

February 20, 2021

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Via email to: [REDACTED]
cc: rule-comments@sec.gov

Revised: File No. SR 2020-081

We understand that: “The Nasdaq Stock Market LLC (‘Nasdaq’ or ‘Exchange’), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (‘Act’),¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (‘SEC’ or ‘Commission’) a proposal to adopt listing rules related to board diversity..”

We note the following:

The nature of incompetence, discrimination and exclusionary practices based on race are so prevalent in the industry, by Nasdaq’s own admission, that it translates into the requirement that we seek to have the research we have conducted on the subject made part of the record. Our diversity research was excluded by Nasdaq most likely due to the fact that we are an African American-owned firm.

Our track record and performance should be viewed in a different, but no less valid, way than that of other, nonminority firms. We note that none of the non-minority economists and consultants cited have as relevant or accurate a track record, as referenced below:

“Pursuant to Request for Proposal No. 2010-5646, the California Public Employees' Retirement System intends to award the contract for Investment Diversity Consultant Services Spring-Fed Pool to Creative Investment Research, Inc. Contracts are of no force or effect until approved by the authorized officials. Contractors may not commence performance until such approval has been obtained. AWARD DATE: March 15, 2011”

“Under any conceivable scenario, the current situation is very bad, and I mean toxic, for democratic institutions in general and for people of color specifically. Bottom line: our Fully Adjusted Return Forecast** indicates that, over time, things will get much, much worse.....”

Trumpism (December 26, 2016) <https://www.impactinvesting.online/2021/01/trumpism-december-26-2016.html>

This Week in ESG and Impact Investing: Why trump Will Win (June 11, 2016)
<https://www.impactinvesting.online/2021/01/wht-trump-will-win-june-11-2016.html>

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We stated, on February 5, 2015, in testimony to the Norwegian Ministry of Finance (<http://www.creativeinvest.com/NorwayTestimonyFeb52015.pdf>) and on April 22, 2015 in testimony to the Government of the United Kingdom: "As the market value of environmental, social and governance factors continues to grow, companies and investment managers will engage in fraudulent practices related to these factors. These practices will range from simple falsification of environmental, social and governance records to more sophisticated, but no less fraudulent methods related to environmental, social and governance ratings." On September 22, 2015 automaker Volkswagen admitted that "'defeat devices' used to cheat emissions testing were installed in 11 million vehicles worldwide.

We tied ESG to the competitive position of the U.S. capital markets. As we noted on Oct. 5, 2006, foreshadowing the rise of cryptocurrencies: "*competitive advantage with respect to capital access is available to any country with significant economic potential and a modest telecommunications infrastructure.*" <https://www.sec.gov/comments/4-526/4526-1.pdf>

We note that the California State Teachers Retirement System (CalSTRS) seeded US\$ 250 million into an exchange-traded fund (ETF) called the Gender Diversity Index ETF (ticker: SHE). Given the nature of the racial discrimination endemic in the industry, while we cannot claim the fund as a client we can and do note that this style of investing is based on the Diversity Investing methodology we created in 2006 (see: <http://diversityfund.net/>, <http://www.diversityfund.net/PaxWSJ.pdf> and <https://www.creativeinvest.com/DiversityFundArticles.pdf>).

While attempting to work with these institutions on a fair, ethical and nonbiased manner would be a futile gesture, for purposes of this comment, we believe the performance cited in creating a diversity investment style is relevant.

In addition, federal appeals and lower courts have accepted several "Amicus Curiae" or "Friend of the Court" briefs we filed in signal cases concerning financial marketplace structure and fraud cases:

The U.S. Court of Appeals for the District of Columbia Circuit accepted a "Friend of the Court" brief filed by William Michael Cunningham in Mozilla Corporation vs. the Federal Communications Commission (net neutrality). <https://www.prlog.org/12729944-william-michael-cunningham-files-amicus-brief-in-net-neutrality-case-18-cv-1051.html>

Amicus Brief in Fiduciary Rule Case (16-cv-1035): <https://www.prlog.org/12573252-william-michael-cunningham-files-amicus-brief-in-fiduciary-rule-case-16-cv-1035.html>

Amicus Brief in Met Life v FSOC (16-5086): <https://www.prlog.org/12570202-william-michael-cunningham-files-amicus-brief-in-met-life-fsoc-16-5086.html>

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Amicus Brief in Galvin v SEC (15-1150): <https://www.prlog.org/12499745-william-michael-cunningham-files-amicus-brief-in-galvin-sec-15-1150.html>

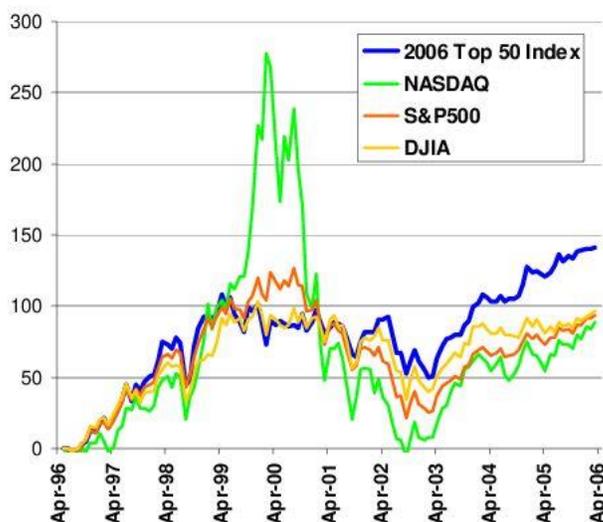
Amicus Brief in US vs. S&P (US District Court, Central District CA): <https://www.prlog.org/12256590-william-michael-cunningham-files-amicus-brief-in-us-vs-sp-us-district-court-central-district-ca.html>

Revised brief in SEC vs. Citigroup (2nd Cir Ct of Ap): <https://www.prlog.org/11948760-william-michael-cunningham-files-revised-brief-in-sec-vs-citigroup-2nd-cir-ct-of-ap.html>

Further, we incorporate by reference all comments made to the US Securities and Exchange Commission by Mr. Cunningham from 2002 to 2019. We also include our chart from 2006, showing the performance of the DiversityInc Top 50 versus major stock market indicators:



Shareholder Return



Source: Creative Investment Research, Inc.

Over the last 10 years, the **DiversityInc Top 50 Index** outperformed the

NASDAQ by 28.2%

S&P 500 by 24.8%

DJIA by 22.4%

The Top 50 Index was competitive on a 1, 3 and 5-year basis as well.



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It is our belief that the input to the Securities and Exchange Commission, the Norwegian Ministry of Finance, the Government of the United Kingdom, the U.S. Court of Appeals for the District of Columbia Circuit, the US District Court, Central District of California, given the discriminatory nature of the industry, should be included in discussions concerning the matter at hand. The fact that the bigoted and biased nature of the industry does not allow us to be recognized or even fairly compensated is, in our view, irrelevant. We work on behalf of the public.

Given the level of exclusion and discrimination embedded in NASDAQs' analysis, we oppose this proposed rule.

**William Michael Cunningham
Economist
Creative Investment Research**