comment at 9-10.

37 *See* Judicial Watch Comment at 3-4; PFR Comment at 14-15; NLPC Comment at 8; Morgan Comment at 2; Burton Comment at 2, 5, 8-9. Others refer to Proposed Rule 5605(f) as a "quota" without referencing an Equal Protection violation. *See* IWF Comment at 2; CAE Comment at 1; Nixon Comment at 5; Glen Comment at 1.

38 To the extent commenters assert constitutional objections to the Proposed Rules, they take the (implicit or explicit) position that Nasdaq is an extension of the federal government, which is subject to the Fifth Amendment. While the Fifth Amendment

1. The Proposed Rules Satisfy the Rational Basis Standard

If subject to such scrutiny, the Proposed Rules would need only satisfy the rational basis standard, meaning that they are rationally related to a legitimate government interest. *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782 (2019). Laws that do not treat individuals differently based on a suspect class are analyzed under the "rational basis" standard of review. *Id*. Under this standard, laws bear a "strong presumption of validity, and those attacking its rationality have the burden to negate every conceivable basis that might support it." *FCC v. Beach Commcns.*, 508 U.S. 307, 314 (1993).

Neither proposed Rule 5605(f) nor proposed Rule 5606 treats individuals differently based on a suspect class. Proposed Rule 5605(f) establishes aspirational goals and is not compulsory. Proposed Rule 5606 is a disclosure requirement for demographic data on all directors serving on the boards of Nasdaq-listed companies. Accordingly, the Proposed Rules do not impose a burden on, or confer a benefit to, the exclusion of others based on a suspect classification, and rational basis is the appropriate standard of review.

While Nasdaq would need only articulate one legitimate government interest for the Proposed Rules, *FCC*, 508 U.S. at 314, the Proposed Rules reflect several legitimate interests. One such interest is increasing transparency about board diversity so that shareholders and other stakeholders are empowered to make investment decisions based on consistent and readily-accessible data. To that end, the needs for increased transparency and data collection are set forth in detail in the Notice. For example, the Notice states that:

- "Nasdaq has also observed recent calls from SEC commissioners and investors for companies to provide more transparency regarding board diversity." Notice at 80472-73.

- "Current reporting of board diversity data [is] not provided in a consistent manner or on a sufficiently widespread basis. As such, investors are not able to readily compare board diversity statistics across companies." *Id.* at 80473.

- "Nasdaq is unable to provide definitive estimates regarding the number of listed companies that will be affected by the proposal due to the inconsistent disclosures and definitions of diversity across companies and the extremely limited disclosure of race and ethnicity information – an information gap the proposed rule addresses." *Id.*

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does not contain an express Equal Protection clause, it is well established that courts construe the Fifth Amendment Due Process Clause as "contain[ing] an Equal Protection component." *Washington v. Davis*, 426 U.S. 229, 239 (1976).

- "[I]nvestors frequently lack access to information about corporate board diversity that could be material to their decision making, and they might divest from companies that fail to take into consideration the demographics of their corporate stakeholder when they refresh their boards." *Id.* at 80474.

- Discussions with stakeholders "revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics." *Id.* at 80481-82.

In addition, the Proposed Rules advance those legitimate government interests by requiring companies that do not have at least two diverse directors to provide an explanation as to why, and by requiring that all companies annually report on a uniform set of board diversity metrics. Accordingly, the Proposed Rule would readily satisfy rational basis scrutiny.

2. The Proposed Rules Would Survive Heightened Scrutiny

Even if the Proposed Rules triggered heightened scrutiny – which they would not for the reasons set forth in subsection D.1 immediately above – they would nonetheless survive such scrutiny. Proposed Rule 5605(f)(A), which relates to a director who self-identifies as female, would satisfy intermediate scrutiny, and proposed Rule 5605(f)(B),[39] which relates to a director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities, would satisfy strict scrutiny. As for directors who self-identify as LGBTQ+, courts are divided on the question of the appropriate constitutional scrutiny (*i.e.*, intermediate scrutiny or rational basis review),[40] but we need not settle that here because under either standard, 5605(f)(B)'s reference to LGBTQ+ status is constitutional.

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39 Similar references to sex, race, ethnicity, national origin, and LGBTQ+ status in proposed Rule 5606's disclosure requirements would be subject only to the rational-basis standard because those requirements are neutral on their face and their application. That is, every director, regardless of race, ethnicity, gender, or LGBTQ+ status is presented with the same opportunity to disclose or decline to disclose the same information. Thus, the heightened-scrutiny analysis set forth here focuses only on proposed Rules 5605(f)(A) and (B).

40 The Supreme Court's decision in *Bostock*, which examines the meaning of "because of sex" for purposes of Title VII, may suggest that LGBTQ+ status, like gender classifications, would be subject to intermediate scrutiny for Equal Protection purposes. 140 S. Ct. 1731, 1742 (2020) ("But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex

Because commenters have likened 5605(f) to an affirmative action program, the following analysis applies the legal framework courts use to assess the constitutionality of such programs. As as discussed above, *see* § II.A.2, *supra*, however, the Proposed Rules do not constitute an affirmative action program. With that in mind, and starting with the more stringent standard of strict scrutiny, this Letter addresses proposed Rule 5605(f)(B) first, and then proposed Rule 5605(f)(A).

a. Proposed Rule 5605(f)(B) Would Survive Strict Scrutiny

With respect to race, ethnicity, or national origin, proposed Rule 5605(f)(B) would survive strict scrutiny because (i) it is necessary to achieve a compelling state interest, and (ii) it is narrowly tailored to achieve that interest. *See Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (finding that a public university law school's affirmative action plan survived strict scrutiny).

As the Notice discusses in detail, there are compelling government interests in perfecting the mechanisms of a free and open market and promoting investor confidence through the promotion of racially or ethnically diverse boards, or through increased transparency (achieved by explanation) about the diversity of a company's board.[41] Much like the Supreme Court's recognition in *Grutter*, 539 U.S. at 328-334, that there is a compelling government interest in attaining a diverse student body because of the many benefits diversity contributes to education, Nasdaq has identified and articulated compelling government interests in promoting diverse boards for its listed companies. In so doing, Nasdaq correctly relied on statistical and anecdotal evidence. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. Sept. 20, 2000) ("Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus . . . ."). Indeed, the Notice is replete with statistical data showing that the compelling interest is more than just theoretical.[42]

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or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

41 These compelling government interests align with the Exchange's responsibility to demonstrate that any proposed rule is consisted with Section 6(b) of the Act because, among other things, it is designed to protect investors, promote the public interest, prevent fraudulent and manipulative acts and practices, and remove impediments to the mechanism of a free and open market. *See* 15 U.S.C. § 78f(b); Notice at 80475.

42 In demonstrating a compelling interest, the government may present both direct and indirect evidence, including post-enactment evidence not found on the face of the rule itself. Accordingly, while the Notice contains voluminous evidence to support compelling government interests, it need not reflect the full universe of supporting information. *Adarand*, 228 F.3d at 1166.

For example, Nasdaq extensively examined third-party studies of the benefits of board diversity, including empirical studies from companies, investors, and governance organizations. Notice at 80473. Those studies on the whole identify a relationship between racial and ethnic diversity on boards and shareholder value, investor protection, and enhanced decision making. *Id.* at 80475-80480.

Nasdaq also conducted its own study of the current state of board diversity among Nasdaq-listed companies and found that "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." *Id.* at 80473. This conclusion is supported by comments from Nasdaq-listed issuers expressing support for the rule.[43]

Accordingly, Nasdaq has sufficiently identified compelling government interests.

Nasdaq has also narrowly tailored the Proposed Rules to achieve those compelling government interests. In assessing the concept of "narrow tailoring," courts often apply one or more of the following factors: (i) the availability of race-neutral means; (ii) limits on the duration of the race-conscious program; (iii) flexibility; (iv) numerical proportionality; (v) the burden on third parties; and (vi) over- or under-inclusiveness. *Adarand*, 228 F.3d at 1177-78. The Proposed Rules are carefully calibrated to satisfy these standards.

As discussed above, the Proposed Rules are a race-neutral means of achieving the compelling interests of perfecting the mechanisms of a free and open market and promoting investor confidence through the promotion of diverse boards because the Proposed Rules permit compliance through explanation. Thus, the first two factors demonstrate narrow tailoring.

With respect to the third factor, the Proposed Rules demonstrate an appropriate degree of flexibility. Courts have found that the existence of a waiver is an indicator of such flexibility. *See, e.g.*, *Adarand*, 228 F.3d at 1177 (identifying the existence of a waiver as a factor in assessing whether a race-conscious program offers flexibility). Certain commenters characterize proposed Rule 5605(f) and the comply-or-explain framework as a quota,

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43 *See, e.g.*, T. Rowe Price Comment, at 1, 2 ("[As a] global asset manager, . . . we have found that insufficient board diversity increases the risk that a company will become less competitive over time, which will impact performance. . . . [The proposal] would improve our ability, as an asset manager, to obtain and analyze board diversity data in a standardized format.").

comparing it to the rigid and unconstitutional city ordinance in at issue *Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 713 (1989).[44] We respectfully disagree.

The ordinance at issue in *Croson* required non-minority-owned prime contractors who were awarded city construction contracts to subcontract at least 30% of the amount of the contract to minority business enterprises. *Id.* Failure to meet the 30% mandate would disqualify an otherwise-winning bid. In addition, waivers were not granted unless a contractor showed "exceptional circumstances" where "every feasible attempt ha[d] been made to comply" and the requesting contractor demonstrated that "sufficient, relevant, qualified" MBEs were "unavailable or unwilling to participate in the contract." *Id.* at 714. In contrast, the Proposed Rules do not include any quota or disqualification provision; rather, companies that do not meet the diversity objectives can explain why, and "Nasdaq would not assess the substance of the company's explanation." Notice at 80488. So long as the company explains its reasoning (and discloses it along with the board demographic data required by proposed Rule 5606), the company would remain in compliance. The Proposed Rules also offer several other elements of flexibility, including by providing companies with ample time to prepare for compliance,[45] by allowing Foreign Issuers and Smaller Reporting Companies to comply by having two Female directors, and by permitting companies to increase the size of their boards – which is the antithesis of a percentage ratio requirement. *See* Proposed Rule 5605(f)(2)(B-C).

The Proposed Rules also are attentive to numerical proportionality. *Croson* reasoned that it was "completely unrealistic" to assume that "minorities will choose a particular trade in lockstep proportion to their representation in the local market." *Id.* at 714 (striking down a city requirement that minority subcontractors receive contracts equal to 30% of the prime contract because the city population was 30% People of Color). Unlike the unconstitutional ordinance in *Croson*, Nasdaq's Proposed Rules are not aimed at aligning board representation with demographic data for any geographical area; rather, the Proposed Rules

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44 *See* Publius Comment at 10 ("The 'or explain why it does not have' prong of the Diversity Mandate is not sufficient to transform this requirement from a mandate to merely a disclosure requirement."); Judicial Watch Comment at 4 ("Moreover, the "comply-or-explain" framework does not save the Rule from its constitutionally fatal flaws. Nasdaq portrays its Proposed Rule as a choice rather than a mandate."); Morgan Comment at 2; Burton Comment at 2, 5, 8-9.

45 Specifically, Nasdaq has proposed to provide companies with at least two years to have, or explain why they do not have, one diverse director, and, depending on the company's listing tier, either four or five years to have or explain why they do not have two diverse directors. Notice at 80503.

aim to have companies reach a minimum of one director who is a Person of Color (or LGBTQ+).

The Proposed Rules also are narrowly tailored because they reduce the burden on third parties – *i.e.*, listed companies and their directors. For example, Nasdaq proposes to provide listed companies with free access to a network of board-ready diverse candidates. In addition, Nasdaq has published FAQs on its Listing Center providing guidance on the application of the Proposed Rule, and established a dedicated email address for listed companies with questions.[46] *See* Notice at 80504-05. Nasdaq acknowledges comments that discuss the potential financial burden on companies, especially small companies, that may feel pressure to expend financial resources to recruit diverse candidates in order to comply.[47] However, the Proposed Rules reflect Nasdaq's mindfulness of their potential impact on small companies. For example, "in recognition of the resource constraints faced by smaller companies," Smaller Reporting Companies may satisfy Rule 5605(f)(2)'s requirement by having two Female directors as opposed to two "Diverse" directors. In addition, the financial burden or unique recruitment challenges posed by the diversity objectives (*e.g.*, a large company headquartered in a geographical market with limited diversity) would be appropriate explanations for a company's inability to meet the diversity objectives in any given year. As for the potential burden on directors themselves, they may decline to share their individual demographic data for one or more of the identified categories, and completion of the proposed self-identification would require no more than a few minutes of their time annually.

Finally, the Proposed Rules are neither over- nor under-inclusive. They apply only to Nasdaq-listed companies, all of which are part of the national market that Nasdaq seeks to protect and enhance. Moreover, Nasdaq seeks to promote diversity in specific categories (race, gender, ethnicity, and LGBTQ+ status) based on established data showing that board diversity will enhance decision making and performance. As discussed in the Notice, the current market faces challenges with respect to board diversity. *See* Notice at 80480-81.

Other factors further demonstrate that the Proposed Rules are not over-inclusive. For example, in recognition of resource constraints that may be faced by smaller – especially pre-revenue – companies, Notice at 80501, Section 5605(f)(4) limits the requirements for Smaller Reporting Companies, as defined in Section 5605(f)(1), to two diverse directors, including at least one who self-identifies as female. In addition, the Proposed Rules exempt companies located in countries where collecting data is prohibited, *see* Rule 5615 and IM-

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46 The FAQs are available at: https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ&cid=157&sub_cid=&years=2020,2019,2018,2020,2019,2018,2017,2016,2015,2014,2013,2012,2011,2010,2009,2008,2007,2006,2005,2004,2003,2002&criteria=1&materials=.

47 *See* Nixon Comment at 4; PFR Comment at 5-6; Glen Comment at 1.

5615-3, and allow foreign private issuers to follow home country practice in lieu of the corporate governance standards set forth in the Rule 5600 series, provided that the company publicly discloses in its annual reports or on its website "each requirement that it does not follow and describe[s] the home country practice followed by the Company in lieu of such requirements." Proposed Rule IM-5615-2(B).

Similarly, the Proposed Rules are not under-inclusive. A law is under-inclusive if it does not apply to individuals who are similarly situated to those to whom the law applies. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 285 n.19 (1985) (finding a rule excluding nonresidents from the New Hampshire bar was under-inclusive "because it permit[ted] lawyers who move away from the State to retain their membership in the bar," but there was "no reason to believe that a former resident would maintain a more active practice in the New Hampshire courts than would a non-resident lawyer who had never lived in the State"). Certain commenters assert that Nasdaq's Proposed Rules are under-inclusive for a variety of reasons, all of which are readily rebutted.[48] For example, some commenters assert that the definition of diversity in proposed Rule 5605(f)(1) is under-inclusive because it does not account for People with Disabilities, veterans, age, profession, or personal experience. However, the fact that Nasdaq has not proposed the broadest possible definition of "diversity" does not render the Proposed Rules under-inclusive. In fact, doing so without evidence of need could cause the rules to be improperly over-inclusive. The proposed definition of diversity tracks the findings of academic studies of the benefits of diverse boards that include members of different races, genders, ethnicities, and LGBTQ+ status. In addition, the Proposed Rules permit companies to consider additional diverse attributes, including in lieu of Nasdaq's definition, so long as that information is contained in its explanation as to why if that company does not have two directors who are "diverse" as defined by proposed Rule 5605(f)(1). Notice at 80486.

Some commenters argue that recent progress in increasing board diversity makes the Proposed Rules unnecessary.[49] However, as Nasdaq found, "progress towards meaningful and multi-dimensional diversification of corporate boardrooms is slow." Moreover, data collection is challenging due to "inconsistent disclosure and definitions of diversity across companies." Notice at 80473.

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48 *See* Publius Comment at 2-3, 7; Morgan Comment at 1-2; PFR Comment at 2, 7, 8, 10; Donnellan Comment at 2; Richter Comment at 2-3; NCPLR Comment at 3; Burton Comment at 3-4, 20; NLPC Comment at 3; IWF Comment at 1-2.

49 *See* Publius Comment at 2-3; PFR Comment at 2, 8, 10; IWF Comment at 1-2; Burton Comment at 3-4; NLPC Comment at 3.

Finally, the fact that companies may explain why they do not comply with proposed Rule 5605(f) does not render the Proposed Rules under-inclusive.[50] As Nasdaq explained, listed companies would be required to disclose diversity data pursuant to Section 5606 whether they comply with Section 5605(f) or explain why they do not. The requirement that all companies disclose such data satisfies the need for consistent and efficient disclosure of board diversity statistics so that investors can establish a baseline and monitor progress for their investment decisions. Greater transparency also would empower shareholders or potential shareholders to engage in conversations with companies that do not meet the diversity objective about initiatives to encourage and promote a more diverse pipeline of qualified board candidates for consideration in the future.

For all of the foregoing reasons, proposed Rule 5606(f)(B) is narrowly tailored to meet compelling government interests, and therefore would satisfy strict scrutiny.

b. Proposed Rule 5065(f)(A) Would Survive Intermediate Scrutiny

With respect to gender and LGBTQ+ status,[51] 5605(f)(A) would satisfy intermediate scrutiny because (i) it is necessary to achieve an important government interest, and (ii) it is substantially related to that important interest. *See Danskine v. Miami Dade Fire Dep't*, 253 F.3d 1288, 1294 (11th Cir. 2001).

As discussed with respect to race and ethnicity in the preceding section, there are important government interests in perfecting the mechanisms of a free and open market and promoting investor confidence through the promotion of diverse boards (to include female and LGBTQ+ directors), or through increased transparency (through explanation) about the diversity of a company's board. Moreover, Nasdaq not only has an interest, but a ***responsibility*** to ensure that any rule it promulgates under the Act is designed "to protect investors and the public interest," "prevent fraudulent and manipulative acts and practices,"

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50 PFR Comment at 6 n. 22 (asserting that if the comply-or-explain provision nullifies any coercive effect on diversity practices beyond disclosure, then it would not serve a useful purpose and therefore would be illegal).

51 Certain commenters question whether intermediate scrutiny or rational basis is the appropriate standard to analyze the inclusion of LGBTQ+ status in the Proposed Rule, and opine that under either standard of review, the Proposed Rules' inclusion of LGBTQ+ status would fail. *See* PFR Comment at 6-7, 15; Morgan Comment at 2; Burton Comment at 14-15. As noted above, courts are divided on this issue. Regardless, for the sake of argument this letter analyzes LGBTQ+ status under the more exacting intermediate scrutiny standard.

and "remove impediments to and perfect the mechanism of a free and open market." 15 U.S.C. § 78f(b)(5).

One commenter states that the Proposed Rules inappropriately rely on the assumption that "women think differently than men" in a way that can affect board functioning.[52] To the contrary, Nasdaq did not make assumptions about how women or men think, but rather, considered third-party studies on the benefits of board diversity, including empirical studies from companies, investors, and governance organizations. Notice at 80473. Those studies identify a relationship between gender diversity on boards and shareholder value, investor protection, and decision making. *Id.* at 80475-80.

With respect to studies focused on LGBTQ+ status, certain commenters assert that Nasdaq has provided insufficient evidence to establish an important government interest as to LGBTQ+ directors, and, to the extent Nasdaq has identified such evidence, it is unreliable because it comes from an LGBTQ+ advocacy organization.[53] Nasdaq acknowledges that there is a relative "lack of published research on LGBTQ+ representation on boards."[54] The available research, however, sufficiently establishes that there is an important government interest in promoting LGBTQ+ diversity on corporate boards. Specifically, in 2016, Credit Suisse found an association between LGBTQ+ diversity and stock performance, "finding that a basket of 270 companies 'supporting and embracing LGBT employees' outperformed the MSCI ACWI index by an average of 3.0% per year over the past six years." Notice at 80476. Credit Suisse also found that "[a]gainst a custom basket of companies in North America, Europe and Australia, the LGBT 270 has outperformed by 140 bps annually." *Id.*

Certain commenters question the argument outlined by Out Leadership's statement that "the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity."[55] However, the Supreme Court has settled that, at least for purposes of Title VII, sexual orientation and gender identity are "inextricably" intertwined with sex. *Bostock*, 140 S. Ct. at 1742. That finding, combined with the research demonstrating a "positive association between board diversity and decision making, company performance

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52 *See* Judicial Watch Comment at 4.

53 *See* PFR Comment at 15; Donnellan Comment at 2; Morgan Comment at 2; Publius Comment at 6-7.

54 The relative paucity of studies relating to LGBTQ+ status and board performance may be due, in part, to the lack of consistent data on board demographics, which only further illustrates the need for the Proposed Rules.

55 *See* PFR Comment at 6-7; Morgan Comment at 2; Publius Comment at 6-7; Burton Comment at 14-15.

and investor protections," establishes an important government interest in increasing LGBTQ+ diversity.[56] Notice at 80494.

Accordingly, proposed Rule 5605(f)(A) is necessary to achieve important government interests, and it is substantially related to those interests.

As detailed in the strict scrutiny section above, *see* § D.2.a., the Proposed Rules are narrowly tailored to address important government interests. It is well-settled that the "substantially related" provision of intermediate scrutiny is a less demanding standard than the "narrowly tailored" requirements of strict scrutiny, and accordingly, for the same reasons as discussed in § D.2.a., above, the Proposed Rules would meet the "substantially related" requirement of intermediate scrutiny. *See Danskine*, 253 F.3d at 1294 (upholding a fire department's hiring goals and noting that "[i]n the gender context, less evidence is required").

In addition, as *Danskine* acknowledged, determining whether there is sufficient evidence to meet the "substantially related" standard "may elude precise formulation." *Id.* at 1294. The critical component of the analysis is to ensure that any preference rests on an "evidence-informed analysis rather than on stereotypical generalizations." *Id.* at 1294-95 (applying intermediate scrutiny and upholding a fire department's long-term goal to hire 36% female firefighters). With that guidance in mind, the Proposed Rules do not rely on stereotypes or make assumptions about how certain classes of people think; rather, they are guided by evidence-based studies and statistics that justify the proposed diversity objectives with respect to gender and LGBTQ+ status. Notice at 80475-80. The data Nasdaq relied upon alone[57] would satisfy the substantially related argument articulated in *Danskine*. 253 F.3d at 1294-95.

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56 As a general matter, with respect to all diversity categories identified in the Proposed Rules, certain comments discuss studies that have found no causation between diversity and financial performance, and some suggest that the studies Nasdaq cited in its Notice confuse correlation with causation. *See* Burton Comment at 7-8; NCPLR Comment at 2; Killian Comment at 1; Richter Comment at 1-2; Donnellan Comment at 1; PFR Comment at 4, 6, 8, 9; Publius Comment at 5-6. While there is undoubtedly a substantial body of research on the effects of board diversity and all the studies do not reach the same conclusions, *see* Notice at 80476-77, on the whole the voluminous research discussed in the Notice amply supports Nasdaq's conclusion that the Proposed Rules will strengthen the market and improve investor protection. That conclusion is bolstered by the overwhelmingly supportive comments submitted to the Commission, which include strong support from listed companies and investors.

57 The Notice contains ample evidence showing the underrepresentation of women on corporate boards. For example, in its 2020 Global Gender Gap Report, the World

Accordingly, for all of the foregoing reasons, proposed Rule 5605(f)(A) is substantially related to important government interests and would satisfy the requirements of intermediate scrutiny.

IV. THE PROPOSED RULES DO NOT VIOLATE THE FIRST AMENDMENT

One commenter, The Project on Fair Representation (the "PFR"), asserts that the Proposed Rules violate the First Amendment because they require companies to engage in compelled speech. *See* PFR Comment at 15-16. Putting aside that the Proposed Rules impose no obligations on PFR (speech or otherwise), and that no listed company has complained that the Proposed Rules violate the First Amendment, Nasdaq respectfully submits that PFR's assertion is incorrect for several reasons.

First, by its terms, the First Amendment – which begins with the words "Congress shall make" – applies only to government actors. As explained in Section V.A. above, Nasdaq is not a state actor and is therefore not subject to the First Amendment. While this alone rebuts the comment, even were the Commission to credit PFR's assertions, that would turn the First Amendment on its head by allowing the government to prevent Nasdaq and its listed companies, as a voluntary association of private companies bound together by contract, from engaging in truthful, lawful speech on the subject of board diversity.

The core purpose of the First Amendment is to prevent the government from restraining such speech and association. There can be no serious question that an individual company enjoys full First Amendment protection to engage in truthful speech about board diversity, including to disclose the composition of its Board or to explain its philosophy of board diversification. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 342 (2010) ("The Court has

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Economic Forum found that "American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women." Notice at 80480. In comparison, women hold more than 30% of board seats in Norway, France, Sweden, and Finland. *Id.* Without action, the U.S. GAO estimates it could take up to 34 years for U.S. companies to achieve gender parity on their boards. *Id.*

While less data is available for LGBTQ+ status, the Notice also includes information on the underrepresentation of that community. Specifically, "[a]mong Fortune 500 companies in 2018, there were fewer than 20 directors who publicly self-identified as LGBT+." *Id.* Relatedly, Nasdaq observed that the lack of LGBTQ+ board representation data "may be due to a lack of consistent, transparent data on broader diverse attributes, or because there is no voluntary self-disclosure workforce reporting requirements for LGBTQ+ status, such as the EEO-1 reporting framework for race, ethnicity, and gender." *Id.* at 80494.

recognized that First Amendment protection extends to corporations.") (citing numerous cases); *id.* at 361-62 (rejecting argument that regulation can be justified based on "protecting dissenting shareholders from being compelled to fund corporate" speech). And, under the First Amendment, members of the public – including, as relevant here, corporate investors – have a concomitant right to ***receive*** information on those subjects. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011) (recognizing that infringement of the public's right to receive information "transgresses the First Amendment"). Finally, as speakers protected by the First Amendment, companies enjoy a First Amendment right to associate with one another and to agree to speak as a group. *See, e.g.*, *Citizens United*, 558 U.S. at 342-44 (First Amendment protects the rights of corporations to associate with one another to engage in speech); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) ("one of the foundations of our society is the right . . . to combine with other[s] in pursuit of a common goal by lawful means"); *see id.* at 933 n.80 ("'The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.'") (quoting 1 A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954)). Given these clear First Amendment protections for speech and association, the Proposed Rules cannot reasonably be viewed as government-compelled speech, when they in fact do the opposite by allowing a voluntary association of private companies to band together to engage in truthful and lawful speech.[58]

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58 Several commenters also contend that Nasdaq failed to give sufficient weight to studies that they assert did not show advantages to Board diversification. *See* Morgan Comment at 2; Donnellan Comment at 1-2; Burton Comment at 2, 5; NLPC Comment at 2; NCPLR Comment at 2-3; Nixon Comment at 2; IWF Comment at 1-2; Richter at 1; Publius Comment at 4-6; PFR Comment at 3-7. But the First Amendment also protects Nasdaq's and listed companies' freedom of thought to reach a reasonable interpretation of the body of available research, even if others might have reached a different interpretation, and to express their conclusions. *See, e.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) (the First Amendment protects the "adoption of one of a number of possible rational interpretations" of circumstances "that bristled with ambiguities," even if it "arguably reflect[ed] a misconception"); *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 496-97 (2d Cir. 2013) (even where propositions "advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts," courts "are ill-equipped to undertake to referee such controversies" and, [i]nstead, the trial of ideas plays out in the pages of peer-reviewed journals").

Second, even if Nasdaq were a state actor and the Proposed Rules were somehow interpreted as the government requiring speech, the particular speech at issue would not constitute compelled speech in any event. We address the Proposed Rules' two components below.

Proposed Rule 5606's basic informational disclosures about board composition are the kinds of disclosures that are routinely permitted without running afoul of the compelled speech doctrine. *See, e.g.*, *AHA v. Azar*, --- F.3d ----, 2020 U.S. App. LEXIS 40545, *29 (D.C. Cir. Dec. 29, 2020) (approving DHHS rule requiring hospitals to disclose charges for services negotiated with insurers, because government "reasonably concluded that the rule's disclosure scheme will help the vast majority of consumers"); *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403, 414 (D.C. Cir. 2012) (sustaining DOT rule requiring airlines to prominently display final prices on their website because "the rule is aimed at providing accurate information, not restricting it").

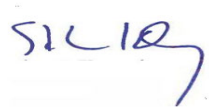
Proposed Rule 5605(f), requiring that companies that do not comply with its aspirational diversity targets explain their reasons for failing to do so, likewise does not compel a company to convey any specific message, much less a particular message with which it disagrees. PFR incorrectly contends that the Proposed Rules require a "compelled political apology," and analogizes them to a California statute at issue in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2861 (2018), under which clinics operated by groups opposed to abortion were required to provide information about family planning services that provided abortion. PFR Comment at 16. Unlike the circumstances in *NIFLA*, however, where clinics were forced to communicate a specific, required message with which they strongly disagreed, here there is no particular message prescribed by the Proposed Rules. Indeed, "Nasdaq would not assess the substance of the company's explanation, but would verify that the company has provided one." Notice at 80488. In the Notice, Nasdaq provided an example of an acceptable disclosure – "The Company has chosen to satisfy Rule 5605(f)(2)(C) by explaining its reasons for not meeting the diversity objectives of Rule 5605(f)(2)(C), which the Company has set forth below" – without in any way prescribing the content of the reasons or explanation a company may provide. *Id.* As a result, the Proposed Rules simply do not require any particular speech.

Finally, even if Nasdaq were a state actor ***and*** the Proposed Rules implicated the compelled speech doctrine, the Proposed Rules would nevertheless be constitutional in light of the substantial body of studies showing the benefits of diverse corporate boards. As explained in the discussion of the other, more onerous alternatives Nasdaq considered and rejected, the Proposed Rules' combination of aspirational targets with disclosures is a narrowly tailored approach to encouraging greater board diversity in line with those studies, while still allowing individual companies substantial flexibility in whether they meet the aspirational target and in the reasons they may provide if they do not do so.

V. CONCLUSION

For all of the foregoing reasons, and as further explained in its Notice, Nasdaq respectfully submits that its proposed listing rules related to board diversity are consistent with the Exchange Act and should be approved.

Very truly yours,



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