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February 26, 2021

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Response to Comments and Notice of Filing of Amendment No. 1 of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (File No. SR-NASDAQ-2020-081)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC ("Nasdaq") submits this letter in response to comments the Securities and Exchange Commission ("SEC" or "Commission") received regarding the above-referenced rule filing to adopt listing rules supporting board diversity (the "Proposal"). The SEC published the Proposal for comment in the Federal Register on December 11, 2020.[1] On January 8, 2021, Nasdaq publicly consented to a 45-day extension for the Commission to act on the Proposal.[2] Today, Nasdaq is also filing Amendment No. 1 (attached as Exhibit 1) to propose modifications and clarifications based on comments received by the SEC.[3]

I. Executive Summary

The Commission received over 200 letters on the Proposal from Nasdaq-listed issuers, institutional investors, asset managers, legislators at the state and federal level, advocacy organizations, law firms, individual board members and other citizens.[4] An overwhelming majority of commenters supported the goals of the Proposal; some supportive commenters recommended modifications or clarifications. Other commenters opposed the Proposal; some recommended modifications. Nasdaq appreciates the thoughtful comments and carefully considered each commenter's views and any concerns expressed.

After reviewing all comment letters, Nasdaq firmly believes that the Proposal ameliorates concerns regarding the consistency and comparability of current board disclosure data by enhancing transparency related to board diversity. Additionally, Nasdaq continues to believe that the diversity objectives for its listed companies will promote board diversity and thus enhance corporate governance and strengthen the integrity of the market by building investor confidence, and enhancing capital formation, efficiency and competition.

A. Broad and Strong Support for Nasdaq's Proposal

Nearly 85% of substantive letters supported the Proposal, including commenters representing every constituency of corporate stakeholder. As illustrated in Appendix 1, the following are the most-cited supportive comments:

- **Enhances Corporate Governance**. Board diversity enhances corporate governance and board decision making.
- **Business-Driven Approach**. Commenters commended Nasdaq's pragmatic, disclosure-based approach to improving board diversity without undue burden, coercion or mandates.
- **Advances Board Diversity**. Nasdaq's Proposal will help meaningfully improve board diversity related to race, ethnicity, sexual orientation, and gender identity.
- **Facilitates Transparency**. By standardizing board diversity disclosures that are material to investors, the Proposal will reduce data collection costs and improve data quality, availability, and comparability.
- **Reflects Core Values**. Nasdaq's Proposal reflects the core values of commenters and/or their clients.
- **Enhances Corporate Performance**. Board diversity is linked to enhanced corporate performance, innovation and/or long-term sustainable returns.
- **Facilitates Decision Making**. Investors seek board diversity statistics that are widespread, consistent and/or transparent so they can integrate diversity into their decision making.
- **Promotes Investor Confidence**. Nasdaq's Proposal will enhance investor confidence and/or improve capital market efficiency.

Based on the comments received, Nasdaq believes that the Proposal aligns with investor expectations for board diversity and with an overwhelming stakeholder commitment to advancing diversity and inclusion.

B. Amendments That Strengthen the Proposal

Nasdaq is proposing amendments that strengthen the Proposal in response to comments by Nasdaq-listed companies and other stakeholders:

- **Offer more flexibility to companies with small boards**. Nasdaq is revising the Proposal to provide companies with boards of five or fewer directors the ability to achieve the diversity objective by having one diverse director.
- **Provide companies a one year grace period.** Nasdaq is revising the Proposal to provide a one year grace period for a listed company that no longer meets the diversity objectives as a result of a vacancy on the board of directors, for example if a diverse director falls ill or resigns.
- **Align listed companies' disclosure requirements with their annual meetings.** Nasdaq is proposing that issuers make board diversity information publicly available in advance of annual

shareholder meetings to align with the timing of other governance-related disclosures, such as those provided in the proxy.

- **Provide companies that list on Nasdaq after the phase-in period additional time to add diverse directors**. To ensure the timeline is reasonable for new companies, Nasdaq is proposing to provide all new companies listing after the phase-in period with two years to fully meet the diverse director objective.

C. Common Misperceptions

Nasdaq would like to address common misperceptions expressed by commenters about the Proposal:

- **Nasdaq's Proposal is not a quota.** Nasdaq's Proposal is a disclosure framework and does not set a quota or numeric mandate. Companies can elect to meet the diverse director objective or disclose why they do not, and the explanation can include a description of a different approach.
- **Nasdaq's Proposal will not force companies to appoint unqualified directors to meet the minimum diverse director objective.** Nasdaq's Proposal does not discourage board candidate recruitment on the basis of merit, and there is a sufficient community of available and qualified diverse candidates.
- **Nasdaq companies will not be delisted solely for choosing not to meet the minimum diverse director objective.** The diverse director objective is not a mandate that subjects Nasdaq companies to delisting since companies have the option to provide an explanation instead.
- **Nasdaq's partnership with Equilar is not generating any revenue for Nasdaq.** Rather, Nasdaq is paying a substantial amount of money to provide listed companies complementary access to a network of board-ready diverse candidates to assist companies that choose to satisfy the diversity objectives.
- **Nasdaq's relationship with Equilar does not create a conflict of interest.** Nasdaq has long offered a suite of technologies and services to companies through Nasdaq Governance Solutions, but none of those services includes board recruitment.

II. Commenters' Views and Nasdaq Responses

Nasdaq has separated comments into three categories: (A) Diversity Objectives, (B) Board Diversity Disclosure Framework, and (C) Other Concerns about the Proposal in general. Nasdaq has responded to each substantive comment with an explanation, a proposed amendment or clarification, or both. The number of comments ascribed to each comment category may exceed the total number of comments received, as many comment letters expressed opinions on multiple elements of the Proposal. For those commenters who opposed the Proposal but did not provide substantive arguments in opposition,[5] Nasdaq nonetheless endeavored to respond to them alongside the commenters who did provide substantive arguments.

A. Diversity Objectives

1. The Proposal Provides Companies with a Flexible Approach to Achieving the Two Diverse Directors Objective

Comment: While 45 commenters agreed that Nasdaq's disclosure-based approach towards achieving an objective of two diverse directors is reasonable, flexible, allows companies to be self-accountable, and will not be overly burdensome or coercive,[6] one commenter argued that Rule 5605(f)'s proposed requirement that companies have two diverse directors, or explain why they do not, will not result in a critical mass of diverse directors.[7] CtW Investment Group expressed that "unless the board is very small, two diverse board members are not sufficient to constitute the critical mass often considered necessary to avoid tokenism and for minorities to have a strong voice in the boardroom."[8] Nasdaq also received informal comments that "Nasdaq should amend the proposed rules to allow greater flexibility for companies with relatively small boards."[9]

Response: Nasdaq carefully considered concerns that the Proposal does not go far enough and also considered critical mass theory in constructing the Proposal.[10] Nasdaq also considered CtW Investment Group's observation that "[t]he proposed listing requirement to add two diverse board members will be the push that many laggards need to start the refreshment process."[11] As noted in Amendment No. 1, Nasdaq "endeavored to provide a disclosure-based, business-driven framework to enhance board diversity that balances the need for flexibility with each company's particular circumstances."[12] Companies may choose to have less than or more than two diverse directors on their board. Nasdaq believes that the Proposal provides companies with a flexible, attainable approach to achieving a reasonable objective that is not overly burdensome or coercive.

Among the 45 commenters supporting Nasdaq's disclosure-based approach towards achieving an objective of two diverse directors,[13] LGIM America stated that "[t]he Proposed Rule establishes a bright line which we believe creates a reasonable minimum standard to appropriately escalate market awareness of listed companies with limited diversity. We have taken a similar public position that US companies should have at least one ethnically diverse director by 2022 or we will vote against the board."[14] Generation Investment Management, LLP observed that "[t]he Nasdaq proposals go with the grain of investor expectations and US corporate good practice,"[15] a sentiment shared by four other commenters.[16] Reflecting this trend in investor expectations, on January 11, 2021, State Street Global Advisors announced that, beginning in 2022, it "will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least 1 director from an underrepresented community on their boards."[17] Nasdaq therefore believes that the proposed objective of two diverse directors aligns investors' demands for increased board diversity with companies' needs for a flexible approach that accommodates each company's unique circumstances. As noted in the Proposal, companies are not precluded from striving to achieve higher or lower diversity objectives,[18] and may even be required to do so pursuant to local laws in the jurisdiction of a company's headquarters or operations.[19]

Nasdaq carefully considered and agrees with commenters claiming that the proposed rules should provide additional flexibility for smaller boards. Nasdaq believes that companies with smaller boards may face similar resource constraints to those of Smaller Reporting Companies. However, Nasdaq recognizes that not all companies with smaller boards are Smaller Reporting Companies and therefore the alternative objective for Smaller Reporting Companies may not be available to them.

Further, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy Rule 5605(f)(2) by adding additional directors. For example, two diverse directors on a five member board comprise 40% of the board, whereas two diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two diverse directors and expands its board to satisfy Rule 5605(f)(2), it may require the company to incur additional costs through director compensation and D&O insurance.

***Amendment**:* In response to these concerns, Nasdaq is amending the Proposal to adopt Rule 5605(f)(2)(D), which proposes that a company with a board of directors of five or fewer members have, or explain why it does not have, at least one member of its board of directors who is diverse.[20] As described under "*Nasdaq's Proposal is a Disclosure-Based Framework, not a Mandate*," the explanation could include describing a different approach. Consequently, all references in this letter to diversity objectives should be construed as a diversity objective of one director for companies with a board of directors of five or fewer members.

2. <u>The Phase-in Period Gives Companies Adequate Time to Satisfy the Rule</u>

***Comment*:** Three commenters suggested that Nasdaq should limit the phase-in period to one calendar year after SEC approval,[21] two years after SEC approval,[22] or compress the phase-in period by one year for all market tiers.[23] Conversely, Nasdaq received informal comments that "Nasdaq should amend the proposed rules to allow additional time for companies listed on the Nasdaq Global Select, Nasdaq Global Market, and Nasdaq Capital Market tiers to meet the diversity objectives of proposed Rule 5605(f)(2)."[24] Nasdaq also received informal comments that "Nasdaq should amend the effective date of the proposed rules better to align listed companies' disclosure requirements with their annual meetings and proxy requirements" and "should amend the proposed rules to provide a 'cure' period for a listed company that does not comply with the diversity objectives of proposed Rule 5605(f)(2) as a result of an unanticipated departure of a diverse director."[25]

***Response*:** Nasdaq observed that 20 commenters applauded Nasdaq for implementing a phase-in period for companies to satisfy the rule and/or stated that the proposed phase-in period gives companies adequate time.[26] For example, Nasdaq-listed issuer Microsoft Corporation stated that "while the composition of our current Board of Directors already exceeds Nasdaq's diversity goal of at least two diverse directors, we believe that Nasdaq's proposed phase-in period of two to five years is reasonable for companies who will need to make changes in the composition of their boards."[27] Another Nasdaq-listed issuer, Ideanomics, Inc., stated that "[w]hile we currently do not meet Nasdaq's diversity goal . . . [w]e believe that Nasdaq's phased approach provides us with sufficient time to attract, screen, and recruit suitable applicants and we base this on the diversity progress achieved in our employee base."[28] Skadden, Arps, Slate, Meagher & Flom LLP, in its capacity as counsel to Nasdaq-listed companies, believes the proposed transition periods "should provide an appropriate level of flexibility for most Nasdaq-listed companies. . . . In our view, requiring a board to engage in this process on an accelerated basis—especially if a board is dealing with other significant matters, such as a pandemic, economic uncertainty, a cybersecurity breach or a transformative transaction—may compromise the likelihood of long-term success and would not be in the interests of Nasdaq-listed companies, their investors or other stakeholders."[29]

As noted in the Proposal, "Nasdaq considered whether an alternative timeframe for satisfying the diversity objectives of Rule 5605(f)(2) would better promote the public interest than the timeframe

Nasdaq has proposed under Rule 5605(f)(7)."[30] Nasdaq endeavored to construct a timeframe that would provide each company with "substantial lead time to identify, interview and select board nominees."[31]

Nasdaq agrees that an accelerated timeframe may increase the challenges for companies seeking to meet the diversity objectives of Rule 5605(f), particularly smaller companies. However, "companies are not precluded from adding additional directors to their boards to satisfy Rule 5605(f)(2) by having two Diverse directors sooner than contemplated by the proposed rule[.]"[32] Therefore, Nasdaq is not amending Rule 5605(f) to reduce the phase-in period for companies to have, or explain why they do not have, at least two diverse directors. As described under "*Nasdaq's Proposal is a Disclosure-Based Framework, not a Mandate*," the explanation could include describing a different approach, but companies would not need to explain their reasons for meeting the objectives early.

***Amendment**:* Nasdaq has considered the comment that it should provide a "cure" period for a company in the event of "an unanticipated departure of a diverse director."[33] Nasdaq recognizes that a company that satisfies Rule 5605(f)(2) with two diverse directors may no longer satisfy the requirement due to a vacancy on the board, for example if a diverse director resigns or falls ill. Given the personal circumstances that may accompany a vacancy on the board, Nasdaq has determined to amend its Proposal to provide each company that previously satisfied Rule 5605(f)(2)'s diversity objectives with a grace period of the later of (i) one year from the date of vacancy, or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the date of vacancy, to meet, or explain why it does not meet, the applicable diversity objectives. As described under "*Nasdaq's Proposal is a Disclosure-Based Framework, not a Mandate*," the explanation provided under Rule 5605(f)(3) could include describing a different approach, but in lieu of providing the disclosure required by Rule 5605(f)(3), a company relying on this provision may publicly disclose that it is relying on the grace period provided by Rule 5605(f)(6)(B). This is intended to notify stakeholders of the company's change in board composition without imposing an additional, unexpected disclosure burden on the company.

***Amendment**:* Nasdaq agrees that it would be beneficial for the proposed phase-in to better align with a company's proxy season, and proposes to amend the Proposal accordingly. Nasdaq also proposes amending the Proposal to provide newly listed companies with two years from the date of listing (or the date the company files its proxy statement or its information statement, or if the company does not file a proxy, its Form 10-K or 20-F, for the company's second annual meeting of shareholders subsequent to the company's listing, whichever is longer), which is an additional year from the initial Proposal, to satisfy the requirements of Rule 5605(f) so that the Proposal is not a barrier to private companies accessing capital through the public markets. This is intended to provide newly public companies with additional time to meet the diversity objectives of Rule 5605(f)(2), recognizing that newly public companies may have unique governance structures, such as staggered boards or director seats held by venture capital firms, that require careful timing when adjusting the composition of the board of directors. These phase-in periods will apply after the end of the transition period provided in Rule 5605(f)(7).

3. <u>Nasdaq's Proposal is a Disclosure-Based Framework, not a Mandate</u>

Comment: Ten commenters mistakenly argued that Nasdaq is proposing a mandate or quota by requiring Nasdaq-listed companies to have at least two diverse directors on their board.[34] Another six

commenters argued the Proposal would limit the ability of boards to determine their own relationships, composition, and future.[35]

Response: Nasdaq believes that comments characterizing the Proposal as a mandate or quota are premised on a misunderstanding of the Proposal. In actuality, the Proposal is a disclosure-based framework, not a mandate or quota. As detailed in the Proposal, Rule 5605(f) would require each company to have, *or explain why it does not have*, at least two diverse directors. The Proposal does not dictate that each company must have at least two diverse directors. Rather, the Proposal provides each company with the option of meeting the proposed diversity objectives, or explaining its reasons for not doing so, which could include describing a different approach.

A company that chooses to not meet the diversity objectives will not face consequences or be delisted. Rather, they can describe their reasons for following a different path. Nasdaq will not adjudicate the merits of a company's reasons for not achieving the diversity objectives, and will not assess the substance of a company's explanation. It will simply verify that the company has specified the requirements of Rule 5605(f)(2) that are applicable to the company (for example, describing the objectives applicable to a Smaller Reporting Company, Foreign Issuer, a smaller board, or the general objective) and has provided an explanation of its reasons for not meeting the objectives of the applicable rule, which could include describing a different approach.

Nasdaq carefully considered the benefits and drawbacks of a mandate and a disclosure-based approach. It consulted with industry stakeholders and considered their feedback that "a disclosure-based framework that provides companies with flexibility would empower companies to maintain decision-making authority over their board's composition while providing stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity."[36] Nasdaq believes that a disclosure-based approach that requires each company to have, or explain why it does not have, at least two diverse directors balances the calls of investors for companies to increase diverse representation on their boards with the need for companies to maintain flexibility and decision-making authority over their board composition. Seven commenters commended Nasdaq for proposing a disclosure-based approach rather than imposing a quota.[37]

Nasdaq considered whether it was necessary to clarify in the Amendment No. 1 that Rule 5605(f) is not a quota in order to eliminate any ambiguity. We do not believe there is any ambiguity on this point: Nasdaq's proposal does not set a quota or numeric mandate and, if adopted, it will not be interpreted as imposing such a quota. Indeed, 27 commenters agreed that Nasdaq's proposal is a disclosure-based requirement rather than a quota, representing institutional investors,[38] the legal community,[39] advocacy organizations,[40] academia,[41] and industry or professional associations.[42] One commenter astutely observed that the Proposal "is providing companies with the *opportunity* to increase board diversity through a disclosure-based, business-driven approach rather than a quota."[43] Another noted that "[t]he [Proposal's] comply or explain provision is consistent with the SEC's disclosure-based regulatory approach rather than serving as a quota or mandate. Indeed, the proposal is modeled after other SEC rules related to board composition that have comply or explain provisions."[44] One commenter observed that "Nasdaq, in their wisdom, has not mandated but rather *recommended* action that will improve the companies on its exchange. And to keep the focus on the goal each year, they simply ask to know the reasons behind a lack of representation if the situation occurs."[45] While Nasdaq has therefore determined that Rule 5605(f) is accurately described in the Proposal as a "have-

or-explain" framework rather than a mandate or quota, it has further clarified in the Amendment that the Proposal is not a mandate or quota.

Nasdaq rejects the two comments claiming that the Proposal is a *de facto* quota.[46] As noted by Ballard Spahr, LLP, counsel to Nasdaq: The diversity objectives of Rule 5605(f) are "not quotas, mandates, or set asides. Companies that do not meet the diversity objectives need only explain why they do not."[47] The Proposal is intended to provide shareholders with sufficient information to make an informed voting or investment decision, or to facilitate informed discussions with companies. The company can choose to disclose as much, or as little, insight into the company's circumstances or diversity philosophy as the company determines, and shareholders may request additional information directly from the company if they need additional information to make an informed voting or investment decision. For example, the company could disclose that "The Company does not meet the diversity objectives of Rule 5605(f)(2)(C) because it does not believe Nasdaq's listing rule is appropriate," or "because it does not believe achieving Nasdaq's diversity objectives are feasible given the company's current circumstances." A company who chooses to describe a different approach could explain that, for example, "The Company does not meet the diversity objectives of Rule 5605(f)(2)(A) because the Nominations Committee considers a variety of professional, industry, and personal backgrounds and skill sets to provide the Board with the appropriate talent, skills, and expertise to oversee the Company's business" or "is committed to ensuring that the Board's composition appropriately reflects the current and anticipated needs of the Board and the company."

4. <u>Evidence Supports an Association between Board Diversity and Company Performance</u>

***Comment*:** While 74[48] commenters agreed that board diversity is linked to enhanced company performance, innovation, long-term sustainable returns, and/or investor protection, eight[49] commenters disagreed.

Response: The weight of empirical evidence supports Nasdaq's belief in the benefits of board diversity for companies that choose to meet the diversity objectives of Rule 5605(f).[50] Nasdaq reviewed two dozen academic studies from researchers writing in peer-reviewed and other academic journals, using data from the U.S. and other countries, spanning more than two decades, along with a dozen empirical studies by investors, corporate governance organizations, consultants and financial institutions. The overwhelming majority of these studies found a positive association between board diversity and company performance, investor protection, and/or enhanced decision making.[51]

These studies are bolstered by the commenters who expressed their belief that board diversity is linked to enhanced company performance, innovation, and/or long-term sustainable returns. Eighteen[52] of these commenters agreed that the breadth of studies referenced in Nasdaq's Proposal represent substantial credible evidence of the benefits of board diversity, including Microsoft:

> Based on our regular conversations with investors and their requests for diversity data, we understand they are increasingly focused on board diversity and many view it as material to their voting decisions. We believe this is important to investors because, as Nasdaq has noted, there is considerable empirical data that a diversity of backgrounds, experiences, and opinions leads to superior decision-making, better business outcomes, and more consistent long-term growth.[53]

Twenty-six commenters also cited additional third party studies or data gleaned from their own independent research to support their view that there is a link between board diversity and enhanced company performance.[54] Senator Dianne Feinstein noted a 2019 study by the Wall Street Journal, which "found that S&P 500 companies with greater board diversity performed better on a range of metrics."[55] The study, which analyzed 10 metrics including board diversity (gender, age, and independence) and workforce diversity (ethnic and gender representation), observed:

> The research showed that the 20 most diverse firms in the ranking have an average operating profit margin (the profit a company generates from its core business before interest and tax, as a percentage of sales) of 12%, compared with 8% for the lowest-ranking companies. Their shares, meanwhile, had an average annual total return of 10% in the five years through June 28 and 14% over the 10 years through June 28, versus 4.2% and 12% for the 20 least-diverse companies.

The Wall Street Journal study concluded that "[p]robably the biggest takeaway from the study is that diversity and inclusion appear to be good for business."[56] Another commenter representing Teachers Insurance and Annuity Association of America ("TIAA"), citing a 2020 corporate director's survey published by Harvard Law School Forum on Corporate Governance, pointed out that "[r]ecent research shows that directors themselves see the benefits of board diversity in promoting unique perspectives among the board, improving a company's relationships with its investors and enhancing long-term performance."[57] FCLTGlobal stated in its letter that, "[b]ased on FCLTGlobal's review of existing academic evidence, our own analysis, and research informed by our multi-year conversations with our Members and other experts, we suggest the SEC carefully consider…[s]ignificant evidence demonstrat[ing] diverse boards add value over the long term."[58] T. Rowe Price Group noted that "we have found that insufficient board diversity increases the risk that a company will become less competitive over time, which will impact its performance."[59] Legal & General Investment Management America, Inc. ("LGIM America"), a subsidiary of the fourth largest institutional global asset manager, believes that "[m]ore diverse organizations make better strategic decisions, show superior growth and innovation, and exhibit lower risk – all significant measures for investors."[60] Wellington Management Company LLP "share[s] Nasdaq's belief, based on compelling research, that board diversity is strongly associated with positive corporate performance. In our view, businesses create shareholder value by appointing boards that thoughtfully debate company strategy and direction."[61] The Pennsylvania State Treasurer believes that "[r]esearch shows that improving board diversity positively impacts corporations[.]"[62]

In addition, 80 commenters agreed that diversity on the board improves corporate governance and board decision-making.[63] For example, State Street Global Advisors notes they "have long viewed strong, independent and effective corporate board oversight as the single most important driver of long term value in public companies, which we view as closely correlated to board diversity."[64] Trillium Asset Management stated that their "belief that greater diversity of opinion, backgrounds and experience enhances decision-making, improves risk assessments and supports the consideration of all stakeholders is echoed in the findings of research from multiple corporate governance experts and business organizations."[65] The International Corporate Governance Network noted that its members, spanning more than 45 countries and including companies, advisors and investors collectively managing assets over $54 trillion, "regard diversity as a strategic issue that is fundamental to board quality."[66]

Nasdaq disagrees with the contention advanced by certain commenters that there is insufficient evidence to establish a positive relationship between LGBTQ+ diversity and board performance.[67] To begin, the U.S. Supreme Court in *Bostock v. Clayton County* has established that sexual orientation and gender identity are "inextricably" intertwined.[68] In addition, Out Leadership (2019) suggested that "many of the reasons that gender diversity is considered beneficial are also applicable to LGBT+ diversity. LGBT+ diversity in the boardroom may create a dynamic that enables better decision-making, and it brings to the boardroom the perspective of a community that is a critical component of the company's consumer population and organizational talent."[69] During the comment period, Equality California expressed the view that "[e]nsuring LGBTQ+ representation on corporate boards is in the public interest, in that it fosters the growth of companies, promotes good governance and board decision-making, boosts investor confidence, and improves the overall economy."[70] Nasdaq therefore reiterates its belief that is reasonable and in the public interest to treat LGBTQ+ status as "inextricably" intertwined with gender identity.

One commenter argued that the Proposal "is not consistent with a free market under Section 6(b)(5) of the Exchange Act because its arbitrary diversity requirement does not demonstrably improve corporate performance, and could sometimes harm it."[71] Nasdaq respectfully asserts that, while Nasdaq of course wants its listed companies to succeed financially, Section 6(b)(5) of the Act does not require Nasdaq to demonstrate that its listing rules enhance the financial performance of its listed companies. Rather, Nasdaq must demonstrate to the Commission that any proposed rule is consistent 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. Nasdaq must also balance promoting capital formation, efficiency, and competition, among other things, alongside enhancing investor confidence.

Nasdaq considered the studies cited by the critical commenters that did not find a statistically significant relationship between diversity and company performance, and observed that they are inconclusive.[72] The United States Government Accountability Office has concluded that the mixed nature of various academic and empirical studies may be due to differences in methodologies, data samples and time periods.[73] One study cited by a commenter that found a negative relationship between diversity and performance analyzed "mandatory" diversity regulations, and therefore is inapplicable to Nasdaq's disclosure-based proposal,[74] which does not "mandate" diversity. The fact that a majority of studies show benefits, while a minority are inconclusive, demonstrates that the weight of the evidence supports Nasdaq's conclusion that the Proposal will not negatively impact capital formation, competition or efficiency among its public companies.

Comment: Two commenters claimed that the Proposal does not promote diversity because, for example, it does not prohibit homogenous boards or diverse directors will bring similar perspectives to those of white male board members.[75]

Response: Nasdaq carefully considered each perspective, but found that these comment letters primarily presented anecdotal evidence, whereas multiple studies cited in the Proposal identify the positive association between diversity and board decision making, as well as 66 comment letters affirming that the Proposal will promote diversity of identity and ideas.[76] In addition, Nasdaq's goal of the proposal was not to impose a board composition requirement on its companies or preclude boards from adding directors on their board who are not considered "diverse" as defined in the Proposal—rather, Nasdaq believes that diversity in all forms, including white males, enhances corporate

governance and board decision making. To that end, the Proposal sets forth a disclosure-based framework for each company to choose whether to achieve the proposed diversity objectives or explain its reasons for not doing so, which could include describing a different approach.

To that end, other commenters believe the proposal does not go far enough. For example, two commenters suggested adding other categories of underrepresented groups.[77] As explained in more detail under "*Nasdaq's Definition of Diverse is Consistent with Categories Reported to the EEOC through the EEO-1 Report*," Nasdaq's Proposal does not preclude other methods of populating boards of directors. Under the Proposal, listed companies are free to consider additional diverse attributes when identifying director nominees, such as nationality, disability, or veteran status, and are free to disclose information related to diverse attributes of board members beyond those highlighted in the rule. Nasdaq believes that the Proposal will encourage meaningful progress on diversity for companies that choose to meet the diversity objectives, and will provide meaningful disclosures to investors for companies that choose to explain their reasons for not doing so.

5. Investors Consider Diversity Disclosures Material to Investment and Voting Decisions

Comment: Two commenters asserted that investors do not consider diversity disclosures to be useful or material information and therefore the Proposal is inconsistent with Section 6(b)(5) of the Exchange Act.[78]

Response: One of these commenters, citing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), defines information as material when there is a "substantial likelihood that a reasonable investor would consider it important to an investment decision."[79] The commenter concludes that "NASDAQ's proposal violates the concept of materiality because, as discussed above, the disclosures would not help a reasonable investor evaluate a company's performance. This purportedly violates Section 6(b)(5) of the Exchange Act for regulating an area that is unrelated to the purpose of the Exchange Act or 'administration of the exchange.'"[80] Nasdaq infers that the commenters cross-reference to "as discussed above" relates to its earlier assertion that "NASDAQ does not sufficiently address the research results finding that gender board diversity correlates very little, if at all, with corporate performance. NASDAQ has also not proven that board diversity *causes* improved corporate performance."[81]

Nasdaq respectfully notes that *Basic* in fact defines information as material when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[82] This view was reaffirmed by the U.S. Supreme Court in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011) and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), and has been accepted and adopted by the Commission.[83] Notably, in *Matrixx*, the Court also determined that statistically significant information was not required to establish materiality, noting that "[g]iven that medical professionals and regulators act on the basis of evidence of causation that is not statistically significant, it stands to reason that in certain cases reasonable investors would as well."[84]

Nasdaq respectfully submits— although a majority of studies in the Proposal found a relationship between company performance, investor protection and decision-making—that there is no bright-line test requiring a certain number of studies to establish a statistically significant relationship between diversity and company performance in order for diversity disclosures to be considered material to investors. The Supreme Court case cited by the commenter, and later decisions affirming its holding,

held that information is material if its omission would significantly alter the 'total mix' of information available to a reasonable investor.

In crafting the Proposal, Nasdaq identified data omissions, inconsistencies, and asymmetries in diversity disclosures among companies. For example, Nasdaq found inconsistent disclosures and definitions of diversity; inconsistent or no disclosure of a director's race, ethnicity, or other diverse attributes; difficult-to-extract data because statistics are often embedded in graphics; and aggregation of information, making it difficult to separate gender from other categories of diversity. As stated in the Proposal, "Nasdaq is concerned that investors also face the many data collection challenges Nasdaq encountered, rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions."[85] Comment letters submitted by institutional investors and asset managers affirmed this view, noting that there is "a lack of standardized, comparable, data on directors' diversity"[86] and "[d]espite the clear benefits of diversity to corporate performance, there is insufficient transparency into the diversity of corporate boards.[87] One commenter pointed to a 2019 study conducted by the Wall Street Journal that concluded "only 17 companies [in the S&P 500] fully report ethnic diversity at the board level."[88] This is further discussed herein under "*There is Ample Evidence that Investors Want Board Diversity Data*."

The wave of investors increasingly calling for companies to disclose diversity metrics and diversify their boards, and basing their voting decisions on whether they do or not, demonstrates that investors consider diversity disclosures material to their voting and investment decisions. As noted in the Initial Proposal, institutional investors including Vanguard, State Street, Blackrock and the NYC Comptroller's Office include board diversity expectations in their engagement and proxy voting guidelines.[89] State Street's comment letter in support of the Proposal stated that "[a]s investors, we believe improving the availability of useful information and data is a critical element in advancing board diversity, and, as a result, will help improve corporate governance and long-term risk management and financial performance.[90] The NYC Comptroller's Office stated that "[t]he Proposed Rules will provide investors with vital information to inform investment and proxy voting decisions, as well as improve shareowner value by fostering increased board racial and gender diversity without imposing mandates or quotas."[91] The Pennsylvania State Treasurer expressed support for Nasdaq's Proposal, noting that "[n]o voice is more important to shareholders than a corporation's board of directors, but most corporate boards do not reflect the increasing diversity of the shareholder base."[92] The Illinois State Treasurer commented that:

> One materially important board attribute we examine within the office of State Treasury is diversity. . . Given the business case for board diversity, investors have a material interest in assessing board diversity data and applying that within the total mix of information. But here lies the underlying problem: investors do not have adequate access to board diversity data.[93]

The SEC's Office of the Investor Advocate[94] and 25 other commenters[95] expressed the view that investors consider diversity disclosures to be material information or useful in making informed voting and investment decisions. LGIM America explained that "[a]s prudent fiduciaries, we consider and engage with companies on a range of factors when making investment decisions on behalf of our clients. Among those are considerations of a company's diversity practices."[96] An association representing over 4,500 attorneys believes that "[a]doption of the proposal will better align companies in the United States with trends within the global economy that recognize the materiality of board diversity."[97] As noted above, Microsoft stated that "[b]ased on our regular conversations with investors and their

requests for diversity data, we understand they are increasingly focused on board diversity and many view it as material to their voting decisions."[98] The U.S. Chamber of Commerce posited that other companies have similar views on diversity:

> It is clear that board diversity is valuable. In fact, according to PwC's 2019 Annual Corporate Directors Survey, corporate directors feel that board diversity significantly benefits a company: 94% of board directors who responded indicated that a diverse board brings unique perspectives; 87% thought that diversity enhances board performance; 84% felt that board diversity improves relationships with investors; and 76% agree that board diversity enhances the performance of the company.[99]

Investors also expressed support for the Proposal, with several noting that they are "relying on returns from my portfolio of investments in publicly traded companies to retire" and urged the SEC to adopt Nasdaq's proposal to "advance board diversity and enhance transparency of diversity statistics through new proposed listing requirements."[100] However, as described in the Proposal, Nasdaq is concerned that the current disclosure framework results in "information asymmetries between larger stakeholders, who are able to collect this data directly from companies, and smaller investors, who must rely on incomplete public disclosures."[101] Two commenters noted that some investors also rely on third party data providers that aggregate diversity disclosures, which is expensive and "raises concerns about accuracy, objectivity and consistency."[102]

Nasdaq believes the Proposal would level the playing field for retail and institutional investors, and decrease the cost and time associated with data collection for all investors, by providing them with accessible, comparable, transparent information that is material to their voting and investment decisions. Nasdaq agrees with UAW Retiree Medical Benefits Trust that "the reduction in information asymmetry occasioned by the Proposed Rules would increase efficiency and improve the functioning of the capital markets."[103] Nasdaq therefore reaffirms its belief that the Proposal "will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions."[104]

Nasdaq respectfully disagrees with the commenter's conclusion that the Proposal "violates the concept of materiality" and therefore "violates Section 6(b)(5) of the Exchange Act for regulating an area that is unrelated to the purpose of the Exchange Act or "administration of the exchange."[105] As stated in the Initial Proposal, Nasdaq firmly believes, and the commenter agrees, that disclosure of material information is the "cornerstone" or "bedrock" of federal securities law.[106] In approving Nasdaq's rule related to third party director compensation, the Commission affirmed that "it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Act, that are designed to improve transparency and accountability into corporate decision making and promote investor confidence in the integrity of the securities markets."[107] Nasdaq is concerned that while investors have increasingly emphasized that they consider board diversity information to be material, the current lack of transparency and consistency makes it difficult for Nasdaq and investors to determine the state of diversity among listed companies as well as each board's philosophy regarding diversity.[108] Nasdaq believes it is well within its delegated regulatory authority to propose listing rules designed to enhance transparency, provided they do not conflict with existing federal securities laws. As noted by Ballard Spahr, LLP, counsel to Nasdaq, "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."[109] For these reasons, and the reasons discussed herein under "*Exchanges Play an Important Role in Promoting Good Corporate Governance Practices*," Nasdaq believes the Proposal is consistent with Section 6(b)(5) of the Act.

6. Nasdaq's Definition of Diverse is Consistent with Categories Reported to the EEOC through the EEO-1 Report

Comment: Fifteen commenters recommended that Nasdaq expand the definition of diverse to include persons with disabilities and other categories, such as age, veteran status, experience in other industries, and cognitive diversity.[110]

Response: When constructing the Proposal, and during its review of the aforementioned comment letters, Nasdaq considered expanding the definition of diverse to include categories beyond gender identity, race, ethnicity, and sexual orientation, such as the examples provided by the SEC staff's Compliance & Disclosure Interpretations ("C&DIs").[111] Currently, the C&DIs provide a list of examples for companies to consider for purposes of providing disclosure of a director's or director nominee's self-identified diverse attributes under Items 401 and 407 of Regulation S-K, including "race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background" and "diverse work experiences, military service, or socio-economic or demographic characteristics."[112] As described in the Proposal, Nasdaq observed that, as a result, "companies currently are permitted to define diversity 'in ways they consider appropriate' under federal securities laws. One of the challenges of this principles-based approach has been the disclosure of inconsistent and noncomparable data across companies."[113] Commenter Professor Lisa M. Fairfax agreed, noting that "when corporations can define boards as diverse using different definitions and criteria, diversity disclosures become inconsistent, confusing, and potentially misleading."[114]

Professor Fairfax and six other commenters expressed the view that Nasdaq's proposed definition of diverse is "suitable to improve transparency and comparability of disclosures across companies, whereas a broader definition could maintain the status quo of inconsistent, non-comparable data."[115] As described in the Proposal, Nasdaq heard similar feedback during its stakeholder outreach, where "most stakeholders supported a narrower definition of Diversity focused on gender, race and ethnicity, with several supporting broadening the definition to include the LGBTQ+ community."[116] Under the Proposal, companies are not precluded from using a broader definition of diversity, including persons with disabilities, veteran status or age, provided that a company that seeks broader diversity in lieu of diversity of race, ethnicity, sexual orientation, or gender identity transparently discloses this under Rule 5605(f)(3). While Nasdaq hopes to offer companies an attainable, consistent, and transparent approach to board diversity, Nasdaq encourages companies to disclose board diversity metrics beyond those categories recognized in the Proposal to the extent a company considers it material to its investors' voting and investment decisions.

Nasdaq considered the view of commenters that suggested the definition of diverse should be expanded to include cognitive diversity[117] and experience, education, political views, and geographic locations.[118] Although companies may consider a variety of factors when selecting a director nominee, Nasdaq believes the Proposal inherently recognizes the cognitive diversity[119] and broader range of experiences that diverse directors bring to the boardroom,[120] particularly those from professional pathways beyond the traditional C-suite experience.[121] Nasdaq agrees with commenter Professor Lisa M. Fairfax that "there is a significantly greater likelihood that racial, ethnic, and gender board diversity

will bring differences in perspectives and views than boards that do not have such diversity. . . . Nasdaq's rule is therefore entirely consistent, and in fact inextricably linked, with boards' expressed desire to enhance the diversity of experiences and perspectives within the boardroom."[122] Similar views were expressed by Washington State Investment Board,[123] Nasdaq-listed issuer Microsoft Corporation,[124] and non-profit BoardReady.[125] As Nasdaq explained in Amendment No. 1, we "endeavored to provide a disclosure-based, business-driven framework to enhance board diversity that balances the need for flexibility with each company's particular circumstances."[126] Therefore, Nasdaq encourages companies to consider board diversity beyond those diversity categories recognized in the Proposal.

Comment: Three commenters stated that the Proposal's definition of Underrepresented Minority is too expansive and does not sufficiently increase representation of racial minorities on boards, particularly Black/African Americans. One commenter suggested limiting the definition of Underrepresented Minority to individuals from underrepresented racial minorities,[127] and one commenter recommended revising the Proposal to require companies to have, or explain why they do not have, "at least two (2) directors—who self-identify as Black or African American—separate from other ethnicities or races."[128] Another commenter suggested "the addition of both an African American board member (or another racial/ethnic minority) and a member of the LGBTQ community, one of which might also be female," and making these requirements mandatory.[129] Two commenters recommended that Nasdaq amend the definition of diverse to include people of Central Asian, North African or Middle Eastern descent.[130]

Response: Nasdaq appreciates that representation of racial minorities on public company boards is progressing at a slow rate. While Nasdaq's definition was carefully considered from many perspectives, Nasdaq chose to propose a more expansive definition of diverse to ensure that more categories of historically underrepresented individuals are included, and to allow companies the flexibility to diversify their boards in a manner that fits their unique circumstances and stakeholders.

In constructing the Proposal, Nasdaq based its proposed definition of Underrepresented Minority on the categories reported to the Equal Employment Opportunity Commission ("EEOC") through the EEO-1 report with which most companies are already familiar, and while it is not included in the EEO-1 report, Nasdaq "believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status in recognition of the U.S. Supreme Court's recent decision in *Bostock v. Clayton County* that sexual orientation and gender identity are 'inextricably' intertwined with sex."[131]

Eleven commenters supported Nasdaq's proposed definition of diverse.[132] The New York City Comptroller noted that "[b]y using the same EEO-1 categories as is applicable for their employees, we note that the Proposed Rules will reinforce the importance of self-identification of diversity within the boardroom and help bring transparency and comparability of this type of data into the marketplace."[133] While Nasdaq-listed issuer Ideanomics, Inc. advocated for a broader definition of diverse, it also noted that it "believe[s] it is appropriate for Nasdaq to base its definition of diversity on the EEO-1 reporting categories. We are already familiar with these categories and do not find this disclosure burdensome."[134] Women for Economic and Leadership Development expressed the view that "Nasdaq's proposal will help make meaningful progress in improving board diversity related to race, ethnicity, sexual orientation and gender identity."[135]

Nasdaq believes that the Proposal provides flexibility to each company to determine whether and how to meet the diversity objectives of Rule 5605(f), based on the company's circumstances, board composition, and stakeholders. Companies may choose to meet the Rule's objectives by, for example, having two directors who self-identify as Black or African American, as suggested by the commenter One Hundred Black Men of NY.[136] Companies may also choose to meet the Rule's objectives by having two directors who self-identify in racial or ethnic categories beyond those included in the EEO-1 report, such as Middle Eastern, North African or Central Asian and describing to stakeholders that the company considers diversity more broadly than Nasdaq's definition of diversity. Therefore, Nasdaq has determined to maintain alignment with the EEO-1 definitions.

Comment: One commenter recommended that Nasdaq expand the definition of diversity to ensure that U.S. companies, with significant operations in countries that have a substantial number of underrepresented minorities, do not use director candidates from those countries to fill their board seats.[137] The commenter believes that allowing this "would be against the spirit of the diversity goals of the Nasdaq [by allowing a director] who is ethnically a minority in the U.S., but who would otherwise not qualify were the same standards in place in their country of origin."

Response: While Nasdaq commends the commenter's efforts to ensure that companies meet the spirit of Rule 5605(f)(2) by recommending that Nasdaq amend the definition of diverse for domestic companies that conduct significant business outside of the United States, a company is not precluded from satisfying Rule 5605(f)(2) with a director who is not a U.S. citizen or resident. Nasdaq believes that it is solely in the company's discretion to identify qualified director nominees who reflect diverse backgrounds that are reflective of the company's communities, employees, investors or other stakeholders, regardless of the director's nationality. Therefore, while Nasdaq appreciates this comment, it is not proposing any amendments to the definition of diversity for U.S. companies.

7. Nasdaq Encourages Post-Implementation Studies

Comment: One commenter welcomed the Proposal, noting the need for increased representation of diverse board members on public company boards. The commenter also noted that the Proposal could aid companies in recruiting diverse candidates and was "a creative and important initiative that will assist companies to achieve the purposes of the Diversity Proposal."[138] The commenter requested that Nasdaq commit to publishing a study analyzing the impact of the Proposal on board diversity and the relationship between diversity and corporate governance and financial results, based on data available three years after implementation.[139]

Response*:* Nasdaq appreciates the author's comments and suggestions. While the Proposal encourages increased board diversity and improved disclosures, the greater benefit of publicly disclosing this data will be that all interested parties, such as Nasdaq-listed companies, academicians, investors or members of the general public can adequately conduct their own analysis of the impact of the Proposal on diverse representation on boards of Nasdaq-listed companies and its relationship with company performance in the years ahead. Nasdaq welcomes these analyses, which will allow for the free exchange of views and increase the substantive discussion on the topic.

B. Board Diversity Disclosure Framework

While most commenters supported Nasdaq's proposed Rule 5606 with no recommended changes, a few commenters provided specific feedback on ways to enhance the disclosure and provide

greater flexibility in the Board Diversity Matrix ("Matrix") format. After reviewing all of the feedback, and upon further review of the Proposal, Nasdaq has made certain clarifying and conforming changes via Amendment No. 1, as discussed below.

1. Nasdaq is Revising the Operative Date for Disclosure

***Comment*:** Nasdaq received informal comments from interested parties asking Nasdaq to amend the effective date of the proposed rules to align listed companies' disclosure requirements with their annual meetings and proxy requirements.[140]

***Response*:** The uncertainty of when the Commission may take action on the Proposal, including Amendment No. 1, may have caused the initial operative date in Rule 5606(e) to give companies less than a year to satisfy Rule 5606(a). For some companies, it may take some time to collect the data required by the proposed rule. Therefore, Nasdaq wants to provide companies with at least one year to publish their Matrix.

***Amendment*:** Nasdaq is amending Rule 5606(e) to propose that companies satisfy Rule 5606 by the later of: (1) one calendar year from the date the SEC issues an order granting approval of the Proposal the (the "Effective Date"); or (2) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for its annual meeting of shareholders during the calendar year of the Effective Date.

2. Nasdaq is Providing Companies with Greater Flexibility to Choose where to Disclose Board Diversity Information

***Comment*:** Four commenters recommended amending Rule 5606(b) to prevent companies from satisfying the diversity reporting requirement by solely posting their board diversity information on the company's website.[141] Rather, these commenters believe that Nasdaq should require companies to include the data in their annual proxy statement or information statement in addition to posting the data on their websites.[142] As two commenters explained, "[i]t is important to make this information available in a manner that available software can be used to compare and aggregate this important data via firms such as FactSet."[143] Additionally, one commenter expressed that companies that are not required to file a proxy or information statement should be given the option of publishing the information in any other SEC filing.[144]

***Response*:** As Nasdaq notes in its Proposal, the SEC has recognized that "[a] company's website is an obvious place for investors to find information about the company"[145] and permits companies to make public disclosure of material information through website disclosures if, among other things, the company's website is "a recognized channel of distribution of information."[146] Nasdaq believes it is in the public interest to allow companies the flexibility to publish board diversity information through alternatives other than SEC filings, because it will avoid imposing additional disclosure and filing obligations on companies while providing shareholders with access to information in a recognized channel of distribution. Additionally, as one commenter noted, not all companies are required under U.S. federal securities laws to file an annual proxy statement.[147] Although two of the commenters mentioned FactSet as a firm that would benefit from Nasdaq not allowing the Matrix to be posted solely on a company's website, FactSet's comment letter did not raise any concerns with the Proposal.[148]

***Amendment*:** In response to the commenters, Nasdaq has amended the instructions to the Matrix to require companies to publish the board diversity information in a searchable format. If a

company uses a graphic or image format (*i.e.,* tif, jpg, gif, png), the company must also include the same information as searchable text or in a searchable table. The searchable information could be included, for example, together with the related graphic or in an appendix.[149] Nasdaq believes that requiring a searchable version of the Matrix will make it easier for investors, firms, and researchers to collect and aggregate the data. In addition, to account for the fact that not every company files a proxy statement, Nasdaq amended the Proposal to allow such companies to provide the disclosures in a Form 10-K or 20-F.[150]

3. A Standardized Matrix Optimizes the Consistency and Comparability of Board Diversity Information across Companies

***Comment*:** Nasdaq received 17 comments generally supporting the proposed Matrix[151]. One Nasdaq-listed issuer is "look[ing] forward to using Nasdaq's board matrix to present board-level diversity data in a manner consistent with our peers."[152] The commenter also expressed that in the company's experience, "directors are comfortable reporting, and even proud of, their background, as they are already required by securities laws to disclose certain other personal information including age and compensation."[153] However, some commenters suggested revisions to the Matrix. Six commenters recommended that Nasdaq amend the Matrix to require director-by-director disclosure.[154] One of those five suggested that Nasdaq clarify that companies could satisfy the rule even if the company's disclosure reflects the information on a director-by-director basis, and recommended that Nasdaq allow sufficient flexibility in the template so that companies are not required to include multiple matrices in their disclosures.[155] This commenter also recommended adding an instruction to permit companies to revise the Matrix to omit inapplicable columns or rows to enhance readability.[156] One commenter also requested that Nasdaq expand the Matrix to include other relevant factors, such as experience and skillset.[157] One additional commenter requested that Nasdaq extend Rule 5606 to director nominees to be consistent with the recent recommendations issued by the Commission's Office of the Investor Advocate.[158]

***Response*:** While Nasdaq appreciates that requiring the information on a director-by-director basis may be helpful to some investors, the Proposal seeks a balance between obtaining key board diversity data and respecting the privacy of directors. As one commenter mentioned, "[w]e appreciate that Nasdaq has structured its board matrix to allow directors to anonymously identify with diverse attributes or opt out of disclosing anything at all. We believe this is a thoughtful way to respect each director's personal decision to identify as diverse."[159] Additionally, Nasdaq encourages companies who seek to meet the diversity objectives of Rule 5605(f) to increase the diversity among its slate of director nominees, by selecting qualified candidates who reflect diverse backgrounds, including among other things, diversity of gender, race, and sexual orientation. However, Nasdaq is not proposing to amend Rule 5606 to include director nominees. We believe that limiting the disclosure to current directors optimizes the consistency and comparability of board diversity statistical information across companies. Notwithstanding, the Proposal does not preclude a company from disclosing additional information beyond the requirements of Rule 5606.

***Amendments*:** Nasdaq is not proposing to amend the Matrix to provide for more detailed information. However, in response to commenters, Nasdaq has amended the instructions to clarify that a company is not prohibited from disclosing more detail than required by the Matrix. The instructions explain that a company may supplement its disclosure by providing additional information related to its directors. The instructions also explain that a company may choose to provide the information on a

director-by-director basis or may choose to include any skills, experience and attributes of each of its directors that are relevant to the company.[160] As described in the Proposal, companies must provide the diversity data in a format substantially similar to the Matrix.[161]

Nasdaq is also amending the Matrix Instructions to include a definition of non-binary in response to informal questions Nasdaq received. As defined in the Matrix, non-binary "refers to genders that are not solely man or woman; someone who is non-binary may have more than one gender, no gender, or their gender may not be in relation to the gender binary."[162] Nasdaq hopes this enables investors to understand all terms used in the Matrix.

4. Nasdaq will not Judge the Accuracy of Company-Reported Self-Identifications and Companies will Not be Subject to Greater Liability

***Comment*:** Two commenters expressed concern that Nasdaq has not included a test to determine the accuracy or falsehood of a director's association with any of the categories in the Matrix.[163] One stated that Nasdaq's reliance on self-identification poses a unique liability concern, which could expose Nasdaq listed companies to liability.[164] More specifically, the commenter expressed that the "federal securities laws could hold issuers, as the makers of false statements, liable for reporting board members' diversity information if their ethnic or gender identity is misrepresented."[165] Additionally, this commenter expressed concerns that more complexity could arise if a director self-identifies in a way that investors would consider misleading.[166]

***Response*:** Voluntary self-identification of personal characteristics is generally accepted as accurate without a "truth test". For example, a person's voluntary self-identification on a census questionnaire or one's driver's license is not subject to any verification. Therefore, Nasdaq will not judge the accuracy of a director's self-identification. Nasdaq believes the risk of falsehood is outweighed by the benefits of allowing directors to determine which disclosure category (or categories) they identify with. Some directors may feel that a "truth test" would violate their privacy and right to choose their self-identification. Moreover, there are legal risks in many aspects of operating a company. Companies are already subject to providing certain diversity information to the EEOC, and the categories used in the Matrix are mostly based on the EEOC's Employer Information Report EEO-1 Form.[167] Similar to Nasdaq, the EEOC has not established a test to determine the accuracy of a self-identification in any of the EEO-1 Form categories. Furthermore, some companies are already disclosing certain diversity information of their boards and have not seen an uptick in plaintiff litigation based on their board diversity disclosure.[168] As one commenter discussed, the company's directors "have undertaken an exercise to voluntarily self-identify with respect to gender, race or ethnicity and LGBTQ+ status, while being sensitive to any of our Board members' preferences to opt out of self-identification. [The company] plan[s] to use this information to enhance disclosures in our 2021 proxy statement regarding [their] Board's composition."[169]

Additionally, most directors and nominees are required to complete a directors' and officers' ("D&O") questionnaire and attest to the accuracy of their responses. The D&O questionnaire requires the directors and nominees to provide their name, age, and other relevant information which may be subject to misrepresentations. A company uses the director's information provided in the D&O questionnaire to ensure that the company has accurately disclosed information in its SEC filings. Along with that, companies carry D&O insurance to protect against misrepresentations. Therefore, Nasdaq does not believe that a director's self-identification responses will subject its company to greater liability

than any other questions found in the D&O questionnaire. Nasdaq believes any legal risk that may arise from these additional disclosures would be nominal and are outweighed by the benefits of providing greater transparency of a company's board.

5. Ample Evidence Shows that Investors Want Board Diversity Data

***Comment*:** With respect to Nasdaq's explanation that more investors are demanding companies to disclose the race, ethnicity, and gender of their board members, one commenter, however, challenges the authenticity of these demands.[170] The commenter does not refute that there is a demand for the data. Rather, the commenter challenges the authenticity of the requests by certain investors and does not believe that Nasdaq should propose new listing standards as a response to investor demand for improved corporate governance and performance.[171]

Response: Nasdaq has observed, and cited within the Proposal, ample evidence that investors are increasingly interested in board diversity data as they view board diversity as a key indicator of corporate governance.[172] Over 50 commenters, [173] including 28 investors and eight Nasdaq-listed companies, stated that investors are seeking consistent board diversity disclosures across issuers so they can integrate board diversity into their decision-making. One Nasdaq-listed issuer stated that "[t]he composition of a company's board and management is an important element of our fundamental analysis, and we see diversity and representation as key investment considerations."[174]

A number of commenters[175] affirmed that Nasdaq's Matrix disclosure format will facilitate investors' ability to integrate board diversity into their decision making. Three commenters praised Nasdaq's efforts in proposing a standardized disclosure format.[176] One commenter stated that "[t]here is currently a lack of standardized, comparable, data on directors' diversity, so the proposed rule would be a positive step towards solving this challenge."[177] Another commenter noted that "Nasdaq's disclosure provisions serve to boost investor confidence and protect investors that view information related to board diversity as material to their investment and voting decisions, thereby also promoting capital formation and market efficiency."[178] One investor noted that, "for companies, a matrix would provide standard definitions and a structure that facilitates intentional discussion with directors on the topic of diversity."[179]

After considering commenters' concerns, Nasdaq does not believe that it should judge the intentions behind any investor's stated desire for companies to disclose information relevant to their board composition. Rather, Nasdaq's goal is to facilitate the collection and improve the reliability and uniformity of the data, while expanding access to the information.[180] Nasdaq also believes that the disclosure provision of Rule 5606 will enhance investor confidence and protect investors that view information related to board diversity as material to their investment and voting decisions.[181]

C. Other Concerns

1. Nasdaq is Offering Complimentary Access to a Board Recruiting Solution to Help Nasdaq-Issuers Meet the Diversity Objectives

***Comment*:** Two commenters expressed the mistaken view that Nasdaq has a potential conflict of interest related to the Proposal because of Nasdaq's partnership with Equilar, which is intended to provide services to listed companies to aid them in meeting the Proposal's diversity objectives.[182] For example, one commenter noted that it was unclear "how [Nasdaq] would address the potential conflicts

of interest between establishing a regulatory standard and concurrently promoting a revenue-generating compliance solution."[183] Another commenter expressed the view that the comment period for the companion rule filing relating to Nasdaq's partnership with Equilar, SR-NASDAQ-2020-082, should not expire before the comment period for the Proposal.[184]

***Response*:** Nasdaq has considered the comments and concludes that the commenters misstate the nature of the services Nasdaq is providing to listed companies. First, Nasdaq is not generating any revenue from its partnership with Equilar. Instead, Nasdaq is making a substantial investment in its listed companies by paying for services to help Nasdaq-issuers that want to pursue the diversity objectives. Nasdaq is offering these services to companies at its own expense, and the complementary access offered to each company has a retail value of approximately $10,000, a value that Nasdaq is required by the SEC to disclose whenever Nasdaq supplies a free service to a listed company.[185] Thus, Nasdaq is not promoting a "revenue-generating compliance solution" because Nasdaq is not generating any revenue, nor is the relationship intended to generate revenue. As such, this comment misconstrues the nature of the partnership between Nasdaq and Equilar.

Second, to be clear, there is no requirement that listed companies take advantage of this offer, nor is there a requirement that they pay for the services if they choose to utilize this resource. In the companion rule filing, SR-NASDAQ-2020-082,[186] Nasdaq explained that it was offering a complimentary service to its listed companies in order to help advance diversity on company boards and to help companies prepare for and meet the diversity objectives of the Proposal. Specifically, Nasdaq is offering listed companies complimentary access to two seats of a board recruiting solution, which will allow companies to identify and evaluate diverse board candidates. Nasdaq is offering this complementary access to a network of board-ready diverse candidates solely to assist listed companies that want to, but currently do not, satisfy the diversity objectives.

Third, there is no conflict of interest because Nasdaq is not in the board recruitment services business. Nasdaq has long offered a suite of technologies and services to companies through Nasdaq Governance Solutions to help organize, streamline, and manage boardroom processes and requirements,[187] but none of those services includes board recruitment. Specifically, Nasdaq offers board portal software, which is a secure platform designed specifically to enhance the effectiveness of meetings, collaboration and decision-making for boards, committees, and senior leadership teams.[188] In addition, Nasdaq offers certain Board Engagement Services, which include board evaluations and assessments to help boards find opportunities to improve effectiveness, digital D&O questionnaires, and CEO and management evaluations designed to promote management and board alignment for a successful leadership culture.[189] However, the services offered through the Nasdaq Governance Solutions business are wholly separate from Nasdaq's partnership with Equilar to provide free board recruitment services. This partnership is solely designed to help companies that want to pursue the diversity objectives. As such, Nasdaq concludes that there is no merit to the contention that a potential conflict of interest exists because Nasdaq is offering listed companies a free service through a board recruiting solution.

One commenter noted that a conflict may exist because Nasdaq "could require the use of a particular service as condition to resolving a listing rule enforcement action or take a non-enforcement posture so long as a company was seeking diversity among its board members using its solution."[190] Nasdaq firmly disagrees with this assertion. Whether a listed company chooses to take advantage of the free board recruiting service has no relationship to how, or whether, Nasdaq enforces the proposed

rule. As described above, companies are not required to use the free service, nor are they even required to pursue the diversity objectives. Accordingly, there are no circumstances under which Nasdaq would penalize a company for its decision not to take advantage of a free board recruiting service. Nor would Nasdaq penalize a company solely for its decision not to pursue the diversity objectives, since this is not mandatory. As such, the suggestion that Nasdaq's enforcement of the proposed rule will be tainted by whether companies use the free board recruiting solution is wholly unfounded and represents a misunderstanding of both the Proposal and the companion rule filing.

Moreover, Nasdaq believes that its costs incurred to provide listed companies with access to a complimentary board recruiting service is justified. As noted in SR-NASDAQ-2020-082, the research surrounding the value of diversity on a company's board, and investor interest in more diverse boards, support Nasdaq's conclusion that offering free access to a board recruiting solution promotes just and equitable principles of trade and protects investors and the public interest. Nasdaq believes in the benefits of increased board diversity and is committed to assisting its listed companies that choose to pursue the diversity objectives.

Regarding one commenter's concern that the comment period for SR-NASDAQ-2020-082 expires before the comment period for the Proposal, Nasdaq concludes that this concern is moot because the comment periods for both the Proposal and the companion rule filing have been extended and are being considered together by the Commission.[191]

2. Exchanges Play a Key Role in Promoting Corporate Governance

Comment: While a number of commenters[192] expressed the opinion that the Proposal is consistent with Nasdaq's role as a stock exchange, seven commenters suggested that Nasdaq lacks the authority to propose the changes to its listing rules contained in the Proposal because it is not the role of Nasdaq, as an exchange, to promote board diversity.[193] According to one commenter, "Nasdaq's rule is a forbidden attempt to engage in social legislation and invade internal corporate affairs, exceeding the authority of stock exchanges under the [Securities Exchange Act of 1934 (the "Exchange Act")]."[194] Other commenters erroneously argued that corporate governance is solely a function of state law and the Proposal improperly furthers the "federalization" of corporate governance.[195]

Response: As an initial matter, Nasdaq notes that the Exchange Act provides the standard for approval of rules proposed by self-regulatory organizations, which is different than rulemaking by the SEC. Unlike the SEC—which is a federal government agency—a proposed rule change of a self-regulatory organization shall be approved by the Commission if it is consistent with the requirements of section 6(b) of the Exchange Act.[196] To be consistent with the Exchange Act, exchange rules must be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange."[197] Nasdaq's responsibility to its listed companies, as a voluntary association of private companies bound together by contract, is to engage in rulemaking that furthers these goals in the Exchange Act.

Nasdaq respectfully disagrees with the commenters that contend the Proposal is beyond its authority because the proposed rule is consistent with Nasdaq's important role in shaping corporate governance. The commenters misapprehend the historical role of stock exchanges in advancing the quality of corporate governance, which has been acknowledged and encouraged by the SEC. Indeed, as aptly noted by one commenter, Nasdaq has "played an important role in fostering accountability, transparency and investor confidence in the securities and financial markets" with the "development of corporate governance listing standards covering matters ranging from financial statements to audit committees and director independence."[198] Importantly, the SEC has explained that "[t]hrough their corporate governance listing standards," exchanges such as Nasdaq "play an important role in assuring that their listed issuers establish good governance practices."[199] Thus, rather than overstepping its role, Nasdaq is performing its duties as an exchange to fashion listing rules that promote good corporate governance.[200]

Indeed, in the past few decades, Nasdaq has proposed, and the SEC has approved, numerous rules relating to corporate governance that are not mandated by federal law. For example, Nasdaq imposed standards on listed companies beyond those required by Sarbanes-Oxley. Congress passed the Sarbanes-Oxley Act of 2002 to "protect investors by improving the accuracy and reliability of corporate disclosures," which had a profound impact on corporate governance.[201] While Sarbanes-Oxley does not impose a requirement that director nominees be selected by an independent nominations committee, Nasdaq's rules do. Specifically, Nasdaq requires that director nominees either be selected, or recommended for the board's selection, by independent directors constituting a majority of the board's independent directors in a vote in which only independent directors participate, or by a nominations committee comprised solely of independent directors.[202] Similarly, Nasdaq's listing rules required that each member of a listed company's compensation committee be an independent director for nearly a decade *before* the same requirement was imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[203] In addition, Nasdaq requires certain disclosures of third party director and nominee compensation that are not required by federal law. For example, Nasdaq requires the disclosure of the material terms of all arrangements between any director or nominee for director and any third party relating to compensation or other payment in connection with such person's candidacy or service as a director of the company. In sum, self-regulatory organizations, such as Nasdaq, have maintained a strong oversight role of board composition for decades, which is part of the exchange's responsibility to the investing public. An exchange that abdicates this role would risk violating its self-regulatory organization's statutory duties.

Through the Proposal, Nasdaq shapes corporate governance in a way consistent with its prior rulemaking that was approved by the Commission. For example, the Commission has approved Nasdaq listing rules concerning board composition that were intended to improve board decision making—like the Proposal—but with respect to director independence. In that instance, Nasdaq's proposed rule was intended to remedy a perceived weakness in board composition that could compromise board decision making. Although the data concerning the benefits of independent directors was not uniformly positive,[204] nonetheless the SEC concluded that requiring independent directors on boards "should increase the likelihood that boards will make decisions in the best interests of shareholders." The SEC further concluded that requiring boards to affirmatively disclose their determination of independence "will increase the accountability of boards to shareholders" and will also "give shareholders the ability to evaluate" the board's determinations concerning independence.[205]

Consistent with Nasdaq's previous rules regulating corporate governance, Nasdaq identified a potential weakness in board composition that the Proposal is intended to remedy. Specifically, available evidence overwhelmingly demonstrates that boards lack diversity with respect to gender identity, race, and sexual orientation.[206] Nasdaq's review of an extensive body of academic research and empirical studies demonstrated that a lack of board diversity may negatively impact the decision-making processes of boards.[207] As such, the Proposal is intended to encourage companies to consider achieving the diversity objectives or provide transparency into their reasons for not doing so. The SEC has made clear that listing rules that "foster greater transparency, accountability and objectivity in the oversight by, and decision-making processes of" boards is an appropriate objective.[208] Nasdaq believes that the Proposal, like the independent director listing rules, "should increase the likelihood that boards will make decisions in the best interests of shareholders."[209]

In addition, the Proposal responds to increased investor demand for more detailed disclosures with respect to board diversity.[210] For example, one commenter noted its desire as an investor to have disclosures regarding "diversity at the board level [that] are made in a transparent and consistent way."[211] Another investor explained that "[w]e, along with many others in the financial-services industry, favor the creation of an external framework that would motivate companies to diversify their boards and standardize disclosures regarding their board composition."[212] The Proposal thus requires companies to disclose the Matrix and, if they chose not to meet the diversity objectives, explain why, which explanation could include describing a different approach. This added transparency provides investors the information they seek regarding board composition and management's approach toward diversity. Like Nasdaq's independent director disclosures, the proposed disclosures "will increase the accountability of boards to shareholders" and will also "give shareholders the ability to evaluate" the board's determinations regarding diversity. By responding to investor demands regarding the need for greater transparency, Nasdaq believes that the Proposal constitutes corporate governance listing standards that ultimately "enhance investor confidence in the securities markets."[213]

Nasdaq also respectfully disagrees with commenters that contend the Proposal contributes to the improper federalization of corporate governance. To the extent commenters are arguing that corporate governance should only be a function of state law, they misconstrue the nature of Nasdaq's role as an exchange operator as contemplated by the Exchange Act. As noted in the Proposal, Nasdaq develops listing rules regarding corporate governance standards to promote uniformity among its listed companies, even if the same areas are also regulated by states.[214] For example, states impose standards related to quorums[215] and shareholder approval of certain transactions,[216] which also are regulated under Nasdaq's listing rules.[217] Inherent in the role of operating an exchange, Nasdaq is expected and required to develop and enforce listing rules that, among other things, "remove impediments to and perfect the mechanisms of a free and open market" and "protect investors and the public interest."[218] In addition, unlike regulation by the federal government, companies voluntarily list on Nasdaq, as a private entity, and choose to submit to Nasdaq's listing rules. Further, listing rules differ across exchanges. Thus, to the extent commenters argued that "federalization" means uniformity, this result will not necessarily follow since national securities exchanges are not required to have identical listing rules. Accordingly, the argument that the listing rules of one exchange can result in the federalization of corporate governance is unfounded.

Notably, 80 commenters, which constitutes the vast majority of commenters that addressed the issue, agreed that the Proposal will enhance corporate governance and board decision making by improving board diversity.[219] For example, commenters with substantial experience in corporate

governance issues that have "worked closely with boards that have become more diverse," noted that they "witnessed a discernible, positive impact on the boardroom environment. Deliberation and discussion have become more focused, and the group has benefited from the additional perspectives contributed by women and individuals from other historically underrepresented groups."[220] Numerous other commenters shared similar experiences and perspectives.[221] For all the above-described reasons, Nasdaq believes that the Proposal fosters accountability, transparency, and investor confidence among Nasdaq-listed companies, consistent with Section 6(b) of the Exchange Act.

3. Companies Will Retain Broad Discretion to Decide How, Whether or When They Meet the Diversity Objectives

***Comment*:** Five commenters expressed the view that the Proposal is unnecessary because, to the extent shareholders and companies value increased board diversity, such changes will occur organically over time.[222] As expressed by one commenter, "[i]f the public is patient, companies will make changes on their own, at the right time and with the right people. . . . Over the years, major companies have elected visible minorities to their boards."[223] Another commenter noted that regulatory action was unnecessary because a "company that purposively does not take advantage of talented, qualified women and minorities places itself at a competitive disadvantage and also risks antidiscrimination lawsuits, enforcement actions and reputational damage."[224] Likewise, another commenter argued that the Proposal "is not needed because it unnecessarily pressures corporations to do something they are already seeking to do."[225] In sum, these commenters view the pursuit of board diversity as best left to the discretion of each company without regulatory action.

***Response*:** Nasdaq reiterates that the Proposal provides flexibility for companies not wishing to achieve the diversity objectives or that wish to do so on a different timeline than that proposed by Nasdaq. The Proposal does not require companies to achieve the diversity objectives if they explain their reasons for not having at least two diverse directors, and the explanation could include describing a different approach. As such, companies are free to use their discretion as to how, whether, or when they pursue the diversity objectives. The Proposal's disclosure requirement also provides shareholders transparency into the companies' decisions with respect to board diversity. As Acting Chair Lee noted, increased disclosure "gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value."[226] By increasing transparency for investors, the Proposal thus allows them to critically evaluate a company's decisions with respect to how, whether, or when to pursue board diversity.

Regulatory action has proven effective in removing barriers and in increasing board diversity among those traditionally underrepresented in other jurisdictions.[227] For example, women account for at least 30% of the largest boards of companies in six countries using disclosure-based models: Australia, Finland, Sweden, New Zealand, Canada, and the United Kingdom.[228] And while the Proposal is not a mandate, Nasdaq observed that following the implementation of Norway's board gender mandate, the number of public company board seats held by women in Norway increased from 6% in 2002 to 42% in 2020.[229] In addition, since California required companies headquartered in the state to have at least one director who self-identifies as a female and one director from an underrepresented community, 669 women have joined public company boards in the state and the number of public companies with all male boards has declined from 30% in 2018 to 3% in 2020.[230] Multiple commenters have similarly touted the success of California's law in increasing board diversity.[231]

Nasdaq notes that absent encouragement, progress toward increased board diversity has been demonstrably slow. The Proposal cited statistics on board diversity that confirm that women, underrepresented minorities, and those with LGBTQ+ status have been and remain underrepresented on boards.[232] As one commenter noted, "Black and African American directors only comprise 4.1% of Russell 3000 board seats in the U.S., 72% of Fortune 1000 companies have no Asian directors, and Hispanic and Latino directors only make up 2.28% of S&P 1500 board seats. These numbers have changed minimally in the past decade, indicating that more direct targets are necessary to address what are materially unequal hiring practices."[233] Numerous commenters have provided additional, similar data.[234] As succinctly noted by one commenter, Senator Josh Becker of the California State Senate, "[w]omen today hold less than 23% of the board seats of companies in the Russell 3000. Underrepresented ethnic and racial groups make up 12.5% of board directors, but are 40% of the U.S. population. While the number is increasing over time, it does so at a glacial pace insufficient with what should be expected as we enter 2021."[235] In light of this research, Nasdaq continues to believe that a "disclosure-based, business-driven framework to enhance board diversity that balances the need for flexibility with each company's particular circumstances" is in the public interest.[236]

4. <u>The Proposal Encourages Companies to Consider Qualified Diverse Director Candidates</u>

Comment: Eight commenters expressed the mistaken belief that the Proposal encourages listed companies to discriminate on the basis of race and sex when seeking board nominees instead of encouraging listed companies to review prospective board members based on their qualifications.[237] As the commenter, Judicial Watch, Inc., noted, "[r]equiring Nasdaq members to focus more on race and gender takes away from the focus on merit."[238] Similarly, one commenter, The Heritage Foundation, expressed the erroneous view that the Proposal "is racist and sexist in that it mandates that firms establish quotas and discriminate based on sex, skin color, ethnicity or sexual orientation rather than making determinations based on individual achievement, talent, experience or competence."[239] Likewise, one commenter mistakenly argued that the Proposal "interferes with the best interest requirement and ignores the dictum, most famously articulated by Warren Buffett, that board members should be chosen on merit and ability to improve corporate performance," and thus the Proposal "weakens shareholder rights."[240]

Response: For the reasons stated in the Ballard Spahr LLP Letter, Nasdaq concludes that the Proposal neither encourages companies to discriminate nor discourages board candidate recruitment on the basis of merit.[241]

Nasdaq categorically rejects the premise that there is a lack of available and qualified candidates who are women, underrepresented minorities, or individuals that self-identify as LGBTQ+. Individuals from these groups collectively comprise the majority of the U.S. population. Women account for approximately 51% of the total U.S. population, while underrepresented ethnic and racial minorities account for approximately 40% of the total U.S. population. Nine commenters[242] wrote to affirm that finding qualified, diverse board candidates will not be unduly difficult, including John Rogers and Mellody Hobson of Ariel Investments who stated, "[i]n a country with over 330 million people, there are plenty of qualified candidates . . . [and] the growing number of attendees at Ariel's annual Black Corporate Directors Conference is a testament to a business community that is rich with untapped Black and brown board talent."[243] Similarly, Olshan Frome Wolosky LLC noted that, "[d]uring the 2019 and 2020 proxy seasons, our shareholder activist clients were responsible for the appointment of

approximately 85 diverse director candidates to public company boards," which reinforces the notion that "if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand."[244]

Despite the availability of qualified diverse candidates, traditional board nominee recruiting practices may result in qualified diverse candidates being overlooked. Studies suggest that the director candidate selection process may create barriers to considering qualified diverse candidates for board positions by limiting the search for director nominees to existing directors' social networks and candidates with C-suite experience.[245] Indeed, one commenter bolstered this point by citing additional studies that "found that 84% of large-cap and 90% of mid-cap organizations most often rely on current director recommendations when seeking to diversify their boards."[246] As a result, that commenter concluded that "reliance on current directors [to recruit board nominees], most of whom are white men, 'will generally produce candidates much like those directors.'"[247]

As such, Nasdaq wholly rejects the viewpoint expressed by some commenters that encouraging companies to consider qualified diverse candidates would in any way undercut a director's "merit or ability to improve corporate performance." Expanding director searches to include qualified women, underrepresented minorities, and those with LGBTQ+ status will not in any way shrink the talent pool. Commenters have cited no evidence for the assertion that encouraging companies to consider diverse board candidates would result in a "weaken[ing] of shareholder rights." To the contrary, as noted in the Proposal and as identified by 72 commenters,[248] board diversity is linked to enhanced company performance, innovation and/or long-term sustainable returns. Moreover, the increased transparency fostered by additional disclosures empowers shareholders to make informed decisions.

5. <u>The Proposal Protects the Privacy Interests of Directors</u>

Comment: Eleven commenters expressed appreciation that the Matrix facilitates disclosure in a manner that simultaneously protects director privacy.[249] However, three commenters disagreed, expressing the view that the Proposal will result in violations of a director's right to privacy and that companies will offend directors by inquiring about their race, ethnicity, sexual orientation, or gender identification.[250] Specifically, International Bancshares Corporation, a Nasdaq-listed company, argued that it "is concerned that forced disclosure based upon a quota system infringes on the privacy rights of board members (particularly on small boards where aggregated data would provide little protection)[.]"[251] In addition, a commenter contended that directors would be "offended" if asked about their ethnicity or gender identification,[252] and one commenter stated that "[i]nvestors' right to know is outweighed by board members right to privacy."[253]

***Response*:** While Nasdaq appreciates the commenters' concerns, Nasdaq believes the Proposal adequately accounts for directors' privacy interests. The Proposal does not require directors to provide any information with respect to their race, gender, or LGBTQ+ status, and thus there is no "forced disclosure" to satisfy a "quota system." Directors may choose to self-identify their respective race, gender, or LGBTQ+ status, or they may decide not to disclose such information. One commenter noted that "directors have self-determination on how to report – including the option to not report," giving them "empowerment."[254] If directors choose not to disclose, the Matrix provides companies with the ability to reflect this non-disclosure.[255] Thus, companies can complete the Matrix even if a director chooses not to self-identify. In addition, when directors choose to self-identify, the Matrix requires aggregated disclosures, rather than individualized, director-by-director disclosures. As mentioned

above, numerous commenters concluded that the format of the Matrix adequately protects a director's privacy interests.[256] Directors with concerns that even aggregated data, based on the unique circumstances of the company, may not fully protect their privacy can choose not to self-identify. Nasdaq believes that the Proposal adequately encourages board diversity disclosure while balancing the privacy interests of directors to ensure they are not compelled to identify their respective race, gender, or LGBTQ+ status.

The Proposal's reliance on self-identification through voluntary disclosures is familiar to directors. For example, D&O questionnaires seek information concerning a director's age, experience, and related party transactions, and the information sought for the Matrix would be an extension of similar questions already posed to directors. Moreover, the voluntary, self-identification approach is well established in a number of familiar contexts. Millions of Americans seeking COVID-19 vaccines are being asked to fill out forms concerning gender, race, and ethnicity on a voluntary basis. In sum, Nasdaq concludes that the Proposal's reliance on the voluntary, self-identification approach to collecting information from directors is appropriate, and the format of the Matrix adequately protects directors' privacy interests.

6. <u>The Proposal Provides Sufficient Flexibility for Companies to Meet the Diversity Objectives</u>

***Comment*:** One commenter worried that the Proposal could cause listed companies to feel compelled to ask current, non-diverse directors to resign from their boards.[257] Another commenter expressed concern that companies would likely add board members to satisfy the proposed diversity objective, "thereby increasing their board's size and potentially creating less effective corporate oversight and governance due to the larger size."[258]

***Response*:** Nasdaq seeks to clarify that the Proposal is neither requiring nor suggesting that companies add or remove any current directors in order to increase diversity. Companies seeking to meet the Proposal's diversity objectives can do so in a number of ways, and the Proposal provides adequate flexibility that allows each company the ability to pursue the approach most suitable for its circumstances. The Proposal is not imposing a required board size or composition, and each company that desires increased board diversity can pursue the diversity objectives in a manner appropriate for that company. Alternatively, a company may choose to pursue different diversity objectives, or none at all, and instead provide an explanation. Commenters illustrated the unique paths a company can take to satisfy the rule. For example, one commenter stated that, as opposed to displacing current directors, research shows companies increase diversity either by expanding their board or by filling seats left vacant.[259] In contrast, Akin Gump stated that "the proposal provides Nasdaq-listed companies with the option of explaining why a minimum of two diverse directors is not achievable, recommended or necessary in lieu of adding new (or replacing existing) directors."[260] Therefore, Nasdaq believes the Proposal provides sufficient flexibility for companies to follow any approach that they choose.

7. <u>Economic Growth will not be Stymied and Companies will not Incur Substantial Costs as a Result of the Proposal</u>

Comment: One commenter raised concerns that the Proposal could expose Nasdaq listed companies to additional costs.[261] More specifically, the commenter expressed concern that companies may opt to stay private as a result of the Proposal. The commenter also conveyed that activist groups could use the diversity disclosures to start costly pressure campaigns against corporations with non-

diverse boards. Additionally, the commenter noted that Nasdaq should provide a more detailed cost-benefit analysis.

Response: Nasdaq recognizes that equity markets are the engine of growth for the United States economy, and that initial public offerings are an important opportunity for investors to share in that growth. In 2017, Nasdaq published a blueprint entitled *The Promise of Market Reform: Revitalizing America's Economic Engine* ("Revitalize") that enumerated concrete enhancements to the public company model. Revitalize was based on years of engagement with investors, public companies, and policy makers, and Nasdaq then engaged in a multi-year effort to advance the reforms recommended in the blueprint. Nasdaq would be loath to undermine the public company model.

Nasdaq carefully considered the risks, rewards, and competitive implications of making the Proposal. While Nasdaq would regret losing even a single valued issuer, Nasdaq fully recognizes that companies are free to decide where they list; experience and empirical data demonstrates that neither the listings contract nor listings fees present an impediment to issuers switching listings markets. Nonetheless, Nasdaq believes that many long-term, newer, and potential public companies strongly support and value the objectives of the Proposal and may affirm their choice or choose anew to list on Nasdaq because of it.

Additionally, Nasdaq respectfully disagrees with the commenter's suggestion that the Proposal will reduce the number of companies desiring to go public. Among the many elements companies consider when becoming public, board composition is growing in importance among pre-public company stakeholders. For example, in February 2020, Goldman Sachs announced a new standard for taking companies public — the company must have at least one diverse board member — effective July 2020. Private equity firms also are being urged to address diversity. As one commenter stated, "many private equity general partners are already moving aggressively toward new and improved standards of diversity in a universe where requirements for public disclosure are far less demanding."[262] Another commenter noted that "[g]iven the frequency of private equity and venture backed companies exiting through an IPO, it appears likely that the Proposed Rules will result in positive movement on board diversity of the portfolio companies owned by the private funds in which our members invest."[263] Nasdaq, in concurrence with these commenters, believes that private companies are recognizing the value of board diversity as an important component of becoming a public company and therefore, will not have misgivings about going public as a result of the Proposal.

Nasdaq also believes that Amendment No. 1 provides a newly listed company with a reasonable amount of time to publish its board disclosure and to have diverse directors in alignment with Nasdaq's diversity objectives after going public. Amendment No. 1 provides a newly listed company with at least one year from the date of listing to have at least one diverse director and at least two years to obtain two diverse directors.[264] These companies would also have the benefit of the initial two to five year phase-in period. Therefore, companies will not avoid going public because Amendment No. 1 provides sufficient time for newly listed companies to have, or explain why they do not have, at least two diverse directors.

Moreover, Nasdaq disagrees with the commenter's belief that pressure campaigns by activist groups will increase because of the proposal. In fact, Nasdaq believes that its Proposal may help to quell such pursuits. As Akin Gump noted in its comment letter, "[i]n light of George Floyd's death in May 2020, coupled with the resulting broader societal awareness and focus on racial inequality and systemic

racism . . . it is logical to expect, absent the adoption of Nasdaq's accelerated rule-based approach for action, that 2021 will bring an increase in the number of shareholder proposals received by Nasdaq-listed companies relating to diversity, equity and inclusion."[265] Amendment No. 1's "have-or-explain" framework allows companies with non-diverse boards to explain their approach to diversity, which Nasdaq believes will limit pressure campaigns by activist groups.

Nasdaq carefully considered the costs potentially imposed on listed companies or those considering listings, including the costs of retaining a director search firm to conduct the search for new or replacement directors; the time corporate employees spend conducting the search, completing the Matrix and/or providing an explanation, and providing corporate disclosure; and potential disruption to Boards from these activities. Because existing, new, and potential public companies will experience these potential costs in vastly different ways and combinations, it is impossible to quantify the costs with meaningful certainty.

Accordingly, Nasdaq took multiple steps to mitigate the potential costs that this Proposal might create. For example, Nasdaq proposed at least two alternatives to help companies mitigate the costs of retaining a search firm: (1) by offering complementary access via Equilar, as described above, and (2) by offering the alternative of an explanation if the company chooses not to meet the diversity objectives. To mitigate the time needed to complete and post the Matrix, Nasdaq has simplified both the Matrix itself and the mechanisms for making it available, in line with commenters' recommendations.

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I hope this information is useful to you in determining under Section 19(b) of the Exchange Act that Nasdaq's proposal to adopt listing rules related to board diversity is consistent with the Exchange Act. Nasdaq believes that its Amendment No. 1 aligns with good corporate governance, investor priorities and enhanced transparency around disclosures. For the above reasons, Nasdaq asks that the Commission approve the Amendment No. 1.

If you have any further questions, please do not hesitate to contact me.

Sincerely yours,

John A. Zecca

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[1] See Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (December 11, 2020) ("Proposal").

[2] See Letter from Jeffrey S. Davis, Nasdaq Inc., (January 8, 2021), available at https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8221271-227700.pdf.

[3] See NASDAQ-2020-081 [(February 26, 2021) available at https://listingcenter.nasdaq.com/Amendment 1 Diversity Proposal.pdf ("Amendment No. 1").

[4] See letters published on *Comments on NASDAQ Rulemaking, The Nasdaq Stock Market LLC; 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]* available at https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081.htm and *Comments on NASDAQ Rulemaking The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rule IM-5900-9 to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution to Help Advance Diversity on Company Boards [Release No. 34-90571; File No. SR-NASDAQ-2020-082]* available at https://www.sec.gov/comments/sr-nasdaq-2020-082/srnasdaq2020082.htm.

[5] See David Pusateri E-mail; Kit Wong E-mails #1 and #2; Peter Samson E-mail; Alex Magid E-mail; Samuel Sloniker E-mail; Yolanda Rivera E-mail; Kevin and Roberta Vinyard E-mail; Jenny Barcus E-mail; Phil Goldstein E-mail; Leslyek Killian E-mail; W. Fischer E-mail; Karen Smith E-mail; Steve Ashe E-mail; Clayton Butler E-mail; Spencer Cleaves E-mail; Jason Negri E-mail; James Huggins E-mail; Robert Harold E-mail; Scott Young E-mail; Jeremy Wichman E-mail; Geoffrey White E-mail; Joseph Miller E-mail; Concerned American Executives E-mail; Werner Lind E-mail; R. Harris E-mail; and Cindy Brandt E-mail.

[6] See Mercy Investment Services, Inc. Letter; Miller/Howard Investments, Inc. Letter; Stardust Letter; Soundboard Governance LLC Letter; Buck Gee E-mail; San Francisco Employees' Retirement System Letter; UAW Retiree Medical Benefits Trust Letter; Professor Margaret M. Chin E-mail; Women for Economic and Leadership Development Letter; Parity.org Letter; Generation Investment Management, LLP Letter; Brightcove, Inc. E-mail; Ohio Public Employees Retirement System Letter; Ariel Investments, LLC Letter; AllianceBernstein L.P. Letter; California State Teachers' Retirement System Letter; MFS Investment Management Letter; New York City Office of the Comptroller Letter; Pennsylvania State Treasurer Letter; 2U, Inc. Letter; Ideanomics, Inc. Letter; Microsoft Corporation Letter; T. Rowe Price Group, Inc. Letter; Apax Partners Letter; Capital Research and Management Company Letter; LGIM America Letter; Lord Abbett Letter; Washington State Investment Board Letter; Professor Lisa M. Fairfax E-mail; Skadden Arps LLP Letter; Akin Gump Strauss Hauer & Feld LLP Letter; California State Treasurer Letter; Amy Goodman and John Olson E-mail; Faye Sahai E-mail; Professor Morgan Flake E-mail; Association of Asian American Investment Managers Letter; Int'l Corporate Governance Network Letter; WomenExecs on Boards E-mail; California State Controller Letter; Olshan Shareholder Activism Group Letter; State of New York Office of the State Comptroller Letter; National Investor Relations Institute Letter; BMO Global Asset Management Letter; BoardReady Letter; and YWCA Metropolitan Chicago Letter.

[7] See CtW Investment Group Letter at 2.

[8] See CtW Investment Group Letter at 2.

[9] On January 14, 2021, Ballard Spahr LLP filed a letter with the Commission summarizing comments that Nasdaq had received informally from interested parties that are not necessarily reflected in the range of comments submitted directly to the Commission. See Ballard Spahr LLP Letter dated January 14, 2021 at 1.

[10] See Proposal at 80,492.

[11] See CtW Investment Group Letter at 2.

[12] See Amendment No. 1 at 16-17.

[13] See 2U, Inc. Letter; Akin Gump Strauss Hauer & Feld LLP Letter; AllianceBernstein L.P. Letter; Amy Goodman and John Olson E-mail; Apax Partners Letter; Ariel Investments, LLC Letter; Association of Asian American

Investment Managers Letter; BMO Global Asset Management Letter; BoardReady Letter; Brightcove, Inc. E-mail; Buck Gee E-mail; California State Controller Letter; California State Teachers' Retirement System Letter; Capital Research and Management Company Letter; New York City Office of the Comptroller Letter; Faye Sahai E-mail; Generation Investment Management, LLP Letter; Professor Lisa M. Fairfax E-mail; Ideanomics, Inc. Letter; Int'l Corporate Governance Network Letter; LGIM America Letter; Lord Abbett Letter; Professor Margaret M. Chin E-mail; Mercy Investment Services, Inc. Letter; MFS Investment Management Letter; Microsoft Corporation Letter; Miller/Howard Investments, Inc. Letter; Professor Morgan Flake E-mail; National Investor Relations Institute Letter; State of New York Office of the State Comptroller Letter; Ohio Public Employees Retirement System Letter; Olshan Shareholder Activism Group Letter; Parity.org Letter; Pennsylvania State Treasurer Letter; San Francisco Employees' Retirement System Letter; Skadden Arps LLP Letter; Soundboard Governance LLC Letter; Stardust Letter; California State Treasurer Letter; T. Rowe Price Group, Inc. Letter; UAW Retiree Medical Benefits Trust Letter; Washington State Investment Board Letter; Women for Economic and Leadership Development Letter; WomenExecs on Boards E-mail; and YWCA Metropolitan Chicago Letter.

[14] See LGIM America Letter at 3.

[15] See Generation Investment Management, LLP Letter at 1.

[16] See Washington State Investment Board Letter at 2; Professor Lisa M. Fairfax E-mail at 2, 4-5; Skadden Arps LLP Letter at 2; and Akin Gump Strauss Hauer & Feld LLP Letter at 3.

[17] See State Street Global Advisors *CEO's Letter on Our 2021 Proxy Voting Agenda* at https://www.ssga.com/us/en/institutional/ic/insights/ceo-letter-2021-proxy-voting-agenda.

[18] See Proposal at 80,493.

[19] See Akin Gump Strauss Hauer & Feld LLP Letter ("We note that the Nasdaq Diversity Proposal is not the first proposed regulation of its kind. For example, in September 2018, California mandated all public companies with executive offices in the State to have at least one female board member by not later than December 2019. Other states have followed suit and adopted similar requirements. Further, on September 30, 2020, California's governor, Gavin Newsom, signed into law Senate Bill (SB) 979, a measure that will require California corporations to achieve diversity on their boards of directors by January 2023, thereby effectively banning all-white boards for more than 600 publicly held companies. Countries around the globe, including Norway, Germany, France, Spain, Belgium, Netherlands and Iceland, have adopted diversity legislation similar to California's[.]").

[20] See Amendment No. 1 at 87.

[21] See Banneker Ventures and The Collective Letter at 2.

[22] See National Urban League Letter at 5.

[23] See Olshan Shareholder Activism Group Letter at 3.

[24] See Ballard Spahr LLP Letter dated January 14, 2021 at 1; see also U.S. Chamber of Commerce Letter at 2 ("It is important for start-ups and EGCs to have the flexibility needed to tap specific founder and entrepreneur expertise. It is why Congress, through the 2012 JOBS Act, provided flexibility in certain board requirements to businesses who fall within the EGC category. We believe that it is important for EGCs and start-ups to have similar levels of flexibility under the Proposal.")

[25] See Ballard Spahr LLP Letter dated January 14, 2021 at 1, 2.

[26] See Mercy Investment Services, Inc. Letter; San Francisco Employees' Retirement System Letter; Women for Economic and Leadership Development Letter; Ariel Investments, LLC Letter; California State Teachers' Retirement System Letter; Capital Stewardship, SEIU Letter; Pennsylvania State Treasurer Letter; Ideanomics, Inc. Letter; Microsoft Corporation Letter; T. Rowe Price Group Inc. Letter; Apax Partners Letter; Miller/Howard Investments, Inc. Letter; TIAA Letter; Professor Lisa M. Fairfax E-mail; Skadden Arps LLP Letter; Akin Gump

Strauss Hauer & Feld LLP Letter; Faye Sahai E-mail; The Links, Incorporated Letter; California State Controller Letter; and Association of Asian American Investment Managers Letter.

[27] See Microsoft Corporation Letter at 2.

[28] See Ideanomics, Inc. Letter at 4.

[29] See Skadden Arps LLP Letter at 2, 3.

[30] See Proposal at 80,493.

[31] See Proposal at 80,493.

[32] See Proposal at 80,493.

[33] See Ballard Spahr LLP Letter dated January 14, 2021 at 1.

[34] See Guess & Co, Corporation Letter at 1; Publius Oeconomicis Letter at 9; Matthew Glen E-mail at 1; Judicial Watch, Inc. Letter at 4; Letter Type A at 1; Walter Donnellan Letter at 1; Independent Women's Forum Letter at 1; International Bancshares Corporation Letter at 2; De la Vega Occidental & Oriental Holdings L.L.C. Letter at 2; and Colin Gallagher E-mail at 1.

[35] See Letter Type A at 1 and Independent Women's Forum Letter at 1.

[36] See Proposal at 80,492.

[37] See Mercy Investment Services, Inc. Letter at 1 ("We commend Nasdaq for providing companies with the opportunity to increase board diversity through a disclosure-based, business-driven approach rather than a quota. We do not believe Nasdaq's requirements will be overly burdensome or coercive."); National Investor Relations Institute Letter at 3 ("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."). See also Miller/Howard Investments, Inc. Letter at 1; Women for Economic and Leadership Development Letter at 1; San Francisco Employees' Retirement System Letter at 2; California State Controller Letter at 1; and Stardust Letter at 2.

[38] See UAW Retiree Medical Benefits Trust Letter at 2, 3; New York City Office of the Comptroller Letter at 1; Pennsylvania State Treasurer Letter at 1; T. Rowe Price Group, Inc. Letter at 1; Apax Partners Letter at 1; Washington State Investment Board Letter at 2; Mercy Investment Services, Inc. Letter at 1; Miller/Howard Investments, Inc. Letter at 1; San Francisco Employees' Retirement System Letter at 2; California State Controller Letter at 1; and Stardust Letter at 2.

[39] See Amy Goodman and John Olson E-mail at 2; Akin Gump Strauss Hauer & Feld LLP Letter at 5; Soundboard Governance LLC Letter at 2; and Skadden Arps LLP Letter at 2.

[40] See Parity.org Letter at 1; Faye Sahai E-mail at 1; and Women for Economic and Leadership Development Letter at 1.

[41] See Professor Lisa M. Fairfax E-mail at 10.

[42] See U.S. Chamber of Commerce Letter at 2; Association of Asian American Investment Managers Letter at 2; The Forum of Executive Women Letter at 1; Women Business Collaborative Letter at 1; YWCA Metropolitan Chicago Letter at 1; and National Investor Relations Institute Letter at 3.

[43] See Stardust Letter at 2. Emphasis in original.

[44] See Professor Lisa M. Fairfax E-mail at 10.

[45] See Parity.org Letter at 1. Emphasis in original.

[46] See Judicial Watch, Inc. Letter 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.");

and Publius Oeconomicis Letter 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.").

[47] On February 5, 2021, Ballard Spahr LLP filed a letter with the Commission to address certain comments submitted to the Commission concerning the Proposal. See Ballard Spahr LLP Letter dated February 5, 2021 at 2.

[48] See Senator Catherine Cortez Masto, et al. Letter; State Street Global Advisors Letter; BMO Global Asset Management Letter; California Legislative Black Caucus Letter; BoardReady Letter; Senator Dianne Feinstein Letter; UAW Retiree Medical Benefits Trust Letter; Mercy Investment Services, Inc. Letter; Wellington Management Company LLP Letter; TIAA Letter; Miller/Howard Investments, Inc. Letter; LGIM America Letter; Generation Investment Management, LLP Letter; Ariel Investments, LLC Letter; FCLTGlobal Letter; The Links, Incorporated Letter; Ohio Public Employees Retirement System Letter; California Public Employees' Retirement System Letter; California State Teachers' Retirement System Letter; Stardust Letter; Capital Stewardship, SEIU Letter; CtW Investment Group Letter; MFS Investment Management Letter; New York City Office of the Comptroller Letter; 2U, Inc. Letter; FactSet Research Systems Inc. Letter; Henry Schein, Inc. Letter; Microsoft Corporation Letter; T. Rowe Price Group, Inc. Letter; WW International, Inc. Letter; Apax Partners Letter; Capital Research and Management Company Letter; Goldman Sachs Group, Inc. Letter; Parity.org Letter; Lord Abbett Letter; Washington State Investment Board Letter; Catalyst Letter; California Partners Project Letter; Biotechnology Innovation Organization Letter; Corporate Counsel Women of Color Letter; State of Rhode Island, Office of the General Treasurer Letter; Professor Lisa M. Fairfax Email; Akin Gump Strauss Hauer & Feld LLP; Cynthia Overton Letter; Brandi Nicole Johnson E-mail; Jo Brickman Email; Paolo Guadiano Email; U.S. Chamber of Commerce Letter; American Civil Liberties Union Letter; Association of Asian American Investment Managers Letter; Bay Area Asian American General Counsel Letter; Greater Sacramento Urban League Letter; Institutional Limited Partners Association Letter; Metro NY Chapter, National Black MBA Association Letter; The Forum of Executive Women Letter; AFL-CIO Letter; National Association of Securities Professionals Letter; The Boston Club Letter; United States Hispanic Chamber of Commerce Letter; The Forum for Sustainable and Responsible Investment Letter; Women Business Collaborative Letter; WomenExecs on Boards E-mail; Banneker Ventures and The Collective Letter; *L* Catterton Management Company, LLC; BetterInvesting (NAIC) Letter; Letter Type C (3); Latino Corporate Directors Association Letter; Olshan Shareholder Activism Group Letter; State of New York Office of the State Comptroller Letter; Robin Hood Letter; Congresswoman Carolyn Maloney and Congressman Gregory Meeks Letter; and California State Controller Letter.

[49] See Publius Oeconomicis Letter at 5; Walter Donnellan Letter at 1; John Richter E-mail at 1-2; Theo Vermaelan E-mail at 1-3; De la Vega Occidental & Oriental Holdings L.L.C. Letter at 2; The Heritage Foundation Letter at 6-9; Project on Fair Representation Presentation at 6-9; and Senator Pat Toomey, et al. Letter at 6.

[50] See Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, J. Bus. Ethics Journal of Business Ethics (2019) 159:705–725; Aaron Dhir, Osgoode Hall, Challenging Boardroom Diversity: Corporate Law, Governance, and Diversity 150 (2015); Scott Yonker, Vineet Bhagwat, Gennaro Bernile, *Board Diversity, Firm Risk, and Corporate Policies* (March 6, 2017), Journal of Financial Economics Volume 127, Issue 3, March 2018, Pages 588-612; Lawrence J. Abbott, Susan Parker, Theresa J. Presley, *Female Board Presence and the Likelihood of Financial Restatement*, 26(4) Accounting Horizons 607, 626 (2012); Daniel P. Forbes and Frances I. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24(3) Acad. Mgmt. Rev. 489, 496 (Jul. 1999); David Abad-Diaz, M. Encarnacion Lucas-Perez, Antonio Mínguez Vera, *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192, 202 (July 2017); Maria Consuelo Pucheta-Martınez, Inmaculada Bel-Oms, Gustau Olcina-Sempere, *Corporate governance, female directors and quality of financial information*; 25(4) Bus. Ethics: A European Rev. 363, 378 (2016); Yu Chen, John Daniel Eshleman, Jared S. Soileau, *Board Gender Diversity and Internal Control Weaknesses*, 33 Advances in Acct. 11 (2016); Bin Srinidhi, Ferdinand A. Gul, Judy Tsui, *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610, 1612-16 (Winter 2011); Francisco Bravo,

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Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140, 142-44 (2019); Ammar Ali Gull, Mehdi Nekhili, Haithem Nagati, France Tawhid Chtioui, *Beyond gender diversity: How specific attributes of female directors affect earnings management*, 50(3) British Acct. Rev. 255 (Sept. 2017), available at: https://ideas.repec.org/a/eee/bracre/v50y2018i3p255-274.html; Ferdinand A. Gul, Bin Srinidhi, Anthony C. Ng, *Does board gender diversity improve the informativeness of stock prices?*, 51(3) J. Acct. & Econ. 314 (April 2011); Douglas Cumming, T. Y. Leung, Oliver Rui, *Gender Diversity and Securities Fraud*, Academy of Management Journal Vol. 58, No 5 (Feb. 9, 2015), available at https://ssrn.com/abstract=2562399; David A. Carter, Betty J. Simkins, W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*. 38(1) Fin. Rev. 33; James D. Westphal and Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40(1) Admin. Sci. Q. 60, 77 (March 1995); Maria Encarnación Lucas-Pérez, Antonio Mínguez-Vera, Juan Samuel Baixauli-Soler, Juan Francisco Martín-Ugedo, and Gregorio Sánchez-Marín, *Women on the Board and Managers' Pay: Evidence from Spain*, 129 J. Bus. Ethics 285 (April 2014); Lynne Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1391 (June 2002); Deborah Rhode, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39(2) Del. J. Corp. L. 377, 402-403 (2014).

[51] This includes four studies (Carlyle (2020), McKinsey (2015), McKinsey (2020) and Carter, Simkins and Simpson (2003)) that specifically analyzed the relationship between company performance and gender, race and ethnic diversity on the board, and the findings of Carter et al. (2003) were affirmed by Bernile, Bhagwat and Yonker (2018). Bernile, Bhagwat and Yonker (2018) found that greater diversity on boards—including gender, ethnicity, educational background, age, financial expertise and board experience—is associated with increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, increased dividend payouts to shareholders, higher investment in R&D and better innovation. The authors observed that "[t]his is in line with the results in Carter, Simkins, and Simpson (2003), which show a positive association between local demographic diversity and firm value." 18 commenters agreed that one of more of these studies represent substantial credible evidence of the benefits of board diversity. See The Links Incorporated, Letter at 2; FCLT Global Letter at 3; LGIM America Letter at 1; Corporate Counsel Women of Color Letter at 2; 41st District of California Letter at 1; 58th District of California Letter at 1; UAW Retiree Medical Benefits Trust Letter at 3; Ariel Investments, LLC Letter at 1; 2U, Inc. Letter at 1; The Forum for Sustainable and Responsible Investment Letter at 2; Greater Sacramento Urban League Letter at 1; AFL-CIO Letter at 1; Stardust Letter at 1; Akin Gump Strauss Hauer & Feld LLP Letter at 2; Capital Stewardship, SEIU Letter at 1; California Legislative LGBTQ Caucus Letter at 1; Latino Corporate Directors Association Letter at 8; and California Legislative Black Caucus at 1. Acting Chair Lee also cited the studies by Bernile et al. and McKinsey (2020) studies in her remarks at the Council of Institutional Investors Fall 2020 Conference. See Acting Chair Allison Herren Lee, *Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference* (September 22, 2020), available at: https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922. Wahid (2019) concluded that gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud, and has publicly stated that she believes her findings could extend to racial backgrounds. See Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, J Bus Ethics 159, 705–725 (2019) (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations); see also Barbara Shecter, *Diverse boards tied to fewer financial 'irregularities,' Canadian study finds*. Financial Post (Feb. 5, 2020), https://business.financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds (last accessed Nov. 27, 2020).

[52] See UAW Retiree Medical Benefits Trust Letter; FCLTGlobal Letter; California State Teachers' Retirement System Letter; Stardust Letter; CtW Investment Group Letter; MFS Investment Management Letter; FactSet Research Systems Inc. Letter; Microsoft Corporation Letter; Apax Partners Letter; Capital Research and Management Company Letter; Goldman Sachs Group, Inc. Letter; California Partners Project Letter; Professor Lisa M. Fairfax Email; Association of Asian American Investment Managers Letter; Bay Area Asian American

General Counsel Letter; Metro NY Chapter, National Black MBA Association Letter; BMO Global Asset Management Letter; and Banneker Ventures and The Collective Letter.

[53] See Microsoft Corporation Letter at 2.

[54] See Parity.org Letter; Professor Lisa M Fairfax E-mail; The Forum for Sustainable and Responsible Investment Letter; ALF-CIO Letter; California Legislative Black Caucus Letter; Greater Sacramento Urban League Letter; Institutional Limited Partners Association Letter; Latino Corporate Directors Association Letter; Brandi Nicole Johnson E-mail; Cynthia Overton Letter; Jo Brickman E-mail; U.S. Chamber of Commerce Letter; Akin Gump Strauss Hauer & Feld LLP Letter; Washington State Investment Board Letter; 2U, Inc. Letter; TIAA Letter; LGIM America Letter; Ariel Investments, LLC Letter; FCLTGlobal Letter; The Links, Incorporated Letter; Stardust Letter; Capital Stewardship, SEIU Letter; California Partners Project Letter; Senator Dianne Feinstein Letter; Senator Catherine Cortez Masto, et al. Letter; and Corporate Counsel Women of Color Letter.

[55] See Senator Dianne Feinstein Letter at 1.

[56] See The Wall Street Journal, *The Business Case for More Diversity* (October 26, 2019), available at: https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200 ("2019 WSJ Study").

[57] See TIAA Letter at 2.

[58] See FCLTGlobal Letter at 1.

[59] See T. Rowe Price Group, Inc. Letter at 2.

[60] LGIM America Letter at 2; see also AllianceBernstein L.P. Letter at 1 ("We believe that diversity, in thought as well as personal characteristics, is an important element of assessing the board's capabilities, as it promotes a wider range of perspectives to be considered for companies to both strategize and mitigate risks."); see also San Francisco Employees' Retirement System Letter at 1 ("We believe this diversity is critical in order for the hoard to properly oversee management, business strategy and risk mitigation.").

[61] See Wellington Management Company LLP Letter at 1.

[62] See Pennsylvania State Treasurer Letter at 1.

[63] See Senator Catherine Cortez Masto, et al. Letter; RespectAbility et al. E-mail; UAW Retiree Medical Benefits Trust Letter; Mercy Investment Services, Inc. Letter; Trillium Asset Management Letter; Fairpointe Capital Letter; Miller/Howard Investments, Inc. Letter; Amy Goodman and John Olson E-mail; TIAA Letter; The Links, Incorporated Letter; LGIM America Letter; San Francisco Employees' Retirement System Letter; Brightcove, Inc. E-mail; Office of the Illinois State Treasurer Letter; Ohio Public Employees Retirement System Letter; Ariel Investments, LLC Letter; Capital Stewardship, SEIU Letter; CtW Investment Group Letter; MFS Investment Management Letter; Pennsylvania State Treasurer Letter; Facebook, Inc. Letter; Henry Schein, Inc. Letter; Ideanomics, Inc. Letter; Microsoft Corporation Letter; T. Rowe Price Group, Inc. Letter; Brighthouse Financial, Inc. E-mail; Apax Partners Letter; Capital Research and Management Company Letter; The Investment Diversity Exchange Letter; Goldman Sachs Group, Inc. Letter; Lord Abbett Letter; National Investor Relations Institute Letter; Stardust Letter; Washington State Investment Board Letter; Biotechnology Innovation Organization Letter; California Partners Project Letter; Equality California Letter; Wellington Management Company LLP Letter; Soundboard Governance LLC Letter; Professor Lisa M. Fairfax E-mail; Loring, Wolcott & Coolidge Letter; Akin Gump Strauss Hauer & Feld LLP Letter; California Legislative Women's Caucus Letter; 58th District of California Letter; 41st District of California Letter; California State Senate Letter; California State Treasurer Letter; Faye Sahai E-mail; Thirty Percent Coalition Letter; U.S. Chamber of Commerce Letter; American Civil Liberties Union Letter; Association of Asian American Investment Managers Letter; Bay Area Asian American General Counsel Letter; Greater Sacramento Urban League Letter; Institutional Limited Partners Association Letter; Int'l Corporate Governance Network Letter; Council of Korean Americans Letter; Metro NY Chapter, National Black MBA Association Letter; The Forum of Executive Women Letter; AFL-CIO Letter; National Association of Securities Professionals Letter; National Asian Pacific American Bar Association Letter; The Boston Club Letter; The Committee of 100 Letter; United States Hispanic Chamber of Commerce

Letter; Women's Forum of New York Letter; The Forum for Sustainable and Responsible Investment Letter; Women Business Collaborative Letter; Women for Economic and Leadership Development Letter; WomenExecs on Boards E-mail; YWCA Metropolitan Chicago Letter; Banneker Ventures and The Collective Letter; Olshan Shareholder Activism Group Letter; BMO Global Asset Management Letter; Morningstar, Inc and Sustainalytics Letter; Latino Corporate Directors Association Letter; State Street Global Advisors Letter; State of New York Office of the State Comptroller Letter; *L* Catterton Management Company, LLC Letter; and California State Controller Letter.

[64] See State Street Global Advisors Letter at 1.

[65] See Trillium Asset Management Letter at 1.

[66] See Int'l Corporate Governance Network Letter at 2.

[67] See, e.g., Walter Donnellan Letter at 1 ("[T]here are not any studies at all which support LGBTQ+ members or those who identify with a gender different than on their birth certificate."); and Project on Fair Representation Presentation at 9 ("Nasdaq concedes 'there is a lack of published research on the issue of LGBTQ+ representation on boards.'").

[68] See Bostock v. Clayton Cty., 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 or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

[69] See Quorum, Out Leadership's LGBT+ Board Diversity and Disclosure Guidelines 3 (2019), available at: https://outleadership.com/content/uploads/2019/01/OL-LGBT-Board-Diversity-Guidelines.pdf. In addition, Credit Suisse in 2016 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." See Proposal at 80,476. 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." See Id.

[70] See Equality California Letter at 2.

[71] See Senator Toomey, et al. Letter at 2.

[72] See, e.g., Publius Oeconomicis Letter at 6 ("Contrary to the research cited by the NASDAQ, other studies have not even found the same positive correlation."); Walter Donnellan Letter at 1 ("Pletzer et al. (2015) found that board gender diversity alone has a "small and non-significant" relationship with a company's financial performance. Post and Byron (2014) found a "near zero" relationship with a company's market performance. Carter, D'Souza, Simkins and Simpson (2010) found that "[w]hen Tobin's Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity, neither positive nor negative."); The Heritage Foundation Letter at 2 ("The actual empirical peer reviewed economics literature is highly inconclusive with most studies showing little or no discernable effect on financial performance due to the sexual, racial or ethnic composition of corporate boards."); and the Senator Toomey et al. Letter at 2 ("First, the research underpinning NASDAQ's proposal is incomplete at best. For example, NASDAQ does not sufficiently address the research results finding that gender board diversity correlates very little, if at all, with corporate performance. NASDAQ has also not proven that board diversity *causes* improved corporate performance. In fact, some evidence suggests that 'the interaction of gender diversity and ethnic minority diversity do not impact financial performance.'"). Emphasis in original.

[73] See United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements 5 (Dec. 2015) (the "GAO Report"), available at: https://www.gao.gov/assets/680/674008.pdf ("Some research has found that gender diverse boards may

have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used").

[74] See Theo Vermaelen E-Mail at 2 ("NASDAQ does not cite the most relevant studies, studies that show significant stock price declines after *mandatory* diversity regulations in Norway (Ahern and Dittmar, 2012; Matsa and Miller, 2013) and California (Greene et al (2020).") Emphasis in original.

[75] See Publius Oeconomicis Letter at 8 ("Further, and as suggested by Professor Klein, the Proposed Rule will not produce actual diversity, but instead will simply require the appointment of people who "self-identify" as women, a designated minority, or gay or transgender, when in reality, these individuals will more likely than not carry with them substantially similar experiences as the white male cisgendered board members they are intended to replace."); see also John Richter E-mail at 2 ("We have already seen cases where companies bring in a "token minority officer" for appearances sake, but no intention to let them change anything.") ("The Proposal's demographic identity test is easily counterfeited. How, precisely, do you define a "black" person? How do you know if a person is bisexual?").

[76] See Senator Catherine Cortez Masto, et al. Letter; Association of Asian American Investment Managers Letter; Council of Korean Americans Letter; Minority Corporate Counsel Association Letter; The Forum of Executive Women Letter; AFL-CIO Letter; Ascend Pinnacle Letter; The Investment Diversity Exchange Letter; The Links, Incorporated Letter; California State Senate Letter; California State Treasurer Letter; Cynthia Overton Letter; Brandi Nicole Johnson E-mail; Faye Sahai E-mail; Jo Brickman E-mail; Laura Gluhanich E-mail; Suzanne Wertheim E-mail; Apax Partners Letter; Ariel Investments, LLC Letter; California State Teachers' Retirement System Letter; Capital Stewardship, SEIU Letter; Lord Abbett Letter; Mercy Investment Services, Inc. Letter; Miller/Howard Investments, Inc. Letter; Pennsylvania State Treasurer Letter; 2U, Inc. Letter; Brightcove, Inc. E-mail; FactSet Research Systems Inc. Letter; T. Rowe Price Group, Inc. Letter; Brighthouse Financial, Inc. E-mail; Professor Lisa M. Fairfax E-mail; CFA Institute Letter; Equality California Letter; The Forum for Sustainable and Responsible Investment Letter; Women Business Collaborative Letter; Women for Economic and Leadership Development Letter; California Legislative LGBTQ Caucus Letter; California State Controller Letter; BetterInvesting (NAIC) Letter; Letter Type B (21); Letter Type C (3); Katerli bounds E-mail; California Insurance Commissioner Letter and State of New York Office of the State Comptroller Letter.

[77] See Publius Oeconomicis Letter at 7 ("In addition, the Proposed Rule does [not] fully address diversity because it is incomplete. It does not account for other categorizations that could also increase diversity of a board (e.g., veteran status, disability status, experience in other industries / regions / etc.).") and John Richter E-mail at 2 ("I've been investing in stocks for decades, and the primary board member demographic I've been interested in is their age; which is already widely published.").

[78] See Senator Pat Toomey, et al. Letter at 1 ("It violates central principles of materiality that govern securities disclosures, and finally, it harms economic growth by imposing costs on public corporations and discouraging private corporations from going public. In so doing, NASDAQ fails to meet its burden to demonstrate that this proposed rule advances investor protection, fosters the public interest, or is otherwise consistent with the Securities Exchange Act of 1934 (Exchange Act)."); see also The Heritage Foundation Letter at 5 ("The proposed rule does not protect investors in any sense. It does not increase their returns or protect them from losses. It does not protect them from fraud or misrepresentation.").

[79] See Senator Pat Toomey, et al. Letter at 3, 4.

[80] See Senator Pat Toomey, et al. Letter at 4.

[81] See Senator Pat Toomey, et al. Letter at 2. Emphasis in original.

[82] See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) ("The Court also explicitly has defined a standard of materiality under the securities laws; see also *TSC Industries, Inc. v. Northway, Inc*., 426 U. S. 438 (1976), concluding in the proxy-solicitation context that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." It further explained that, to

fulfill the materiality requirement, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available. We now expressly adopt the TSC Industries standard of materiality for the § 10(b) and Rule 10b-5 context.")

[83] See the Adopting Release for Regulation FD (SEC Release No. 33-7881 (Aug. 15, 2000) ("The regulation does not define the terms "material" and "nonpublic," but relies on existing definitions of these terms established in the case law. Information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision. To fulfill the materiality requirement, there must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."). See also SEC Staff Accounting Bulletin: No. 99 - Materiality (SEC Release No. SAB 99 (Aug. 12, 1999)) (SAB 99) ("This formulation in the accounting literature is in substance identical to the formulation used by the courts in interpreting the federal securities laws. The Supreme Court has held that a fact is material if there is a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. Under the governing principles, an assessment of materiality requires that one views the facts in the context of the "surrounding circumstances," as the accounting literature puts it, or the "total mix" of information, in the words of the Supreme Court.").

[84] See Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011) ("Absent statistical significance, Matrixx argues, adverse event reports provide only "anecdotal" evidence that "the user of a drug experienced an adverse event at some point during or following the use of that drug." Accordingly, it contends, reasonable investors would not consider such reports relevant unless they are statistically significant because only then do they "reflect a scientifically reliable basis for inferring a potential causal link between product use and the adverse event." As in *Basic*, Matrixx's categorical rule would "artificially exclud[e]" information that "would otherwise be considered significant to the trading decision of a reasonable investor." Matrixx's argument rests on the premise that statistical significance is the only reliable indication of causation. This premise is flawed: As the SEC points out, "medical researchers . . . consider multiple factors in assessing causation." Statistically significant data are not always available. For example, when an adverse event is subtle or rare, "an inability to obtain a data set of appropriate quality or quantity may preclude a finding of statistical significance." . . . A lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events. As Matrixx itself concedes, medical experts rely on other evidence to establish an inference of causation. We note that courts frequently permit expert testimony on causation based on evidence other than statistical significance. We need not consider whether the expert testimony was properly admitted in those cases, and we do not attempt to define here what constitutes reliable evidence of causation. It suffices to note that, as these courts have recognized, "medical professionals and researchers do not limit the data they consider to the results of randomized clinical trials or to statistically significant evidence." . . . The FDA similarly does not limit the evidence it considers for purposes of assessing causation and taking regulatory action to statistically significant data. . . Not only does the FDA rely on a wide range of evidence of causation, it sometimes acts on the basis of evidence that suggests, but does not prove, causation" (citations omitted).).

[85] See Proposal at 80,483.

[86] See San Francisco Employees' Retirement System Letter at 2.

[87] See Wellington Management Company LLP Letter at 1.

[88] See Senator Dianne Feinstein Letter at 1; see also 2019 WSJ Study.

[89] See Proposal at 80,474.

[90] See State Street Global Advisors Letter at 2.

[91] See New York City Office of the Comptroller Letter at 1.

[92] See Pennsylvania State Treasurer Letter at 1.

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[93] See Office of the Illinois State Treasurer Letter at 1, 2.

[94] See Office of the Investor Advocate, U.S. Securities and Exchange Commission, Report on Activities, Fiscal Year 2020 (Dec. 29, 2020), available at: https://www.sec.gov/files/sec-investor-advocate-report-on-activities-2020.pdf. ("To make fully informed investment decisions, investors generally would benefit from greater insight into the diversity characteristics of a company's current board, as well as its policies designed to promote diversity in board composition going forward. Thus, to be listed on a national exchange, a company should be required to provide more fulsome disclosure regarding the composition of its board of directors, nominees for director positions, and executive officers . . . listing standards could help ensure that more companies make this information publicly available on a basis that enables investors to draw comparisons.").

[95] See FactSet Research Systems Inc. Letter at 1; California State Teachers' Retirement Systems Letter at 1; Ohio Public Employees Retirement System Letter at 1; Ideanomics, Inc. Letter at 3; Soundboard Governance LLC Letter at 2; Ariel Investments, LLC Letter at 1; State of Rhode Island, Office of the General Treasurer Letter at 1; TIAA Letter at 3; CFA Institute Letter at 3; MFS Investment Management Letter at 2; The Forum for Sustainable and Responsible Investment Letter at 2; Lisa Fairfax E-mail at 5; United States Hispanic Chamber of Commerce Letter at 2; Stardust Letter at 2; Skadden Arps LLP Letter at 2; Women's Forum of New York Letter at 2; Akin Gump Strauss Hauer & Feld LLP Letter at 3; Latino Corporate Directors Association Letter at 6; BoardReady Letter at 1; Olshan Shareholder Activism Group Letter at 2; BMO Global Asset Management Letter at 1; Morningstar, Inc. and Sustainalytics Letter at 1; BetterInvesting (NAIC) Letter at 1; The Links, Incorporated Letter at 2; LGIM American Letter at 1; Corporate Counsel Women of Color Letter at 2; Microsoft Corporate Letter at 2; and Capital Stewardship, SEIU Letter at 2.

[96] See LGIM America Letter at 1.

[97] See Corporate Counsel Women of Color Letter at 2.

[98] See Microsoft Corporation Letter at 2.

[99] See U.S. Chamber of Commerce Letter at 1.

[100] See Letter Type C at 1; see also Jo Brickman E-mail at 1 and Cynthia Overton Letter at 1.

[101] See Proposal at 80,485. see also Lisa Fairfax Letter at 6 ("The company-by-company engagement effort to determine whether and to what extent boards promote diversity on their board is similarly time consuming, expensive, inaccurate and ultimately inefficient. This effort also creates informational asymmetries, particularly for investors without the time or resources to effectively engage in this manner.").

[102] See TIAA Letter at 2 ("Many investors are left to consult board data that has been "assessed" by third parties for commercial purposes rather than collected directly from company reporting, which raises concerns about accuracy, objectivity and consistency."); see also LGIM America Letter at 2 ("Specialty diversity data is expensive. Only the large investors can afford to pay for this information. . .Assessed data by data providers creates problems for companies because they lose control of the profile of directors of their companies as subjective assessments by data providers are made. If they disclosed through a standard matrix they would control the quality and accuracy of their data.").

[103] See UAW Retiree Medical Benefits Trust Letter at 6.

[104] See Proposal at 80,497.

[105] See Senator Pat Toomey, et al. Letter at 1 ("It violates central principles of materiality that govern securities disclosures, and finally, it harms economic growth by imposing costs on public corporations and discouraging private corporations from going public. In so doing, NASDAQ fails to meet its burden to demonstrate that this proposed rule advances investor protection, fosters the public interest, or is otherwise consistent with the Securities Exchange Act of 1934 (Exchange Act).") and 4.

[106] See Senator Pat Toomey, et al. Letter at 3 and Proposal at 80,474, 80,484.

[107] See Proposal at 80,485.

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[108] See Proposal at 80,485.

[109] See Ballard Spahr LLP Letter dated February 5, 2021 at 17.

[110] See Ludke Consulting LLC and Smartjob, LLC Letter; National Organization on Disability Letter; Publius Oeconomicis Letter; Ideanomics, Inc. Letter; James Morgan E-mail; Snowdon Beinn Ltd. Letter; NYC Mayor's Office for People with Disabilities Letter; Nicholas D. Lawson Letter; Hearing Access & Innovations, Inc. Letter; Deaf and Hard of Hearing Bar Association Letter; RespectAbility et al. E-mail; National Stuttering Association Letter; Congressman Brad Sherman Letter; Disability:IN/American Association of People with Disabilities Letter; and Senator Pat Toomey, et al. Letter.

[111] See Proposal at 80,493.

[112] See SEC C&DI 116.11 and 133.13. https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#116-11

[113] See Proposal at 80,493.

[114] See Professor Lisa M. Fairfax E-mail at 8.

[115] See San Francisco Employees' Retirement System Letter at 2; Association of Asian American Investment Managers Letter at 2; Ariel Investments, LLC Letter at 2; Mercy Investment Services, Inc. Letter at 2; Miller/Howard Investments, Inc. Letter at 2; Professor Lisa M. Fairfax E-mail at 8; and Faye Sahai E-mail at 1.

[116] See Proposal at 80,493.

[117] See Snowdon Beinn Ltd. Letter at 1, 2, 3.

[118] See The Heritage Foundation Letter at 16, 20.

[119] See Proposal at 80,497.

[120] See Proposal at 80,497.

[121] See Proposal at 80,496.

[122] See Professor Lisa M. Fairfax E-mail at 9, 10.

[123] See Washington State Investment Board Letter at 1 ("We believe that teams with cognitive diversity and diversity of background can make better decisions, and one way to achieve this is to appoint directors representing a range of racial and ethnic backgrounds, as well as a material number of women").

[124] See Microsoft Corporation Letter at 1 ("Diversity in our leadership and our workforce matters. It provides an opportunity for everyone to learn from the breadth of experiences each of us have to create better outcomes for the customers we serve.").

[125] See BoardReady Letter at 1 ("In our experience on boards in the United States, The United Kingdom, and Canada, diverse boards exhibit a broader range of perspectives than homogeneous boards do, which can broaden a company's awareness of risk and revenue opportunities. In many industries, a diverse board is paramount to representing multiple stakeholder perspectives.").

[126] See Amendment No. 1 at 16-17.

[127] See Banneker Ventures and The Collective Letter at 1.

[128] See One Hundred Black Men, Inc. Letter at 1.

[129] See National Urban League Letter at 4, 5.

[130] See Fenwick & West LLP Letter at 2 and Ideanomics, Inc. Letter at 4.

[131] See Proposal at 5480,486.

[132] See LGIM America Letter; San Francisco Employees' Retirement System Letter; Wellington Management Company LLP Letter; Women for Economic and Leadership Development Letter; Office of the Illinois State Treasurer Letter; Ariel Investments, LLC Letter; New York City Office of Comptroller Letter; Professor Lisa M.

Fairfax E-mail; Faye Sahai E-mail; Morningstar, Inc. and Sustainalytics Letter; and California State Controller Letter.

[133] See New York City Office of the Comptroller Letter at 2.

[134] See Ideanomics, Inc. Letter at 4.

[135] See Women for Economic and Leadership Development Letter at 1.

[136] See One Hundred Black Men, Inc. Letter at 1.

[137] See Ideanomics, Inc. Letter at 4.

[138] See Rothwell Consulting LLC Letter at 2.

[139] See Rothwell Consulting LLC Letter at 3.

[140] See Ballard Spahr LLP Letter dated January 14, 2021 at 2.

[141] See The Boston Club Letter at 2; Ropes & Gray LLP Letter at 2-4 and Annex A; Thirty Percent Coalition Letter at 2-4; and Trillium Asset Management Letter at 2.

[142] See The Boston Club Letter at 2; Ropes & Gray LLP Letter at 2-4 and Annex A; Thirty Percent Coalition Letter at 2-4; and Trillium Asset Management Letter at 2.

[143] See The Boston Club Letter at 2 and Thirty Percent Coalition Letter at 2.

[144] See Skadden Arps LLP Letter at 3.

[145] See Proposal at 80,502 (citing Commission Guidance on the Use of Company Websites, 73 FR 45,862, 45,864 (Aug. 7, 2008).

[146] See Proposal at 80,502 (citing Commission Guidance on the Use of Company Websites, 73 FR 45,862, 45,867 (Aug. 7, 2008).

[147] For example, foreign private issuers are not required to file proxy statements. See 17 CFR § 240.3a12-3(b); see also Skadden Arps LLP Letter at 3 (noting that a foreign private issuer may not file a proxy or information statement).

[148] See FactSet Research Systems Inc. Letter.

[149] See Amendment No. 1, Exhibit 3 (proposed Instruction No. 7).

[150] See Amendment No. 1, Proposed Rule 5606(b).

[151] See LGIM America Letter; Ideanomics, Inc. Letter; San Francisco Employees' Retirement System Letter; Wellington Management Company LLP Letter; Office of the Illinois State Treasurer Letter; Ariel Investments, LLC Letter; AllianceBernstein L.P. Letter; New York City Office of the Comptroller Letter; Brighthouse Financial, Inc. E-mail; Professor Lisa M. Fairfax E-mail; Olshan Shareholder Activism Group Letter; Morningstar, Inc. and Sustainalytics Letter; MFS Investment Management Letter; CFA Institute Letter; Skadden Arps LLP Letter; National Investor Relations Institute Letter; and 2U, Inc. Letter.

[152] See Ideanomics, Inc. Letter at 3.

[153] See Ideanomics, Inc. Letter at 3.

[154] See The Boston Club Letter at 2; Ropes & Gray LLP Letter at 2-4 and Annex A; Skadden Arps LLP Letter at 3; Thirty Percent Coalition Letter at 2-4; New York City Office of the Comptroller Letter at 1; and Trillium Asset Management Letter at 2.

[155] See Skadden Arps LLP Letter at 3.

[156] See Skadden Arps LLP Letter at 3-4.

[157] See New York City Office of the Comptroller Letter at 3.

[158] See CFA Institute Letter at 6.

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[159] See Ideanomics, Inc. Letter at 3.

[160] See Amendment No. 1, Exhibit 3 (proposed Instruction No. 9).

[161] See Proposal at 80,486.

[162] See Amendment No. 1, Exhibit 3 (proposed Definitions).

[163] See John Richter E-mail at 2 and Senator Pat Toomey, et al. Letter at 4 - 5.

[164] See Senator Pat Toomey, et al. Letter at 4.

[165] Id.

[166] Id. at 5.

[167] See Proposal at 80,473.

[168] See PepsiCo 2020 Proxy Statement at 13, available at https://www.pepsico.com/docs/album/annual-reports/pepsico-inc-2020-proxy-statement.pdf?sfvrsn=b0543005_2 and Intel 2020 Proxy Statement at 24, available at https://s21.q4cdn.com/600692695/files/doc_financials/2019/Final-2020-Proxy-Statement.pdf.

[169] See Brighthouse Financial, Inc. Email at 1, 2.

[170] See Publius Oeconomicis Letter at 3.

[171] See Publius Oeconomicis Letter at 3.

[172] See Proposal at 80,472, 80474; 80482-83. Nasdaq also discusses in its Amendment No. 1 that Blackrock recently published its annual proxy voting guidelines encouraging boards to disclose demographics related to board diversity, including, but not limited to, gender, ethnicity, race, age, and geographic location. Nasdaq also notes in Amendment No. 1 that in August 2020, State Street Global Advisors reiterated their call for U.S. companies in State Street's portfolio to disclose board-level diversity characteristics, including the racial and ethnic makeup of directors. See State Street Global Advisors Letter at 3. Additionally, Amendment No. 1 notes that State Street Global Advisors' CEO, Cyrus Taraporevala, stated in his annual proxy voting agenda letter that starting in 2021, the company would commence voting against of the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards. See Amendment No. 1 at 56-57.

[173] See Lord Abbett Letter; Stardust Letter; Trillium Asset Management Letter; Wellington Management Company LLP Letter; Principles for Responsible Investment E-mail; Soundboard Governance LLC Letter; Office of the Illinois State Treasurer Letter; San Francisco Employees' Retirement System Letter; TIAA Letter; UAW Retiree Medical Benefits Trust Letter; Ropes and Gray Letter; Washington State Investment Board Letter; LGIM America Letter; Brightcove, Inc. E-mail; Ohio Public Employees Retirement System Letter; Ariel Investments, LLC Letter; AllianceBernstein L.P. Letter; California Public Employees' Retirement System Letter; California State Teachers' Retirement System Letter; CtW Investment Group Letter; MFS Investment Management Letter; New York City Office of Comptroller Letter; 2U, Inc. Letter; FactSet Research Systems Inc. Letter; Ideanomics, Inc. Letter; Microsoft Corporation Letter; T. Rowe Price Group, Inc. Letter; Brighthouse Financial, Inc. E-mail; Capital Research and Management Company Letter; The Alliance for Board Diversity Letter; Goldman Sachs Group, Inc. Letter; Miller/Howard Investments, Inc. Letter; CFA Institute Letter; Professor Lisa M. Fairfax E-mail; Skadden Arps LLP Letter; Loring, Wolcott & Coolidge Letter; Akin Gump Strauss Hauer & Feld LLP Letter; Amy Goodman and John Olson E-mail; Thirty Percent Coalition Letter; Institutional Limited Partners Association Letter; Int'l Corporate Governance Network Letter; AFL-CIO Letter; The Forum for Sustainable and Responsible Investment Letter; Senator Dianne Feinstein Letter; Olshan Shareholder Activism Group Letter; BMO Global Asset Management Letter; Morningstar, Inc. and Systainalytics Letter; Latino Corporate Directors Association Letter; California State Controller Letter; L Catteron Management Company, LLC Letter; BetterInvesting (NAIC) Letter; National Investor Relations Institute Letter; and State of New York Office of the Comptroller Letter.

[174] See T. Rowe Price Group, Inc. Letter at 2.

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[175] See LGIM America Letter; Ideanomics, Inc. Letter; San Francisco Employees' Retirement System Letter; Wellington Management Company LLP Letter; Office of the Illinois State Treasurer Letter; Ariel Investments, LLC Letter; AllianceBernstein L.P. Letter; New York City Office of the Comptroller Letter; Brighthouse Financial, Inc. E-mail; Professor Lisa M. Fairfax E-mail; Olshan Shareholder Activism Group Letter; Morningstar, Inc. and Sustainalytics Letter; MFS Investment Management Letter; CFA Institute Letter; Skadden Arps LLP Letter; National Investor Relations Institute Letter; and 2U, Inc. Letter.

[176] See San Francisco Employees' Retirement System Letter at 2; Stardust Letter at 2; and T. Rowe Price Group, Inc. Letter at 1.

[177] See San Francisco Employees' Retirement System Letter at 2.

[178] See Professor Lisa M. Fairfax E-mail at 5.

[179] See LGIM America Letter at 2.

[180] As one investor noted, typically, only large investors can afford to pay for this information when it is not freely published by a company. See LGIM America Letter at 2. Additionally, in the Proposal, Nasdaq noted the inconsistencies in the disclosures related to the board composition of companies. See Proposal at 80,473; 80,475; 80,483; 80,485; and 80,573.

[181] See Proposal at 80,475; 80,477; 80,486; 80,494; 80,495; and 80,500.

[182] See Judicial Watch, Inc. Letter at 2 & n.5 and Senator Pat Toomey, et al. Letter at 3. Two other commenters raised related concerns that are also addressed in this section. See Matthew Glen E-mail at 1 ("The proposed rule diverts funds from the efficient administration of the NASDAQ reducing the order and efficiency of markets the SEC was created to promote.") and Eugene F. Kelly E-mail at 1 (arguing that "the -082 proposal seeks to offer an unwise, deforming, and unlawful assistance -- disguised as a useful and laudatory service. The -082 proposal is not in the public interest.").

[183] See Senator Pat Toomey, et al. Letter at 3.

[184] See Eugene F. Kelly E-mail at 1.

[185] See Exchange Act Release No. 72669 (July 24, 2014), 79 FR 44234 (July 30, 2014) (SR-NASDAQ-2014-058) (footnote 39 and accompanying text: "We would expect Nasdaq, consistent with Section 19(b) of the Exchange Act, to periodically update the retail values of services offered should they change. This will help to provide transparency to listed companies on the value of the free services they receive and the actual costs associated with listing on Nasdaq.").

[186] See Securities Exchange Act Release No. 90571 (December 4, 2020), 89 FR 79556 (December 10, 2020).

[187] See https://www.nasdaq.com/solutions/nasdaq-governance-solutions.

[188] See https://www.nasdaq.com/solutions/boardvantage.

[189] See https://www.nasdaq.com/solutions/board-engagement.

[190] See Senator Pat Toomey, et al. Letter at 3.

[191] For clarity, Nasdaq filed both rule filings with the Commission on the same date, December 1, 2020. Nasdaq does not control the timing of the publication of its rule filings.

[192] See Amy Goodman and John Olson E-mail at 3; Stardust Letter at 2; LGIM America Letter at 3; Washington State Investment Board Letter at 1, 2; Soundboard Governance LLC Letter at 3; Int'l Corporate Governance Network Letter at 2; and WomenExecs on Boards E-mail at 1.

[193] See American Securities Association Letter at 1-2; Walter Donnellan Letter at 2; The Heritage Foundation Letter at 20; National Legal and Policy Center Letter at 7-8; Project on Fair Representation Presentation at 1; Edward J. Shoen Letter at 1; and Senator Pat Toomey, et al. Letter at 6.

[194] See Project on Fair Representation Presentation at 4. See also American Securities Association Letter at 1-2.

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[195] See The Heritage Foundation Letter at 20 ("Traditionally, corporate governance is a function of state law and private decision-making. The Nasdaq rule is one more large step towards the federalization of corporate governance."). See also Walter Donnellan Letter at 2 ("While diversity is a good goal, enforcing it goes down a road outside the realm of a stock exchange."); and National Legal and Policy Center Letter at 7 ("While there is a legitimate need for the federal government to regulate the financial markets to ensure their integrity, corporate governance is a matter of state law where the company is chartered.").

[196] See 15 U.S.C. § 78f(b).

[197] See 15 U.S.C.S. § 78f(b)(5).

[198] See Amy Goodman and John Olson E-mail at 3 (arguing that "[t]he Proposal is consistent with the historical role of the stock exchanges in advancing the quality of corporate governance"); see also CFA Institute Letter at 4 ("We agree that the Proposal is consistent with the historical role of stock exchanges in furthering good corporate governance.").

[199] See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,175 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

[200] Exchanges have historically served as leaders in the field of corporate governance. For example, the Blue Ribbon Committee was established in September 1998 by the New York Stock Exchange and the NASD to make recommendations on strengthening the role of audit committees in overseeing the corporate financial reporting process and was comprised of members from the business, financial and accounting communities. See NYSE Chair Richard Grasso, NASD Chair Frank Zarb, and Blue Ribbon Panel Co-Chairs Ira Millstein and John Whitehead Announce "Ten Point Plan" to Improve Oversight of Financial Reporting Process, available at: https://www.sec.gov/news/press/pressarchive/1999/99-14.txt. The SEC noted that "in response to the recommendations of the Blue Ribbon Committee," "several exchanges and Nasdaq implemented rules to strengthen the effectiveness of their listed companies' audit committees." See also Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,175 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

[201] See Sarbanes- Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 745.

[202] See Nasdaq Listing Rule 5606(e)(1).

[203] On June 20, 2012, the Commission adopted Rule 10C-1, which implemented Section 10C of the Exchange Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Rule 10C-1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent. However, Nasdaq's rules had already "require[d] each member of a listed company's compensation committee to be an Independent Director as defined in Nasdaq Rule 5605(a)(2)." Securities Exchange Act Release No. 34-68640 (Jan. 11, 2013), 78 FR 4554, 4555 (Jan. 22, 2013). Indeed, Nasdaq first proposed this listing requirement on October 9, 2002. See Securities Exchange Act Release No. 34-47516 (Mar. 17, 2003), 68 FR 14451 (Mar. 25, 2003).

[204] See Proposal at 80,477; see also Professor Lisa M. Fairfax E-mail at 3-4 ("[T]he SEC, Nasdaq, and other regulatory bodies have embraced corporate governance reforms despite . . . equivocal support. The most recent and visible example of this relates to director independence. There is a clear consensus that director independence is consistent with good corporate governance. However, the empirical evidence supporting the link between director independence and corporate or firm performance has been characterized as mixed or weak." (citations omitted)).

[205] See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,176 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

[206] See Proposal at 80,480.

[207] See Proposal at 80,475-80,480.

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[208] See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,175 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

[209] Id. at 64,176.

[210] In addition to the investor demand noted in the Proposal, 54 commenters submitted comment letters confirming that investors seek board diversity statistics that are widespread, consistent and/or transparent so that they can integrate diversity into their decision-making.

[211] See Trillium Asset Management Letter at 2. See also UAW Retiree Medical Benefits Trust Letter at 5 (noting that "Vanguard and State Street, two of the largest U.S. asset managers, have endorsed aggregate board diversity disclosure, including disclosure of racial and ethnic characteristics, as a minimum standard. Recently, the Russell 3000 Board Diversity Disclosure Initiative sent letters signed by 21 investor organizations—including the Trust—representing over $3 trillion in assets under management, urging Russell 3000 companies to disclose the racial/ethnic and gender composition of their boards in their 2021 proxy statements." (citations omitted)).

[212] See TIAA Letter at 2.

[213] See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,176 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

[214] See Proposal at 80,503.

[215] Id. (citing 8 Del. Code § 216 (providing that a quorum at a shareholder's meeting shall consist of no less than 1/3 of the shares entitled to vote at such meeting)).

[216] See Proposal at 80,503 (citing 8 Del. Code §§ 251, 271 (providing that shareholder approval by a majority of the outstanding voting shares entitled to vote is required for mergers and the sale of all or substantially all of a corporation's assets)).

[217] See Proposal at 80,503 (citing Nasdaq Rulebook, Rules 5620(c) and 5635(a)).

[218] In [re] Nasdaq Stock Market, 71 Fed. Reg. 3550, 3551 (Jan. 23, 2006).

[219] See note 63, supra.

[220] See Amy Goodman and John Olson E-mail at 1-2.

[221] See Akin Gump Strauss Hauer & Feld LLP Letter at 2 ("[W]e believe that the proposal . . . will aid boards in the fulfillment of their fiduciary duties and will serve to benefit stockholders', as well as other stakeholders', interests."); BoardReady Letter at 1 ("In our experience on boards in the United States, The United Kingdom, and Canada, diverse boards exhibit a broader range of perspectives than homogeneous boards do, which can broaden a company's awareness of risk and revenue opportunities."); Goldman Sachs Group, Inc. Letter at 1 ("Diversity in the boardroom can also lead to an increased variety of unique perspectives, better decision-making and improved oversight."); and Brighthouse Financial, Inc. E-mail at 1 (according to the board of the company, "[w]e recognize that diversity of all kinds adds to the overall mix of perspectives of the Board as a whole, enriching our discussions and enhancing our decision-making. We believe that having a diverse Board has made us better able to effectively oversee the Company's management and its strategy to deliver long-term value for its stockholders.").

[222] See Walter Donnellan Letter at 2; Guess & Co, Corporation Letter at 1-2; The Heritage Foundation Letter at 6; Paul Kraft E-mail at 1; and Senator Pat Toomey, et al. Letter at 3.

[223] See Guess & Co, Corporation Letter at 1. Relatedly, another commenter noted that "[t]he idea of a free market is that anyone can have a business and run it how they choose. There is nothing stopping anyone regardless of sexual orientation, gender identity, or ethnic background from starting their own business and running it however they choose[.]" See also Walter Donnellan Letter at 2.

[224] See The Heritage Foundation Letter at 6.

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[225] See Senator Pat Toomey, et al. Letter at 3.

[226] See Proposal at 80,496 (citing [Commissioner Allison Herren Lee, Diversity Matters, Disclosure Works], and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference (September 22, 2020), available at: https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922).

[227] See Proposal at 80,496.

[228] Proposal at 80,496 (citing Paul Hastings, *Breaking the Glass Ceiling: Women in the Boardroom* 139 (2018), available at: https://www.paulhastings.com/genderparity/; Deloitte, *Women in the Boardroom: A global perspective* (6th ed. 2019), available at: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-theboardroom-sixth-edition.pdf); KPMG and ASX, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended 1 January 2015 and 31 December 2015* 4 (2016) available at: https://www.asx.com.au/documents/asx-compliance/asx-corpgovernance-kpmg-diversity-report.pdf; The Conference Board of Canada, *Data Dashboard* (Sept. 23, 2020), available at: https://www.conferenceboard.ca/focus-areas/inclusion/2020/aob-comparisons-around-the-worldtable?AspxAutoDetectCookieSupport=1; Andrew MacDougall et al., Osler, Diversity Disclosure Practices 4 (2020), available at https://www.osler.com/osler/media/Osler/reports/corporategovernance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf).

[229] Id. (citing Marianne Bertrand et al., *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway*, Nat'l Bureau of Econ. Rsch. Working Paper 20256 (June 2017), available at https://www.nber.org/papers/w20256; Statistics Norway, *Board and management in limited companies* (Mar. 6, 2020), https://www.ssb.no/en/styre (last accessed Nov. 27, 2020)).

[230] Proposal at 80,485 (citing California Partners Project, *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards* 4 (2020), available at: https://www.calpartnersproject.org/claimyourseat). See Cal. S.B. 826 (Sept. 30, 2018) and Cal. A.B. 979 (Sept. 30, 2020).

[231] See California Insurance Commissioner Letter at 2 (noting that "of the 511 newly appointed public board seats subject to this recently chaptered measure [in California], white women account for 77.9%, followed by Asian women at 11.5%, African American women at 5.3%, and Latina at 3.3%"); see also Buck Gee E-mail at 1; California Partners Project Letter at 2-3; California Legislative Women's Caucus Letter at 1; 58th District of California Letter at 1; and 41st District of California Letter at 1.

[232] See Proposal at 80,480.

[233] See BoardReady Letter at 1 (citations omitted).

[234] See CtW Investment Group Letter at 1-2 ("According to a 2020 report published by The Conference Board and ESG data analytics firm ESGAUGE, over 13 percent of companies in the Russell 3000 had no female directors on their boards. According to their analysis, only 10 percent of S&P 500 companies disclosed director ethnicity and of those 8 out of 10 directors were white.") (citation omitted); Professor Lisa M. Fairfax E-mail at 6 ("Only 19% of directors at the 200 largest S&P 500 companies are people of color. One 2019 study found that 37% of S&P 500 boards did not have any Black directors. Recent studies have referred to board diversity improvements with respect to racial and ethnicity as 'disappointing,' noting that 'little progress' has been made with respect to racial and ethnic diversity on large boards.") (citations omitted); and Parity.org Letter at 2 ("Can companies do this without interventions like those Nasdaq has proposed? Perhaps, but getting there has been excruciatingly slow. The World Economic Forum has predicted that it will take 257 years for women to reach economic gender parity in the world, and 151 years before the United States achieves gender parity. When we began Parity.org three years ago, the prediction was a 'mere' 160 years for global equality—we are going backwards. If progress is measured by how quickly women and people of color are represented on the S&P, without impetus like the proposed, the results have been appallingly low numbers.").

[235] See California State Senate Letter at 1.

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[236] See Proposal at 80,474.

[237] See Colin Gallagher E-mail at 1; The Heritage Foundation Letter at 15-16; Paul Kraft E-mail at 1; Judicial Watch, Inc. Letter at 5; Eugene F. Kelly E-mail at 2; John Richter E-mail at 3; Edward J. Shoen Letter at 2; and Senator Pat Toomey, et al. Letter at 2.

[238] See Judicial Watch, Inc. Letter at 5.

[239] See The Heritage Foundation Letter at 16.

[240] See Senator Pat Toomey, et al. Letter at 2.

[241] To the extent these commenters also intended to challenge the Proposal on legal grounds, Nasdaq's response is addressed separately in the letter filed by Ballard Spahr LLP with the Commission on January 29, 2021.

[242] See Ariel Investments, LLC Letter at 1; Professor Lisa M. Fairfax E-mail at 12-13; Parity.org Letter at 3; Latino Corporate Directors Association Letter at 3-4; The Alliance for Board Diversity Letter at 2; Ascend Pinnacle Letter at 1; Amy Goodman and John Olson E-mail at 2-3; Buck Gee E-mail at 1; and Olshan Shareholder Activism Group Letter at 3.

[243] See Ariel Investments, LLC Letter at 1.

[244] See Olshan Shareholder Activism Group Letter at 3.

[245] See Proposal at 80,496.

[246] See Professor Lisa M. Fairfax E-mail at 12 (citing Deloitte, *2017 Board Survey: Seeing is Believing*, 10, available at: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/aboutdeloitte/us-about-board-diversity-survey-seeing-is-believing.pdf).

[247] Id.

[248] See note 48, supra.

[249] See Ideanomics, Inc. Letter at 3; Ariel Investments, LLC Letter at 2; AllianceBernstein L.P. Letter at 1; MFS Investment Management Letter at 2; Brighthouse Financial, Inc. E-mail at 1-2; LGIM America Letter at 2; CFA Institute Letter at 5; Professor Lisa M. Fairfax E-mail at 8; Skadden Arps LLP Letter at 3; Olshan Shareholder Activism Group Letter at 4; and National Investor Relations Institute Letter at 3.

[250] See International Bancshares Corporation Letter at 5; John Reddy Letter at 1; and John Richter Letter at 2.

[251] See International Bancshares Corporation Letter at 5.

[252] See John Reddy Letter at 1.

[253] See John Richter Letter at 2.

[254] See LGIM America Letter at 2.

[255] See Ideanomics, Inc. Letter at 3 ("We appreciate that Nasdaq has structured its board matrix to allow directors to anonymously identify with diverse attributes or opt out of disclosing anything at all. We believe this is a thoughtful way to respect each director's personal decision to identify as diverse."); see also AllianceBernstein L.P. Letter at 2 (noting support for the Proposal, in part, because the Board Diversity Matrix "includes an option for directors to not disclose their gender, LGBTQ+ and/or ethnic identity").

[256] See note 249, supra.

[257] See Ballard Spahr LLP Letter dated January 14, 2021 at 1.

[258] See Senator Toomey, et al. Letter at 3.

[259] See Professor Lisa M. Fairfax E-mail at 11 ("To the extent there is concern that compliance with Nasdaq's rule will require boards to displace existing directors, research negates that concern. This is because, as indicated above, companies increase diversity either by expanding their board, or by filling seats that are left vacant due to turnover. Research reveals that since 2012, boards primarily add seats to accommodate diversity rather

than waiting for men to step down." (citing 2020 Women on Boards: Gender Diversity Index, 5, available at: https://2020wob.com/wp-content/uploads/2020/10/2020-GDIFINAL.pdf)).

[260] See Akin Gump Strauss Hauer & Feld LLP Letter at 5 ("We believe that the Nasdaq Diversity Rule – which includes a one-year phase-in approach – is neither burdensome to comply with or adopt and provides sufficient flexibility. Notably, the proposed rule is not quota based, and it provides a board with the option to simply expand its size so as to add new members and not replace existing directors. Further, the proposal provides Nasdaq-listed companies with the option of explaining why a minimum of two diverse directors is not achievable, recommended or necessary in lieu of adding new (or replacing existing) directors. Accordingly, should the SEC approve the Nasdaq Diversity Proposal, we do not believe boards of directors of Nasdaq-list companies will be confronted with any undue hardship, other than the ordinary course onboarding hurdles and/or drafting of requisite disclosure.").

[261] See Senator Pat Toomey, et al. Letter at 1, 4-5.

[262] See Washington State Investment Board Letter at 2.

[263] See Institutional Limited Partners Association Letter at 2.

[264] See Amendment No. 1, Rule 5605(f)(5).

[265] See Akin Gump Strauss Hauer & Feld LLP Letter at 3-4.

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
2U, Inc. Letter		✓	✓	✓	✓	✓	✓		✓
41st District of California Letter	✓				✓				✓
58th District of California Letter	✓				✓				✓
AFL-CIO Letter	✓		✓	✓			✓		✓
Akin Gump Strauss Hauer & Feld LLP Letter	✓	✓			✓		✓		✓
AllianceBernstein L.P. Letter		✓		✓			✓	✓	✓
American Civil Liberties Union Letter	✓				✓				✓
Amy Goodman and John Olson E-mail	✓	✓					✓		✓
Amy Hepburn E-mail									✓
Apax Partners Letter	✓	✓	✓		✓	✓			✓
Ariel Investments, LLC Letter	✓	✓	✓	✓	✓	✓	✓		✓
Ascend Pinnacle Letter			✓						✓
Association of Asian American Investment Managers Letter	✓	✓	✓	✓	✓	✓		✓	✓
Banneker Ventures and The Collective Letter	✓								✓
Bay Area Asian American General Counsel Letter	✓			✓	✓	✓			✓
BetterInvesting Letter			✓	✓		✓	✓		✓
Biotechnology Innovation Organization Letter	✓			✓		✓			✓
BMO Global Asset Management Letter	✓	✓		✓	✓	✓	✓		✓
BoardReady Letter		✓		✓		✓			✓
Brandi Nicole Johnson E-mail			✓			✓			✓
Brightcove, Inc. E-mail	✓	✓	✓				✓	✓	✓
Brighthouse Financial, Inc. E-mail	✓		✓	✓	✓		✓		✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
Buck Gee E-mail		✓							✓
California Insurance Commissioner Letter			✓		✓				✓
California Legislative Black Caucus Letter					✓	✓			✓
California Legislative LGBTQ Caucus Letter			✓		✓				✓
California Legislative Women's Caucus Letter	✓				✓				✓
California Partners Project Letter	✓			✓		✓			✓
California Public Employees' Retirement System Letter				✓	✓	✓	✓		✓
California State Controller Letter	✓	✓	✓	✓		✓	✓		✓
California State Senate Letter	✓		✓		✓			✓	✓
California State Teachers' Retirement System Letter		✓	✓	✓	✓	✓	✓		✓
California State Treasurer Letter	✓	✓	✓					✓	✓
Capital Research and Management Company Letter	✓	✓		✓		✓	✓		✓
Capital Stewardship, SEIU Letter	✓		✓	✓		✓			✓
Catalyst Letter						✓			✓
CFA Institute Letter			✓	✓			✓		✓
Committee of 100 Letter	✓							✓	✓
Congressman Brad Sherman Letter									✓
Congresswoman Carolyn Maloney and Congressman Gregory Meeks Letter				✓		✓	✓		✓
Corporate Counsel Women of Color Letter				✓		✓			✓
Council of Korean Americans Letter	✓		✓		✓			✓	✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
CtW Investment Group Letter	✓			✓	✓	✓	✓		✓
Cynthia Overton Letter			✓			✓			✓
Deaf and Hard of Hearing Bar Association Letter									✓
Disability:IN/ American Association of People with Disabilities Letter									✓
Elicia Banks-Gabriel E-mail									✓
Equality California Letter	✓		✓						✓
Facebook, Inc. Letter	✓				✓				✓
FactSet Research Systems Inc. Letter			✓	✓	✓	✓	✓	✓	✓
Fairpointe Capital Letter	✓				✓			✓	✓
Faye Sahai E-mail	✓	✓	✓	✓	✓			✓	✓
FCLTGlobal Letter				✓		✓			✓
Fenwick & West LLP Letter									✓
Generation Investment Management, LLP Letter		✓				✓			✓
Goldman Sachs Group, Inc. Letter	✓				✓	✓	✓		✓
Greater Sacramento Urban League Letter	✓				✓	✓			✓
Hearing Access & Innovations, Inc. Letter									✓
Henry Schein, Inc. Letter	✓				✓	✓			✓
Ideanomics, Inc. Letter	✓	✓		✓	✓		✓		✓
Institutional Limited Partners Association Letter	✓			✓	✓	✓	✓		✓
Int'l Corporate Governance Network Letter	✓	✓			✓		✓		✓
James Morgan E-mail									✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
Jo Brickman E-mail			✓			✓			✓
Katerli bounds E-mail			✓						✓
L Catterton Management Company, LLC Letter	✓			✓	✓	✓	✓		✓
Latino Corporate Directors Association Letter	✓			✓	✓	✓	✓	✓	✓
Laura Gluhanich E-mail			✓						✓
Letter Type B			✓	✓					✓
Letter Type C			✓	✓		✓			✓
LGIM America Letter	✓	✓		✓	✓	✓	✓		✓
Lord Abbett Letter	✓	✓	✓	✓	✓	✓	✓	✓	✓
Loring,Wolcott & Coolidge Letter	✓						✓		✓
Ludke Consulting, LLC and Smartjob, LLC Letter									✓
Mercy Investment Services, Inc. Letter	✓	✓	✓	✓	✓	✓		✓	✓
Metro NY Chapter, National Black MBA Association Letter	✓				✓	✓			✓
MFS Investment Management Letter	✓	✓		✓	✓	✓	✓		✓
Microsoft Corporation Letter	✓	✓			✓	✓	✓	✓	✓
Miller/Howard Investments, Inc. Letter	✓	✓	✓	✓		✓	✓	✓	✓
Minority Corporate Counsel Association Letter			✓		✓				✓
Morningstar, Inc. and Sustainalytics Letter	✓			✓			✓		✓
National Asian Pacific American Bar Association Letter	✓			✓	✓			✓	✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
National Association of Securities Professionals Letter	✓			✓	✓	✓			✓
National Investor Relations Institute Letter	✓	✓					✓		✓
National Organization on Disability Letter									✓
National Stuttering Association Letter									✓
National Urban League Letter									✓
New York City Office of the Comptroller Letter		✓		✓	✓	✓	✓	✓	✓
Nicholas D. Lawson Letter									✓
NYC Mayor's Office for People with Disabilities Letter									✓
Office of the Illinois State Treasurer Letter	✓			✓			✓	✓	✓
Ohio Public Employees Retirement System Letter	✓	✓				✓	✓	✓	✓
Olshan Shareholder Activism Group Letter	✓	✓		✓		✓	✓	✓	✓
One Hundred Black Men, Inc. Letter					✓				✓
Paolo Gaudiano E-mail					✓	✓			✓
Parity.org Letter		✓			✓	✓			✓
Pennsylvania State Treasurer Letter	✓	✓	✓						✓
Principles for Responsible Investment E-mail				✓			✓		✓
Professor Julie Park E-mail									✓
Professor Lisa M. Fairfax E-mail	✓	✓	✓	✓		✓	✓	✓	✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
Professor Margaret M. Chin E-mail		✓							✓
Professor Morgan Flake E-mail		✓							✓
RespectAbility et al. E-mail	✓								✓
Robin Hood Letter				✓	✓	✓			✓
Ropes and Gray LLP Letter				✓			✓		✓
Rothwell Consulting LLC Letter					✓				✓
San Francisco Employees' Retirement System Letter	✓	✓		✓			✓	✓	✓
Senator Dianne Feinstein Letter						✓	✓		✓
Senator Catherine Cortez Masto, et al. Letter	✓		✓			✓			✓
Skadden Arps LLP Letter		✓			✓		✓		✓
Snowdon Beinn Ltd. Letter					✓				✓
Soundboard Governance LLC Letter	✓	✓					✓	✓	✓
Stardust Letter	✓	✓		✓	✓	✓	✓	✓	✓
State of New York Office of the State Comptroller Letter	✓	✓	✓	✓		✓	✓		✓
State of Rhode Island, Office of the General Treasurer Letter						✓			✓
State Street Global Advisors Letter	✓			✓		✓			✓
Suzanne Wertheim E-mail			✓						✓
T. Rowe Price Group, Inc. Letter	✓	✓	✓	✓	✓	✓	✓		✓
The Alliance for Board Diversity Letter				✓	✓		✓		✓
The Boston Club Letter	✓			✓	✓	✓			✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
The Forum for Sustainable and Responsible Investment Letter	✓		✓	✓		✓	✓		✓
The Forum of Executive Women Letter	✓		✓		✓	✓			✓
The Harkin Institute for Public Policy Citizen Engagement E-mail									✓
The Investment Diversity Exchange Letter	✓		✓		✓			✓	✓
The Links, Incorporated Letter	✓		✓	✓	✓	✓		✓	✓
Thirty Percent Coalition Letter	✓			✓	✓		✓		✓
TIAA Letter	✓			✓	✓	✓	✓		✓
Trillium Asset Management Letter	✓			✓	✓		✓	✓	✓
U.S. Chamber of Commerce Letter	✓				✓	✓			✓
UAW Retiree Medical Benefits Trust Letter	✓	✓		✓	✓	✓	✓	✓	✓
United States Hispanic Chamber of Commerce Letter	✓			✓		✓			✓
Washington State Investment Board Letter	✓	✓		✓	✓	✓	✓		✓
Wellington Management Company LLP Letter	✓			✓	✓	✓	✓		✓
Women Business Collaborative Letter	✓		✓		✓	✓		✓	✓
Women for Economic and Leadership Development Letter	✓	✓	✓	✓	✓			✓	✓
WomenExecs on Boards E-mail	✓	✓		✓		✓			✓
Women's Forum of New York Letter	✓			✓	✓			✓	✓
Working Mother Media Letter				✓	✓				✓

Appendix 1: Supportive Comments

	Enhances Corporate Governance	Pragmatic, Business-Driven Approach	Advances Board Diversity	Facilitates Transparency	Reflects Core Values	Enhances Corporate Performance	Facilitates Decision Making	Promotes Investor Confidence	Generally Supportive
WW International, Inc. Letter						✓			✓
YWCA Metropolitan Chicago Letter	✓	✓						✓	✓

OMB APPROVAL
OMB Number: 3235-0045 Estimated average burden hours per response.....38

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 354

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2020 - * 081
Amendment No. (req. for Amendments *) 1

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
☐	☑	☐	☑	☐	☐

Pilot	Extension of Time Period for Commission Action *	Date Expires *
☐	☐	

Rule

19b-4(f)(1) 19b-4(f)(4)
19b-4(f)(2) 19b-4(f)(5)
19b-4(f)(3) 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐

Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Jeffrey S. Last Name * Davis

Title * Senior Vice President, Senior Deputy General Counsel

E-mail * jeffrey.davis@nasdaq.com

Telephone * (301) 978-8484 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 02/26/2021

By John Zecca

(Name *)

(Title *)

EVP and Chief Legal Counsel

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Digitally Sign and Lock Form

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information * Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document ☐	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document ☐	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) 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, as described in more detail below:

(i) to adopt Rule 5605(f) (Diverse Board Representation), which would require each Nasdaq-listed company, subject to certain exceptions, (A) to have, or explain why it does not have, at least one director who self-identifies as a female, and (B) to have, or explain why it does not have, at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+;

(ii) to adopt Rule 5606 (Board Diversity Disclosure), which would require each Nasdaq-listed company, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+; and

(iii) to update Rule 5615 and IM-5615-3 (Foreign Private Issuers) and Rule 5810(c) (Types of Deficiencies and Notifications) to incorporate references to proposed Rule 5605(f) and proposed Rule 5606; and

(iv) to make certain other non-substantive conforming changes.

This Amendment No. 1 amends and supersedes the original filing in its entirety.

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[1] 15 U.S.C. § 78s(b)(1).

[2] 17 C.F.R. § 240.19b-4.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. A proposed Board Diversity Matrix form is attached as Exhibit 3 and the amended rule text indicating additions to or deletions from the preceding filing is attached as Exhibit 4. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on November 5, 2020. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Jeffrey S. Davis
Senior Vice President, Senior Deputy General Counsel
Nasdaq, Inc.
(301) 978-8484

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

Nasdaq is filing this amendment to SR-NASDAQ-2020-081, which was published for comment by the Commission on December 11, 2020,[3] in order to: make certain material, technical, and conforming amendments to the Initial Proposal, and to provide additional clarification and justification in support of the proposed rule changes.

[3] Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (December 11, 2020) ("Initial Proposal").

This amendment supersedes and replaces the Initial Proposal in its entirety. Nasdaq is submitting by separate letter its response to comments on the proposed rule change contemporaneously with this Amendment No. 1.

I. Summary of Amendments to the Initial Proposal

As discussed in Nasdaq's response to comments filed in conjunction with this Amendment No. 1, upon further examination of the Initial Proposal and after carefully reviewing all comment letters submitted by commenters, Nasdaq has modified the Initial Proposal to propose certain material amendments, technical clarifications, and non-substantive changes, as well as provided additional clarification and justification in support of the proposed rule change.

As a result of the comments received, Nasdaq is proposing the following three **material amendments**:

- Adding proposed Rule 5605(f)(2)(D) to provide more flexibility in achieving the diversity objectives of Rule 5605(f)(2) for companies with boards of five or fewer directors (as discussed in Section 3.a.VII.C.iii).
- Amending proposed Rule 5605(f)(5) to allow additional time for newly listing companies on the Nasdaq Global Select ("NGS"), Nasdaq Global Market ("NGM"), and Nasdaq Capital Market ("NCM") tiers (as discussed in Section 3.a.VII.C.i).
- Adding proposed Rule 5605(f)(6)(B) to provide a grace period for a listed company that no longer meets the diversity objectives as a result of a vacancy on the board of directors, for example if a diverse director falls ill or resigns (as discussed in Section 3.a.VII.C.iii).

Nasdaq is also proposing the following **technical amendments** to the Initial Proposal:

- Amending proposed Rule 5605(f)(3) and proposed Rule 5606(b) to allow companies the flexibility of providing the disclosures in advance of the company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the

disclosure through the Nasdaq Listing Center, within one business day after such posting.

- Clarifying in the Board Diversity Matrix ("Matrix") Instructions that a company may include supplemental data in addition to the information required by the Matrix.
- Revising proposed Rule 5605(f)(2)(B)(i) to change the reference from "home country jurisdiction" to "country of the Company's principal executive offices."
- Providing a definition in the Matrix for "Non-binary."
- Amending proposed Rule 5606(d) to clarify the types of newly listed companies.
- Revising operative dates in proposed Rule 5606(e).

Finally, Nasdaq has also proposed certain **non-substantive** changes to the Initial Proposal, including clarifying throughout the filing that the proposed rule change is a disclosure requirement, not a mandate, and clarifying in the Matrix Instructions that a company may not substantially alter the Matrix and must disclose the information in a searchable format.

II. The Diversity Imperative for Corporate Boards

The past year has brought heightened attention to the commitment of public companies to diversity and inclusion. Corporate culture, human capital management, and technology-driven changes to the business landscape have underscored the benefits of enhanced board diversity—diversity in the boardroom is good corporate governance. The benefits to stakeholders of increased diversity are becoming more apparent and include an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls. Nasdaq believes that the heightened focus

on corporate board diversity by companies,[4] investors,[5] corporate governance organizations,[6] and legislators[7] demonstrates that investor confidence is enhanced when boardrooms are comprised of more than one demographic group. Nasdaq has also

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4 See Deloitte and the Society for Corporate Governance, *Board Practices Quarterly: Diversity, equity, and inclusion* (Sept. 2020), available at: https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/diversity-equity-and-inclusion.html (finding, in a survey of over 200 companies, that "most companies and/or their boards have taken, or intend to take, actions in response to recent events surrounding racial inequality and inequity; 71% of public companies and 65% of private companies answered this question affirmatively").

5 See ISS Governance, *2020 Global Benchmark Policy Survey, Summary of Results* 6 (Sept. 24, 2020), available at: https://www.issgovernance.com/wp-content/uploads/publications/2020-iss-policy-survey-results-report-1.pdf (finding that "a significant majority of investors (61 percent) indicated that boards should aim to reflect the company's customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups").

6 See International Corporate Governance Network, *ICGN Guidance on Diversity on Boards* 5 (2016), available at: https://www.icgn.org/sites/default/files/ICGN%20Guidance%20on%20Diversity%20on%20Boards%20-%20Final.pdf ("The ICGN believes that diversity is a core attribute of a well-functioning board which supports greater long-term value for shareholders and companies.").

7 See, e.g., John J. Cannon et al., Sherman & Sterling LLP, *Washington State Becomes Next to Mandate Gender Diversity on Boards* (May 28, 2020), available at: https://www.shearman.com/perspectives/2020/05/washington-state-becomes-next-to-mandate-gender-diversity-on-boards; Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020) (California legislation requiring companies headquartered in the state to have at least one director who self-identifies as a Female and one from an Underrepresented Community).

observed recent calls from SEC commissioners[8] and investors[9] for companies to provide more transparency regarding board diversity.

While Nasdaq-listed companies have made laudable progress in diversifying their boardrooms, Nasdaq believes that the national market system and the public interest would be well-served by a "disclosure-based, business-driven" framework for companies to embrace meaningful and multi-dimensional diversification of their

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8 See Acting Chair Allison Herren Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), available at: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26#_ftnref15 ("There is ever-growing recognition of the importance of diversity from all types of investors . . . [a]nd large numbers of commenters on this [SEC] rule proposal emphasized the need for specific diversity disclosure requirements."); see also Commissioner Caroline Crenshaw, *Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105* (August 26, 2020), available at: https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k ("As Commissioner Lee noted in her statement, the final [SEC] rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation. The failure to grapple with these issues is, quite simply, a failure to modernize."); Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), available at: https://www.sec.gov/news/speech/chair-white-icgn-speech.html ("Companies' disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted… Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.").

9 See Vanguard, *Investment Stewardship 2019 Annual Report* (2019), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf ("We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis."); see also State Street Global Advisors, *Diversity Strategy, Goals & Disclosure: Our Expectations for Public Companies* (Aug. 27, 2020) https://www.ssga.com/us/en/individual/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies (announcing expectation that State Street's portfolio companies (including US companies "and, to the greatest extent possible, non-US companies") provide board level "[d]iversity characteristics, including racial and ethnic makeup, of the board of directors").

boards.[10] Nasdaq has also found that current reporting of board diversity data was 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.

Accordingly, Nasdaq is proposing to require each of its listed companies, subject to certain exceptions for non-operating companies, to: (i) provide statistical information regarding diversity among the members of the company's board of directors under proposed Rule 5606; and (ii) have, or explain why it does not have, at least two "Diverse" directors on its board under proposed Rule 5605(f)(2). "Diverse" means an individual who self-identifies as: (i) Female, (ii) an Underrepresented Minority, or (iii) LGBTQ+. Each listed company must have, or explain why it does not have, at least one Female director and at least one director who is either an Underrepresented Minority or LGBTQ+. Foreign Issuers (including Foreign Private Issuers) and Smaller Reporting Companies, by contrast, have more flexibility and may satisfy the rule by having, or explaining why they do not have, two Female directors. Further, each company with a board of directors of five or fewer members may satisfy the rule by having, or explaining why it does not have, one Diverse director.[11] "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. "Underrepresented Minority" means, consistent with the categories reported to the Equal Employment Opportunity Commission ("EEOC")

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[10] See Letter from Mercy Investments Inc. to Ms. Vanessa Countryman (December 22, 2020); see also Letter from San Francisco City and County Employees Retirement System to Ms. Vanessa Countryman (December 17, 2020); see also Letter from Ideanomics, Inc. to Ms. Vanessa Countryman (December 28, 2020).

[11] Consequently, all references in this Amendment No. 1 to "diversity objectives" should be construed as a diversity objective of one Diverse director for companies with a board of directors of five or fewer members.

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. "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or a member of the queer community.

Nasdaq proposes that Rule 5606 will be operative one year after the Commission approves this proposal (the "Approval Date"). As such, Nasdaq proposes to require a company to provide statistical information regarding its board's diversity by the later of (1) one calendar year from the Approval Date (the "Effective Date"); or (2) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.

Under proposed Rule 5605(f)(2), Nasdaq proposes that each listed company in the NGS, NGM, and NCM have, or explain why it does not have, one Diverse director by the later of: (i) two calendar years after the date that the Commission approves this proposal (the "First Effective Date"); or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date. Further, each company must have, or explain why it does not have, two Diverse directors no later than: (i) four calendar years after the Approval Date for companies listed on the NGS or NGM tiers; or

(ii) five calendar years after the Approval Date for companies listed on the NCM tier. If a company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting after the anniversary of the Approval Date in the calendar year for each respective year noted above, then the company will have until the date it makes such filing to have, or explain why it does not have, two Diverse directors.

Nasdaq proposes that a company with a board of five or fewer members have, or explain why it does not have, at least one member of its board of directors who is Diverse. Nasdaq proposes that such companies share the timeline described above for companies that must have, or explain why they do not have, one Diverse director by the later of: (i) the First Effective Date; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date.

Nasdaq undertook extensive research and analysis and has concluded that the proposal will fulfill the objectives of the Act in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. In addition to conducting its own internal analysis, Nasdaq reviewed a substantial body of third-party research and interviewed leaders representing a broad spectrum of market participants and other stakeholders to:

- determine whether empirical evidence demonstrates an association between board diversity, company performance, investor protection and board decision-making;

- understand investors' interest in, and impediments to obtaining, information regarding the state of board diversity at public companies;
- review the current state of board diversity and disclosure, both among Nasdaq-listed companies and more broadly within the U.S.;
- gain a better understanding of the causes of underrepresentation on boards;
- obtain the views of leaders representing public companies, investment banks, corporate governance organizations, investors, regulators and civil rights groups on the value of more diverse corporate boards, and on various approaches to encouraging more diversity on corporate boards; and
- evaluate the success of approaches taken by exchanges, regulators, and governments in both the U.S. and foreign jurisdictions to remedy underrepresentation on boards.

While gender diversity has improved among U.S. company boards in recent years, the pace of change has been gradual, and the U.S. still lags behind other jurisdictions that have focused on board diversity. **Progress in bringing underrepresented racial and ethnic groups into the boardroom has been slower**. 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. Based on the limited information that is available, Nasdaq believes a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the board. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. While studies suggest that current candidate selection processes may result in diverse candidates being overlooked, Nasdaq also believes that

the lack of reliable and consistent data creates a barrier to measuring and improving diversity in the boardroom.

Nasdaq reviewed dozens of empirical studies and found that an extensive body of empirical research demonstrates that diverse boards are positively associated with improved corporate governance and company performance.[12] For example, as discussed in detail below in *Section III, Empirical Research: The Relationship between Diversity and Company Performance, Investor Protection and Decision Making*, studies have found that companies with gender-diverse boards or audit committees are associated with: more transparent public disclosures and less information asymmetry; better reporting discipline by management; a lower likelihood of manipulated earnings through earnings management; an increased likelihood of voluntarily disclosing forward-looking information; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a lower likelihood of securities fraud. In addition, studies found that having at least one woman on the board is associated with a lower likelihood of material weaknesses in internal control over financial reporting and a lower likelihood of material financial restatements. Studies also identified positive relationships between board diversity and commonly used financial metrics, including higher returns on invested capital, returns on equity, earnings per share, earnings before interest and taxation margin, asset valuation multiples and credit ratings.

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[12] See e.g., Bernile et al. (2018), infra note 33; Wahid (2019), infra note 65; Abbott, Parker & Persley (2012), infra note 64; Abad el al. (2017), infra note 73.

Nasdaq believes there are additional compelling reasons to support the diversification of company boards beyond a link to improved corporate governance and company performance:

- Investors are calling in greater numbers for diversification of boardrooms. Vanguard, State Street Advisors, BlackRock, and the NYC Comptroller's Office include board diversity expectations in their engagement and proxy voting guidelines.[13] The heightened investor focus on corporate diversity and inclusion efforts demonstrates that investor confidence is undermined when a company's

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[13] Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors. See Vanguard, *Investment Stewardship 2020 Annual Report* (2020), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2020_investment_stewardship_annual_report.pdf ("Vanguard 2020 Annual Report"). Starting in 2020, State Street Global Advisors will vote against the entire nominating committee of companies that do not have at least one woman on their boards and have not addressed questions on gender diversity within the last three years. See State Street Global Advisors, *Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines* (2020), available at: https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf. State Street Global Advisors' CEO, Cyrus Taraporevala, stated in his annual proxy voting agenda letter that starting in 2021, the company would commence voting against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards. Beginning in 2022, it "will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least 1 director from an underrepresented community on their boards." See Cyrus Taraporevala, CEO's Letter on 2021 Proxy Voting Agenda, dated January 11, 2021, available at https://www.ssga.com/us/en/institutional/ic/insights/ceo-letter-2021-proxy-voting-agenda?WT.mc_id=social_-ibr_asset-stewardship-web_gl_lkdin_img__n_n_jan21&spi=100001784867075. Beginning in 2018, BlackRock stated in proxy voting guidelines they "would normally expect to see at least 2 women directors on every board." See BlackRock Investment Stewardship, *Corporate governance and proxy voting guidelines for U.S. securities* (Jan. 2020), available at: https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf. The NYC Comptroller's Office in 2019 asked companies to adopt policies to ensure women and people of color are on the initial list for every open board seat. See Scott M. Stringer, *Remarks at the Bureau of Asset Management 'Emerging Managers and MWBE Managers Conference* (Oct. 11, 2019), available at: https://comptroller.nyc.gov/wp-content/uploads/2019/10/10.11.19-SMS-BAM-remarks_distro.pdf.

boardroom is homogenous and when transparency about such efforts is lacking. Investors 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 stakeholders when they refresh their boards. Nasdaq explores these investor sentiments in *Section IV, Current State of Board Diversity and Causes of Underrepresentation on Boards*.

- Nasdaq believes, consistent with SEC disclosure requirements in other contexts,[14] that management's vision on key issues impacting the company should be communicated with investors in a clear and straightforward manner. Indeed, transparency is the bedrock of federal securities laws regarding disclosure, and this sentiment is reflected in the broad-based support for uniform disclosure requirements regarding board diversity that Nasdaq observed during the course of its outreach to the industry. In addition, organizational leaders representing every category of corporate stakeholders Nasdaq spoke with (including business, investor, governance, regulatory, and civil rights communities) were

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[14] See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056 (Dec. 29, 2003) ("We believe that management's most important responsibilities include communicating with investors in a clear and straightforward manner. MD&A is a critical component of that communication. The Commission has long sought through its rules, enforcement actions and interpretive processes to elicit MD&A that not only meets technical disclosure requirements but generally is informative and transparent."); see also Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890 (Nov. 19, 2020) (citing the 2003 MD&A Interpretative Release and stating that the purpose of the MD&A section is to enable investors to see a company "through the eyes of management").

overwhelmingly in favor of diversifying boardrooms. Nasdaq summarizes the findings of its stakeholder outreach in *Section V, Stakeholder Perspectives.*

- Legislators at the federal and state level increasingly are taking action to encourage or mandate corporations to diversify their boards and improve diversity disclosures. Congress currently is considering legislation requiring each SEC-registered company to provide board diversity statistics and disclose whether it has a board diversity policy. To date, eleven states have passed or proposed legislation related to board diversity.[15] SEC regulations require companies to disclose whether diversity is considered when identifying director nominees and, if so, how. Nasdaq explores various state and federal initiatives in *Section VI, U.S. Regulatory Framework and Section VII, Nasdaq's Proposal***.**

In considering the merits and shaping the substance of the proposed listing rule, Nasdaq also sought and received valuable input from corporate stakeholders. During those discussions, Nasdaq found consensus across every constituency in the inherent value of board diversity. Business leaders also expressed concern that companies –particularly smaller ones – would prefer an approach that allows flexibility for their unique circumstances and stakeholders. Nasdaq recognizes that the operations, size, and current board composition of each Nasdaq-listed company are unique, and Nasdaq therefore endeavored to provide a disclosure-based, business-driven framework

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[15] See Michael Hatcher and Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!*, Harv. L. Sch. Forum on Corp. Governance (May 12, 2020), available at: https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/.

to enhance board diversity that balances the need for flexibility with each company's particular circumstances.

The Exchange also considered the experience of its parent company, Nasdaq, Inc., as a public company.[16] In 2002, Nasdaq, Inc. met the milestone of welcoming its first woman, Mary Jo White, who later served as SEC Chair, to its board of directors. In her own words, "I was the first and only woman to serve on the board when I started, but, happily, I was joined by another woman during my tenure . . . . And then there were two. Not enough, but better than one."[17] In 2019, Nasdaq, Inc. also welcomed its first Black director. As a Charter Pledge Partner of The Board Challenge, Nasdaq supports The Board Challenge's goal of "true and full representation on all boards of directors."[18]

As a self-regulatory organization, Nasdaq also is cognizant of its role in advancing diversity within the financial industry, as outlined in the Commission's diversity standards issued pursuant to Section 342 of the Dodd-Frank Wall Street

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16 While the Exchange recognizes that it is only one part of an ecosystem in which multiple stakeholders are advocating for board diversity, that part is meaningful: the United Nations Sustainable Stock Exchanges Initiative, of which Nasdaq, Inc., is an official supporter, recognized that "[s]tock exchanges are uniquely positioned to influence their market in a way few other actors can." See United Nations Sustainable Stock Exchanges Initiative, *How Stock Exchanges Can Advance Gender Equality* 2 (2017), available at: https://sseinitiative.org/wp-content/uploads/2019/12/How-stock-exchanges-can-advance-gender-equality.pdf.

17 See Mary Jo White, Completing the Journey: Women as Directors of Public Companies (Sept. 16, 2014), available at: https://www.sec.gov/news/speech/2014-spch091614-mjw#.VBiLMhaaXDo.

18 See The Board Challenge, https://theboardchallenge.org/. See also Nasdaq, Inc., *Notice of 2020 Annual Meeting of Shareholders and Proxy Statement* 52 (Mar. 31, 2020), available at: https://ir.nasdaq.com/static-files/ce5519d4-3a0b-48ac-8441-5376ccbad4e5 (Nasdaq, Inc. believes that "[d]iverse backgrounds lead to diverse perspectives. We are committed to ensuring diverse backgrounds are represented on our board and throughout our organization to further the success of our business and best serve the diverse communities in which we operate.").

Reform and Consumer Protection Act of 2010 ("Standards").[19] Authored jointly by the Commission and five other financial regulators, the Standards seek to provide a framework for exchanges and financial services organizations "to create and strengthen [their] diversity policies and practices." Through these voluntary Standards, the Commission and other regulators "encourage each entity to use the[] Standards in a manner appropriate to its unique characteristics."[20] To that end, the proposed rule leverages the Exchange's unique ability to influence corporate governance in furtherance of the goal of Section 342, which is to address the lack of diversity in the financial services industry.[21] Finally, while the Exchange recognizes the importance of maximizing company performance, its role as a listing venue is to establish and enforce substantive standards that promote investor protection. As a self-regulatory organization, the Exchange must demonstrate to the Commission that any proposed rule is consistent 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. The Exchange must also balance promoting capital formation, efficiency, and competition, among other things, alongside enhancing investor confidence.

With these objectives in mind, Nasdaq believes that a listing rule designed to enhance transparency related to board diversity will increase consistency and comparability of information across Nasdaq-listed companies, thereby increasing

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19 See Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016 (June 10, 2015).

20 Id. at 33,023.

21 156 Cong. Rec. H5233-61 (June 30, 2010).

transparency and decreasing information collection costs. Nasdaq further believes that a listing rule designed to encourage listed companies to increase diverse representation on their boards will result in improved corporate governance, thus strengthening the integrity of the market, enhancing capital formation, efficiency, and competition, and building investor confidence. The proposal is a disclosure-based framework, not a mandate. To the extent a company chooses not to meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional transparency through disclosure explaining the company's reasons for not doing so. For example, the company may choose to disclose that it does not meet the diversity objectives of proposed Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to meet that standard instead, or has a board philosophy regarding diversity that differs from the diversity objectives set forth in proposed Rule 5605(f)(2), including an expanded or different definition of diversity. Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency.

Nasdaq plans to assist listed companies who choose to achieve the diversity objectives of this proposal. Nasdaq has observed that studies suggest that certain groups may be underrepresented on boards because the traditional director nomination process is limited by directors looking within their own social networks for candidates with previous C-suite experience.[22] Leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and

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[22] See infra Section II of the Statutory Basis section.

expertise rather than title, they will find there is more than enough diverse talent to satisfy demand. In order to assist companies that strive to meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq has proposed to provide listed companies that have not yet met diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking, and refreshment and has submitted a rule filing to the Commission regarding the provision of such services.[23] Nasdaq has also published FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

III. Empirical Research: The Relationship between Diversity and Company Performance, Investor Protection and Decision Making

A company's board of directors plays a critical role in formulating company strategy; appointing, advising, and overseeing management; and protecting investors. Nasdaq has recognized the importance of varied perspectives on boards since 2003, when the Exchange adopted a listing rule intended to enhance investor confidence by requiring listed companies, subject to certain exceptions and grace periods, to have a majority independent board.[24] Accompanying the rule are interpretive materials recognizing that

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[23] Securities Exchange Act Release No. 90571 (December 4, 2020), 85 FR 79556 (December 10, 2020) (SR-NASDAQ-2020-082).

[24] See The Nasdaq Stock Market Rulebook ("Rulebook"), Rules 5605(b), 5615(a), and 5605(b)(1)(A).

independent directors "play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in the Companies they oversee and guard against conflicts of interest."[25]

A. Diversity and Company Performance

A significant body of research suggests a positive association between diversity and several measures of company performance.[26] In the words of SEC Acting Chair Allison Herren Lee: "to the extent one seeks economic support for diversity and inclusion (instead of requiring economic support for the lack of diversity and exclusion), the evidence is in."[27]

The Carlyle Group (2020) found that its portfolio companies with two or more diverse directors had average earnings growth of 12.3% over the previous three years, compared to 0.5% among portfolio companies with no diverse directors, where diverse directors were defined as female, Black, Hispanic, or Asian.[28] "After controlling for

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25 Id., IM-5605-1.

26 Some companies recently have expressed the belief that a company must consider the impact of its activities on a broader group of stakeholders beyond shareholders. See Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at: https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf. Commentators articulated this view as early as 1932. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1153 (1932).

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

28 See Jason M. Thomas and Megan Starr, The Carlyle Group, *Global Insights: From Impact Investing to Investing for Impact* 5 (Feb. 24, 2020), available at: https://www.carlyle.com/sites/default/files/2020-

industry, fund, and vintage year, companies with diverse boards generate earnings growth that's five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth."[29]

Several other studies found a positive association between diverse boards and other measures of company performance. McKinsey (2015) found that "companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial returns above their national industry median."[30] McKinsey reaffirmed their findings in a 2020 study, finding "a positive, statistically significant correlation between company financial outperformance and [board] diversity, on the dimensions of both gender and ethnicity," with companies in the top quartile for board gender diversity "28 percent more likely than their peers to outperform financially," and a statistically significant correlation between board gender diversity and outperformance on earnings before interest and taxation margin.[31] Carter, Simkins and Simpson (2003) found among Fortune 1000

02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf (analyzing Carlyle U.S. portfolio company data, February 2020).

29 Id.

30 See Vivian Hunt et al., McKinsey & Company, *Diversity Matters* (February 2, 2015), available at: https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/why%20diversity%20matters/diversity%20matters.pdf (analyzing 366 public companies in the United Kingdom, Canada, the United States, and Latin America in industries for the years 2010 to 2013, using the ethnic and racial categories African ancestry, European ancestry, Near Eastern, East Asian, South Asian, Latino, Native American, and other).

31 See McKinsey & Company, *Diversity wins: How inclusion matters* 13 (May 2020), available at: https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf (analyzing 1,039 companies across 15 countries for the period from December 2018 to November 2019).

companies "statistically significant positive relationships between the presence of women or minorities on the board and firm value."[32] Bernile, Bhagwat and Yonker (2018) found that greater diversity on boards—including gender, ethnicity, educational background, age, financial expertise, and board experience—is associated with increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, increased dividend payouts to shareholders, higher investment in R&D, and better innovation.[33] The authors observed that "[t]his is in line with the results in Carter, Simkins, and Simpson (2003), which show a positive association between local demographic diversity and firm value."[34]

Several studies have found a positive association between gender diversity and company performance. Credit Suisse (2014) found companies with at least one woman on the board had an average sector-adjusted return on equity ("ROE") of 12.2%, compared to 10.1% for companies with no female directors, and average sector-adjusted ROEs of 14.1% and 11.2%, respectively, for the previous nine years.[35] MSCI (2016) found that U.S. companies with at least three women on the board in 2011 experienced

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32 See David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*. 38(1) Fin. Rev. 33 (analyzing 638 Fortune 1000 firms in 1997, measuring firm value by Tobin's Q, with board diversity defined as the percentage of women, African Americans, Asians, and Hispanics on the board of directors).

33 See Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies,* Journal of Financial Economics 127(3), 588-612 (2018) (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat and Center for Research on Security Prices databases).

34 Id. at 604.

35 See Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), available at: https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/the-cs-gender-3000-women-in-senior-management.pdf (analyzing 3,000 companies across 40 countries from the period from 2005 to 2013).

median gains in ROE of 10% and earnings per share ("EPS") of 37% over a five year period, whereas companies that had no female directors in 2011 showed median changes of -1% in ROE and -8% in EPS over the same five-year period.[36] Catalyst (2011) found that the ROE of Fortune 500 companies with at least three women on the board (in at least four of five years) was 46% higher than companies with no women on the board, and return on sales and return on invested capital was 84% and 60% higher, respectively.[37] FCLTGlobal (2019) found that "the most diverse boards (top 20 percent) added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers (bottom 20 percent)."[38] Moody's (2019) found that greater board gender diversity is associated with higher credit ratings, with women accounting for an average of 28% of board seats at Aaa-rated companies but less than 5% of board seats at Ca-rated companies.[39]

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36 See Meggin Thwing Eastman et al., MSCI, *The tipping point: Women on boards and financial performance* 3 (December 2016), available at: https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb (analyzing of U.S. companies that were constituents of the MSCI World Index for the entire period from July 1, 2011 to June 30, 2016).

37 See Harvey M. Wagner, Catalyst, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)* (March 1, 2011), available at: https://www.catalyst.org/research/the-bottom-line-corporate-performance-and-womens-representation-on-boards-2004-2008/ (analyzing gender diversity data from Catalyst's annual Fortune 500 Census of Women Board Directors report series for the years 2005 to 2009, and corresponding financial data from S&P's Compustat database for the years 2004 to 2008).

38 See FCLTGlobal, *The Long-term Habits of a Highly Effective Corporate Board* 11 (March 2019), available at: https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effective-corporate-boards.pdf (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data, with board diversity encompassing gender and age).

39 See Moody's Investors Service, *Gender diversity is correlated with higher ratings, but mandates pose short-term risk* 2 (Sept. 11, 2019), available at: https://www.moodys.com/research/Moodys-Corporate-board-gender-diversity-

Credit Suisse (2016) 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 6 years.[40] Further, "[a]gainst a custom basket of companies in North America, Europe and Australia, the LGBT 270 has outperformed by 140 bps annually."[41] Nasdaq acknowledges that this study focused on LGBTQ+ employees as opposed to directors, and that there is a lack of published research on the issue of LGBTQ+ representation on boards. However, Out Leadership (2019) suggests that the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity:

> While the precise reason for the positive correlation between gender diversity and better corporate performance is unknown, many of the reasons that gender diversity is considered beneficial are also applicable to LGBT+ diversity. LGBT+ diversity in the boardroom may create a dynamic that enables better decision-making, and it brings to the boardroom the perspective of a community that is a critical component of the company's consumer population and organizational talent.[42]

While the overwhelming majority of empirical studies Nasdaq reviewed present a compelling case that board diversity is positively associated with company performance, the results of some other studies on gender diversity are mixed. For example, Pletzer et

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associated-with-higher-credit-ratings--PBC_1193768 (analyzing 1,109 publicly traded North American companies rated by Moody's).

40 See Credit Suisse ESG Research, *LGBT: the value of diversity* 1 (April 15, 2016), available at: https://research-doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=807075590&extdocid=807075590_1_eng_pdf&serialid=evu4wNcHexx7kusNLaZQphUkT9naxi1PvptZQvPjr1k%3d.

41 Id.

42 See Quorum, *Out Leadership's LGBT+ Board Diversity and Disclosure Guidelines* 3 (2019), available at: https://outleadership.com/content/uploads/2019/01/OL-LGBT-Board-Diversity-Guidelines.pdf.

al. (2015) found that board gender diversity alone has a "small and non-significant" relationship with a company's financial performance.[43] Post and Byron (2014) found a "near zero" relationship with a company's market performance, but a positive relationship with a company's accounting returns.[44] Carter, D'Souza, Simkins and Simpson (2010) found that "[w]hen Tobin's Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity, neither positive nor negative."[45] A study conducted by Campbell and Minguez-Vera (2007) "suggests, at a minimum, that increased gender diversity can be achieved without destroying shareholder value."[46] Adams and Ferreira (2009) found that "gender diversity has beneficial effects in companies with weak shareholder rights, where additional board

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43 See Jan Luca Pletzer et al., *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance – A Meta-Analysis* 1, PLOS One (June 18, 2015); see also Alice H. Eagly (2016), *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. Social Issues 199 (2016), available at https://doi.org/10.1111/josi.12163 (concluding that the "research findings are mixed, and repeated meta-analyses have yielded average correlational findings that are null or extremely small" with respect to board gender diversity and company performance).

44 See Corinne Post and Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis* 1 (2014). In 2016, the same authors, based on a review of the results for 87 studies, "found that board gender diversity is weakly but significantly positively correlated with [corporate social responsibility]," although they noted that "a significant correlational relationship does not prove causality." See Corinne Post and Kris Byron, *Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis*, 24(4) Corp. Governance: An Int'l Rev. 428 (July 2016), available at http://dx.doi.org/10.1111/corg.12165.

45 See David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18(5) Corp. Governance 396, 410 (2010) (analysis of 541 S&P 500 companies for the years 1998-2002).

46 See Kevin Campbell and Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83(3) J. Bus. Ethics 13 (Feb. 2008) (analyzing 68 non-financial companies listed on the continuous market in Madrid during the period from January 1995 to December 2000, measuring firm value by an approximation of Tobin's Q defined as the sum of the market value of stock and the book value of debt divided by the book value of total assets).

monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights."[47] Carter et al. (2010)[48] and the U.S. Government Accountability Office ("GAO") (2015)[49] concluded that the mixed nature of various academic and empirical studies may be due to differences in methodologies, data samples, and time periods. Di Miceli and Donaggio (2018) concluded that "[t]he overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)".[50]

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47 See Renee B. Adams and Daniel Ferreira, *Women in the boardroom and their impact on governance and performance*, 94 J. Fin. Econ. 291 (2009) (analyzing 1,939 S&P 500, S&P MidCaps, and S&P SmallCap companies for the period 1996 to 2003, measuring company performance by a proxy for Tobin's Q (the ratio of market value to book value) and return on assets).

48 See Carter et al., supra note 45, at 400 (observing that the different "statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.").

49 See United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements* 5 (Dec. 2015) (the "GAO Report"), available at: https://www.gao.gov/assets/680/674008.pdf ("Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used").

50 See Alexandre Di Miceli and Angela Donaggio, *Women in Business Leadership Boost ESG Performance: Existing Body of Evidence Makes Compelling Case*, 42 International Finance Corporation World Bank Group, Private Sector Opinion at 11 n.15 (2018), available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/private+sector+opinion/women+in+business+leadership+boost+esg+performance ("The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)").

While there are studies drawing different conclusions, Nasdaq believes that there is a compelling body of credible research on the association between company performance and board diversity. At a minimum, Nasdaq believes that the academic and empirical studies support the conclusion that board diversity does not have adverse effects on company performance. This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are a sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the varying findings of studies at the time regarding the relationship between company performance and board independence,[51] Nasdaq adopted listing rules requiring a majority independent board that were "intended to enhance investor confidence in the companies that list on Nasdaq."[52] In its Approval Order, the SEC stated that "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets."[53]

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51 See, e.g., Benjamin E. Hermalin and Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance*, 20 Fin. Mgmt. 101, 111 (1991) (finding that "there appears to be no relation between board composition and performance"); Sanjai Bhagat and Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54(3) Bus. Law. 921, 950 (1999) ("At the very least, there is no convincing evidence that increasing board independence, relative to the norms that currently prevail among large American firms, will improve firm performance. And there is some evidence suggesting the opposite—that firms with supermajority-independent boards perform worse than other firms, and that firms with more inside than independent directors perform about as well as firms with majority- (but not supermajority-) independent boards.").

52 See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,161 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

53 Id. at 64,176.

Along the same lines, even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards. Therefore, Nasdaq believes that the proposal will enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by meeting the applicable diversity objective of proposed Rule 5605(f)(2) or by explaining their rationale for not meeting that objective. Further, Nasdaq believes that the proposal is consistent with the Act because it will not negatively impact capital formation, competition or efficiency among its public companies, and will promote investor protection and the public interest.[54]

B. Diversity and Investor Protection

There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures, and management oversight. In reaching this conclusion, Nasdaq evaluated the results of more than a dozen studies spanning more than two decades that found a positive association between gender diversity and important investor protections, and the assertions by some academics that such findings may extend to other forms of diversity, including racial and ethnic diversity. The findings of the studies reviewed by Nasdaq are summarized below.

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[54] See also Lee, supra note 27 ("I could never quite buy in to the view that some 40 percent of the population in our country (if we're talking about minorities) or over half the country (if we're talking about women) must rationalize their inclusion in corporate boardrooms and elsewhere in economic terms instead of the reverse. How can one possibly justify—in economic terms—the systematic exclusion of a major portion of our talent base from the corporate pool?").

Adams and Ferreira (2009) found that women are "more likely to sit on" the audit committee,[55] and a subsequent study by Srinidhi, Gul and Tsui (2011) found that companies with women on the audit committee are associated with "higher earnings quality" and "better reporting discipline by managers,"[56] leading the authors to conclude that "including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements."[57]

A study conducted in 2016 by Pucheta-Martínez et al. concluded that gender diversity on the audit committee "improves the quality of financial information."[58] They found that "the percentage of females on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,"[59] and found a positive association between gender diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender diverse

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55 See Adams and Ferreira, supra note 47, at 292.

56 See Bin Srinidhi et al., *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610, 1612-16 (Winter 2011) (analyzing 3,132 firm years during the period from 2001 to 2007 based on S&P COMPUSTAT, Corporate Library's Board Analyst, and IRRC databases; "choos[ing] the accruals quality as the metric that best reflects the ability of current earnings to reflect future cash flows" (noting that it "best predicts the incidence and magnitude of fraud relative to other commonly used measures of earnings quality") and analyzing surprise earnings results that exceeded previous earnings or analyst forecasts, because "managers of firms whose unmanaged earnings fall marginally below the benchmarks have [an] incentive to manage earnings upwards so as to meet or beat previous earnings").

57 Id. at 1612.

58 See Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information.* 25(4) Bus. Ethics: A European Rev. 363, 378 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004-2011).

59 Id. at 363.

audit committees "ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion" when any uncertainties or scope limitations are identified.[60]

More recently, a study by Gull in 2018 found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management,[61] and a study conducted in 2019 by Bravo and Alcaide-Ruiz found "the disclosure of [financial forward-looking] information is associated with the presence of female audit committee members with financial expertise, especially accounting expertise."[62] Bravo and Alcaide-Ruiz concluded that "female [audit committee] members with financial expertise play an important role in influencing disclosure strategies that provide forward-looking information containing projections and financial data useful for investors."[63]

While the above studies demonstrate a positive association between gender diverse audit committees and the quality of a company's earnings, financial information,

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60 Id. at 368.

61 See Ammar Gull et al., *Beyond gender diversity: How specific attributes of female directors affect earnings management*, 50(3) British Acct. Rev. 255 (Sept. 2017), available at: https://ideas.repec.org/a/eee/bracre/v50y2018i3p255-274.html (analyzing 394 French companies belonging to the CAC All-Shares index listed on Euronext Paris from 2001 to 2010, prior to the implementation of France's gender mandate law that required women to comprise 20% of a company's board of directors by 2014 and 40% by 2016).

62 See Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140, 140 (2019) (analyzing companies included in the S&P 100 Index in 2016, "focus[ing] on the disclosure of financial forward-looking information (which is likely to require financial expertise), such as earnings forecasts, expected revenues, anticipated cash flows or any other financial indicator").

63 Id. at 150.

and public disclosures, other studies found a positive association between board gender diversity and important investor protections regardless of whether or not women are on the audit committee.

Abbott, Parker & Persley (2012) found, within a sample of non-Fortune 1000 companies, "a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement."[64] Their findings are consistent with a subsequent study by Wahid (2019), which concluded that "gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud."[65] Specifically, companies with female directors have "fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation."[66] Wahid suggested that the implications of her study extend beyond gender diversity:

> If you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds . . . [and] [i]f we just focus on one, we

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64 See Lawrence J. Abbott et al., *Female Board Presence and the Likelihood of Financial Restatement*, 26(4) Accounting Horizons 607, 626 (2012) (analyzing a sample of 278 pre-SOX annual financial restatements and 187 pre-SOX quarterly financial restatements of U.S. companies from January 1, 1997 through June 30, 2002 identified by the U.S. General Accounting Office restatement report 03-138 (which only included "material misstatements of financial results"), and 75 post-SOX annual financial restatements from July 1, 2002, to September 30, 2005 identified by U.S. General Accounting Office restatement report 06-678 (which only included "restatements that were being made to correct material misstatements of previously reported financial information"), consisting almost exclusively of non-Fortune 1000 companies).

65 Further, these results hold whether firm governance is weak or strong, suggesting that benefits of gender-diverse boards can be realized even in already well-governed firms. See Aida Sijamic Wahid, The *Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, J Bus Ethics 159, 705–725 (2019) (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations).

66 Id. at 721.

could be essentially taking away from other dimensions of diversity and decreasing perspective.[67]

Cumming, Leung and Rui (2015) also examined the relationship between gender diversity and fraud, and found that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found "strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample."[68] The authors suggested that "other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud."[69]

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced weaknesses in internal control over financial reporting, noting that "prior literature has established a negative relationship between internal control weaknesses and earnings quality."[70] The authors found that having at least one woman on the board (regardless of whether or not she is on the audit committee) "may

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67 See Barbara Shecter, *Diverse boards tied to fewer financial 'irregularities,' Canadian study finds*. Financial Post (Feb. 5, 2020), https://business.financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds (last accessed Nov. 27, 2020).

68 See Douglas J. Cumming et al., *Gender Diversity and Securities Fraud*, Academy of Management Journal Vol. 58, No. 5, 1572–1593 (2015) (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud, and 742 non-fraudulent companies for a control group).

69 Id. at 1588.

70 See Yu Chen et al., *Board Gender Diversity and Internal Control Weaknesses*, 33 Advances in Acct. 11 (2016) (analyzing a sample of 4267 firm-year observations during the period from 2004 to 2013, beginning "the first year internal control weaknesses were required to be disclosed under section 404 of SOX").

lead to [a] reduced likelihood of material weaknesses [in internal control over financial reporting]."[71]

Board gender diversity also was found to be positively associated with more transparent public disclosures. Gul, Srinidhi & Ng (2011) concluded that "gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms."[72] Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with "reducing the risk of informed trading and enhancing stock liquidity."[73]

Other studies have found that diverse boards are better at overseeing management. Adams and Ferreira (2009) found "direct evidence that more diverse boards are more likely to hold CEOs accountable for poor stock price performance; CEO turnover is more sensitive to stock return performance in firms with relatively more women on boards."[74] Lucas-Perez et al. (2014) found that board gender diversity is positively associated with

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71 Id. at 18.

72 See Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?*, 51(3) J. Acct. & Econ. 314 (April 2011) (analyzing 4,084 firm years during the period from 2002 to 2007, excluding companies in the utilities and financial industries, measuring public information disclosure using "voluntary continuous disclosure of 'other' events in 8K reports" and measuring stock price informativeness by "idiosyncratic volatility," or volatility that cannot be explained to systematic factors and can be diversified away).

73 See David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192, 202 (July 2017) (analyzing 531 company-year observations from 2004 to 2009 of non-financial companies traded on the electronic trading platform of the Spanish Stock Exchange (SIBE)).

74 See Adams and Ferreira, supra note 47, at 292.

linking executive compensation plans to company performance,[75] which may be an effective mechanism to deter opportunistic behavior by management and align their interests with shareholders.[76] A lack of diversity has been found to have the opposite effect. Westphal and Zajac (1995) found that "increased demographic similarity between CEOs and the board is likely to result in more generous CEO compensation contracts."[77]

C. Diversity and Decision Making

Wahid (2019) suggests that "at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards' ability to monitor firm management."[78] Nasdaq reviewed studies suggesting that board diversity can indeed enhance a company's ability to monitor management by reducing "groupthink" and improving decision making.

In 2009, the Commission, in adopting rules requiring proxy disclosure describing whether a company considers diversity in identifying director nominees, recognized the impact of diversity on decision making and corporate governance:

> A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board

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75 See Maria Encarnacion Lucas-Perez et al., *Women on the Board and Managers' Pay: Evidence from Spain*, 129 J. Bus. Ethics 285 (April 2014).

76 Id.

77 See James D. Westphal and Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40(1) Admin. Sci. Q. 60, 77 (March 1995).

78 See Wahid, supra note 65, at 707.

> independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board's decision making process by encouraging consideration of a broader range of views.[79]

Nasdaq agrees with the Commission's suggestion that board diversity improves board quality, governance, and decision making. Nasdaq is concerned that boards lacking diversity can inadvertently suffer from "groupthink," which is "a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members."[80] The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis, after which the IMF's Independent Evaluation Office concluded that "[t]he IMF's ability to correctly identify the mounting risks [as the crisis developed] was hindered by a high degree of groupthink."[81]

Other studies suggest that increased diversity reduces groupthink and leads to robust dialogue and better decision making. Dallas (2002) observed that "heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and

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

80 See Daniel P. Forbes and Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24(3) Acad. Mgmt. Rev. 489, 496 (Jul. 1999).

81 See International Monetary Fund, *IMF Performance in the Run-Up to the Financial and Economic Crisis* (August 2011), available at: https://www.elibrary.imf.org/view/IMF017/11570-9781616350789/11570-9781616350789/ch04.xml?language=en&redirect=true ("The evaluation found that incentives were not well aligned to foster the candid exchange of ideas that is needed for good surveillance—many staff reported concerns about the consequences of expressing views contrary to those of supervisors, [m]anagement, and country authorities.").

consequences."[82] Bernile et al. (2018) found that "diversity in the board of directors reduces stock return volatility, which is consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with 'groupthink.'"[83] Dhir (2015) concluded that gender diversity may "promote cognitive diversity and constructive conflict in the boardroom."[84] After interviewing 23 directors about their experience with Norway's board gender mandate, he observed:

> First, many respondents contended that gender diversity promotes enhanced dialogue. Interviewees frequently spoke of their belief that heterogeneity has resulted in: (1) higher quality boardroom discussions; (2) broader discussions that consider a wide range of angles or viewpoints; (3) deeper or more thorough discussions; (4) more frequent and lengthier discussions; (5) better informed discussions; (6) discussions that are more frequently brought inside the boardroom (as opposed to being held in spaces outside the boardroom, either exclusively or in addition to inside the boardroom); or (7) discussions in which items that directors previously took for granted are drawn out and addressed—where the implicit becomes explicit. Second, and intimately related, many interviewees indicated that diversification has led to (or has the potential to lead to) better decision making processes and/or final decisions.[85]

Investors also have emphasized the importance of diversity in decision making. A group of institutional investors charged with overseeing state investments and the retirement savings of public employees asserted that "board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are

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

83 See Bernile et al., supra note 33, at 608.

84 See Aaron A. Dhir, CHALLENGING BOARDROOM DIVERSITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 150 (2015) (emphasis removed) (sample included 23 directors of Norwegian corporate boards, representing an aggregate of 95 board appointments at more than 70 corporations).

85 Id. at 124 (emphasis removed).

not limited by gender, race, or ethnicity."[86]

Nasdaq believes that cognitive diversity is particularly important on boards in their advisory role, especially related to corporate strategy, because "the 'output' that boards produce is entirely cognitive in nature."[87] While in 1999, Forbes and Milliken characterized boards as "large, elite, and episodic decision making groups that face complex tasks pertaining to strategic-issue processing,"[88] over the past two decades, their role has evolved; boards are now more active, frequent advisors on areas such as cybersecurity, social media, and environmental, social and governance ("ESG") issues such as climate change and racial and gender inequality. Nasdaq believes that boards comprised of directors from diverse backgrounds enhance investor confidence by ensuring that board deliberations include the perspectives of more than one demographic group, leading to more robust dialogue and better decision making.

IV. Current State of Board Diversity and Causes of Underrepresentation on Boards

While the above studies suggest a positive association between board diversity, company performance, investor protections, and decision making, there is a noticeable lack of diversity among U.S. public companies. Nasdaq is a global organization and operates in many countries that already have implemented diversity-focused directives. In fact, Nasdaq-listed companies in Europe already are subject to diversity

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86 See Petition for Amendment of Proxy Rule (March 31, 2015), available at: https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.

87 See Forbes and Milliken, supra note 80, at 492.

88 Id.

requirements.[89] This first-hand experience provides Nasdaq with a unique perspective to incorporate global best practices into its proposal to advance diversity on U.S. corporate boards. Given that the U.S. ranks 53rd in board gender diversity, according to the World Economic Forum in its 2020 Global Gender Gap Report, Nasdaq believes advancing board diversity in the U.S. is a critical business and market imperative. This same report also found that "American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women."[90] As of 2019, women directors held 19% of Russell 3000 seats (up from 16% in 2018).[91] In comparison, women hold more than 30% of board seats in Norway, France, Sweden, and Finland.[92] At the current pace, the U.S. GAO estimates that it could take up to 34 years for U.S. companies to achieve gender parity on their boards.[93]

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89 On Nasdaq's Nordic and Baltic exchanges, large companies must comply with EU Directive 2014/95/EU (the "EU Directive"), as implemented by each member state, which requires companies to disclose a board diversity policy with measurable objectives (including gender), or explain why they do not have such a policy. On Nasdaq Vilnius, companies are also required to comply with the Nasdaq Corporate Governance Code for Listed Companies or explain why they do not, which requires companies to consider diversity and seek gender equality on the board. Similarly, on Nasdaq Copenhagen, companies are required to comply with the Danish Corporate Governance Recommendations or explain why they do not, which requires companies to adopt and disclose a diversity policy that considers gender, age and international experience. On Nasdaq Iceland, listed companies must have at least 40% women on their board (a government requirement) and comply with the EU Directive.

90 See World Economic Forum, *Global Gender Gap Report 2020* 33 (2019), available at: http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

91 See Kosmas Papadopoulos, ISS Analytics, *U.S. Board Diversity Trends in 2019* 4-5 (May 31, 2019), available at: https://www.issgovernance.com/file/publications/ISS_US-Board-Diversity-Trends-2019.pdf.

92 See Deloitte, *Women in the Boardroom: A global perspective* (6th ed. 2019), available at: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-the-boardroom-sixth-edition.pdf.

93 See GAO Report, supra note 49.

Progress toward greater racial and ethnic diversity in U.S. company boardrooms has been slower. Over the past ten years, the percentage of African American/Black directors at Fortune 500 companies has remained between 7 and 9%, while the percentage of women directors has grown from 16 to 23%.[94] In 2019, only 10% of board seats at Russell 3000 companies were held by racial minorities, reflecting an incremental increase from 8% in 2008.[95] Among Fortune 500 companies in 2018, there were fewer than 20 directors who publicly self-identified as LGBT+, and only nine companies reported considering sexual orientation and/or gender identity when identifying director nominees.[96]

Women and minority directors combined accounted for 34% of Fortune 500 board seats in 2018.[97] While women of color represent 18% of the U.S. population, they held 4.6% of Fortune 500 board seats in 2018.[98] Male underrepresented minorities held 11.5% of board seats at Fortune 500 companies in 2018, compared to 66% of board seats held by Caucasian/White men. Overall in 2018, 83.9% of board seats among Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of

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94 See Russell Reynolds, *Ethnic & Gender Diversity on US Public Company Boards* 6 (September 8, 2020).

95 See Papadopoulous, supra note 91, at 5.

96 See Out Leadership, supra note 42.

97 See Deloitte, *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards* 9 (2018), available at: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf.

98 See Catalyst, *Too Few Women of Color on Boards: Statistics and Solutions* (Jan. 31, 2020), https://www.catalyst.org/research/women-minorities-corporate-boards/.

the U.S. population), 3.8% by Hispanic/Latino(a) individuals (who represent 19% of the U.S. population), and 3.7% by Asian/Pacific Islander individuals (who represent 6% of the U.S. population).[99] In its analysis of Russell 3000 companies, 2020 Women on Boards concluded that "larger companies do better with their diversity efforts than smaller companies."[100]

Based on the limited information that is available, Nasdaq believes a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the board. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. Thus, and for the reasons discussed in this Section IV of the Purpose section, Nasdaq has concluded that a disclosure-based approach to encouraging greater diversity and data transparency would be beneficial.

Nasdaq reviewed academic and empirical studies on the causes of underrepresentation on boards and the approaches taken by other jurisdictions to remedy underrepresentation. Those studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions. Dhir (2015) explains that "[t]he presence of unconscious bias in the board appointment process, coupled with closed social networks, generates a complex set

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99 See Deloitte, *Missing Pieces Report*, supra note 97; United States Census Bureau, *QuickFacts*, available at: https://www.census.gov/quickfacts/fact/table/US/PST045219.

100 See *2020 Women On Boards Gender Diversity Index* 4 (2019), available at: https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf.

of barriers for diverse directors; these are the 'phantoms' that prevent entry."[101] In 2011, the Davies Review found that "informal networks influential in board appointments" contribute to the underrepresentation of women in the boardrooms of U.K. listed companies.[102] In 2017, the Parker Review acknowledged that "as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom."[103] In 2020, the United Kingdom Financial Reporting Council commissioned a report to analyze barriers to LGBTQ+ inclusion and promotion in the workplace. Leaders who self-identified as LGBTQ+ expressed concerns about the current board nomination process, which includes "relying on personal recommendations without transparent competition or due process [and] informal 'interviewing' outside the selection process."[104]

These concerns are not unique to the United Kingdom. The U.S. GAO (2015) found that women's representation on corporate boards may be hindered by directors' tendencies to "rely on their personal networks to identify new board candidates."[105] Vell (2017) found that "92% of board seats [of public U.S. and Canadian technology

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101 See Dhir, supra note 84, at 47.

102 See Lord Davies of Abersoch, *Women on Boards* 17 (Feb. 2011), available at: https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf.

103 See Sir John Parker, *A Report into the Ethnic Diversity of UK Boards* 38 (Oct. 12, 2017), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf.

104 See Catriona Hay et al., The Financial Reporting Council, *Building more open business* 25 (2020), available at: https://www.frc.org.uk/getattachment/19f3b216-bd45-4d46-af2f-f191f5bf4a07/The-Good-Side-x-Financial-Reporting-Council-1811-AMENDED.pdf.

105 See GAO Report, supra note 49, at 15.

companies] are filled through networking, and women have less access to these networks."[106] Deloitte and the Society for Corporate Governance (2019) found that this is also common in other industries including media, communications, energy, consumer products, financial services and life sciences.[107] They observed that although 94% of companies surveyed were looking to increase diversity among their boards, 77% of those boards looked to referrals from current directors when identifying diverse director candidates, suggesting that "networking is still key to board succession."[108] Dhir (2015), in a qualitative study of Norwegian directors, observed that "[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background."[109]

Another contributing factor may be the traditional experience sought in director nominees. Rhode & Packel (2014) observed that:

> One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service. The primary route to board directorship has long been through experience as a CEO of a public corporation. . . . Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened.[110]

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106 See Vell Executive Search, *Women Board Members in Tech Companies: Strategies for Building High Performing Diverse Boards* 6 (2017), available at: https://www.vell.com/images/pdf/VELL%20Report%20Women%20Board%20Members%20on%20Tech%20Boards%202017%203%2029.pdf.

107 See Deloitte and the Society of Corporate Governance, *Board Practices Report: Common threads across boardrooms* 5 (2019), available at: https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/1202241_2018_Board_Practices_Report_FINAL.pdf.

108 Id. at 6.

109 See Dhir, supra note 84, at 52.

110 See Deborah Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39(2) Del. J. Corp. L. 377, 402-403 (2014); see also

Hillman et al. (2002) found that while white male directors of public companies were more likely to have current or former experience as a CEO, senior manager or director, African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy.[111] Dhir (2015) suggests that "[c]onsidering persons from other, non-management pools, such as academia, legal and accounting practice, the not-for-profit sector and politics, may help create a broader pool of diverse candidates."[112] Directors surveyed by the U.S. GAO also "suggested, for example, that boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and government sectors. . . . [I]f boards were to expand their director searches beyond CEOs more women might be included in the candidate pool."[113]

Investors have begun calling for greater transparency surrounding ethnic diversity on company boards, and in the past several months as the U.S. has seen an uprising in the racial justice movement, there has been an increase in the number of African Americans

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Dhir, supra note 84, at 39 ("[T]here is an apparent preference for either CEOs (whether current or retired) or senior management who have experience at the helm of a particular business stream or unit…. The fact that far fewer women than men have been CEOs has a potentially devastating effect on access to the boardroom, which in turn can have an effect on the number of women who rise to the level of CEO and to the executive suite.").

111 See Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28(6) J. Mgmt. 747, 749, 754 (2002).

112 See Dhir, supra note 84, at 42.

113 See GAO Report supra note 49, at 18.

appointed to Russell 3000 corporate boards.[114] In a five-month span, 130 directors appointed were African American, in comparison to the 38 African American directors who were appointed in the preceding five months.[115] Although tracking the acceleration in board diversity is feasible for some Russell 3000 companies, many of the companies do not disclose the racial makeup of the board, making it impossible to more broadly assess the impact of recent events on board diversity.

V. Stakeholder Perspectives

To gain a better understanding of the current state of board diversity, benefits of diversity, causes of underrepresentation on boards, and potential remedies to address underrepresentation, Nasdaq spoke with leaders representing a broad spectrum of market participants and other stakeholders. Nasdaq sought their perspectives to inform its analysis of whether the proposed rule changes would promote the public interest and protection of investors without unduly burdening competition or conflicting with existing securities laws. The group included representatives from the investor, regulatory, investment banking, venture capital and legal communities. Nasdaq also spoke with leaders of civil rights and corporate governance organizations, and organizations representing the interests of private and public companies, including Nasdaq-listed companies. Specifically, Nasdaq obtained their views on:

- the current state of board diversity in the U.S.;
- the inherent value of board diversity;

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114 See Leslie P. Norton, *The Number of Black Board Members Surged After George Floyd's Death*, Barron's, Oct. 27, 2020, available at: https://www.barrons.com/articles/after-george-floyds-death-the-number-of-black-board-members-surges-51603809011.

115 Id.

- increasing pressure from legislators and investors to improve diverse representation on boards and board diversity disclosure;
- whether a listing rule related to board diversity is in the public interest;
- how to define a "diverse" director; and
- the benefits and challenges of various approaches to improving board diversity disclosures and increasing diverse representation on boards, including mandates and disclosure-based models.

The discussions revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics. The majority of organizations also were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can accelerate the rate of change, they expressed that a disclosure-based approach is less controversial, would spur companies to take action, and make meaningful progress on board diversity. Business leaders also expressed concern that smaller companies would require flexibility and support to meet with any time-sensitive objectives to add diverse directors. Some stakeholders highlighted additional challenges that smaller companies, and companies in certain industries, may face finding diverse board members. Leaders from across the spectrum of stakeholders that Nasdaq surveyed reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand. Leaders from the legal community emphasized that any proposed rule that imposed additional burdens beyond, or is inconsistent with, existing securities laws—by, for example, requiring companies to adopt a diversity policy

or include disclosure solely in their proxy statements—would present an additional burden and potentially more legal liability for listed companies.

VI. U.S. Regulatory Framework

As detailed above, diversity has been the topic of a growing number of studies over the past decade and, in recent years, investors have been increasingly advocating for greater diversity among directors of public companies.[116] In recent years, diversity has become increasingly important to the public, including institutional investors, pension funds, and other stakeholders who believe that board diversity enhances board performance and is an important factor in the voting decisions of some investors.[117] Legislators increasingly are taking action to encourage corporations to diversify their boards and improve diversity disclosures.[118]

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[116] In 2009, when the Commission proposed enhancements to proxy disclosures, including addressing board diversity disclosures, the Commission received over 130 comment letters related to its proposal, including from corporations, pension funds, professional associations, trade unions, accounting firms, law firms, consultants, academics, individual investors and other interested parties. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,335; see also David A. Katz and Laura McIntosh, *Raising the Stakes for Board Diversity*, Law.com (July 22, 2020), available at: https://www.law.com/newyorklawjournal/2020/07/22/raising-the-stakes-for-board-diversity/?slreturn=20201017021522; Office of the Illinois State Treasurer, *The Investment Case For Board Diversity: A Review of the Academic and Practitioner Research on the Value of Gender and Racial/Ethnic Board Diversity for Investors* 7 (Oct. 2020), available at: https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20(oct%202020).pdf.

[117] See Comments on Proposed Rule: Proxy Disclosure and Solicitation Enhancements, available at: https://www.sec.gov/comments/s7-13-09/s71309.shtml. See also CGLytics, *Diversity on the Board? Metrics Used by Fortune 100 Companies* (June 29, 2020), available at: https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/; Office of the Illinois State Treasurer, supra note 116.

[118] For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one director from an Underrepresented Community. See Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020). Washington requires companies headquartered in the state to have at least 25% women

A. SEC Diversity Disclosure Requirements – Background

In 2009, the Commission sought comment on whether to amend Item 407(c)(2)(v) of Regulation S-K to require disclosure of whether a nominating committee considers diversity when selecting a director for a position on the board.[119] The Commission received more than 130 comment letters on its proposal. According to a University of Dayton Law Review analysis of those comment letters, most were submitted by groups with a specific interest in diversity, or by institutional investors, including mutual funds, pension funds, and socially responsible investment funds.[120] Further, the analysis showed that 56 commenters addressed the issue of diversity disclosures, and only five of those 56 commenters did not favor such disclosure.[121] Twenty-seven of the 56 mentioned gender diversity, 18 mentioned racial diversity, and 13 mentioned ethnic diversity. However, neither the proposed rule nor the final rule defined diversity.[122]

Ten years after adopting board diversity disclosure rules, the Commission staff revisited the rules by establishing new Compliance and Disclosure Interpretations ("C&DI").[123] However, the staff did not provide a definition of diversity, and therefore

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on the board by 2022 or provide certain disclosures. See Wash. Subst. S.B. 6037 (June 11, 2020). At least eleven states have proposed diversity-related requirements. See Hatcher and Latham, supra note 15.

119 See Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076, 35,084 (July 17, 2009) (proposed rule).

120 See Thomas Lee Hazen and Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37:1 Univ. Dayton L. Review 41, 51, n. 82 (citing the comment letters).

121 Of the five comments that opposed diversity disclosure, three stated that diversity was an important value. See Comments on Proposed Rule, supra note 117; see also Hazen and Broome, supra note 120, at 54 n.88 (citing the 56 comment letters).

122 See Hazen and Broome, supra note 120, at 53 n. 84-86.

123 See Securities and Exchange Commission Compliance & Disclosure Interpretations, available at: https://www.sec.gov/divisions/corpfin/cfguidance.shtml.

issuers currently are not required to disclose the race, ethnicity or gender of their directors or nominees.

Currently, Item 401(e)(1) of Regulation S-K requires a company to "briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director."[124] The C&DI, in response to Question 116.11, clarifies that if a board considered a director's self-identified diversity characteristics (*e.g.*, race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background) during the nomination process, and the individual consents to disclose those diverse characteristics, the Commission staff "would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered."[125]

Rather than providing a specific definition of diversity, the C&DI provides a non-exhaustive list of examples of diverse characteristics that a company could consider for purposes of Item 401(e)(1), including "race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background."[126] Additionally, the Commission staff stated that any description of a company's diversity policy would be expected to include "a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into

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124 See 17 C.F.R. § 229.401(e)(1).

125 See Securities and Exchange Commission, Regulation S-K Compliance & Disclosure Interpretations (Sept. 21, 2020), Question 116.11 Answer, available at: https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

126 Id.

account, such as diverse work experiences, military service, or socio-economic or demographic characteristics."[127]

Item 407(c)(2)(vi) of Regulation S-K requires proxy disclosure regarding whether diversity is considered when identifying director nominees and, if so, how. In addition, if the board or nominations committee has adopted a diversity policy, the company must describe how the policy is implemented and its effectiveness is assessed.[128] When adopting Item 407(c)(2)(vi), the Commission explained:

> We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result, we have not defined diversity in the amendments.[129]

Moreover, Item 407(c)(2)(vi) does not require companies to adopt a formal policy and does not require them to explain why they have not. It also does not require public disclosure of board-level diversity statistics.

B. Weaknesses of Current Diversity Disclosure Requirements

Given the broad latitude afforded to companies by the Commission's rules related to board diversity and proxy disclosure, current reporting of board-level diversity statistics is unreliable and unusable to investors. This is due to myriad data collection challenges, including the scarcity of reported information, the lack of uniformity in the

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127 Id.

128 See 17 C.F.R. § 229.407(c)(2)(vi).

129 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,344.

information that is disclosed and inconsistencies in the definitions of diversity characteristics across companies.[130] Nasdaq recently began examining the state of board diversity among its listed companies. While conducting that research, Nasdaq encountered multiple key challenges, such as: (1) inconsistent disclosure and definitions of diversity across companies; (2) limited data on diverse characteristics outside of gender; (3) inconsistent or no disclosure of a director's race, ethnicity, or other diversity attributes (*e.g.*, nationality); (4) difficult-to-extract data because statistics are often embedded in graphics; and (5) aggregation of information, making it difficult to separate gender from other categories of diversity. Investors and data analysts have raised similar criticisms.

As the Illinois Treasurer observed, the paucity of data on race and ethnicity creates barriers to investment analysis, due diligence, and academic study.[131] For example, the scarcity of such data is an impediment to academics who want to study the performance impact of racially diverse boards.[132] Nasdaq is concerned that investors also face the many data collection challenges Nasdaq encountered, rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions. Acting Chair Allison Herren Lee expressed similar concerns, stating that the current SEC disclosure requirements have "led to spotty information that is not

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130 See Petition for Rulemaking (July 6, 2017), available at: https://www.sec.gov/rules/petitions/2017/petn4-711.pdf.

131 See Press Release, *Illinois State Treasurer Frerichs Calls on Russell 3000 Companies to Disclose Diversity Data* (Oct. 28, 2020), available at https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/october2020_russell3000.pdf.

132 See Office of Illinois State Treasurer, supra note 116, at 3-4.

standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. . . . And the current state of disclosure reveals the shortcomings of a principles-based materiality regime in this area."[133]

Some stakeholders believe there is a correlation between companies that disclose the gender, racial and ethnic composition of their board, and the number of diverse directors on those companies' boards.[134] Currently, the lack of reliable and consistent data makes it difficult to measure diversity in the boardroom, and a common set of standards for diversity definitions and disclosure format is greatly needed. At present, U.S. companies must navigate a complex patchwork of federal and state regulations and disclosure requirements. The limited disclosure currently provided voluntarily, which is primarily focused on gender (due in part to that data being the most readily available), fails to provide the full scope of a board's diverse characteristics.[135] It is difficult to improve what one cannot accurately measure. This lack of transparency is impacting investors who are increasingly basing public advocacy, proxy voting and direct shareholder-company engagement decisions on board diversity considerations.[136]

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133 See Lee, supra note 27.

134 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 ("Although the[se] amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition. A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity."); see also Office of Illinois State Treasurer, supra note 116, at 3.

135 See, e.g., CGLytics, supra note 117, at https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/; Petition for Amendment of Proxy Rule, supra note 86; Office of Illinois State Treasurer, supra note 116.

136 See Office of the Illinois State Treasurer, *Russell 3000 Board Diversity Disclosure Initiative*, https://www.illinoistreasurer.gov/Financial_Institutions/Equity,_Diversity__Inclusion/Russell_3000_Board_Diversity_Disclosure_Initiative (last accessed Nov. 25, 2020).

C. Widespread Support for Updating Diversity Disclosure Requirements

Nasdaq's surveys of investors and reviews of their disclosed policies and actions show that board diversity is a priority when assessing companies, and investors report, in some cases, relying on intuition when there is a lack of empirical, evidenced-based data. Furthermore, the continued growth of ESG investing raises the importance of quality data, given the data-driven nature of investment products such as diversity-specific indices and broader ESG funds.

Shareholders have a unique platform from which to engage and influence a company's position on important topics like diversity. Similarly, Nasdaq, like other self-regulatory organizations, is well positioned to establish practices that will assist in carrying out Nasdaq's mandate to protect investors and remove impediments from the market. Various stakeholders, including Nasdaq, believe that clear and concise annual disclosure of board diversity information that disaggregates the data by race, ethnicity, gender identity, and sexual orientation will provide the public, including key stakeholders, with a better sense of a company's approach to improving corporate diversity and the support needed to effectuate any changes. Required disclosures also would eliminate the number of shareholder proposals asking for these key metrics and the need for companies to respond to multiple investor requests for information.[137] Moreover, companies manage issues more closely and demonstrate greater progress when data is available.[138]

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[137] See Petition for Rulemaking, supra note 130, at 2.

[138] See, e.g., Gwen Le Berre, Parametric, *Investors Need Data to Make Diversity a Reality* (Aug. 24, 2020), https://www.parametricportfolio.com/blog/investors-need-data-to-make-diversity-a-reality.

In 2015, nine large public pension funds that collectively supervised $1.12 trillion in assets at the time petitioned the Commission to require registrants to disclose information related to, among other things, the gender, racial, and ethnic diversity of the registrant's board nominees.[139] In 2017, Human Capital Management Coalition, which described itself as a group of institutional investors with $2.8 trillion in assets at the time, made a similar petition to the Commission.[140] Additionally, Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors.[141] More recently, in January 2021, Blackrock published its annual proxy voting guidelines encouraging boards to disclose demographics related to board diversity, including, but not limited to, gender, ethnicity, race, age, and geographic location.[142] In October 2020, the Illinois Treasurer spearheaded an initiative along with twenty other investor organizations, asking for all companies in the Russell 3000 Index to disclose the composition of their board, including each board member's gender, race, and ethnicity.[143] And in August 2020, State Street Global Advisors reiterated their call for U.S. companies in State Street's portfolio to disclose board-level diversity characteristics, including the racial and ethnic makeup of directors.[144]

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139 See Petition for Amendment of Proxy Rule, supra note 86.

140 See Petition for Rulemaking, supra note 130.

141 See Vanguard 2020 Annual Report supra note 13.

142 See Blackrock Investor Stewardship Proxy Voting Guidelines for U.S. Securities, available at https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

143 See Press Release, supra note 131.

144 See Richard, F. Lacaille, State Street Global Advisors, Diversity Strategy, Goals & Disclosure: Our Expectation for Public Companies, dated August 27, 2020, available at https://www.ssga.com/us/en/institutional/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies.

The largest proxy advisory firms have aligned their voting policies to encourage increased board diversity disclosure. Institutional Shareholder Services ("ISS") recently adopted a new voting policy under which it will identify boards of companies in the Russell 3000 or S&P 1500 that "lack racial and ethnic diversity (or lack disclosure of such)" in 2021 and, beginning in 2022, will recommend voting against the chair of the nominating committee of such companies. The stated goal of the policy is "helping investors identify companies with which they may wish to engage and to foster dialogue between investors and companies on this topic."[145] In 2017, proxy advisory firm Glass Lewis announced a policy regarding board gender diversity that took effect in 2019. Glass Lewis generally recommends voting against the nominating committee chair of a board that has no female members, and when making such a recommendation, the firm closely examines the company's disclosure of its board diversity considerations and other relevant contextual factors.[146] On November 24, 2020, Glass Lewis announced the publication of its 2021 Proxy Voting Policy Guidelines, which expand its board gender diversity policy to vote against nominating chairs if there are fewer than two female directors, beginning in 2022.[147] Most notably, beginning with the 2021 proxy season, the company will include an assessment report of company proxy disclosures relating to

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145 See ISS Governance, *ISS Announces 2021 Benchmark Policy Updates* (November 12, 2020), available at: https://www.issgovernance.com/iss-announces-2021-benchmark-policy-updates/.

146 See Glass Lewis, *2019 Policy Guideline Updates* (Oct. 24, 2018), available at: https://www.glasslewis.com/2019-policy-guideline-updates-united-states-canada-shareholder-initiatives-israel/.

147 See Glass Lewis, *2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice - United States* (2020), available at: https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b.

board diversity, skills and the director nomination process for companies in the S&P 500 index. According to Glass Lewis, it "will reflect how a company's proxy statement presents: (i) the board's current percentage of racial/ethnic diversity; (ii) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; (iii) whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (aka 'Rooney Rule'); and (iv) board skills disclosure."[148]

Congress and members of the Commission also have weighed in on the importance of improving board transparency. In 2017, Representative Carolyn Maloney introduced the "Gender Diversity in Corporate Leadership Act of 2017," which proposed requiring public companies to provide proxy disclosure regarding the gender diversity of the board of directors and nominees.[149] In November 2019, the U.S. House of Representatives, with bipartisan support, passed the "Corporate Governance Through Diversity Act of 2019," which requires certain registrants annually to disclose the racial, ethnic, and gender composition of their boards and executive officers, as well as the veteran status of any of those directors and officers, in their proxy statements.[150] The bill also requires the disclosure of any policy, plan or strategy to promote racial, ethnic, and

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148 Id.

149 Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017).

150 Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019).

gender diversity among these groups. Legislators have proposed a companion bill in the U.S. Senate.[151]

The Council of Institutional Investors ("CII"), U.S. Chamber of Commerce,[152] National Urban League, Office of New York State Comptroller, and the National Association for the Advancement of Colored People praised the House of Representatives' for passing the 2019 legislation. According to the U.S. Chamber of Commerce's members and associations, it has become increasingly important to see improvements in board diversity.[153] Additionally, CII's General Counsel stated that the proxy statement disclosure requirement in the legislation "could contribute to enhancing U.S. public company board consideration of diversity."[154]

More recently, SEC Commissioners have called for greater transparency surrounding ethnic diversity on company boards. In a September 2020 speech titled "Diversity Matters, Disclosure Works, and the SEC Can Do More" given at the CII Fall Conference, Acting Chair Lee advocated advancing corporate diversity and for various approaches by which the Commission could promote diversity, including among other

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151 Improving Corporate Governance Through Diversity Act of 2019, S. 360, 116th Cong. (2019).

152 See Letter from Various U.S. Chamber of Commerce Associations and Members to Chairman Mike Crapo and Ranking Member Sherrod Brown, U.S. House Committee on Banking, Housing, and Urban Affairs (July 27, 2020), available at: https://www.uschamber.com/sites/default/files/200727_coalition_h.r._5084_senatesmallbusiness.pdf.

153 Id.

154 See Joe Mont, *SEC, Congress seek better diversity disclosures*, Compliance Week (Feb. 20, 2019), https://www.complianceweek.com/sec-congress-seek-better-diversity-disclosures/24802.article.

things, strengthening the Commission staff's C&DI's guidance related to disclosure of board candidate diversity characteristics.[155] Acting Chair Lee stated:

> [The SEC has] largely declined to require diversity-related disclosure. In 2009, we adopted a requirement for companies to disclose if and how diversity is considered as a factor in the process for considering candidates for board positions, including any policies related to the consideration of diversity. In 2018, we issued guidance encouraging the disclosure of self-identified characteristics of board candidates. While I appreciate these measures, given that women of color hold just 4.6% of Fortune 500 board seats and less than one percent of Fortune 500 CEOs are Black, it's time to consider how to get investors the diversity information they need to allocate their capital wisely.[156]

VII. Nasdaq's Proposal

A. Overview of Disclosure Requirements

Disclosure of information material to an investor's voting and investment decision is the bedrock of federal securities laws. The Exchange's listing rules require companies to comply with federal securities laws, including the registration requirements under the Securities Act of 1933. Once listed, companies are obligated to solicit proxies and file all annual and periodic reports with the Commission under the Act at the prescribed times.[157] In discharging its obligation to protect investors, Nasdaq monitors listed companies for compliance with those disclosure obligations, and the failure to do so results in a notice of deficiency or delisting.

Proposing listing rules designed to enhance transparency is well within the Exchange's delegated regulatory authority, provided they do not conflict with existing federal securities laws. For example, Nasdaq already requires listed companies to

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155 See Lee, supra note 27.

156 Id. Commissioner Crenshaw also expressed disappointment with the Commission's silence on diversity. See Crenshaw, supra note 8.

157 See Nasdaq Rulebook, Rules 5250(c) and (d).

publicly disclose compensation or other payments by third parties to a company's directors or nominees, notwithstanding that such disclosure is not required by federal securities laws. In approving that proposed rule, the Commission noted:

> To the extent there are certain factual scenarios that would require disclosure not otherwise required under Commission rules, we believe that it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Act, that are designed to improve transparency and accountability into corporate decision making and promote investor confidence in the integrity of the securities markets.[158]

Nasdaq is concerned that while investors have increasingly emphasized that they consider board diversity information to be material, the current lack of transparency and consistency makes it difficult for Nasdaq and investors to determine the state of diversity among listed companies as well as each board's philosophy regarding diversity. Investors also have voiced dissatisfaction about having to independently collect board-level data about race, ethnicity, and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.[159] Moreover, in some instances, based on Nasdaq's own investigation, such information is either unavailable, or, if available, not comparable across companies. To the extent investors must obtain this information on their own through an imperfect process, Nasdaq is concerned that it increases information asymmetries between larger stakeholders, who are able to collect this data directly from companies, and smaller investors, who must rely on incomplete public disclosures. For all investors who take on the burden of independently obtaining the current information, there is a cost and time burden related to the data collection.

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

[159] See Petition for Amendment of Proxy Rule, supra note 86, at 2.

Nasdaq believes that additional disclosure regarding a board's composition and philosophy related to board diversity will improve transparency and accountability into corporate decision making. Nasdaq proposes to improve transparency regarding board diversity by requiring all listed companies to publicly disclose unbundled, consistent data utilizing a uniform, transparent framework on their website or in their proxy statement or information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) under proposed Rule 5606. Similarly, Nasdaq proposes to promote accountability in corporate decision-making by requiring companies that do not meet the applicable diversity objectives of proposed Rule 5605(f)(2) to provide investors with an alternative public disclosure of the board's reasons for not doing so under proposed Rule 5605(f)(3). The proposal is a disclosure-based framework, not a mandate. Nasdaq designed the proposal to avoid a conflict with existing disclosure requirements under Regulation S-K and to mitigate additional burdens for companies by providing them with flexibility to provide such disclosure in advance of the company's next annual meeting of shareholders on their website, in their proxy statement or information statement, or, if the Company does not file a proxy, in its Form 10-K or 20-F, and not requiring them to adopt a formal diversity policy.

Nasdaq proposes to foster consistency in board diversity data disclosure by defining "Diverse" under proposed Rule 5605(f)(1) as "an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+," and by adopting the following definitions under proposed Rule 5605(f)(1):

- "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

- "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.
- "Underrepresented Minority" means 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.

The terms in the proposed definition of "Underrepresented Minority" reflect the EEOC's categories and are construed in accordance with the EEOC's definitions, which are set forth in Exhibit 3 - Board Diversity Matrix and Instructions.[160] The terms in the proposed definition of LGBTQ+ are similar to the identities defined in California's A.B. 979, described below, but have been expanded to include the queer community based on Nasdaq's consultation with stakeholders, including human rights organizations.[161]

When defining "Diverse," Nasdaq considered various state and federal legislation, stakeholder sentiments, and academic and empirical studies. For example, California requires public companies headquartered in the state to have at least one individual who self-identifies as a female on the board by 2019 under S.B. 826[162] and at least one director who is a member of an "underrepresented community" by 2021 under A.B.

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160 While the EEO-1 report refers to "Hispanic or Latino" rather than Latinx, Nasdaq proposes to use the term Latinx to apply broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.

161 Nasdaq agrees with the United Kingdom Financial Reporting Council that the acronym LGBTQ+ "does not attempt to exclude other groups, nor does it imply that the experiences of people under its umbrella are the same." See Hay et al., supra note 104, at 14.

162 See Cal. S.B. 826, supra note 118.

979.[163] S.B. 826 defines "Female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth," consistent with legislation proposed by New Jersey, Michigan and Hawaii related to board gender diversity.[164] A.B. 979 considers directors from underrepresented communities to be individuals who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender. Since S.B. 826 was passed, 669 women have joined public company boards in the state and the number of public companies with all male boards has declined from 30% in 2018 to 3% in 2020.[165]

The state of Washington requires public companies whose boards are not comprised of at least 25% directors who self-identify as women by January 1, 2022 to provide public disclosures related to the board's consideration of "diverse groups" during the director nomination process. The state considers "diverse groups" to include "women, racial minorities, and historically underrepresented groups."[166]

As discussed above, Congress has proposed legislation relating to disclosure of racial, ethnic, gender and veteran status among the company's directors. Section 342 of the Dodd-Frank Act defines "minority" as "Black American, Native American, Hispanic

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163 See Cal. A.B. 979, supra note 118.

164 See Cal. S.B. 826, supra note 118. See also N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

165 See California Partners Project, *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards* 4 (2020), available at: https://www.calpartnersproject.org/claimyourseat.

166 See Wash. Subst. S.B. 6037, supra note 118. At least 11 states have proposed diversity-related requirements. See Hatcher and Latham, supra note 15.

American, and Asian American,"[167] and the Diversity Assessment Report for Entities Regulated by the SEC requires the Exchange to report workforce composition data to the SEC based on the EEOC's categories.[168] Most companies are required by law to provide similar workforce data to the EEOC through the EEO-1 Report, which requires employers to report statistical data related to race, ethnicity and gender to the EEOC.[169]

Nasdaq has designed the proposed rule to require all companies to provide consistent, comparable data under proposed Rule 5606 by utilizing the existing EEO-1 reporting categories that companies are already familiar with, and by requiring companies to have, or publicly explain why they do not have, at least two directors who are diverse in terms of race, ethnicity, sexual orientation, or gender identity under proposed Rule 5605(f)(2). While the EEO-1 report does not currently include sexual orientation or gender identity, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status in recognition of the U.S. Supreme Court's recent decision in *Bostock v. Clayton County* that sexual orientation and gender identity are "inextricably" intertwined with sex.[170]

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167 See 12 U.S.C. § 5452(g)(3) and Pub. L. 101-73 § 1204(c)(3).

168 See Securities and Exchange Commission, Diversity Assessment Report for Entities Regulated by the SEC, available at: https://www.sec.gov/files/OMWI-DAR-FORM.pdf.

169 All companies with 100 or more employees are required to complete the EEO-1 Report. See U.S. Equal Employment Opportunity Commission, EEO-1: Who Must File, https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-who-must-file (last accessed Nov. 27, 2020).

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

The proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members. Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. However, the company would have to provide the disclosure under proposed Rule 5605(f)(3) if the company does not also meet the diversity objectives of proposed Rule 5605(f)(2). Nasdaq believes such disclosure would provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

Overall, Nasdaq believes the proposal will enhance investor confidence that board discussions at listed companies that meet the applicable diversity objectives of proposed Rule 5605(f)(2) include the perspectives of more than one demographic group. They will also be confident that boardrooms that do not meet the applicable diversity objectives are having a thoughtful discussion about their reasons for not doing so and publicly explaining those reasons. On balance, the proposal will advance the public interest and enhance investor confidence in the integrity of the securities markets by ensuring investors that Nasdaq is monitoring all listed companies to verify that they have the applicable number of Diverse directors under proposed Rule 5605(f) or explain why they do not, and by requiring all listed companies to provide consistent, comparable diversity disclosures.

B. Board Statistical Disclosure

Proposed Rule 5606(a) would require each company to publicly disclose, to the extent permitted by applicable law, information on the directors' voluntary self-identified gender and racial characteristics and LGBTQ+ status.

All Nasdaq-listed companies that are subject to proposed Rule 5605(f), whether they choose to have the applicable number of Diverse directors under proposed Rule 5605(f)(2) or to explain why they do not, would be required to make the proposed Rule 5606 disclosure. This proposed rule will assist the Exchange in assessing whether companies meet the diversity objectives of proposed Rule 5605(f)(2). Under proposed Rule 5606(e), Nasdaq proposes to make proposed Rule 5606 operative for listed companies by the later of (1) one calendar year from the Approval Date ("Effective Date"); or (2) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.[171]

Pursuant to proposed Rule 5606(a), each company would annually provide its board-level diversity data in a format substantially similar to the Matrix in proposed Rule 5606(a) and attached as Exhibit 3. In accordance with the proposed accompanying instructions to the Matrix, companies are required to provide the Matrix information at least once per year. If, within the same year, a company changes its board composition after it publishes its Matrix, the company may, but is not required to, publish its updated information.

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[171] Based on informal feedback requesting that the Exchange better align the compliance date for proposed Rule 5606 with its listed companies' annual shareholder meetings and proxy filings, Nasdaq is amending proposed Rule 5606(e). See Letter from Stephen J. Kastenberg, Ballard Spahr LLP, to Ms. Vanessa Countryman, dated January 14, 2021 ("Ballard Spahr Comment Letter"), available at: https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8245975-227819.pdf.

In accordance with proposed Rule 5606(a), a company would provide the total number of directors on its board and include the date the information was collected as the "As of Date." If a director voluntarily self-identifies, each company, other than a Foreign Issuer (as defined under proposed Rule 5605(f)(1)) or Foreign Private Issuer (as defined under Rule 3b-4(b) of the Act),[172] would include the following in a table titled "Board Diversity Matrix," in accordance with the instructions accompanying the proposed disclosure format: (1) the number of directors based on gender identity (female, male, or non-binary[173]); (2) the number of directors based on race and ethnicity (African American or Black, Alaskan Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities[174]); and (3) the number of directors who self-identify as LGBTQ+.

Any director who chooses not to disclose a gender would be included in the "Did Not Disclose Gender" category and any director who chooses not to identify as any race or not to identify as LGBTQ+ would be included in the "Did Not Disclose Demographic Background " category at the bottom of the table. The defined terms for the race and ethnicity categories in the instructions to the Matrix disclosure format are substantially

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172 See 17 C.F.R. § 240.3b-4.

173 Nasdaq received informal questions on the definition of "non-binary." As a result, Nasdaq is amending the Matrix to define non-binary as genders that are not solely man or woman; someone who is non-binary may have more than one gender, no gender, or their gender may not be in relation to the gender binary. Although non-binary is included as a category in the proposed Matrix, a company would not satisfy the diversity objectives proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

174 If a director self-identifies in the "Two or More Races or Ethnicities" category, the director must also self-identify in each individual category, as appropriate.

similar to the terms and definitions used in the EEO-1 Report.[175] LGTBQ+ is defined similarly to proposed Rule 5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

In addition to providing the information included in the Matrix, the accompanying directions to the Matrix allows a company to supplement its disclosure including additional information related to its directors.[176] For example, a company may choose to provide the information on a director-by-director basis or may choose to include any skills, experience, and attributes of each of its directors that are relevant to the company.

Below is an example of a Matrix that companies may use, which is also attached as Exhibit 3:[177]

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#

175 See supra note 169. Additionally, the EEOC does not categorize LGBTQ+ or any other sexual orientation identifier on its EEO-1 Report. The definitions of the EEO-1 race and ethnicity categories may be found in the appendix to the EEO-1 Report instructional booklet, available at https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-instruction-booklet.

176 While Nasdaq is not proposing to amend the information required by the Matrix, based on commenter feedback, Nasdaq is amending the instructions to clarify that a company is not limited to only providing the information required by the Matrix.

177 Nasdaq is proposing two non-substantive amendments to the Matrix that was provided in the Initial Proposal. First, Nasdaq has alphabetized the gender columns by listing "Female" before "Male." Nasdaq has also replaced the term "American Indian" with "Native American" to conform with the terms used in the EEO-1 report and proposed Rule 5605(f)(1).

Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

Nasdaq recognizes that some Foreign Issuers, including Foreign Private Issuers as defined by the Act,[178] may have their principal executive offices located outside of the United States and in jurisdictions that may impose laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race, ethnicity, or LGBTQ+ status. In such countries, a Foreign Issuer may be precluded by law from requesting diversity data from its directors. Moreover, Nasdaq's definition of Underrepresented Minority proposed in proposed Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Matrix data less relevant for such companies and not useful for investors.

As a result of these limitations, Nasdaq is proposing the option of a separate Matrix for Foreign Issuers and Foreign Private Issuers, as defined by Rule 3b-4(b) of the Act.[179] Similar to other companies, a Foreign Issuer would provide the total number of directors on its board. If a director voluntarily self-identifies, the company would include the following in a table titled "Board Diversity Matrix": (1) the country of its principal executive offices; (2) whether or not the company is a Foreign Private Issuer; (3) whether

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178 See 17 C.F.R. § 240.3b-4.

179 Id. Nasdaq has made a non-substantive amendment to the title of the Matrix for Foreign Issuers to further clarify that it is applicable to Foreign Issuers with a principal executive office outside of the United States.

or not the disclosure is prohibited under the company's home country law; (4) the total number of directors; (5) the number of directors based on gender identity (female, male or non-binary[180]); (6) the number of directors who are considered underrepresented in the country of the principal executive office; and (7) the number of directors who self-identify as LGBTQ+. If a director chooses not to self-identify, the company would select "Did Not Disclose Gender" and/or "Did Not Disclose Demographic Background," as applicable. "Underrepresented Individual in Home Country Jurisdiction" is defined in the instructions to the Matrix as a person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Foreign Private Issuer or Foreign Issuer's principal executive offices (as reported on the Foreign Issuer's Forms F-1, 10-K, 20-F or 40-F).[181] Rule 5605(f)(2)(B)(i) also proposes the same definition for Diverse directors of Foreign Issuers. As described below in Section II.D.i of the Statutory Basis section, this definition is based on the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* and the United Nations *Declaration on the Rights of Indigenous Peoples*.[182]

Nasdaq is also proposing new Rule 5606(b), under which each company would provide the disclosure described in proposed Rule 5606(a) in advance of the company's

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[180] Although non-binary is included as a category in the proposed Matrix, a company would not satisfy any aspect of the diversity objective proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

[181] In an effort to provide more clarification, Nasdaq is amending the definition of "Underrepresented Individual in Home Country Jurisdiction" in Exhibit 3 by removing "a Foreign Issuer's home country jurisdiction" and replacing it with "the Foreign Issuer's principal executive office."

[182] See infra note 337.

next annual meeting of shareholders: (1) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (2) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (1) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.[183] The proposed time period to submit information in the Matrix is aligned with the time period provided in proposed Rule 5605(f)(3) for a company to submit its explanation for why it does not have the applicable number of Diverse directors under proposed Rule 5605(f). Disclosure of the statistical data is not in lieu of any SEC requirements for a company to disclose any required information pursuant to Regulation S-K or any other federal, state or foreign laws or regulations. As described in the instructions to the Matrix and proposed Rule 5606(a), each year following the first year of the disclosure of the Matrix, all companies must include the current year and immediately prior year diversity statistics in its disclosure. If the company publishes the Matrix on its website, the disclosure must remain accessible on the company's website. Additionally, the instructions require companies to publish the Matrix information in a searchable format. If a company uses a graphic or image format (*i.e.,* tif, jpg, gif, png), the company must also include the same information as searchable text or in a searchable table. The searchable information could be included, for example, together with the related graphic or in an appendix to the filing.[184]

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183 Nasdaq is amending the proposed Rule 5606(b) to align the timing of this disclosure with the timing of other governance-related disclosures.

184 Nasdaq's clarification on the manner in which companies must provide the Board Diversity Matrix information is a non-substantive amendment to the Initial Proposal.

Nasdaq is also proposing Rule 5606(c), which exempts the following types of companies from proposed Rule 5606(a): asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series. The exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition. Additionally, Nasdaq is proposing to exempt an acquisition company listed under IM-5101-2 from the requirements of proposed Rule 5606. This approach is similar to other phase-in periods granted to SPACs.

Nasdaq is also proposing Rule 5606(d) to allow newly listed Nasdaq companies to satisfy the requirement of proposed Rule 5606 within one year of listing on Nasdaq. Newly-listed companies include those listing through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2. A newly listed company would be required to provide the information proposed by proposed Rule 5606(a) in advance of the company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently

with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

If a company does not timely provide the diversity disclosure, Nasdaq will notify the company that it is not in compliance with a listing requirement and begin its existing, standard process to allow the company to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,[185] Nasdaq proposes to amend Rule 5810(c)(2)(A)(iv) to provide companies that fail to adhere to proposed Rule 5606 with 45 calendar days to submit a plan in accordance with Rule 5810(c)(2) to regain compliance. Based on that plan, Nasdaq can provide the company with up to 180 days to regain compliance. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815.

Although proposed Rule 5606 is not identical to current Regulation S-K disclosure requirements, it is similar to, and does not deviate from, the Commission staff's C&DI related to Items 401(e)(1) and 407(c)(2)(vi) of Regulation S-K. Moreover, the proposed rule provides clarity to the definition of diversity and streamlines investors' desire for clear, complete and consistent disclosures. Nasdaq believes that the format of

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[185] Pursuant to Nasdaq Rule 5810(c)(2)(A)(iii), a company is provided 45 days to submit a plan to regain compliance with Rules 5620(a) (Meetings of Shareholders), 5620(c) (Quorum), 5630 (Review of Related Party Transactions), 5635 (Shareholder Approval), 5250(c)(3) (Auditor Registration), 5255(a) (Direct Registration Program), 5610 (Code of Conduct), 5615(a)(4)(D) (Partner Meetings of Limited Partnerships), 5615(a)(4)(E) (Quorum of Limited Partnerships), 5615(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 5640 (Voting Rights). Pursuant to Nasdaq Rule 5810(c)(2)(A)(iv), a company is also provided 45 days to submit a plan to regain compliance with Rule 5250(b)(3) (Disclosure of Third Party Director and Nominee Compensation). A company is generally provided 60 days to submit a plan to regain compliance with the requirement to timely file periodic reports contained in Rule 5250(c)(1).

the Matrix and the information that it will provide offers greater transparency into a company's board composition and will enable the data to be easily aggregated across issuers.[186] Nasdaq also believes that requiring annual disclosure of the data will ensure that the information remains current and easy for investors, data analysts and other parties to track.

C. Diverse Board Representation or Explanation

Nasdaq is proposing to adopt new Rule 5605(f)(2) to require each listed company to have, or explain why it does not have, the applicable number of Diverse directors. Generally, the diversity objectives under proposed Rule 5605(f)(2)(A) would include having at least two members of its board of directors who are Diverse, including at least one who self-identifies as Female and one who self-identifies as an Underrepresented Minority or LGBTQ+.[187] The proposal is a disclosure-based framework, not a mandate. A company does not need to provide additional public disclosures if the company demonstrates under proposed Rule 5606 that it meets the applicable diversity objectives of proposed Rule 5605(f)(2). The terms in the proposed definition of "Underrepresented Minority" reflect the EEOC's categories and are construed in accordance with the EEOC's definitions. Nasdaq has provided additional flexibility for Smaller Reporting Companies, Foreign Issuers (including Foreign Private Issuers), and each company with a board of directors of five or fewer members to meet alternative objectives.

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186 Various stakeholders have requested easier aggregation. See Petition for Amendment of Proxy Rule, supra note 86, at 1.

187 Nasdaq has published an FAQ on the Listing Center clarifying that "two members of its board of directors who are Diverse" would exclude emeritus directors, retired directors and members of an advisory board.

Under proposed Rule 5605(f)(3), if a company chooses to satisfy proposed Rule 5605(f)(2) by explaining why it does not have the applicable number of Diverse directors under proposed Rule 5605(f)(2), the company must: (i) specify the requirements of proposed Rule 5605(f)(2) that are applicable (*e.g.*, the applicable subparagraph, the applicable diversity objectives, and the timeframe applicable to the company's market tier); and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for companies with five or fewer directors). Such disclosure must be provided: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website.[188] If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.[189]

Nasdaq will not evaluate the substance or merits of the company's explanation, but would verify that the company has provided one at the time it files its proxy statement or information statement (or, if the company does not file a proxy, at the time it files its Form 10-K or 20-F).[190] If the company does not meet the diversity objectives and has

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188 Nasdaq is amending the proposed Rule 5605(f)(3) to align the timing of this disclosure with the timing of other governance-related disclosures, such as those provided in the proxy, to make it easier for investors to know where a company has provided the disclosure and to give shareholders have access to the information prior to the company's annual shareholder meetings.

189 Nasdaq's clarification on the timing in which a company must provide such disclosure on its website is an amendment to the Initial Proposal.

190 Nasdaq's clarification on the timing in which Nasdaq will verify that the company has provided an explanation under proposed Rule 5605(f)(3) is an amendment to the Initial Proposal.

not provided any explanation, or has provided an explanation that does not satisfy subparagraphs (i) and (ii) of proposed Rule 5605(f)(3), then the explanation will not satisfy proposed Rule 5605(f)(3). For example, it would not satisfy proposed Rule 5605(f)(3) merely to state that "the Company does not comply with Nasdaq's diversity rule." As described above, the company must specify the requirements of proposed Rule 5605(f)(2) that are applicable, which is intended to provide transparency to investors who are not familiar with Nasdaq's listing rules, and explain the reasons why it does not have the applicable number of Diverse directors. For example, a company could disclose the following to satisfy subparagraph (i) of proposed Rule 5605(f)(3): "As a Smaller Reporting Company listed on the Nasdaq Capital Market tier, the Company is subject to Nasdaq Rule 5605(f)(2)(C), which requires the company to have, or explain why it does not have, at least two Diverse directors, including at least one director who self-identifies as Female. Under Rule 5605(f)(7), the Company may have at least one Diverse director by March 10, 2023, and a second Diverse director by March 10, 2026, or explain its reasons for not doing so. 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."

i. Effective Dates and Phase-in Period

Proposed Rule 5605(f)(7) provides a transition period before companies must fully meet the diversity objectives or explain why they do not upon the initial implementation of the rule. Under this transition rule, each NGS, NGM, and NCM listed company (including companies with smaller boards under proposed Rule 5606(f)(2)(D)) must have, or explain why it does not have, at least one Diverse director by the later of:

(i) two calendar years after the Approval Date[191] (the "First Effective Date"); or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date. Each company listed on the NGS or NGM tiers must have, or explain why it does not have, two Diverse directors by the later of: (i) four calendar years after the Approval Date (the "Second NGS/NGM Effective Date"); or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date. Each company listed on the NCM tier must have, or explain why it does not have, at least two Diverse directors by the later of: (i) five calendar years after the Approval Date (the "Second NCM Effective Date") or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NCM Effective Date.[192]

For example, if the Approval Date is March 10, 2021, all companies (including companies with smaller boards under proposed Rule 5606(f)(2)(D)) would be required to have, or explain why they do not have, one Diverse director by March 10, 2023 (the First Effective Date). Companies with boards of more than five members would be required to

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191 The "Approval Date" is the date that the SEC approves the proposed rule.

192 Nasdaq's proposal to permit companies to satisfy Rule 5605(f)(2) by the later of: (i) each respective effective date described above; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of each respective effective date is an amendment to the Initial Proposal.

have, or explain why they do not have, two Diverse directors by March 10, 2025 (the Second NGS/NGM Effective Date applicable to NGS/NGM companies only) or March 10, 2026 (the Second NCM Effective Date applicable to NCM companies only). However, if a company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting after the anniversary of the Approval Date in the respective calendar year noted above, it would not be required to satisfy proposed Rule 5605(f)(2) until such filing date. This is intended to better to align listed companies' disclosure requirements with their annual meetings and proxy requirements.[193]

Under proposed Rule 5605(f)(5)(A), a newly listed company on the NGS or NGM tiers that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one Diverse director by the later of: (a) one year from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to the company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

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[193] See Ballard Spahr Comment Letter, supra note 171.

Under proposed Rule 5605(f)(5)(B), a newly listed company on the NCM tier that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2) by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(D), any newly listed company on any market tier that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

These "phase-in" periods apply to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a business combination with a SPAC.

Under proposed Rule 5605(f)(7)(E), any company listing before the end of the phase-in periods described in proposed Rule 5605(f)(7) would have the remaining length of the phase-in periods to satisfy proposed Rule 5605(f)(2), or the two year period set

forth in proposed Rule 5605(f)(5), whichever is longer. As a result, companies listing on the NGS or NGM tiers after the expiration of the phase-in periods provided by proposed Rule 5605(f)(7) would be provided with at least one year from the date of listing to satisfy the applicable requirement of proposed Rule 5605(f)(2) to have, or explain why they do not have, at least one Diverse director, and one additional year to satisfy the requirement to have, or explain why they do not have, at least two Diverse directors. Companies listing on the NCM tier after the expiration of the phase-in periods provided by proposed Rule 5605(f)(7) would be provided with at least two years from the date of listing to satisfy the applicable requirement of proposed Rule 5605(f)(2) to have, or explain why they do not have, at least two Diverse directors. This is intended to provide newly public companies with additional time to meet the diversity objectives of proposed Rule 5605(f)(2), recognizing that newly public companies may have unique governance structures, such as staggered boards or director seats held by venture capital firms, that require additional timing considerations when adjusting the composition of the board of directors. It is also intended to provide additional flexibility to companies on the NCM tier in recognition that such companies are typically smaller and may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For example, if the Approval Date is March 10, 2021, all companies (including companies with smaller boards) would be required to have, or explain why they do not have, one Diverse director by March 10, 2023. Companies with boards of more than five members would be required to have, or explain why they do not have, at least two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for

NCM companies) (or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting in each respective year, whichever is later). If a company lists on the NGS or NGM tier on January 1, 2023, it would be required to have, or explain why it does not have, at least one Diverse director by the later of January 1, 2024 and the date it files its proxy statement for its 2024 annual shareholders meeting (or, if the Company does not file a proxy, in its Form 10-K or 20-F), rather than March 10, 2023. Similarly, if a company lists on the NCM tier on September 1, 2025 and has a board of more than five members, it would be required to have at least two Diverse directors by the later of September 1, 2027 and the date of the filing of the proxy statement for its 2027 annual shareholders meeting (or, if the company does not file a proxy, in its Form 10-K or 20-F), rather than March 10, 2026.

Under proposed Rule 5605(f)(7)(F), a company listed on the NCM tier that transfers to the NGS or NGM tiers after the Approval Date, but prior to the expiration of the phase-in periods provided by proposed Rule 5605(f)(7), would be provided with the later of the periods set forth in proposed Rule 5605(f)(7)(C) or one year from the date of transfer. As a result, if a company transfers from NCM to NGS/NGM, they still have the benefit of the phase-in for NCM, or one year from the date of transfer, whichever is later. For example, if a U.S. company with a board of more than five members transfers from the NCM tier to the NGS tier on August 1, 2024, and already has at least one Diverse director, it would be required to have, or explain why it does not have, at least two Diverse directors by the later of August 1, 2025 and the date it files its proxy statement for its 2025 annual shareholders meeting, rather than March 10, 2025. However, if such

company does not have at least one Diverse director, it would be required to have, or explain why it does not have, at least two Diverse directors by August 1, 2025 (or the date it files its proxy statement for its annual shareholders meeting in each respective year, whichever is later).

Nasdaq believes these proposed periods are consistent with the phase-in periods for Nasdaq's other board composition requirements. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and with the majority independent board requirement of proposed Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement. In addition, Rule 5620 and IM-5620 requires each new listing to hold its first annual shareholders within one-year after its first fiscal year-end following listing. Therefore, Nasdaq believes it is appropriate to provide each new listing additional time to satisfy proposed Rule 5605(f)(2) if the date it files its proxy statement for the company's annual shareholders meeting subsequent to the company's listing is later than the anniversary of listing.

ii. Foreign Issuers

Nasdaq recognizes that the EEOC categories of race and ethnicity may not extend to all countries globally because each country has its own unique demographic composition. However, Nasdaq observed that on average, women tend to be

underrepresented in boardrooms across the globe, holding an estimated 16.9% of board seats in 2018.[194] As an official supporter of the United Nations Sustainable Stock Exchanges Initiative, Nasdaq recognizes that ensuring women have equal opportunities for leadership in economic decision making is one of the United Nations Sustainable Development Goals to be accomplished by 2030.[195] However, studies estimate that at current rates, it could take 18[196] to 34 years[197] for U.S. companies to achieve gender parity on their boards.

Accordingly, under proposed Rule 5605(f)(2)(B), each Foreign Issuer with a board of more than five members must have, or explain why it does not have, at least two Diverse directors on its board, including at least one Female. Nasdaq proposes to provide Foreign Issuers with additional flexibility in that Foreign Issuers may satisfy the diversity objective by having two Female directors. In addition, Foreign Issuers may also satisfy the diversity objective by having one Female director, and one individual who self-identifies as (i) LGBTQ+ or (ii) an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form F-1, 10-K,

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194 See Deloitte, *Women in the Boardroom*, supra note 92.

195 See United Nations Sustainable Stock Exchanges Initiative, *Gender Equality*, https://www.un.org/sustainabledevelopment/gender-equality/ (last accessed Nov. 24, 2020).

196 See McKinsey & Company, supra note 31, at 17.

197 See GAO Report, supra note 49, at 9 (estimating "it could take about 10 years from 2014 for women to comprise 30 percent of board directors and more than 40 years for the representation of women on boards to match that of men").

20-F or 40-F).[198] Alternatively, a company could satisfy proposed Rule 5605(f)(2)(B) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule.

Nasdaq proposes to define a Foreign Issuer under proposed Rule 5605(f)(1) as (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that: (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act;[199] and (ii) has its principal executive offices located outside of the United States. This definition will include all Foreign Private Issuers (as defined in Rule 5005(a)(19), regardless of where they are headquartered or whether they file domestic SEC reports),[200] and any foreign issuers that are not foreign private issuers so long as they are also headquartered outside of the United States. This is designed to recognize that companies that are not Foreign Private Issuers but are headquartered outside of the United States are foreign companies notwithstanding the fact that they file domestic SEC reports. It is also designed to exclude companies that are domiciled in a foreign jurisdiction without having a physical presence in that country.

Proposed Rule 5605(f)(5)(C) will allow any company that ceases to be a Foreign Issuer to satisfy the diversity objectives of proposed Rule 5605(f) by the later of: (i) one year from the date that the company no longer qualifies as a Foreign Issuer; or (ii) the

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198 To provide more clarity, Nasdaq is amending the definition of "Diverse" by removing "a company's home country jurisdiction" and replacing it with "the company's principal executive office (as reported on the company's Form F-1, 10-K, 20-F or 40-F)."

199 See 17 C.F.R. § 240.3b-4(b) ("The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.").

200 Under Nasdaq Rule 5005(a)(19), the term Foreign Private Issuer has "the same meaning as under Rule 3b-4 under the Act."

date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event. Nasdaq proposes to define "board of directors" in proposed Rule 5605(f)(2)(B)(i)(b) to mean, in the case of a Foreign Issuer with a two-tiered board system, the company's supervisory or non-management board, which is consistent with the SEC's definition in Rule 10A-3(e)(2) of the Exchange Act.[201]

Nasdaq also proposes to revise Rule 5615 and IM-5615-3, which currently permit a Foreign Private Issuer to follow home country practices in lieu of the requirements set forth in the Rule 5600 Series, subject to several exclusions. Nasdaq proposes to revise Rule 5615 and IM-5615-3 to add Rules 5605(f) and 5606 to the list of excluded corporate governance rules. As a result, Foreign Private Issuers must satisfy the requirements of proposed Rules 5605(f) and 5606 and may not follow home country practices in lieu of such requirements. However, Foreign Private Issuers that elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, may satisfy the requirements of proposed Rule 5605(f) by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

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[201] See 17 CFR § 240.10A-3(e)(2) ("In the case of foreign private issuers with a two-tier board system, the term board of directors means the supervisory or non-management board."). Nasdaq's clarification on the definition of "board of directors" for a Foreign Issuer is an amendment to the Initial Proposal.

iii. Smaller Reporting Companies

Smaller companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources necessary to compensate an additional director or engage a search firm to search outside of directors' networks. Recognizing the resource constraints smaller companies face, Nasdaq proposes to provide each Smaller Reporting Company with additional flexibility. Specifically, these companies could satisfy the two Diverse directors objective under proposed Rule 5605(f)(2)(C) by having two Female directors.

Like other companies, Smaller Reporting Companies could also satisfy the diversity objectives by having one Female director and one director who self-identifies as either (i) an Underrepresented Minority, or (ii) a member of the LGBTQ+ community. Alternatively, a company could satisfy proposed Rule 5605(f)(2)(C) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule. Under proposed Rule 5605(f)(1), Nasdaq proposes to define a Smaller Reporting Company as set forth in Rule 12b-2 under the Act.[202]

Proposed Rule 5605(f)(5)(C) will allow any company that ceases to be a Smaller Reporting Company to satisfy the requirements of proposed Rule 5605(f) by the later of: (i) one year from the date that the company no longer qualifies as a Smaller Reporting Company; or (ii) the date the company files its proxy statement or its information

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[202] Under 12b-2 of the Act, a Smaller Reporting Company "means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than $250 million; or (2) Had annual revenues of less than $100 million and either: (i) No public float; or (ii) A public float of less than $700 million." See 17 C.F.R. § 240.12b-2.

statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event.

iv. Companies with Smaller Boards

Nasdaq considered comments that it should "amend the proposed rules to allow greater flexibility for companies with relatively small boards."[203] Nasdaq believes that companies with smaller boards may face similar resource constraints to those of Smaller Reporting Companies. However, not all companies with small boards are Smaller Reporting Companies, and therefore the alternative diversity objective provided to Smaller Reporting Companies may not be available to them. Further, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy proposed Rule 5605(f)(2) by adding additional directors. For example, two Diverse directors on a five member board comprise 40% of the board, whereas two Diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two Diverse directors and expands its board to satisfy proposed Rule 5605(f)(2), it may require the company to incur additional costs through director compensation and D&O insurance.

Accordingly, Nasdaq proposes to adopt Rule 5605(f)(2)(D) to require a company with a board of directors of five or fewer members to have, or explain why it does not have, at least one member of its board of directors who is Diverse. Nasdaq seeks to avoid complexity for companies that attempt to satisfy the diversity objective by adding a

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203 See Ballard Spahr Comment Letter, supra note 171.

Diverse director.[204] To prevent such companies from being subject to a higher threshold by virtue of adding directors, Nasdaq proposes to clarify in proposed Rule 5605(f)(2)(D) that if a company has five members on its board of directors before becoming subject to proposed Rule 5605(f), then it shall not become subject to the requirement of subparagraphs (A), (B), or (C) to have, or explain why it does not have, at least two members of its board of directors who are Diverse if it adds one director to satisfy subparagraph (D), thereby becoming a six member board. However, a company would become subject to proposed Rule 5605(f)(2)(A), (B), or (C) if it subsequently expands its board.

v. Cure Period and Grace Period

Nasdaq proposes to adopt Rule 5605(f)(6)(A) and a new Rule 5810(c)(3)(F) to specify what happens if a company (i) does not meet the applicable diversity objectives set forth under proposed Rule 5605(f)(2) and fails to provide the disclosure required by proposed Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in proposed Rule 5605(f)(5) or (7) and therefore fails to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2).[205] In these circumstances, the Listing Qualifications Department will promptly notify the company that it has until the later of its next annual shareholders

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204 See e.g. David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *Gender Diversity and Board Quotas*, New York Law Journal (July 25, 2018), available at: https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26150.18.pdf ("California legislators dispute that the bill requires men to be displaced by women, noting that boards can simply increase their size. This may be easier said than done, however: Because the required quota increases with board size, a company with a four-man board that did not wish to force out a current director would need to add three women to accommodate the requirements of the law by 2021.").

205 Nasdaq proposes that existing Rules 5810(c)(3)(F) and (G) be renumbered as Rules 5810(c)(3)(G) and (H) respectively.

meeting, or 180 days from the event that caused the deficiency, to cure the deficiency. The company can cure the deficiency either by nominating additional directors so that it satisfies the diversity objective 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. Nasdaq also proposes revising Rule 5810(c)(2)(A)(iv) to make a non-substantive change clarifying that Rule 5250(b)(3) is related to "Disclosure of Third Party Director and Nominee Compensation."

Nasdaq proposes to adopt Rule 5605(f)(6)(B) to provide a grace period for a company that no longer meets the diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on the board of directors.[206] A company that met the diversity objectives of proposed Rule 5605(f)(2) within the timeframes set forth in proposed Rule 5605(f)(7), but no longer meets the diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on its board of directors (for example if a diverse director falls ill or resigns), shall have until the later of: (i) one year from the date of vacancy; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy, to satisfy proposed Rule 5605(f)(2) or (3). In lieu of providing the disclosure required by proposed Rule 5605(f)(3), a company relying on this provision may publicly disclose that it is relying on the grace period provided by proposed Rule 5605(f)(6)(B). Such

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[206] Nasdaq's proposed grace period is an amendment to the Initial Proposal.

disclosure must be provided: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting. This is intended to notify stakeholders of the company's change in board composition without imposing an additional, unexpected disclosure burden on the company.

For example, if the Approval Date is March 10, 2021, all companies (including companies with smaller boards) would be required to have, or explain why they do not have, one Diverse director by March 10, 2023. Companies with boards of more than five members would be required to have, or explain why they do not have, two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies). Company ABC had one Female director on March 10, 2023, and she self-identified as Female in the company's Board Diversity Matrix published in the company's proxy statements for its 2023 and 2024 annual shareholders meetings. She unexpectedly resigned from the company's board on March 10, 2024, prior to April 30, 2024, which is the date the company files its proxy statement for its annual shareholders meeting to be held on June 10, 2024. The company would have until March 10, 2025, to satisfy the diversity objectives of proposed Rule 5605(f)(2), rather than April 30, 2024.

The company could disclose in its 2025 proxy statement or on its website at the time it files its 2025 proxy statement, "The Company is relying on the grace period provided by Nasdaq Rule 5605(f)(6)(B) related to diverse board representation."

vi. Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of proposed Rule 5605(f) ("Exempt Companies"): SPACs, asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series.

Proposed Rule 5605(f)(5)(C) will allow any company that ceases to be an Exempt Company to satisfy the requirements of proposed Rule 5605(f) by the later of: (i) one year from the date that the company no longer qualifies as an Exempt Company; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event.

Nasdaq believes it is appropriate to exempt these types of companies from the proposed rule because such companies do not have boards, do not list equity securities, or are not operating companies. These companies are already exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615. Nasdaq is also proposing to exempt SPACs from the requirements of proposed Rule 5605(f), and the post-business combination entity would have at least two years after they complete a business combination. This approach is similar to other phase-in periods granted to SPACs. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering, including a SPAC, one year to fully

comply with the independent compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, Rule 5615(b)(1) and SEC Rule 10A-3(b)(1)(iv)(A) allow a newly listed company, including a SPAC, up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements.

Under proposed Rule 5605(f)(5)(A) or (B), a newly listed company, including through a business combination with a SPAC, would be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2) by the later of two years from the date of listing or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones depending on the company's market tier. Nasdaq believes it is not appropriate to subject SPACs to proposed Rule 5605(f) prior to completing a business combination because SPACs are shell companies until they complete an acquisition of an operating company. Rather, Nasdaq believes it is appropriate to provide SPACs with the same phase-in provided to other newly listed companies upon completing a business combination, because a SPAC must satisfy all of Nasdaq's initial listing requirements upon completing a business combination, including its requirements related to committee composition and majority independent board.

D. Alternatives Considered

Nasdaq considered multiple alternatives in determining whether requiring listed companies to have, or explain why they do not have, a minimum number of diverse

directors would better promote the public interest. Nasdaq's reasoned decision-making process included considering: (i) mandate and disclosure-based approaches; (ii) higher and lower diversity objectives; (iii) longer and shorter timeframes; and (iv) broader and narrower definitions of "Diverse."

i. Mandate vs. Disclosure Based Approach

The proposal is a disclosure-based framework, not a mandate. Globally, gender mandates range from requiring at least one woman on the board,[207] requiring two or more women based on board size,[208] or requiring 30 to 50% women on the board.[209] Some

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[207] For example, the Securities and Exchange Board of India requires public companies to have at least one woman on the board. See Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, Regulation 17(1)(a) (2015), available at: https://www.sebi.gov.in/legal/regulations/jan-2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-10-2020-_37269.html. Similarly, the Israeli Companies Law requires public companies to have at least one woman on the board. See Paul Hastings, *Breaking the Glass Ceiling: Women in the Boardroom* 139 (2018), available at: https://www.paulhastings.com/genderparity/. In the United States, California's S.B. 826 requires public companies headquartered in California to have at least one woman on the board. See Cal. S.B. 826, supra note 118, at § 301.3(b)(3).

[208] For example, California's S.B. 826 requires public companies headquartered in California to have at least two women on the board if their board is comprised of five directors, and at least three women on the board if their board is comprised of six or more directors. See Cal. S.B. 826, supra note 118, at § 301.3(b)(1) and (2). Similar legislation has been proposed in New Jersey, Michigan and Hawaii. See N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

[209] For example, Norway imposes a gender quota ranging from 33%-50% depending on board size. See Paul Hastings, supra note 207, at 103. Portugal requires listed companies to have at least 33.3% women on boards by 2020. See Deloitte, *Women in the Boardroom*, supra note 92, at 143. Germany requires public companies with co-determined boards (at least 50% employee representation) to have at least 30% women, and all other listed companies to establish a company-defined target. See Ulrike Binder and Guido Zeppenfeld, Mayer Brown, *Germany Introduces Rules on Female Quota for Supervisory Boards and Leadership Positions* (March 13, 2015), available at https://www.mayerbrown.com/en/perspectives-events/publications/2015/03/germany-introduces-rules-on-female-quota-for-super. Belgium requires listed companies to have at least 33% women on the board. See Deloitte, *Women in the Boardroom*, supra note 92, at 85. Austria requires listed companies with more than 1,000 employees to have at least

mandates vary by board size—for example, Norway imposes different standards for boards of two to three directors, four to five directors, six to eight directors, nine directors and ten or more directors.[210] California imposes a higher standard for gender diversity that boards with five directors or six or more directors must satisfy by the end of 2021 under S.B. 826, and a higher standard for underrepresented communities that boards with five to eight directors and nine or more directors must satisfy by the end of 2022 under A.B. 979. Nasdaq did not observe a common denominator among the mandates applicable to varying board sizes. However, Nasdaq considered observations that a model based on various board sizes could subject companies to a higher threshold by virtue of adding directors.[211] Based on Nasdaq data, the average board size of its listed companies is eight directors.

Soft targets ranging from 25% to 40% women on boards have been suggested by various corporate governance codes and corporate governance organizations. For example, Rule 4.1 of the Swedish Corporate Governance Code (the "Code") provides that

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30% women on the board. See id. at 81. Iceland requires public companies with more than 50 employees to have at least 40% women on the board. See Act respecting Public Limited Companies No. 2/199, Article 63, available at: https://www.government.is/publications/legislation/lex/2018/02/06/TRANSLATION-OF-RECENT-AMENDMENTS-OF-ICELANDIC-PUBLIC-AND-PRIVATE-LIMITED-COMPANIES-LEGISLATION-2008-2010-including-Acts-13-2010-sex-ratios-and-68-2010-minority-protection-remuneration/. France and Italy both require public companies to have at least 40% women on their boards. See Paul Hastings, supra note 207, at 91; White & Case, *Italy increases gender quotas in corporate boards of listed companies* (Jan. 29, 2020), available at: https://www.whitecase.com/publications/alert/italy-increases-gender-quotas-corporate-boards-listed-companies).

210 See Paul Hastings, supra note 207, at 103.

211 See David A. Katz and Laura A. McIntosh, infra note 204.

listed companies are to "strive for gender balance on the board."[212] Each company's nominations committee is to publish a statement on its website at the time it issues notice of its shareholders meeting "with regard to the requirement in rule 4.1, that the proposed composition of the board is appropriate according to the criteria set out in the Code and that the company is to strive for gender balance."[213] Companies are not required to comply with the Code, "but are allowed the freedom to choose alternative solutions which they feel are better suited to their particular circumstances, as long as they openly report every deviation, describe the alternative solution they have chosen and explain their reasons for doing so."[214] Signifying progress, in 2019, 7% of nominations committees did not issue a statement on board gender balance, compared to 58% in 2013.[215]

In 2015, the Swedish Corporate Governance Board, which is responsible for administering the Code, established a goal to achieve representation of women on boards of small/mid cap (and Swedish companies listed on NGM Equity) and large cap companies of 30% and 35%, respectively, by 2017. Further, the Board aimed to achieve

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212 See Swedish Corporate Governance Board, *The Swedish Corporate Governance Code* §4.1 17 (eff. Jan. 1, 2020), available at: http://www.bolagsstyrning.se/UserFiles/Koden/The_Swedish_Corporate_Governance_Code_1_January_2020.pdf.

213 See Swedish Corporate Governance Board, *Annual Report 2020* 22 (August 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3930/kodkoll_arsrapport-2020_eng.pdf.

214 See Swedish Corporate Governance Board, *Gender balance on boards of listed companies: The Swedish Corporate Governance Board assesses the situation ahead of this year's AGMs* (February 3, 2015), available at: http://www.bolagsstyrning.se/userfiles/archive/3856/pressrelease_gender_2014-02-03.pdf.

215 See Swedish Corporate Governance Board, *Annual Report 2020*, supra note 213, at 22.

40% representation of women on boards of all listed Swedish companies by 2020.[216] Based on data as of June 30, 2020, among listed companies, women accounted for 32.7% of board seats on small/mid cap companies and NGM Equity, 38.6% of large cap companies and 34.7% of all listed companies.[217]

In the United Kingdom, the Financial Conduct Authority requires companies with a premium listing on the London Stock Exchange to publicly disclose whether or not they comply with the Financial Reporting Council's U.K. Corporate Governance Code (the "U.K. Code"), and if not, to explain their reasons for non-compliance.[218] Provision 23 of the U.K. Code requires each company to publicly describe "the work of the nomination committee, including . . . the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives,"[219] and Principle J states that board appointments and succession planning

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216 See Swedish Corporate Governance Board, *Gender balance*, supra note 214.

217 See Swedish Corporate Governance Board, *Statistics regarding gender balance* (July 15, 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3922/200715_gender_balance_on_boards.pdf; see also *Sammanfattning*, available at http://www.bolagsstyrning.se/userfiles/archive/3922/statistik_konsfordelning_2020.pdf.

218 See Financial Conduct Authority, LR 9.8.6(6), available at: https://www.handbook.fca.org.uk/handbook/LR/9/8.html; see also Financial Reporting Council, *The UK Corporate Governance Code* 3 (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF. In addition, "[i]n 2016, the [UK] Government also implemented the relevant provision of the EU Non-Financial Reporting Directive with a new reporting requirement in the FCA's Disclosure and Transparency Rules. This requires issuers (excluding [small and medium-sized enterprises]) admitted to trading on an EU regulated market to disclose their diversity policy in the corporate governance statement." See Financial Reporting Council, *Board Diversity Reporting* 5 (September 2018), available at: https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf.

219 See Financial Reporting Council, *The UK Corporate Governance Code*, supra note 218, at 9.

should, among other things, "promote diversity of gender, social and ethnic backgrounds."[220] In addition, the Companies Act requires companies to disclose gender diversity statistics among the board, management and employees.[221] In 2018, the Financial Reporting Council reported that 83% of FTSE 100 and 74% of FTSE 250 companies had established a board diversity policy specifying gender, with approximately 1/3 specifying ethnicity.[222] More recently, a report commissioned by the Financial Reporting Council concluded that there is a lack of public disclosure regarding the LGBTQ+ status among directors and executives of public companies. While the report did not recommend amending Principle J of the U.K. Code to consider sexual orientation or gender identity, it emphasized that the U.K. Code "seeks to promote diversity and inclusion of all minority groups within business"[223] and suggested that the government "update corporate reporting requirements to require companies to demonstrate how they intend to capture data on the sexual orientation and gender identity of staff."[224]

In 2011, the Davies Review called on FTSE 100 boards to achieve 25% women on boards by 2015.[225] After that milestone was achieved, the Hampton Alexander Review encouraged FTSE 350 boards to have 1/3 women by 2020, and it has been

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220 Id. at 8.

221 See UK Companies Act 2006, § 414C.

222 See Financial Reporting Council, Board Diversity Reporting, supra note 218, at 9.

223 See Hay et al., supra note 104, at 37.

224 Id.

225 See *Women on boards*, supra note 100.

achieved by FTSE 100 companies.[226] In 2017, the Parker Review called on FTSE 100 and 250 companies to have at least one director of color by 2021 and 2024, respectively.[227] As of February 2020, approximately 37% of FTSE 100 companies surveyed and 69% of FTSE 250 companies surveyed did not have one director of color on their board.[228]

Australian Securities Exchange ("ASX")-listed companies must comply with the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (the "ASX Recommendations") or explain why they do not. The ASX Recommendations require companies to have and disclose a diversity policy with measurable objectives and report on progress towards meeting those objectives. If the company is in the ASX/S&P 300, its objective for achieving gender diversity should be at least 30%.[229] The Australian government also requires companies with 100 or more employees to provide an annual report about gender equality indicators, including the gender composition of the board and the rest of the workforce.[230] In 2015, the ASX and KPMG found that 99% of S&P/ASX 200 companies and 88% of ASX 201-500

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226 See *Hampton-Alexander Review: FTSE Women Leaders* (November 2016), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf.

227 See Parker, supra note 103.

228 See Sir John Parker, *Ethnic Diversity Enriching Business Leadership* 19 (Feb. 5, 2020), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2020-report-final.pdf.

229 See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* 9 (4th ed. Feb. 2019), available at: https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf.

230 Workplace Gender Equality Act 2012, Part IV § 13 (March 25, 2015), available at: https://www.legislation.gov.au/Details/C2015C00088.

companies disclosed establishing a diversity policy rather than explaining why they do not have one.[231] As of July 2020, women account for 28.4% and 31.8% of board seats among ASX 300 and ASX 100 companies, respectively.[232]

Nasdaq observed that women account for at least 30% of the boards of the largest companies in Australia, Sweden, and the United Kingdom, and in three other countries that have implemented disclosure requirements or suggested milestones on a comply-or-explain basis: Finland, New Zealand, and Canada.[233] Nasdaq considered that countries that have implemented mandates have also seen progress in women's representation on boards, including, for example, Austria, Iceland, Belgium, France, Germany, Italy, and

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231 See KPMG and ASX, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended 1 January 2015 and 31 December 2015* 4 (2016) available at: https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf.

232 See KPMG and 30% Club, *Building Gender Diversity on ASX 300 Boards: Seven Learnings from the ASX 200* 4 (July 2020), available at: https://assets.kpmg/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf. The report also noted that diversity counteracts groupthink and that ASX 201-299 companies with at least 30% female directors "are more likely than not to [have seen] market capitalisation increases over the past 12 months." Id. at 6.

233 See The Conference Board of Canada, *Data Dashboard* (Sept. 23, 2020), available at: https://www.conferenceboard.ca/focus-areas/inclusion/2020/aob-comparisons-around-the-world-table?AspxAutoDetectCookieSupport=1; see also Andrew MacDougall et al., Osler, *Diversity Disclosure Practices* 4 (2020), available at https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf. But see Heike Mensi-Klarbach et al., *The Carrot or the Stick: Self-Regulation for Gender-Diverse Boards via Codes of Good Governance*, J. Bus. Ethics 11 (2019), available at: https://doi.org/10.1007/s10551-019-04336-z (reviewing longitudinal data from 2006 to 2016 on listed and state-owned companies in Austria and concluding that "self-regulation of gender diversity on boards is ineffective if merely based on recommendations in codes of good governance"). Mensi-Klarbach recommends setting concrete targets and providing public monitoring to improve the effectiveness of comply-or-explain frameworks.

Portugal.[234] On average, women account for 31% of board seats in countries with gender mandates.[235] Albertine d'Hoop-Azar et al. (2017) compared gender diversity on boards in countries with varying requirements and enforcement measures and concluded that external pressures—"progressive societal norms" and regulations—are needed to increase board diversity.[236]

Nasdaq discussed the benefits and challenges of mandate and comply-or-explain models with over a dozen stakeholders, and while the majority of organizations were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, the majority also stated that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. Most organizations Nasdaq spoke with expressed general discomfort with mandates, although they acknowledged that opposition is lessening in the wake of California's S.B. 826[237] and A.B. 979.[238] While many recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial, would spur companies to take action and would make meaningful progress on board diversity. Some stakeholders also highlighted

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234 See Paul Hastings, supra note 207; see also Deloitte, *Women in the Boardroom*, supra note 92.

235 See Paul Hastings, supra note 207; The Conference Board of Canada, supra note 233.

236 See Albertine d'Hoop-Azar et al., Gender Parity on Boards Around the World, Harv. L. Sch. Forum on Corp. Governance (January 5, 2017), available at: https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/ (comparing gender diversity on boards in countries with varying requirements and enforcement measures and concluding that external pressures—"progressive societal norms" and regulations—are needed to increase board diversity).

237 See Cal. S.B. 826, supra note 118.

238 See Cal. A.B. 979, supra note 118.

additional challenges that smaller companies and companies in certain industries may face finding diverse board members. In contrast, a disclosure-based framework that provides companies with flexibility would empower companies to maintain decision-making authority over their board's composition while providing stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity. This approach would better inform the investment community and enable more informed analysis of, and conversations with, companies. Nasdaq believes that these goals will be achieved through the disclosure of consistent, comparable data across companies, as would be required by the Exchange's proposed definition of Diverse. The Exchange is therefore proposing a disclosure-based framework rather than a mandate.

For example, if, under Israeli law regarding board diversity, an Israeli company is required only to have a minimum of one woman on the board and such Israeli company chooses to meet the requirements under Israeli home country law in lieu of meeting the diversity objectives of proposed Rule 5605(f)(2)(B), it may choose to disclose that "the Company is incorporated in Israel and required by Israeli law to have a minimum of one woman on the board, and satisfies home country requirements in lieu of Nasdaq Rule 5605(f)(2)(B), which requires each Foreign Issuer to have at least two Diverse directors." If a U.S. company had two Diverse directors but one resigned due to unforeseen circumstances, and it is not eligible for the grace period under proposed Rule 5605(f)(6), it could disclose, for example: "Due to the unexpected resignation of Ms. Smith this year, the Company does not have at least one director who self-identifies as Female and one director who self-identifies as an Underrepresented Minority or LGBTQ+. We

intend to undertake reasonable efforts to meet the diversity objectives of proposed Rule 5605(f)(2)(A) prior to our next annual shareholder meeting and have engaged a search firm to identify qualified Diverse candidates. However, due to unforeseen circumstances, we may not achieve this goal." Or a U.S. company may disclose that it chooses to define diversity more broadly than Nasdaq's definition by considering national origin, veteran status or individuals with disabilities when identifying nominees for director because it believes such diversity brings a wide range of perspectives and experiences to the board. In each case, investors will have a better understanding of the company's reasons for not meeting the applicable diversity objectives and can use that information to make an informed investment or voting decision.

ii. Higher and Lower Diversity Objectives

Nasdaq observed that existing empirical research spanned companies across several countries, including the United States, Spain, China, Canada, France, and Norway. Nasdaq considered that the studies related to company performance and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board,[239] two or more diverse directors (with diverse considered female, Black, Hispanic, or Asian),[240] at least three women on the board[241] and being in the top quartile for gender and ethnic diversity.[242]

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239 See Credit Suisse, supra note 35, at 16.

240 See Thomas and Starr, supra note 28, at 5.

241 See Eastman et al., supra note 36, at 3; Wagner, supra note 37.

242 See McKinsey, supra note 31.

Nasdaq considered that the academic and empirical studies related to investor protection and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board[243] or up to 50% women on the board, and the assertions of certain academics that their findings may extend to other forms of diversity, including racial and ethnic diversity.[244] Nasdaq also reviewed academic and empirical research suggesting that "critical mass" is achieved by having three or more women on the board, and that having only one diverse director on the board risks "tokenism."[245] Nasdaq considered that although the legislation enacted by Norway and California, and proposed by several other states, varies based on board size, the academic and empirical research considered companies across a spectrum of sizes and board sizes, including Fortune 500, S&P 500, Fortune 1000 and smaller (non-Fortune 1000) companies.

Nasdaq concluded that there is no "one-size fits all" approach to promoting board diversity and that the academic and empirical studies regarding the relationship between board diversity, company performance and investor protections is continuing to evolve. However, in Nasdaq's survey of academic studies described above—and of the targets or mandates promulgated by regulatory bodies and organizations worldwide—Nasdaq

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243 See Abbott et al., supra note 64; Chen et al., supra note 70.

244 See Wahid, supra note 65; Cumming et al., supra note 68, at 1588 (observing that previous studies considered directors' independence, experience and education, and "further research is warranted on the comparison of different forms of diversity with respect to securities fraud.").

245 See Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37(2) Org. Dynamics 145 (April 2008); Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, 52(2) J. Fin. & Quant. Analysis 751 (April 2017); Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102(2) J. Bus. Ethics. 299 (Feb. 25, 2011), available at https://ssrn.com/abstract=1858347.

observed a common denominator of having at least one woman on the board. Similarly, Nasdaq observed a common denominator of having at least one director who is diverse in terms of race, ethnicity or sexual orientation among the requirements related to, and academic research considering, board diversity beyond gender identity. Nasdaq therefore believes that a diversity objective of at least two Diverse directors provides a reasonable baseline for comparison across companies. However, Nasdaq considered comments that it should "amend the proposed rules to allow greater flexibility for companies with relatively small boards."[246] Nasdaq considered that, based on the requirement of proposed Rule 5605(c)(2) for each listed company to have an audit committee composed of at least three independent directors,[247] the minimum board size of a company listed on Nasdaq must be at least three directors. Based on Nasdaq data, the average board size of all listed companies is eight directors, with an average board size of 7.3 for Smaller Reporting Companies and Foreign Issuers. However, not all companies with small boards are Smaller Reporting Companies, and therefore the alternative diversity objective provided to Smaller Reporting Companies may not be available to them. Further, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy proposed Rule 5605(f)(2) by adding additional directors. For example, two Diverse directors on a five member board comprise 40% of the board, whereas two Diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two Diverse directors and expands its board to satisfy proposed Rule 5605(f)(2), it may require the company to incur

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246 See Ballard Spahr Comment Letter, supra note 171.

247 See Nasdaq Rulebook, Rule 5605(c)(2).

additional costs through director compensation and D&O insurance. Accordingly, Nasdaq proposes to adopt Rule 5605(f)(2)(D) a company with a board of directors of five or fewer members to have, or explain why it does not have, at least one member of its board of directors who is Diverse.

Nasdaq considered criticisms levied against other models that base board diversity objectives on board size. For example, such models may create complexity for companies by subjecting them to a higher diversity objective for larger boards if they add diverse directors.[248] In California under S.B. 826, a five member board is required to have at least two female directors, and a board of six or more members must have at least three female directors. Therefore, if a five member board adds two female directors to comply with S.B. 826, it becomes a seven member board subject to the higher threshold to have at least three female directors, and must add another female director. Therefore, Nasdaq proposes to clarify in proposed Rule 5605(f)(2)(D) that if a company has five members on its board of directors before becoming subject to proposed Rule 5605(f), it shall not become subject to the requirement of subparagraphs (A), (B), or (C) to have at least two members of its board of directors who are Diverse if it adds one director to satisfy subparagraph (D), thereby becoming a six member board. However, a company would become subject to proposed Rule 5605(f)(2)(A), (B) or (C) if it subsequently expands its board.

Companies are not precluded from meeting a higher or lower alternative measurable objective. For example, a company may choose to disclose that it does not meet the diversity objectives under proposed Rule 5605(f)(2) because it is subject to an

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[248] See David A. Katz and Laura A. McIntosh, supra note 204.

alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in Nasdaq's proposed rule. Nasdaq believes that providing flexibility and clear disclosure when the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.

iii. Longer and Shorter Timeframes

Nasdaq considered whether an alternative timeframe for satisfying the diversity objectives of proposed Rule 5605(f)(2) would better promote the public interest than the timeframe Nasdaq has proposed under Rule 5605(f)(7). While companies are not precluded from adding additional directors to their boards to meet the diversity objectives of proposed Rule 5605(f)(2) sooner than contemplated by the proposed rule, Nasdaq understands that some companies may need to obtain shareholder approval to amend their governing documents to allow for board expansion. Other companies may choose to replace an existing director on the board with a Diverse director, and board turnover may be low.[249] Nasdaq recognizes that it also takes substantial lead time to identify, interview, and select board nominees. To provide companies with sufficient time to meet the diversity objectives of proposed Rule 5605(f)(2), while recognizing that investors are calling for expedient change, Nasdaq has structured its proposal similarly to the approach taken by California, where companies with larger boards must achieve one target by an

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[249] See Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, Harv. L. Sch. Forum on Corp. Governance (Oct. 18, 2020), https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/ (last accessed Nov. 24, 2020).

earlier date and satisfy the entire diversity objective at a later date. Nasdaq also considered the approaches taken by foreign jurisdictions to implement diversity objectives. For example, Belgium and France implemented diversity objectives under a phased approach that provided companies with at least five years to fully satisfy the objectives,[250] whereas Iceland and Portugal provided companies with three years or less.[251]

While companies may choose to satisfy proposed Rule 5605(f)(2) on an alternative timeframe, a company that chooses a timeframe that is longer than the timeframes set forth in proposed Rule 5605(f)(7) also must publicly explain its reasons for doing so. For example, an NGM-listed company that chooses to comply with the NCM timeframe may disclose the following: "While the Company is listed on NGM, the Company believes that it is similarly situated to companies listed on NCM in terms of its annual revenues and public float, and therefore has chosen to meet the objectives of Rule 5605(f)(2)(C) in lieu of Rule 5605(f)(2)(A). The company has met these objectives by having at least two Diverse directors on the board who self-identify as Female within the timeframe provided under Rule 5605(f)(7) applicable to NCM-listed companies."

iv. Broader and Narrower Definition of Diverse

Nasdaq considered whether the definition of Diverse should include broader characteristics than those reported on the EEO-1 report, such as the examples provided by the Commission staff's C&DI, including LGBTQ+, nationality, veteran status, and individuals with disabilities. During its stakeholder outreach, Nasdaq inquired whether a

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250 See Paul Hastings, supra note 207, at 79 and 90; see also supra note 209.

251 See Deloitte, Women in the Boardroom, supra note 92, at 115 and 143; see also supra note 209.

broad definition of Diversity would promote the public interest. While recognizing the diverse perspectives that different backgrounds can provide, most stakeholders supported a narrower definition of Diversity focused on gender, race and ethnicity, with several supporting broadening the definition to include the LGBTQ+ community.

As discussed above, companies currently are permitted to define diversity "in ways they consider appropriate" under federal securities laws. One of the challenges of this principles-based approach has been the disclosure of inconsistent and noncomparable data across companies. However, most companies are required by law to report data on race, ethnicity and gender to the EEOC through the EEO-1 Report. Nasdaq believes that adopting a broad definition of Diverse would maintain the status quo of inconsistent, noncomparable disclosures, whereas a narrower definition of Diverse focused on race, ethnicity, sexual orientation and gender identity will promote the public interest by improving transparency and comparability. Nasdaq also is concerned that the broader definitions of diversity utilized by some companies may result in Diverse candidates being overlooked, and may be hindering meaningful progress on improving diversity related to race, ethnicity, sexual orientation and gender identity. For example, a company may consider diversity to include age, education, and board tenure. While such characteristics may provide laudable cognitive diversity, this focus may result in a homogenous board with respect to race, ethnicity, sexual orientation, and gender identity that, by extension, does not reflect the diversity of a company's communities, employees, investors, or other stakeholders.

Nasdaq also believes that a transparent, consistent definition of Diverse would provide stakeholders with a better understanding of the company's current board

composition and its philosophy regarding diversity if it does not meet the diversity objectives of proposed Rule 5605(f)(2). This would enable the investment community to conduct more informed analysis of, and have more informed conversations with, companies. To the extent a company chooses to satisfy proposed Rule 5605(f)(2) by meeting the applicable diversity objectives, it will have the ancillary benefit of making meaningful progress in improving board diversity related to race, ethnicity, sexual orientation and gender identity.

Nasdaq's review of academic and empirical research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities.[252] Nasdaq acknowledges that there also is a lack of published research on the issue of LGBTQ+ representation on boards.[253] This 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. In any event, it is evident that while

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[252] KPMG (2020) states that veterans are underrepresented in boardrooms, with retired General and Flag Officers ("GFOs") occupying less than 1% of Fortune 500 board seats. See KPMG, *The value of veterans in the boardroom* 1 (2020), available at: https://boardleadership.kpmg.us/content/dam/boardleadership/en/pdf/2020/the-value-of-veterans-in-the-boardroom.pdf (noting that "[r]etired GFOs who have honed their leadership and critical decision-making skills in a high-threat environment can bring extensive risk oversight experience to the board, which may be especially valuable in the context of today's risk landscape"). Accenture (2018) observed that companies that offered inclusive working environments for employees with disabilities achieved an average of 28% higher revenue, 30% higher economic profit margins, and 2x net income than their industry peers. See Accenture, *Getting to Equal: The Disability Inclusion Advantage* (2018), available at: https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf.

[253] See Credit Suisse ESG Research, supra note 40, at 1; see also Out Leadership, supra note 42.

"[b]oardroom diversity is a topic that has gained significant traction . . . LGBT+ diversity, however, has largely been left out of the conversation."[254]

Nonetheless, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ in recognition of the U.S. Supreme Court's recent affirmation that sexual orientation and gender identity are "inextricably" intertwined with sex,[255] and based on studies demonstrating a positive association between board diversity and decision making, company performance and investor protections. Nasdaq also believes that the proposed rule would foster the development of data to conduct meaningful assessments of the association between LGBTQ+ board diversity, company performance, and investor protections.

As noted above, the proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, company would still have to provide the required disclosure under proposed Rule 5605(f)(3) if the company does not also have at least two directors who are Diverse (or one Diverse director for companies with a board of directors of five or fewer members). Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would help inform the evolving body of research on the relationship between broader diverse attributes, company performance and investor

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254 See Out Leadership, supra note 42, at 3.

255 See Bostock v. Clayton Cnty., supra note 170.

protection and provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[256] in general, and furthers the objectives of Section 6(b)(5) of the Act,[257] in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest, for the reasons set forth below. Further, Nasdaq believes the proposal is not designed to permit unfair discrimination between issuers or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange, for the reasons set forth below.

I. Board Statistical Disclosure

Nasdaq has proposed what it believes to be a straightforward and clear approach for companies to publish their statistical data pursuant to proposed Rule 5606. This disclosure requirement will protect investors that view information related to board diversity as material to their investment and voting decisions. The proposed disclosure format prescribed by the rule also protects investors by eliminating data collection inaccuracies and decreasing costs, while enhancing investors' ability to utilize the information. Nasdaq also believes that the rule will enhance investor confidence by assisting investors in making more informed decisions through Nasdaq's efforts to

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256 See 15 U.S.C. § 78f(b).

257 Id. § 78f(b)(5).

require meaningful, consistent, reliable and comparable data readily available and in a clear and comprehensive manner. Nasdaq also believes that the disclosure format provides a company with a uniformed template with the flexibility to include any additional details about its board that the company believes would be useful to investors.

As a threshold matter, as discussed above, diversity has become an increasingly important subject and, in recent years, investors increasingly have been advocating for greater board diversity and for the disclosure of board diversity statistics.[258] The current board diversity disclosure regime is lacking in several respects, and Nasdaq believes that its proposed Rule 5606 addresses many of the current concerns and responds to investors' demands for greater transparency into the diversity characteristics of a company's board composition by mandating disclosure and curing certain deficiencies that exist within the current SEC disclosure requirements.

Investors have expressed their dissatisfaction with having to independently collect board-level data about race, ethnicity, and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.[259] The lack of consistency and specificity in Regulation S-K has been a major impediment for many investors and data collectors. As a general matter, the Commission's requirements have not addressed the concerns expressed by commenters that "disclosure about board diversity was important information to investors."[260] Nasdaq believes that its proposed Rule 5606 addresses many of the concerns that have been raised.

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258 See Petition for Amendment of Proxy Rule, supra note 86; see also Office of Illinois State Treasurer, supra note 116.

259 See Petition for Amendment of Proxy Rule, supra note 86, at 2.

260 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,343-44 (amending Item 407(c)(2)(vi) of Regulation S-K, codified at 17 C.F.R. § 229.407(c)(2)(vi)).

Nasdaq also believes that requiring the annual disclosure of a company's board diversity, as proposed in Rule 5606(a), will provide consistent information to the public and will enable investors to continually review the board composition of a company to track trends and simplify or eliminate the need for a company to respond to multiple investor requests for information about the diverse characteristics of the company's board. Requiring annual disclosures also would make information available to investors who otherwise would not be able to obtain individualized disclosures.[261] Moreover, consistent disclosures may encourage boards to consider a wider range of board candidates in the nomination process, including candidates with fewer ties to the current board.[262]

The Commission's 2009 amendments to Regulation S-K provide no definition for diversity and do not explicitly require disclosures specifically related to details about the board's gender, racial, ethnic and LGBTQ+ composition. Additionally, the Commission staff's C&DI does not address the definition of diversity, and it requires a registrant to disclose diversity information only in certain limited circumstances. Investors have expressed that current regulations and accompanying interpretations impair their ability to obtain clear and consistent data.[263] As a result, Nasdaq believes that proposed Rule 5606(a) protects investors and the public interest by making clear that a company's annual diversity data disclosure must include information related to gender identity, race,

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261 See Petition for Rulemaking, supra note 130.

262 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 ("To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent."); Hazen and Broome, supra note 120, at 57-58.

263 See Petition for Amendment of Proxy Rule, supra note 86, at 2; Petition for Rulemaking, supra note 130, at 7.

ethnicity and LGBTQ+ status, thereby leaving less discretion for companies to selectively disclose certain diversity information and enhancing the comparability of such data across companies. Moreover, it is in the public interest to provide clear requirements for diversity disclosure, and Nasdaq's proposed Matrix format provides such clarity.

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 directors 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 categorize such directors in the "Did Not Disclose Gender" and "Did Not Disclose Demographic Background" sections of the Matrix.

Nasdaq believes that it is in the public interest to utilize the Matrix format for all companies as proposed in Rule 5606(a). Additionally, Nasdaq believes that the format removes impediments to aggregating and analyzing data across all companies by requiring each company to disclose separately the number of female, male, and non-binary directors, the number of female, male, and non-binary directors that fall into certain racial and ethnic categories, and the number of directors that identify as LGBTQ+. In addition to the format, Nasdaq believes that prohibiting companies from providing the information through graphics and images will allow investors to easily disaggregate the data and track directors with multiple diversity characteristics. Nasdaq also believes that it is reasonable and in the public interest to allow companies the flexibility of a supplementing their disclosure by providing additional information related to its directors in the Matrix, beyond what is required by proposed Rule 5606(a).

As discussed above, most listed companies are required by law to complete an EEOC Employer Information Report EEO-1 Form. Although outside directors generally are not employees and therefore are not covered in the EEO-1,[264] Nasdaq believes that collecting the information required by proposed Rule 5606(a) is familiar to most companies, and that it is reasonable to require disclosure of the additional board information.

Further, Nasdaq believes that the disclosure proposed under Rule 5606(a) will remove impediments to shareholders by making available information related to board-level diversity in a standardized manner, thereby enhancing the consistency and comparability of the information and helping to better protect investors. The proposed disclosure will also help protect investors and the public interest by enabling investors to determine the total number of diverse directors, which is information that is not consistently available in existing proxy disclosures in cases where a single director has multiple diverse characteristics. Nasdaq believes it is in the public interest to allow companies the option to provide the disclosure in a way they believe will be most meaningful to their shareholders. Therefore, Nasdaq has proposed Rule 5606(b) to provide companies the option of electing to provide the information in the same manner as, and concurrently with, the disclosure required by proposed Rule 5605(f)(3). Specifically, such disclosure must be provided in advance of the company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's

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[264] The EEO-1 Form does not require a company to disclose data for outside directors because such directors are not company employees.

website. Aligning the timing for providing the board composition disclosure with other governance-related disclosures, such as those provided in the proxy, makes it easier for investors to know where a company has provided the proposed Rule 5606(b) disclosure and gives shareholders access to the Matrix information prior to a company's annual shareholder meeting.

Moreover, Nasdaq believes it is reasonable to request that companies that publish their Matrix data on their website also submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting because this closely aligns the timing for companies who opt to disclose via their website and companies who choose to provide the disclosure through an SEC filing. In the interest of providing companies flexibility, Nasdaq has not required companies that publish their Matrix data on their websites to publish the data in a specified location on their websites.

Nasdaq believes it is reasonable, and not unfairly discriminatory, to provide a separate Matrix to Foreign Issuers. Nasdaq recognizes that the proposed definition of Underrepresented Minority in proposed Rule 5605(f)(1) may not apply to companies outside of the United States because each country has its own unique demographic composition. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5605(f)(1) may be inapplicable to a Foreign Issuer, making this Matrix data less relevant for such companies and not useful for investors. Therefore, Nasdaq believes that offering Foreign Issuers the option of a separate template that requires different disclosure categories will provide investors with more accurate disclosures related to the diversity of directors among the board of a Foreign Issuer. Additionally, Nasdaq believes

that providing an "Underrepresented Individual in Home Country Jurisdiction" category provides Foreign Issuers with more flexibility to identify and disclose diverse directors within their home countries.

The annual requirement in proposed Rule 5606(a) will guarantee that the information is available to the public on a continuous and consistent basis. As described in the instructions to the Matrix disclosure form and proposed Rule 5606(a), each year following the first year of disclosure of the Matrix, all companies must include the current year and immediately prior year diversity statistics in its disclosure. If the company publishes the Matrix on its website, the disclosure must remain accessible on the company's website. Nasdaq believes that disclosing at least two years of data allows the public to view any changes and track a board's diversity progress. Moreover, requiring the disclosure to remain accessible on the company's website will allow investors to maintain access to the disclosure in the same manner as they would for companies who opt to provide the disclosure in an SEC filing.

In addition to providing a means for shareholders to assess a company's board-level diversity and measure its progress in improving that diversity over time, Nasdaq believes that proposed Rule 5606 will provide a means for Nasdaq to assess whether companies meet the diversity objectives of proposed Rule 5605(f). The ability to determine satisfaction of the proposed listing rule's diversity objectives will protect investors and the public interest.

Moreover, the proposed rule provides transparency into diversity based not only on race, ethnicity, and gender identity, but also on a director's self-identified sexual orientation. Nasdaq believes that expanding the diversity characteristics beyond those

which are commonly reported by companies currently will broaden the way boards view diversity and ensure that board diversity is occurring across all protected groups.

Nasdaq believes that the proposal is not unfairly discriminatory because proposed Rule 5606 will apply to all Nasdaq-listed companies, except for the following companies exempt pursuant to proposed Rule 5606(c): SPACs; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series—which meet the definition of Exempt Companies as defined under proposed Rule 5605(f)(4). Nasdaq believes it is reasonable and not unfairly discriminatory to exempt these companies from the proposed rule because the exemption of these companies, except for SPACs, is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition. Nasdaq believes it is not unfairly discriminatory to exempt SPACs from the requirements of proposed Rule 5605(f) because this approach is similar to other phase-in periods granted to SPACs. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering, including a SPAC, one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, Rule 5615(b)(1) and SEC Rule 10A-3(b)(1)(iv)(A) allows a newly listed company, including a SPAC, up to one year from the date its registration statement is effective to

fully comply with the applicable audit committee composition requirements. Moreover, the post-business combination entity would be required to satisfy proposed Rule 5605(f) by the later of two years from the date of listing or the date the Company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones depending on the company's market tier.

Finally, Nasdaq believes it is reasonable under proposed Rule 5606(e) to allow companies the later of (1) one calendar year from the Approval Date, which is the Effective Date; or (2) the date the Company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the Company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date. Nasdaq believes proposed Rule 5606(e) is reasonable because there is only a *de minimis* burden placed on companies to collect the board data and prepare the Matrix given that most companies already collect similar information for certain employees. Additionally, most companies are required to prepare an annual proxy statement and update the Commission within four business days when a new director is appointed to the board.[265] Proposed Rule 5606(e) also aligns the operative date for proposed Rule 5606 with Nasdaq's listed companies' annual shareholder meetings and proxy filings with the uncertainty of when the Commission may take action on the proposed changes. Therefore, Nasdaq believes that at least a minimum of one year is sufficient time for companies to incorporate their directors into their data collection.

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[265] See SEC Form 8-K, available at: https://www.sec.gov/files/form8-k.pdf.

II. Diverse Board Representation or Explanation

A. Removes Impediments to and Perfects the Mechanism of a Free and Open Market and a National Market System

As discussed above, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions by limiting the search for director nominees to existing directors' social networks and candidates with C-suite experience.[266] As noted in Section IV of the Purpose section, women hold more than 30% of board seats in Norway, France, Sweden, and Finland.[267] As noted in Section IV of the Purpose section, in analyzing Norway's experience in implementing a gender mandate, Dhir (2015) observed that "[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background."[268] Dhir concluded that broadening the search for directors outside of traditional networks "is unlikely to occur without some form of regulatory intervention, given the prevalence of homogenous social networks and in-group favoritism."[269] He also observed that regulatory action was effective in increasing the representation of women on boards in Norway by "democratiz[ing] access to a space previously unavailable to women."[270] One Norwegian director "grudgingly

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266 See GAO Report, supra note 49; Vell, supra note 106; Rhode & Packel, supra note 110, at 39; Deloitte, *Women in the Boardroom*, supra note 92; see also Parker, supra note 103, at 38 (acknowledging that, "as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom").

267 See supra note 92.

268 See Dhir, supra note 84, at 52.

269 Id. at 51. See also Albertine d'Hoop-Azar et al., supra note 236.

270 See Dhir, supra note 84, at 101.

accept[ed] that the free market principles she held so dearly had disappointed her—and that the [mandate] was a necessary correction of market failure."[271]

In contrast, Nasdaq observed that other countries have made comparable progress using a disclosure-based model. Women account for at least 30% of the largest boards of companies in six countries using comply-or-explain models:[272] Australia, Finland, Sweden, New Zealand, Canada, and the United Kingdom.[273] Nasdaq discussed the benefits and challenges of mandate and disclosure-based models with over a dozen stakeholders, and the majority of organizations were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial, would spur companies to take action and would make meaningful progress on board diversity. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. However, leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand. The Exchange is therefore proposing a disclosure-based framework, not a mandate.

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271 See Dhir, supra note 84, at 116.

272 See Paul Hastings, supra note 207; Deloitte, *Women in the Boardroom*, supra note 92.

273 See Conference Board of Canada, supra note 233; Osler, supra note 233, at 4.

Nasdaq also considered Acting Chair Lee's observation that disclosure "gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value. Importantly, it can also drive corporate behavior." Specifically, she observed that:

> For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the "what gets measured, gets managed" phenomenon. Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company. The Commission has long-recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that "disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct" and that "[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws."[274]

Nasdaq believes that a disclosure-based framework may influence corporate conduct if a company chooses to meet the diversity objectives of proposed Rule 5605(f)(2). A company may satisfy that objective by broadening the search for qualified candidates and considering candidates from other professional pathways that bring a wider range of skills and perspectives beyond traditional C-suite experience.[275] Nasdaq believes that this will help increase opportunities for Diverse candidates that otherwise may be overlooked due to the impediments of the traditional director recruitment process, and therefore the proposed rule is designed to remove impediments to a free and open market and a national market system. Further, boards that choose to meet the applicable diversity objectives may experience other benefits from diversity that perfect the

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[274] See Lee, supra note 27.

[275] See, e.g., Hillman et al., supra note 111 (finding that African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy).

mechanism of a free and open market and national market system. As discussed above in Section 3.a.III.B of the Purpose section (*Diversity and Investor Protection*), and further discussed below in Section 3.b.II.B of the Statutory basis section (*Prevents Fraudulent and Manipulative Acts and Practices*), studies suggest that diversity is positively associated with reduced stock volatility,[276] more transparent public disclosures,[277] and less information asymmetry,[278] leading to stock prices that better reflect public information, and therefore Nasdaq believes the proposed rule is designed to remove impediments to and perfecting a free and open market and a national market system. Importantly, Nasdaq believes that the disclosure-based framework proposed under proposed Rule 5605(f) is not designed to create additional impediments to a free and open market and a national market system because it will empower companies to maintain decision-making authority over the composition of their boards.

To the extent a company chooses not to meet the applicable diversity objectives of proposed Rule 5605(f)(2), Nasdaq believes that proposed Rule 5605(f)(3) will provide analysts and investors with a better understanding about the company's reasons for not doing so and its philosophy regarding diversity. Proposed Rule 5605(f) is thus designed to remove impediments to a free and open market and a national market system by enabling the investment community to conduct more informed analyses of, and have more informed conversations with, companies. Nasdaq believes that such analyses and conversations will be better informed by consistent, comparable data across companies,

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276 See Bernile et al., supra note 33.

277 See Gul et al., supra note 72; Bravo and Alcaide-Ruiz, supra note 62.

278 See Abad et al., supra note 73.

which Nasdaq proposes to achieve by adopting a consistent definition of "Diverse" under proposed Rule 5605(f)(1). Nasdaq further believes that providing such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, and is therefore designed to promote capital formation and efficiency and perfect the mechanism of a free and open market and a national market system.

B. Prevents Fraudulent and Manipulative Acts and Practices

As discussed above in Section III of the Purpose section, Nasdaq is concerned that the failure of homogenous boards to consider a broad range of viewpoints can result in "groupthink," which may lead to suboptimal decisions that have adverse effects on company performance, board performance and stakeholders. Nasdaq believes that including diverse directors with a broader range of skills, perspectives and experiences may help detect and prevent fraudulent and manipulative acts and practices by mitigating "groupthink." Increased board diversity also may reduce the likelihood of insider trading and other fraudulent and manipulative acts and practices.

Nasdaq reached this conclusion by reviewing public statements by investors and organizations regarding the impact of groupthink on decision making processes, as well as academic and empirical studies on the relationship between diversity, groupthink and fraud. Nasdaq observed that groupthink can result in "self-censorship"[279] and failure to voice dissenting viewpoints in pursuit of "consensus without critical evaluation and without considering different possibilities."[280] In contrast, "board members who possess

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279 See Forbes and Milliken, supra note 80, at 496.

280 See Dhir, supra note 84, at 124.

a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity."[281]

Dhir (2015) concluded that gender diversity may "promote cognitive diversity and constructive conflict in the boardroom" and gender diverse boards may be more effective at overseeing management.[282] One respondent in Dhir's survey of Norwegian directors observed that:

> I've seen situations where the women were more willing to dig into the difficult questions and really go to the bottom even if it was extremely painful for the rest of the board, but mostly for the CEO . . . when it comes to the really difficult situations, [where] you think that the CEO has . . . done something criminal . . . [o]r you think that he has done something negligent, something that makes it such that you . . . are unsure whether he's the suitable person to be in the driving seat.[283]

Another director observed that "[i]f you have different experiences and a more diversified board, you will have different questions asked."[284] Dhir concluded that "women directors may be particularly adept at critically questioning, guiding and advising management without disrupting the overall working relationship between the board and management."[285]

Pucheta-Martínez et al. (2016) reasoned that questioning management is a critical part of the audit committee's oversight role, along with ensuring that management does not pressure the external auditor to issue a clean audit opinion notwithstanding the

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281 See Petition for Amendment of Proxy Rule, supra note 86, at 4.

282 See Dhir, supra note 84, at 150.

283 Id. at xiv.

284 Id. at 120.

285 Id. at 35.

identification of any uncertainties or scope limitations.[286] Otherwise, "[a]uditors may accept the demands of management for a clean audit report when the firm deserves a scope limitation and an uncertainty qualification."[287] The authors found that "the percentage of female [directors] on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,"[288] and further found that:

> The percentage of female directors on [audit committees], the proportion of independent female directors on [audit committees] and [audit committees] chaired by women, impact positively on the likelihood of disclosing scope limitations and uncertainties qualifications, suggesting an improvement of the quality of financial information.[289]

The authors concluded that this suggests that gender-diverse audit committees better "ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion" when any uncertainties or scope limitations are identified.[290]

Nasdaq also reviewed studies that found a positive association between board gender diversity and important investor protections regardless of whether women are on the audit committee, and considered the assessment of some academics that their findings may extend to other forms of diversity, including racial and ethnic diversity. Nasdaq therefore believes that such findings with respect to audit committees would be expected to be more broadly applicable to the quality of the broader board's decision-making

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286 See Pucheta-Martínez et al., supra note 58, at 368.

287 Id. at 364.

288 Id. at 363.

289 Id. at 378.

290 Id. at 368.

process, and to other forms of diversity, including diversity of race, ethnicity and sexual orientation.

In examining the association between broader board gender diversity and fraud, Cumming, et al. observed that "[g]ender diversity, in particular, has been found to facilitate more effective monitoring by the board and protection of shareholder interests by broadening the board's expertise, experience, interests, perspectives and creativity."[291] They observed that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found "strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample."[292] The authors suggested that "other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud."[293]

Similarly, Wahid (2019) noted that board gender diversity may "lead to less biased and superior decision-making" because it "has a potential to alter group dynamics by affecting cognitive conflict and cohesion."[294] Wahid (2019) concluded that "gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud,"[295] finding that companies with female directors have "fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation."[296] Wahid also suggested that other forms of diversity, including racial diversity, could introduce

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291 See Cumming et al., supra note 68, at 1574.

292 Id. at 1589.

293 Id. at 1588.

294 See Wahid, supra note 65, at 707.

295 Id. at 705.

296 Id. at 721.

additional perspectives to the boardroom,[297] which Nasdaq believes could further mitigate groupthink.

Abbott, Parker and Persley (2012) posited that "a female board presence contribut[es] to the board's ability to maintain an attitude of mental independence, diminish[es] the extent of groupthink and enhance[es] the ability of the board to monitor financial reporting."[298] They noted that "poorer [internal] controls and the lack of an independent and questioning board-level attitude toward accounting judgments can create an opportunity for fraud."[299] They observed a lower likelihood of a material financial restatements stemming from fraud or error in companies with at least one woman on the board.[300]

Nasdaq believes that these studies provide substantial evidence suggesting an association between gender diverse boards or audit committees and a lower likelihood of fraud; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a greater likelihood of disclosing audit reports with uncertainties and scope limitations. Moreover, academics have suggested that other

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297 Id. at 24-25; see also Shecter, supra note 67 (quoting Wahid as saying that "[i]f you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds…. If we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.").

298 See Abbott et al., supra note 64, at 607.

299 Id. at 610.

300 Id. at 613 ("The previously discussed lines of research lead us to form our hypothesis. In summary, restatements may stem from error or fraud. In either instance, the internal control system (to which the board of directors contributes by setting the overall tone at the top) has failed to detect or prevent a misstatement. Ineffective internal controls may stem from insufficient questioning of assumptions underlying financial reporting, inadequate attention to the internal control systems, or insufficient support for the audit committee's activities.").

forms of diversity, including racial and ethnic diversity, may reduce fraud and mitigate groupthink. Further, while homogenous boards may unwittingly fall into the trap of groupthink due to a lack of diverse perspectives, "heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences."[301] Nasdaq therefore believes that the proposed rule is designed to reduce groupthink, and otherwise to enhance the functioning of boards, and is therefore designed to prevent fraudulent and manipulative acts and practices.

Further, the Commission has suggested that in seeking board diversity, "[t]o the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent."[302] Nasdaq believes that the benefits of the proposed rule are analogous to the benefits of Nasdaq's rules governing and requiring director independence. In 2003, Nasdaq adopted listing rules requiring, among other things, that independent directors comprise a majority of listed companies' boards, which were "intended to enhance investor confidence in the companies that list on Nasdaq."[303] The Commission observed that self-regulatory organizations "play an important role in assuring that their listed issuers establish good governance practices," and concluded that the proposed rule changes would secure an "objective oversight role" for issuers' boards of directors, and "foster greater transparency, accountability, and objectivity" in that

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301 See Dallas, supra note 82, at 1391.

302 See Proxy Disclosure Enhancements, supra note 79, 74 Fed. Reg. at 68,355.

303 See Order Approving Proposed Rule Changes, supra note 52, at 64,161.

role."[304] Along the same lines, in approving Nasdaq's application for registration as a national securities exchange, the Commission found Nasdaq's rules governing the independence of members of boards and certain committees to be consistent with Section 6(b)(5) of the Act because they advanced the "interests of shareholders" in "greater transparency, accountability, and objectivity" in oversight and decision-making by corporate boards.[305] Nasdaq proposes to promote accountability in corporate decision-making by requiring companies that do not have the applicable number of Diverse directors under proposed Rule 5605(f)(2) to provide investors with a public explanation of the board's reasons for not doing so under proposed Rule 5605(f)(3).

Nasdaq believes it is critical to the detection and prevention of fraudulent and manipulative acts and practices to have directors on the board who are willing to critically question management and air dissenting views. Nasdaq believes that boards comprised of directors from Diverse backgrounds enhance investor confidence by ensuring that board deliberations consider the perspectives of more than one demographic group, leading to robust dialogue and better decision making. However, Nasdaq recognizes that directors may bring diverse perspectives, skills and experiences to the board, notwithstanding that they have similar attributes. Nasdaq therefore believes it is in the public interest to permit a company to choose whether to meet the diversity objectives of proposed Rule 5605(f)(2) or to explain why it does not, in accordance with proposed

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304 Id. at 64, 175.

305 See In re Nasdaq Stock Market, 71 Fed. Reg. 3550, 3565 (Jan. 23, 2006). See also 68 Fed. Reg. 18,788, 18,815 (April 16, 2003) (in adopting Rule 10A-3, setting standards for the independence of audit committee members, the Commission concluded that such standards would "enhance the quality and accountability of the financial reporting process and may help increase investor confidence, which implies increased efficiency and competitiveness of the U.S. capital markets").

Rule 5605(f)(3). For example, it may believe that defining diversity more broadly than Nasdaq (by considering national origin, veteran status and disabilities) brings a wide range of perspectives and experiences to the board. Nasdaq believes such disclosure will provide investors with a better understanding of the company's philosophy regarding diversity. This would better inform the investment community and enable more informed analyses of, and conversations with, companies. Therefore, Nasdaq believes satisfying proposed Rule 5605(f)(2) through disclosure pursuant to proposed Rule 5605(f)(3) is consistent with Section 6(b)(5) of the Act because it is designed to advance the "interests of shareholders" in "greater transparency, accountability, and objectivity" of boards and their decision-making processes.[306] In addition, as discussed further in Section 3.b.II.C of the Statutory Basis section (*Promotes Investor Protection and the Public Interest*) below, Nasdaq believes that proposed Rule 5605(f) could help to reduce information asymmetry, and thereby reduce the risk of insider trading or other opportunistic insider behavior.

C. Promotes Investor Protection and the Public Interest

Substantial evidence exists that board diversity is positively associated with more transparent public disclosures and higher quality financial reporting, and therefore Nasdaq believes the proposal is designed to promote investor protection. Specifically, studies have concluded that companies with gender-diverse boards are associated with more transparent public disclosures and less information asymmetry, leading to stock prices that better reflect public information. Gul, Srinidhi & Ng (2011) found that

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306 Id.

"gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms."[307] Bravo and Alcaide-Ruiz (2019) concluded that "female [audit committee] members with financial expertise play an important role in influencing disclosure strategies that provide forward-looking information containing projections and financial data useful for investors."[308] Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with "reducing the risk of informed trading and enhancing stock liquidity."[309]

Nasdaq believes that one consequence of information asymmetry is that insiders may engage in opportunistic behavior prior to a public announcement of financial results and before the market incorporates the new information into the company's stock price. This can result in unfair gains or an avoidance of losses at the expense of shareholders who did not have access to the same information. This may exacerbate the principal-agent problem, in which the interests of a company's board and shareholders are not aligned. Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,[310] which may be an effective mechanism to deter opportunistic behavior by management and better align their interests with those of their company's shareholders.[311]

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307 See Gul et al., supra note 72, at 2.

308 See Bravo and Alcaide-Ruiz, supra note 62, at 151.

309 See Abad et al., supra note 73, at 202.

310 See Lucas-Perez et al., supra note 75.

311 Id.

Another concern is that "[w]hen information asymmetry is high, stakeholders do not have sufficient resources, incentives, or access to relevant information to monitor managers' actions, which gives rise to the practice of earnings management."[312] Earnings management "is generally defined as the practice of using discretionary accounting methods to attain desired levels of reported earnings."[313] Manipulating earnings is particularly concerning to investors because "[i]f users of financial data are 'misled' by the level of reported income, then investors' allocation of resources may be inappropriate when based on the financial statements provided by management,"[314] which could undermine the efficacy of the capital formation process for investors who rely on such information to make informed investment and voting decisions.

Gull et al. (2018)[315] observe that overseeing management is a crucial component of investor protection, particularly with regard to earnings management:

> The role of the board of directors and board characteristics (*i.e.* board independence and gender diversity) is usually associated with the protection of shareholder interests…. This role is particularly crucial with regard to the issue of earnings management, in that one of the responsibilities of boards is to monitor management.[316]

The authors of that study found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management. Srinidhi, Gul and Tsui (2011) observed that better oversight of

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312 See Vernon J. Richardson, *Information Asymmetry and Earnings Management: Some Evidence*, 15 Rev. Quantitative Fin. and Acct. 325 (2000).

313 See Gull et al., supra note 61, at 2.

314 Id.

315 See generally id.

316 Id. at 6 (citations omitted).

management combined with lower information asymmetry leads to better earnings quality. They noted that "[e]arnings quality is an important outcome of good governance demanded by investors and therefore its improvement constitutes an important objective of the board."[317] They found that companies with women on the board, specifically on the audit committee, exhibit "higher earnings quality" and "better reporting discipline by managers."[318] They concluded that "including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements."[319]

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced internal control weaknesses, noting that "prior literature has established a negative relationship between internal control weaknesses and earnings quality."[320] Internal control over financial reporting are procedures designed "to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP."[321] Weaknesses in

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317 See Srinidhi et al., supra note 56, at 1638.

318 Id. at 1612. The authors used two measures of earnings quality: discretionary accruals quality "computed as the absolute value of the estimation error in accruals after controlling for current, past, and future cash flows, sales and long-term assets, and operating cycle and volatility in sales" and "the lower propensity among firms whose unmanaged earnings are just shy of earnings benchmarks to manage earnings and beat the benchmarks by a small amount."

319 Id.

320 See Chen et al., supra note 70, at 18.

321 See Public Company Accounting Oversight Board, *Auditing Standard No. 5: Appendix A*, A5 available at: https://pcaobus.org/oversight/standards/archived-standards/details/Auditing_Standard_5_Appendix_A.

internal controls can "lead to poor financial reporting quality" and "more severe insider trading"[322] or failure to detect a material misstatement. According to the PCAOB:

> A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.[323]

A material misstatement can occur "as a result of some type of inherent risk, whether fraud or error (*e.g.*, management's aggressive accounting practices, erroneous application of GAAP)."[324] The failure to prevent or detect a material misstatement before financial statements are issued can require the company to reissue its financial statements and potentially face costly shareholder litigation. Chen et al. found that having at least one woman on the board (regardless of whether or not she is on the audit committee) "may lead [a] to reduced likelihood of material weaknesses [in internal control over financial reporting]],"[325] and Abbott, Parker and Persley (2012) found "a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement."[326] Notably, while the Sarbanes-Oxley Act ("SOX") implemented additional measures to ensure that a company has robust internal controls, the findings of Abbott et al. were consistent among a sample of pre- and post-SOX restatements, suggesting that "an additional, beneficial layer of independence in group decision-making is associated with gender diversity."[327]

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322 See Chen et al., supra note 70, at 12.

323 See Public Company Accounting Oversight Board, supra note 321, at A7.

324 See Abbott et al., supra note 64, at 609-10.

325 See Chen et al., supra note 70, at 18.

326 See Abbott et al., supra note 64, at 607.

327 Id. at 609.

Nasdaq believes that the proposal to require listed companies to have, or explain why they do not have, the applicable number of Diverse directors under proposed Rule 5605(f) could help to lower information asymmetry and reduce the risk of insider trading or other opportunistic insider behavior, which would help to increase stock price informativeness and enhance stock liquidity, and is therefore designed to protect investors and promoting capital formation and efficiency. Nasdaq believes that information asymmetry could also be reduced by permitting companies to satisfy proposed Rule 5605(f)(2) by publicly disclosing their reasons for not meeting the applicable diversity objectives in accordance with proposed Rule 5605(f)(3), because the requirement will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, and is therefore designed to protect investors and promote capital formation and efficiency. Aligning the timing for companies to provide an explanation in accordance with 5605(f) with other governance-related disclosures, such as those provided in the proxy, will make it easier for investors to know where a company has provided the proposed Rule 5605(f) disclosure and gives shareholders access to the information prior to a company's annual shareholder meeting.

Moreover, Nasdaq believes that proposed Rule 5605(f) could foster more transparent public disclosures, higher quality financial reporting, and stronger internal control over financial reporting and mechanisms to monitor management. This could be particularly beneficial for Smaller Reporting Companies that are not subject to the SOX 404(b) requirement to obtain an independent auditor's attestation of management's

assessment of the effectiveness of internal control over financial reporting, which is therefore designed to promote investor protection.

Nasdaq believes that the body of research on the relationship between company performance and board diversity summarized under Section III.A of the Purpose section above provides substantial evidence supporting the conclusion that board diversity does not have adverse effects on company performance, and therefore Nasdaq believes the proposal is designed to not negatively impact capital formation, competition or efficiency among its public companies.[328] Nasdaq considered that some studies on gender diversity alone have had mixed results,[329] and that the U.S. GAO (2015) and Carter et al. (2010) concluded that the mixed results are due to differences in methodologies, data samples and time periods.[330] This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the mixed results of studies regarding the relationship between company

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328 See Di Miceli and Donaggio, supra note 50 ("The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)"). See also Wahid, supra note 65, at 707 (suggesting that "at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards' ability to monitor firm management").

329 See, e.g., Pletzer et al., supra note 43; Post and Byron, supra note 44; Adams and Ferreira, supra note 47.

330 See GAO Report, supra note 49, at 5 ("Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used"); Carter (2010), supra note 45, at 400 (observing that the different "statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.").

performance and board independence,[331] Nasdaq adopted listing rules requiring a majority independent board that were "intended to enhance investor confidence in the companies that list on Nasdaq."[332] In its Approval Order, the SEC noted that "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets;" the Commission concluded that the independence rules would secure an "objective oversight role" for issuers' boards, and "foster greater transparency, accountability, and objectivity" in that role.[333] Nasdaq believes this reasoning applies to the current proposed rule as well. Even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards.[334] Legislators are increasingly taking action to encourage corporations to diversify their boards and improve diversity disclosures.[335] Moreover, during its discussions with stakeholders, Nasdaq found consensus across every constituency that there is inherent value in board diversity. Lastly, it has been a longstanding principle that "Nasdaq stands for integrity and ethical

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331 See supra note 50.

332 See Order Approving Proposed Rule Changes, supra note 52, at 64,161.

333 Id. at 64,176.

334 See supra notes 4 and 8.

335 See supra note 118.

business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process."[336]

For all the foregoing reasons, Nasdaq believes that proposed Rule 5605(f) is designed to promote investor protection and the public interest by enhancing investor confidence that all listed companies are considering diversity in the context of selecting directors, either by meeting the applicable diversity objectives of proposed Rule 5605(f)(2) or by explaining their rationale for not doing so. To the extent a company chooses not to meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional disclosure about the company's reasons for doing so under proposed Rule 5605(f)(3). For example, the company may choose to disclose that it does not meet the diversity objectives of proposed Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in our proposed rule. Nasdaq believes that providing such flexibility and clear disclosure where the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency, and further promoting the public interest.

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[336] See Nasdaq Rulebook, Rule 5101.

D. Not Designed to Permit Unfair Discrimination between Customers, Issuers, Brokers, or Dealers

Nasdaq believes that proposed Rule 5605(f) is not designed to permit unfair discrimination among companies because it requires all companies subject to the rule to meet the applicable diversity objectives under proposed Rule 5605(f)(2) or explain why they do not, which could include describing a different approach. While the proposal provides different objectives for the second Diverse director among Smaller Reporting Companies, Foreign Issuers, and other companies, Nasdaq believes that the rule is not designed to permit unfair discrimination among companies. In all cases, a company can choose to meet the diversity objectives of the entire rule or to satisfy only certain elements of the rule. Further, while the proposal provides an alternative objective for companies with smaller boards, the proposed rule does not limit board sizes—if a board chooses to nominate a Diverse individual to the board to meet the diversity objectives of the proposed rule, it is not precluded from also nominating a non-Diverse director for an additional board seat. Lastly, the proposal is a disclosure-based framework, not a mandate, and companies can choose to explain their reasons for not meeting the proposed diversity objectives.

i. Rule 5605(f)(2)(B): Foreign Issuers

Similar to all other companies subject to proposed Rule 5605(f), the proposal requires all Foreign Issuers with boards of more than five members to have, or explain why they do not have, at least two Diverse directors, including one director who self-identifies as Female. Foreign Issuers with boards of five or fewer members could meet an alternative objective of one Diverse director. However, Nasdaq proposes to provide Foreign Issuers with boards of more than five members with additional flexibility with

regard to the second Diverse director. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form 10-K, 20-F or 40-F). While the proposal provides a different objective for the second Diverse director for Foreign Issuers with larger boards, Nasdaq believes it is not designed to permit unfair discrimination between Foreign Issuers and other companies because it recognizes that the unique demographic composition of the United States, and its historical marginalization of Underrepresented Minorities and the LGBTQ+ community, may not extend to all countries outside of the United States. Further, Nasdaq believes that it is challenging to apply a consistent definition of minorities to all countries globally because "[t]here is no internationally agreed definition as to which groups constitute minorities."[337] However, Nasdaq observed that the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* states that:

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[337] See United Nations, *Minority Rights: International Standards and Guidance for Implementation* 2 (2010), available at: https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf. See also G.A. Res. 47/135. art. 1.1 (Dec. 18, 1992) ("States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."). The preamble to the Declaration also "[r]eaffirm[s] that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion."

> States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. [Article 1.1]
>
> Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. [Article 2.1]

Similarly, "there is no universally accepted international definition of indigenous peoples."[338] Rather, the United Nations *Declaration on the Rights of Indigenous Peoples* recognizes "that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration."[339] Accordingly, Nasdaq believes that it is not unfairly discriminatory to allow an alternative mechanism for Foreign Issuers to satisfy proposed Rule 5605(f)(2) in recognition that the U.S.-based EEOC definition of Underrepresented Minorities is not appropriate for every Foreign Issuer. In addition, Foreign Issuers have the ability to satisfy proposed Rule 5605(f)(2)(B) by explaining that they do not satisfy this alternative definition. Similarly, any company that is not a Foreign Issuer, but that prefers the alternative definition available for Foreign Issuers, could follow proposed Rule 5605(f)(2)(B) and disclose its reasons for doing so.

Under the proposal, Foreign Issuer means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act, and (ii) has its principal executive offices located outside of the

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338 See id. at 3.

339 See G.A. Res. 61/295 (Sept. 13, 2007).

United States. For example, a company that is considered a "foreign issuer" under Rule 3b-4(b) under the Act and has its principal executive offices located in Ireland would qualify as a Foreign Issuer for purposes of proposed Rule 5605(f)(2), even if it is not considered a Foreign Private Issuer under Nasdaq or SEC rules. Nasdaq proposes to define "board of directors" in proposed Rule 5605(f)(2)(B)(i)(b) to mean, in the case of a Foreign Issuer with a two-tiered board system, the company's supervisory or non-management board, which is consistent with the SEC's definition in Rule 10A-3(e)(2) of the Exchange Act.[340]

Nasdaq recognizes that Foreign Issuers may be located in jurisdictions that impose privacy laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race or ethnicity. In such countries, a company may not be able to determine each director's self-identified Diverse attributes due to restrictions on the collection of personal information. The company may instead publicly disclose pursuant to proposed Rule 5605(f)(3) that "Due to privacy laws in the company's home country jurisdiction limiting its ability to collect information regarding a director's self-identified Diverse attributes, the company is not able to determine that it has two Diverse directors as set forth under Rule 5605(f)(2)(B)(ii)."

ii. Rule 5605(f)(2)(C): Smaller Reporting Companies

While the proposal provides a different objective for the second Diverse director for Smaller Reporting Companies with boards of more than five members, Nasdaq believes that this distinction is not designed to permit unfair discrimination among

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340 See 17 CFR § 240.10A-3(e)(2) ("In the case of foreign private issuers with a two-tier board system, the term board of directors means the supervisory or non-management board.").

companies. Nasdaq has designed the proposed rule to ensure it does not have a disproportionate economic impact on Smaller Reporting Companies by imposing undue costs or burdens. Nasdaq recognizes that Smaller Reporting Companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources to compensate an additional director or engage a search firm to find director candidates outside of the directors' traditional networks. Nasdaq believes that this is a reasonable basis to distinguish Smaller Reporting Companies from other companies subject to the rule.

Smaller Reporting Companies already are provided certain exemptions from Nasdaq's listing rules. For example, under proposed Rule 5605(d)(3), Smaller Reporting Companies must have a compensation committee comprised of at least two independent directors and a formal written compensation committee charter or board resolution that specifies the committee's responsibilities and authority, but such companies are not required to grant authority to the committee to retain or compensate consultants or advisors or consider certain independence factors before selecting such advisors, consistent with Rule 10C-1 of the Act.[341] In its approval order, the SEC concluded as follows:

> The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C-1 requirements, it makes sense for Nasdaq to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further . . . in view of the potential additional costs of an annual

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[341] See Nasdaq Rulebook, Rule 5605(d)(3).

review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.[342]

The Commission also makes accommodations for Smaller Reporting Companies based on their more limited resources, allowing them to comply with scaled disclosure requirements in certain SEC reports rather than the more rigorous disclosure requirements for larger companies. For example, Smaller Reporting Companies are not required to include a compensation discussion and analysis in their proxy or Form 10-K describing the material elements of the compensation of its named executive officers.[343] Eligible Smaller Reporting Companies also are relieved from the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting.[344] In each case, companies may choose to satisfy the more rigorous requirements in lieu of relying on the exemptions.

Any company that is not a Smaller Reporting Company, but prefers the alternative rule available for Smaller Reporting Companies, could follow proposed Rule 5605(f)(2)(C) and disclose their reasons for doing so. In addition, companies with boards of five or fewer members could meet an alternative objective of one Diverse director. As such, Nasdaq believes that the proposed alternative rule for Smaller Reporting Companies is not designed to, and does not, unfairly discriminate among companies. Lastly, Nasdaq believes that proposed Rule 5605(f)(2)(C) is not designed to permit unfair

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342 See Order Granting Accelerated Approval of Proposed Rule Change, 78 Fed. Reg. 4,554, 4,567 (Jan. 22, 2013).

343 See 17 C.F.R. § 229.402(l).

344 See Accelerated Filer and Large Accelerated Filer Definitions, 85 Fed. Reg. 17,178 (March 26, 2020).

discrimination among companies because it requires Smaller Reporting Companies to have, or explain why they do not have, at least one director who self-identifies as Female, similar to other companies subject to Rule 5065(f).

iii. Rule 5605(f)(2)(D): Companies with Smaller Boards

While Nasdaq proposes to permit each company with a board of directors of five or fewer members to satisfy proposed Rule 5605(f)(2) by having, or explaining why it does not have, at least one member of its board of directors who is Diverse, Nasdaq believes that this distinction does not unfairly discriminate among issuers.

Nasdaq considered comments that it should "amend the proposed rules to allow greater flexibility for companies with relatively small boards."[345] Based on Nasdaq data, the average board size of all listed companies is eight directors, with an average board size of 7.3 for Smaller Reporting Companies and Foreign Issuers. The average market value of all companies with five or fewer directors is $706,062,658, with a median market value of $72,087,090, which is similar to the SEC's thresholds for Smaller Reporting Companies and non-accelerated filers, respectively.[346] Under 12b-2 of the Act, a company may qualify as a Smaller Reporting Company if it has: (1) public float of less than $250 million; or (2) annual revenues of less than $100 million and either: (i) no public float; or (ii) public float of less than $700 million.[347] A company may qualify as a non-accelerated filer if it has less than $75 million public float.[348]

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345 See Ballard Spahr Comment Letter, supra note 171.

346 Compared to an average market value of approximately $8,483,965,004 and median market value of $615,940,923 for all companies with more than five directors.

347 See 17 C.F.R. § 240.12b-2.

348 Id.

Based on these thresholds, while a company with a smaller board and $706 million public float may be similarly situated with a company with a public float of $699 million, it would not qualify as a Smaller Reporting Company under the Act. In contrast, a company with a smaller board and a public float of $72 million would qualify as a Smaller Reporting Company and as a non-accelerated filer, providing it with additional time to file its periodic reports and exempting it from the requirement to provide an auditor's attestation of management's assessment of ICFR.

Nasdaq believes that companies with smaller boards may face similar resource constraints to those of Smaller Reporting Companies. However, the alternative diversity objective Nasdaq proposes to provide Smaller Reporting Companies may not be available to them because not all companies with small boards qualify as Smaller Reporting Companies. Nasdaq believes that providing companies with boards of five or fewer with an alternative diversity objective recognizes that they are similarly situated with Smaller Reporting Companies without disproportionately impacting board composition. For example, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy proposed Rule 5605(f)(2) by adding additional directors. Two Diverse directors on a five member board comprise 40% of the board, whereas two Diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two Diverse directors and expands its board to satisfy proposed Rule 5605(f)(2), it may require the company to incur additional costs through director compensation and D&O insurance. Nasdaq seeks to avoid creating complexity for companies that attempt to meet the alternative diversity objective by subjecting them to a higher diversity objective.

Nasdaq believes that proposed Rule 5605(f)(2)(D) therefore recognizes that companies with smaller boards are not similarly situated with companies with larger boards, and has designed the proposal to avoid imposing undue costs and burdens on them. Further, companies with smaller boards are not precluded from satisfying the higher objective to have, or explain why they do not have, at least two Diverse directors, nor are companies with larger boards precluded from satisfying a lower objective, provided they transparently explain their reasons for doing so.

iv. Rule 5605(f)(3): Alternative Public Disclosure

The proposal is a disclosure-based framework, not a mandate. Under proposed Rule 5605(f)(3), a company may choose to meet the diversity objectives of proposed Rule 5605(f) or choose to explain its reasons for not meeting the applicable objective, which could include describing a different approach. Nasdaq designed the proposal to avoid unduly burdening competition or efficiency, or conflicting with existing securities laws, by providing all companies subject to proposed Rule 5605(f) with the option to make the public disclosure required under proposed Rule 5605(f)(3) in the company's proxy statement or information statement for its annual meeting of shareholders (or, if the company does not file a proxy, in its Form 10-K or 20-F). Alternatively, such disclosure may be provided on the company's website concurrently with the filing of the company's proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F), provided the company submits a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting. Nasdaq believes proposed Rule 5605(f)(3) is not designed to permit unfair discrimination among companies because the proposed rule provides all companies subject to proposed Rule

5605(f) the option to disclose an explanation rather than meet the diversity objectives of proposed Rule 5605(f)(2). Additionally, all companies who choose to explain their reason for not meeting the applicable objective are given the same options for providing the disclosure.

Certain federal securities laws similarly permit companies to satisfy corporate governance requirements through disclosure of reasons for not meeting the applicable requirement. For example, under Regulation S-K, Item 407 requires a company to disclose whether or not its board of directors has determined that the company has at least one audit committee financial expert. If a company does not have a financial expert on the audit committee, it must provide an explanation.[349] Item 406 requires a company to disclose whether it has adopted a written code of ethics that applies to the chief executive officer and senior financial or accounting officers. If a company has not adopted such a code of ethics, it must disclose the reasons why not.[350] Item 402 regarding pay ratio disclosure defines how total compensation for employees should be calculated, but permits companies to use a different measure as long as they explain their approach.[351] In addition, under Nasdaq's listing rules, foreign private issuers may choose to follow home country practice in lieu of the corporate governance standards set forth in the Rule 5600 series, provided that a company publicly discloses in its annual reports or on its website "each requirement that it does not follow and describe the home country practice followed by the Company in lieu of such requirements."[352]

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349 See 17 C.F.R. § 229.407(d)(5).

350 Id. § 229.406(a).

351 Id. § 229.402.

352 See Nasdaq Rulebook, Rule 5615(a)(3)(B)(i).

Nasdaq rules and SEC guidance already recognize that website disclosure can be a method of disseminating information to the public. For example, in addition to permitting foreign private issuers to provide website disclosures related to home country practices,[353] Nasdaq listing rules also provide such flexibility for disclosures regarding third party director compensation[354] and reliance on the exception relating to independent compensation committee members.[355] The SEC has recognized that "[a] company's web site is an obvious place for investors to find information about the company"[356] and permits companies to make public disclosure of material information through website disclosures if, among other things, the company's website is "a recognized channel of distribution of information."[357]

v. Rule 5605(f)(4): Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of proposed Rule 5605(f) (defined as "Exempt Companies"): SPACs; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on

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353 Id., Rule 5615(a)(3)(B) and IM-5615-3.

354 See Nasdaq Rulebook, Rule 5250(b)(3)(A).

355 Id., Rules 5605(d)(2)(B) (non-independent compensation committee member under exceptional and limited circumstances) and 5605(e)(3) (non-independent nominations committee member under exceptional and limited circumstances).

356 See Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,864 (Aug. 7, 2008).

357 Id. at 45,867.

Nasdaq; and issuers of securities listed under the Rule 5700 Series. Each of the types of Exempt Companies either has no board of directors, lists only securities with no voting rights towards the election of directors, or is not an operating company, and the holders of the securities they issue do not expect to have a say in the composition of their boards. As such, Nasdaq believes the proposal is not designed to permit unfair discrimination by excluding Exempt Companies from the application of proposed Rule 5605(f). These companies, other than SPACs, already are exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615.

Nasdaq is also proposing to exempt SPACs from the requirements of proposed Rule 5605(f), and the post-business combination entity would have at least two years after they complete a business combination. This approach is similar to other phase-in periods granted to SPACs. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering, including a SPAC, one year to fully comply with the independent compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, Rule 5615(b)(1) and SEC Rule 10A-3(b)(1)(iv)(A) allows a newly listed company, including a SPAC, up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements.

Under proposed Rule 5605(f)(5)(A) or (B), a newly listed company, including through a business combination with a SPAC, would be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2) by the later of

two years from the date of listing or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones depending on the company's market tier. Nasdaq believes it is not appropriate to subject SPACs to proposed Rule 5605(f) prior to completing a business combination because SPACs are shell companies until they complete an acquisition of an operating company. Rather, Nasdaq believes it is appropriate to provide SPACs with the same phase-in provided to other newly listed companies upon completing a business combination, because a SPAC must satisfy all of Nasdaq's initial listing requirements upon completing a business combination, including its requirements related to committee composition and majority independent board.

vi. Rule 5605(f)(5): Phase-in Period

Under proposed Rule 5605(f)(5)(A), a newly listed company on the NGS or NGM tiers that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one Diverse director by the later of: (a) one year from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to the company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(B), a newly listed company on the NCM tier that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(D), any newly listed company on any market tier that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

These "phase-in" periods apply to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a business combination with a SPAC.

Nasdaq believes this approach is not designed to permit unfair discrimination because it provides all companies that become newly subject to the rule the same time period within which to satisfy proposed Rule 5605(f)(2), while providing additional

flexibility to companies on the NCM tier and companies with smaller boards in recognition that such companies are typically smaller and may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

In addition, this approach is similar to other phase-in periods granted to companies listing on or transferring to Nasdaq. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

vii. Rule 5605(f)(7): Effective Dates/Transition

Under proposed Rule 5605(f)(7), each company (including a company with a smaller board under proposed Rule 5606(f)(2)(D)) must have, or explain why it does not have, at least one Diverse director by the later of: (i) the First Effective Date;[358] or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date.

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358 The "First Effective Date" is two calendar years after the Approval Date.

Each company listed on the NGS or NGM tiers must have, or explain why it does not have, two Diverse directors by the later of: (i) the Second NGS/NGM Effective Date;[359] or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date. Each company listed on the NCM tier must have, or explain why it does not have, at least two Diverse directors by the later of: (i) the Second NCM Effective Date[360] or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NCM Effective Date.

Nasdaq believes this approach is not designed to permit unfair discrimination because it recognizes that companies listed on the NCM tier may not have the resources necessary to compensate an additional director or engage a search firm to search for director candidates outside of the directors' traditional networks. Therefore, Nasdaq believes it is in the public interest to provide such companies with one additional year to meet the diversity objectives of proposed Rule 5605(f), should they choose to do so. Nasdaq notes that all companies may choose to follow a timeframe applicable to a different market tier, provided they publicly describe their explanation for doing so. They also may construct their own timeframe for meeting the diversity objectives of proposed Rule 5605(f), provided they publicly disclose their reasons for not abiding by Nasdaq's timeframe.

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[359] The "Second NGS/NGM Effective Date" is four calendar years after the Approval Date.

[360] The "Second NCM Effective Date" is five calendar years after the Approval Date.

E. Not Designed to Regulate by Virtue of any Authority Conferred by the Act Matters Not Related to the Purposes of the Act or the Administration of the Exchange

Nasdaq believes that the proposal is not designed to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.[361] The proposal relates to the Exchange's corporate governance standards for listed companies. As discussed above, "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets."[362] And because "it is not always feasible to define . . . every practice which is inconsistent with the public interest or with the protection of investors," the Act leaves to SROs "the necessary work" of rulemaking pursuant to Section 6(b)(5).[363]

Nasdaq recognizes that U.S. states are increasingly proposing and adopting board diversity requirements, and because corporations are creatures of state law, some market participants may believe that such regulation is best left to states. However, Nasdaq considered that certain of its listing rules related to corporate governance currently relate to areas that are also regulated by states. For example, states impose standards related to quorums[364] and shareholder approval of certain transactions,[365] which also are regulated

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361 See 15 U.S.C. § 78f(b)(5).

362 See Order Approving Proposed Rule Changes, supra note 52, at 64,161.

363 See Heath v. SEC, 586 F.3d 122, 132 (2d Cir. 2009) (citing Avery v. Moffat, 55 N.Y.S.2d 215, 228 (Sup. Ct. 1945)).

364 See, e.g., 8 Del. Code § 216 (providing that a quorum at a shareholder's meeting shall consist of no less than 1/3 of the shares entitled to vote at such meeting).

365 See, e.g., id. §§ 251, 271 (providing that shareholder approval by a majority of the outstanding voting shares entitled to vote is required for mergers and the sale of all or substantially all of a corporation's assets).

under Nasdaq's listing rules.[366] Nasdaq has adopted rules relating to such matters to ensure uniformity of such rules among its listed companies. Similarly, Nasdaq believes that the proposed rule will create uniformity among listed companies by helping to assure investors that all non-exempt companies meet the applicable diversity objectives of proposed Rule 5605(f)(2) or publicly describe why they do not.

Further, Nasdaq believes the proposal will enhance investor confidence that listed companies that meet the diversity objectives of proposed Rule 5605(f)(2) are considering the perspectives of more than one demographic group, leading to robust dialogue and better decision making, as well as the other corporate governance benefits of diverse boards discussed above in Section II of the Purpose section. To the extent companies choose to disclose their reasons for not meeting the diversity objectives of proposed Rule 5605(f)(2) pursuant to proposed Rule 5605(f)(3), Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make an informed voting decision, thereby promoting capital formation and efficiency. It has been the Exchange's longstanding principle that "Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process."[367]

In addition, as discussed in Section II of the Purpose section, in passing Section 342 of the Dodd-Frank Act, Congress recognized the need to respond to the lack of diversity in the financial services industry, and the Standards designed by the

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366 See, e.g., Nasdaq Rulebook, Rules 5620(c) and 5635(a).

367 Id., Rule 5101.

Commission and other financial regulators provide a framework for addressing that industry challenge. The Standards themselves identify several focus areas, including the importance of "Organizational Commitment," which speaks to the critical role of senior leadership—including boards of directors—in promoting diversity and inclusion across an organization. In addition, like the proposed rule, the Standards also consider "Practice to Promote Transparency," and recognize that transparency is a key component of any diversity initiative. Specifically, the Standards provide that the "transparency of an entity's diversity and inclusion program promotes the objectives of Section 342," and also is important because it provides the public with necessary information to assess an entity's diversity policies and practices.[368]

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Nasdaq reviewed requirements related to board diversity in two dozen foreign jurisdictions, and almost every jurisdiction imposes diversity-focused requirements on listed companies, either through a securities exchange, financial regulator or the government. Nasdaq competes for listings globally, including in countries that have implemented a more robust regulatory reporting framework for diversity and ESG disclosures. Nasdaq carefully considered the competitive implications of the proposal. While Nasdaq would regret losing even a single valued issuer, experience and empirical data demonstrate that neither the listings contract nor listings fees prevents issuers from switching listings markets. Moreover, based on public comments, Nasdaq believes that a

[368] Final Interagency Policy Statement, supra note 19.

significant body of issuers supports the proposal, and that some issuers share these values so strongly that they may choose to list on Nasdaq because of it.

Currently in the U.S., the Long-Term Stock Exchange ("LTSE"), which has established a coalition of "asset owners and asset managers representing a combined $7 trillion in assets under management,"[369] seeks to distinguish itself by focusing on long-term elements of corporate governance, including, for example, diversity and inclusion. Under Rule 14.425, companies listed on LTSE must adopt and publish a long-term stakeholder policy that explains, among other things, "the Company's approach to diversity and inclusion."[370]

I. Board Statistical Disclosure

The Exchange does not believe that proposed Rule 5606 will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the adoption of Rule 5606 will not impose any undue burden on competition among listed companies for the reasons set forth below.

With a few exceptions, all companies would be required to make the same disclosure of their board-level statistical information. The average board size of a company that is currently listed on the Exchange is eight directors. Although a company would be required to disclose its board-level statistical data, directors may choose to opt out rather than reveal their diversity characteristics to their company. A company would identify such directors in the "Did Not Disclose Demographic Background" category. For directors who voluntarily disclose their diversity characteristics, the company would

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369 See Long-Term Stock Exchange, *A coalition of long-term company builders*, available at: https://ltse.com/coalition.

370 See Long-Term Stock Exchange Rule Book, Rule 14.425.

collect their responses and disclose the information in either the company's proxy statement, information statement of shareholder meeting, any other disclosure form filed with the SEC or on the company's website, using Nasdaq's required format. While the time and economic burden may vary based on a company's board size, Nasdaq does not believe there is any significant burden associated with gathering, preparing and reporting this data. Therefore, Nasdaq believes that there will be a *de minimis* time and economic burden on listed companies to collect and disclose the diversity statistical data.

Some investors value demographic diversity, and list it as an important factor influencing their director voting decisions.[371] Investors have stated that consistent data would make its collection and analysis easier and more equitable for investors that are not large enough to demand or otherwise access individualized disclosures.[372] Therefore, Nasdaq believes that any burden placed on companies to gather and disclose their board-level diversity statistics is counterbalanced by the benefits that the information will provide to a company's investors.

Moreover, as discussed above, most listed companies are required to submit an annual EEO-1 Report, which provides statistical data related to race and gender data among employees similar to the data required under proposed Rule 5606(a). Because most companies are already collecting similar information annually to satisfy their EEOC requirement, Nasdaq does not believe that adding directors to the collection will place a significant burden on these companies. Additionally, the information requested from

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371 See Hunt et al., supra note 30.

372 See Petition for Rulemaking, supra note 130, at 2.

Foreign Issuers is limited in scope and therefore does not impose a significant burden on them.

Nasdaq faces competition in the market for listing services. Proposed Rule 5606 reflects that competition, but it does not impose any burden on competition with other exchanges. As discussed above, investors have made clear their desire for greater transparency into public companies' board-level diversity as it relates to gender identity, race, and ethnicity. Nasdaq believes that the proposed rule will enhance the competition for listings. Other exchanges can set similar requirements for their listed companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

II. Diverse Board Representation or Explanation

Nasdaq believes that proposed Rule 5605(f) will not impose burdens on competition among listed companies because the Exchange has constructed a framework for similarly-situated companies to satisfy similar requirements (*i.e.*, Foreign Issuers, Smaller Reporting Companies, companies with smaller boards, and other companies), and has provided all companies with the choice of satisfying the requirements of proposed Rule 5605(f)(2) by having the applicable number of Diverse directors, or by explaining why they do not. Nasdaq believes that this will avoid imposing undue costs or burdens on companies that, for example, cannot afford to compensate an additional director or believe it is not appropriate, feasible or desirable to meet the diversity objectives of proposed Rule 5605(f) based on the company's particular circumstances (for example, the company's size, operations, or current board composition). Rather than

requiring a company to divert resources to compensate an additional director, and place the company at a competitive disadvantage with its peers, the rule provides the flexibility for such company to explain why it does not meet the diversity objectives. The proposal further mitigates the burden imposed on companies with smaller boards by providing them with flexibility to have, or explain why they do not have, one Diverse director.

The cost of identifying director candidates can range from nothing or a nominal fee (via personal, work or school-related networks, or board affinity organizations, as well as internal research by the corporate secretary's team) to amounts that can vary widely depending on the specific search firm and the size of the company. Some industry observers estimate board searches for independent directors cost about one-third of a director's annual compensation, while others estimate it costs between $75,000 and $150,000. The underlying figures vary; for example, one search firm generally charges $25,000 to $50,000. Nasdaq observes that total annual director compensation can range widely; median director pay is estimated at $134,000 for Russell 3000 companies and $232,000 for S&P 500 companies. Moreover, there is a wider range of underlying compensation amounts. For example, Russell 3000 directors may receive approximately $32,600 (10th percentile), or up to $250,000 (90th percentile) or more. S&P 500 directors may receive approximately $100,000 (10th percentile) or up to $310,000 (90th percentile) or more.[373] Most, if not all, of these costs would be borne in any event in the search for new directors regardless of the proposed rule. While the proposed rule might

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[373] Total annual director compensation varies by compensation elements and structure as well as amount, which is generally based on the size, sector, maturity of the company, and company specific situation. See Mark Emanuel et al., Semler Brossy and the Conference Board, *Director Compensation Practices in the Russell 3000 and S&P 500* (2020 ed.), available at https://conferenceboard.esgauge.org/directorcompensation/report.

lead some companies to search for director candidates outside of already established networks, the incremental costs of doing so would be tied directly to the benefit of a broader search.

To reduce costs for companies that do not currently meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq has proposed to provide listed companies that have not yet met their diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment.[374] This offering is designed to ease the search for diverse nominees and reduce the costs on companies that choose to meet the diversity objectives of proposed Rule 5605(f)(2). Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of such services. Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

Nasdaq also has structured the proposed rule to provide companies with at least four years from the Approval Date to satisfy proposed Rule 5605(f)(2) so that companies do not incur immediate costs striving to meet the diversity objectives of proposed Rule 5605(f)(2). Nasdaq also has reduced the compliance burden on Smaller Reporting Companies and Foreign Issuers by providing them with additional flexibility when satisfying the objective related to the second Diverse director. Smaller Reporting

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[374] See supra note 23.

Companies could satisfy the proposed diversity objective to have two Diverse directors under proposed Rule 5605(f)(2)(C) with two Female directors. Like other companies, Smaller Reporting Companies also could satisfy the second director objective by including an individual who self-identifies as an Underrepresented Minority or a member of the LGBTQ+ community. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form F-1, 10-K, 20-F or 40-F). Companies with smaller boards could satisfy the diversity objective with one Diverse director. Nasdaq has further reduced the compliance burdens on companies listed on the NCM tier by providing them with five years from the Approval Date to satisfy proposed Rule 5605(f)(2), recognizing that such companies may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For the foregoing reasons, Nasdaq does not believe that proposed Rule 5605(f) will impose any burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act. Further, Nasdaq does not believe the proposed rule will impose any burden on competition among listing exchanges. As described above, Nasdaq competes with other exchanges globally for listings, including exchanges based in jurisdictions that have implemented disclosure requirements related to diversity. Within the United States, LTSE requires listed companies to adopt and publish a long-term stakeholder policy that explains, among other things, "the Company's approach to

diversity and inclusion."[375] Other listing venues within the United States may propose to adopt rules similar to LTSE's requirements or the Exchange's proposal if they believe companies would prefer to list on an exchange with diversity-related listing standards.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

The Exchange has consented to an extension of the time period for Commission action until March 11, 2021.[376]

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

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375 See Long-Term Stock Exchange Rule Book, Rule 14.425.

376 See Securities Exchange Act Release No. 90951 (January 26, 2021), 86 FR 7135 (January 19, 2021); see also Letter from Jeffrey S. Davis, Senior Vice President, Nasdaq, Inc., to Vanessa Countryman, dated January 8, 2021, available at https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8221271-227700.pdf.

3. Board Diversity Matrix and Instructions.
4. Amended rule text indicating additions to or deletions from the Initial Proposal.
5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. ; File No. SR-NASDAQ-2020-081)

February__, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b-4 thereunder,[2] notice is hereby given that on February 26, 2021,The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt listing rules related to board diversity, as described in more detail below:

(i) to adopt Rule 5605(f) (Diverse Board Representation), which would require each Nasdaq-listed company, subject to certain exceptions, (A) to have, or explain why it does not have, at least one director who self-identifies as a female, and (B) to have, or explain why it does not have, at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+;

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

(ii) to adopt Rule 5606 (Board Diversity Disclosure), which would require each Nasdaq-listed company, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+; and

(iii) to update Rule 5615 and IM-5615-3 (Foreign Private Issuers) and Rule 5810(c) (Types of Deficiencies and Notifications) to incorporate references to proposed Rule 5605(f) and proposed Rule 5606; and

(iv) to make certain other non-substantive conforming changes.

This Amendment No. 1 amends and supersedes the original filing in its entirety.

The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is filing this amendment to SR-NASDAQ-2020-081, which was published for comment by the Commission on December 11, 2020,[3] in order to: make certain material, technical, and conforming amendments to the Initial Proposal, and to provide additional clarification and justification in support of the proposed rule changes.

This amendment supersedes and replaces the Initial Proposal in its entirety. Nasdaq is submitting by separate letter its response to comments on the proposed rule change contemporaneously with this Amendment No. 1.

I. Summary of Amendments to the Initial Proposal

As discussed in Nasdaq's response to comments filed in conjunction with this Amendment No. 1, upon further examination of the Initial Proposal and after carefully reviewing all comment letters submitted by commenters, Nasdaq has modified the Initial Proposal to propose certain material amendments, technical clarifications, and non-substantive changes, as well as provided additional clarification and justification in support of the proposed rule change.

As a result of the comments received, Nasdaq is proposing the following three **material amendments**:

- Adding proposed Rule 5605(f)(2)(D) to provide more flexibility in achieving the diversity objectives of Rule 5605(f)(2) for companies with boards of five or fewer directors (as discussed in Section 3.a.VII.C.iii).
- Amending proposed Rule 5605(f)(5) to allow additional time for newly listing companies on the Nasdaq Global Select ("NGS"), Nasdaq Global Market

[3] Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (December 11, 2020) ("Initial Proposal").

("NGM"), and Nasdaq Capital Market ("NCM") tiers (as discussed in Section 3.a.VII.C.i).

- Adding proposed Rule 5605(f)(6)(B) to provide a grace period for a listed company that no longer meets the diversity objectives as a result of a vacancy on the board of directors, for example if a diverse director falls ill or resigns (as discussed in Section 3.a.VII.C.iii).

Nasdaq is also proposing the following **technical amendments** to the Initial Proposal:

- Amending proposed Rule 5605(f)(3) and proposed Rule 5606(b) to allow companies the flexibility of providing the disclosures in advance of the company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.
- Clarifying in the Board Diversity Matrix ("Matrix") Instructions that a company may include supplemental data in addition to the information required by the Matrix.
- Revising proposed Rule 5605(f)(2)(B)(i) to change the reference from "home country jurisdiction" to "country of the Company's principal executive offices."
- Providing a definition in the Matrix for "Non-binary."
- Amending proposed Rule 5606(d) to clarify the types of newly listed companies.
- Revising operative dates in proposed Rule 5606(e).

Finally, Nasdaq has also proposed certain **non-substantive** changes to the Initial Proposal, including clarifying throughout the filing that the proposed rule change is a disclosure requirement, not a mandate, and clarifying in the Matrix Instructions that a company may not substantially alter the Matrix and must disclose the information in a searchable format.

II. The Diversity Imperative for Corporate Boards

The past year has brought heightened attention to the commitment of public companies to diversity and inclusion. Corporate culture, human capital management,

and technology-driven changes to the business landscape have underscored the benefits of enhanced board diversity—diversity in the boardroom is good corporate governance. The benefits to stakeholders of increased diversity are becoming more apparent and include an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls. Nasdaq believes that the heightened focus on corporate board diversity by companies,[4] investors,[5] corporate governance organizations,[6] and legislators[7] demonstrates that investor confidence is enhanced when boardrooms are comprised of more than one demographic group. Nasdaq has also

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4 See Deloitte and the Society for Corporate Governance, *Board Practices Quarterly: Diversity, equity, and inclusion* (Sept. 2020), available at: https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/diversity-equity-and-inclusion.html (finding, in a survey of over 200 companies, that "most companies and/or their boards have taken, or intend to take, actions in response to recent events surrounding racial inequality and inequity; 71% of public companies and 65% of private companies answered this question affirmatively").

5 See ISS Governance, *2020 Global Benchmark Policy Survey, Summary of Results* 6 (Sept. 24, 2020), available at: https://www.issgovernance.com/wp-content/uploads/publications/2020-iss-policy-survey-results-report-1.pdf (finding that "a significant majority of investors (61 percent) indicated that boards should aim to reflect the company's customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups").

6 See International Corporate Governance Network, *ICGN Guidance on Diversity on Boards* 5 (2016), available at: https://www.icgn.org/sites/default/files/ICGN%20Guidance%20on%20Diversity%20on%20Boards%20-%20Final.pdf ("The ICGN believes that diversity is a core attribute of a well-functioning board which supports greater long-term value for shareholders and companies.").

7 See, e.g., John J. Cannon et al., Sherman & Sterling LLP, *Washington State Becomes Next to Mandate Gender Diversity on Boards* (May 28, 2020), available at: https://www.shearman.com/perspectives/2020/05/washington-state-becomes-next-to-mandate-gender-diversity-on-boards; Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020) (California legislation requiring companies headquartered in the state to have at least one director who self-identifies as a Female and one from an Underrepresented Community).

observed recent calls from SEC commissioners[8] and investors[9] for companies to provide more transparency regarding board diversity.

While Nasdaq-listed companies have made laudable progress in diversifying their boardrooms, Nasdaq believes that the national market system and the public interest would be well-served by a "disclosure-based, business-driven" framework for companies to embrace meaningful and multi-dimensional diversification of their boards.[10] Nasdaq has also found that current reporting of board diversity data was not

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8 See Acting Chair Allison Herren Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), available at: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26#_ftnref15 ("There is ever-growing recognition of the importance of diversity from all types of investors . . . [a]nd large numbers of commenters on this [SEC] rule proposal emphasized the need for specific diversity disclosure requirements."); see also Commissioner Caroline Crenshaw, *Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105* (August 26, 2020), available at: https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k ("As Commissioner Lee noted in her statement, the final [SEC] rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation. The failure to grapple with these issues is, quite simply, a failure to modernize."); Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), available at: https://www.sec.gov/news/speech/chair-white-icgn-speech.html ("Companies' disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted… Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.").

9 See Vanguard, *Investment Stewardship 2019 Annual Report* (2019), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf ("We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis."); see also State Street Global Advisors, *Diversity Strategy, Goals & Disclosure: Our Expectations for Public Companies* (Aug. 27, 2020) https://www.ssga.com/us/en/individual/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies (announcing expectation that State Street's portfolio companies (including US companies "and, to the greatest extent possible, non-US companies") provide board level "[d]iversity characteristics, including racial and ethnic makeup, of the board of directors").

10 See Letter from Mercy Investments Inc. to Ms. Vanessa Countryman (December 22, 2020); see also Letter from San Francisco City and County Employees Retirement

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.

Accordingly, Nasdaq is proposing to require each of its listed companies, subject to certain exceptions for non-operating companies, to: (i) provide statistical information regarding diversity among the members of the company's board of directors under proposed Rule 5606; and (ii) have, or explain why it does not have, at least two "Diverse" directors on its board under proposed Rule 5605(f)(2). "Diverse" means an individual who self-identifies as: (i) Female, (ii) an Underrepresented Minority, or (iii) LGBTQ+. Each listed company must have, or explain why it does not have, at least one Female director and at least one director who is either an Underrepresented Minority or LGBTQ+. Foreign Issuers (including Foreign Private Issuers) and Smaller Reporting Companies, by contrast, have more flexibility and may satisfy the rule by having, or explaining why they do not have, two Female directors. Further, each company with a board of directors of five or fewer members may satisfy the rule by having, or explaining why it does not have, one Diverse director.[11] "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. "Underrepresented Minority" means, 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,

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System to Ms. Vanessa Countryman (December 17, 2020); see also Letter from Ideanomics, Inc. to Ms. Vanessa Countryman (December 28, 2020).

[11] Consequently, all references in this Amendment No. 1 to "diversity objectives" should be construed as a diversity objective of one Diverse director for companies with a board of directors of five or fewer members.

Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities. "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or a member of the queer community.

Nasdaq proposes that Rule 5606 will be operative one year after the Commission approves this proposal (the "Approval Date"). As such, Nasdaq proposes to require a company to provide statistical information regarding its board's diversity by the later of (1) one calendar year from the Approval Date (the "Effective Date"); or (2) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.

Under proposed Rule 5605(f)(2), Nasdaq proposes that each listed company in the NGS, NGM, and NCM have, or explain why it does not have, one Diverse director by the later of: (i) two calendar years after the date that the Commission approves this proposal (the "First Effective Date"); or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date. Further, each company must have, or explain why it does not have, two Diverse directors no later than: (i) four calendar years after the Approval Date for companies listed on the NGS or NGM tiers; or (ii) five calendar years after the Approval Date for companies listed on the NCM tier. If a company files its proxy statement or its information statement (or, if the company does

not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting after the anniversary of the Approval Date in the calendar year for each respective year noted above, then the company will have until the date it makes such filing to have, or explain why it does not have, two Diverse directors.

Nasdaq proposes that a company with a board of five or fewer members have, or explain why it does not have, at least one member of its board of directors who is Diverse. Nasdaq proposes that such companies share the timeline described above for companies that must have, or explain why they do not have, one Diverse director by the later of: (i) the First Effective Date; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date.

Nasdaq undertook extensive research and analysis and has concluded that the proposal will fulfill the objectives of the Act in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. In addition to conducting its own internal analysis, Nasdaq reviewed a substantial body of third-party research and interviewed leaders representing a broad spectrum of market participants and other stakeholders to:

- determine whether empirical evidence demonstrates an association between board diversity, company performance, investor protection and board decision-making;
- understand investors' interest in, and impediments to obtaining, information regarding the state of board diversity at public companies;
- review the current state of board diversity and disclosure, both among Nasdaq-listed companies and more broadly within the U.S.;

- gain a better understanding of the causes of underrepresentation on boards;
- obtain the views of leaders representing public companies, investment banks, corporate governance organizations, investors, regulators and civil rights groups on the value of more diverse corporate boards, and on various approaches to encouraging more diversity on corporate boards; and
- evaluate the success of approaches taken by exchanges, regulators, and governments in both the U.S. and foreign jurisdictions to remedy underrepresentation on boards.

While gender diversity has improved among U.S. company boards in recent years, the pace of change has been gradual, and the U.S. still lags behind other jurisdictions that have focused on board diversity. **Progress in bringing underrepresented racial and ethnic groups into the boardroom has been slower**. 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. Based on the limited information that is available, Nasdaq believes a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the board. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. While studies suggest that current candidate selection processes may result in diverse candidates being overlooked, Nasdaq also believes that the lack of reliable and consistent data creates a barrier to measuring and improving diversity in the boardroom.

Nasdaq reviewed dozens of empirical studies and found that an extensive body of empirical research demonstrates that diverse boards are positively associated with improved corporate governance and company performance.[12] For example, as discussed in detail below in *Section III, Empirical Research: The Relationship between Diversity and Company Performance, Investor Protection and Decision Making*, studies have found that companies with gender-diverse boards or audit committees are associated with: more transparent public disclosures and less information asymmetry; better reporting discipline by management; a lower likelihood of manipulated earnings through earnings management; an increased likelihood of voluntarily disclosing forward-looking information; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a lower likelihood of securities fraud. In addition, studies found that having at least one woman on the board is associated with a lower likelihood of material weaknesses in internal control over financial reporting and a lower likelihood of material financial restatements. Studies also identified positive relationships between board diversity and commonly used financial metrics, including higher returns on invested capital, returns on equity, earnings per share, earnings before interest and taxation margin, asset valuation multiples and credit ratings.

Nasdaq believes there are additional compelling reasons to support the diversification of company boards beyond a link to improved corporate governance and company performance:

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[12] See e.g., Bernile et al. (2018), infra note 33; Wahid (2019), infra note 65; Abbott, Parker & Persley (2012), infra note 64; Abad el al. (2017), infra note 73.

- Investors are calling in greater numbers for diversification of boardrooms. Vanguard, State Street Advisors, BlackRock, and the NYC Comptroller's Office include board diversity expectations in their engagement and proxy voting guidelines.[13] The heightened investor focus on corporate diversity and inclusion efforts demonstrates that investor confidence is undermined when a company's boardroom is homogenous and when transparency about such efforts is lacking. Investors 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

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[13] Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors. See Vanguard, *Investment Stewardship 2020 Annual Report* (2020), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2020_investment_stewardship_annual_report.pdf ("Vanguard 2020 Annual Report"). Starting in 2020, State Street Global Advisors will vote against the entire nominating committee of companies that do not have at least one woman on their boards and have not addressed questions on gender diversity within the last three years. See State Street Global Advisors, *Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines* (2020), available at: https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf. State Street Global Advisors' CEO, Cyrus Taraporevala, stated in his annual proxy voting agenda letter that starting in 2021, the company would commence voting against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards. Beginning in 2022, it "will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least 1 director from an underrepresented community on their boards." See Cyrus Taraporevala, CEO's Letter on 2021 Proxy Voting Agenda, dated January 11, 2021, available at https://www.ssga.com/us/en/institutional/ic/insights/ceo-letter-2021-proxy-voting-agenda?WT.mc_id=social_-ibr_asset-stewardship-web_gl_lkdin_img__n_n_jan21&spi=100001784867075. Beginning in 2018, BlackRock stated in proxy voting guidelines they "would normally expect to see at least 2 women directors on every board." See BlackRock Investment Stewardship, *Corporate governance and proxy voting guidelines for U.S. securities* (Jan. 2020), available at: https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf. The NYC Comptroller's Office in 2019 asked companies to adopt policies to ensure women and people of color are on the initial list for every open board seat. See Scott M. Stringer, *Remarks at the Bureau of Asset Management 'Emerging Managers and MWBE Managers Conference* (Oct. 11, 2019), available at: https://comptroller.nyc.gov/wp-content/uploads/2019/10/10.11.19-SMS-BAM-remarks_distro.pdf.

stakeholders when they refresh their boards. Nasdaq explores these investor sentiments in *Section IV, Current State of Board Diversity and Causes of Underrepresentation on Boards*.

- Nasdaq believes, consistent with SEC disclosure requirements in other contexts,[14] that management's vision on key issues impacting the company should be communicated with investors in a clear and straightforward manner. Indeed, transparency is the bedrock of federal securities laws regarding disclosure, and this sentiment is reflected in the broad-based support for uniform disclosure requirements regarding board diversity that Nasdaq observed during the course of its outreach to the industry. In addition, organizational leaders representing every category of corporate stakeholders Nasdaq spoke with (including business, investor, governance, regulatory, and civil rights communities) were overwhelmingly in favor of diversifying boardrooms. Nasdaq summarizes the findings of its stakeholder outreach in *Section V, Stakeholder Perspectives.*
- Legislators at the federal and state level increasingly are taking action to encourage or mandate corporations to diversify their boards and improve diversity disclosures. Congress currently is considering legislation requiring each SEC-registered company to provide board diversity statistics and disclose whether it

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[14] See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056 (Dec. 29, 2003) ("We believe that management's most important responsibilities include communicating with investors in a clear and straightforward manner. MD&A is a critical component of that communication. The Commission has long sought through its rules, enforcement actions and interpretive processes to elicit MD&A that not only meets technical disclosure requirements but generally is informative and transparent."); see also Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890 (Nov. 19, 2020) (citing the 2003 MD&A Interpretative Release and stating that the purpose of the MD&A section is to enable investors to see a company "through the eyes of management").

has a board diversity policy. To date, eleven states have passed or proposed legislation related to board diversity.[15] SEC regulations require companies to disclose whether diversity is considered when identifying director nominees and, if so, how. Nasdaq explores various state and federal initiatives in *Section VI, U.S. Regulatory Framework and Section VII, Nasdaq's Proposal***.**

In considering the merits and shaping the substance of the proposed listing rule, Nasdaq also sought and received valuable input from corporate stakeholders. During those discussions, Nasdaq found consensus across every constituency in the inherent value of board diversity. Business leaders also expressed concern that companies –particularly smaller ones – would prefer an approach that allows flexibility for their unique circumstances and stakeholders. Nasdaq recognizes that the operations, size, and current board composition of each Nasdaq-listed company are unique, and Nasdaq therefore endeavored to provide a disclosure-based, business-driven framework to enhance board diversity that balances the need for flexibility with each company's particular circumstances.

The Exchange also considered the experience of its parent company, Nasdaq, Inc., as a public company.[16] In 2002, Nasdaq, Inc. met the milestone of welcoming its

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15 See Michael Hatcher and Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!*, Harv. L. Sch. Forum on Corp. Governance (May 12, 2020), available at: https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/.

16 While the Exchange recognizes that it is only one part of an ecosystem in which multiple stakeholders are advocating for board diversity, that part is meaningful: the United Nations Sustainable Stock Exchanges Initiative, of which Nasdaq, Inc., is an official supporter, recognized that "[s]tock exchanges are uniquely positioned to influence their market in a way few other actors can." See United Nations Sustainable Stock Exchanges Initiative, *How Stock Exchanges Can Advance Gender Equality* 2 (2017), available at: https://sseinitiative.org/wp-content/uploads/2019/12/How-stock-exchanges-can-advance-gender-equality.pdf.

first woman, Mary Jo White, who later served as SEC Chair, to its board of directors. In her own words, "I was the first and only woman to serve on the board when I started, but, happily, I was joined by another woman during my tenure . . . . And then there were two. Not enough, but better than one."[17] In 2019, Nasdaq, Inc. also welcomed its first Black director. As a Charter Pledge Partner of The Board Challenge, Nasdaq supports The Board Challenge's goal of "true and full representation on all boards of directors."[18]

As a self-regulatory organization, Nasdaq also is cognizant of its role in advancing diversity within the financial industry, as outlined in the Commission's diversity standards issued pursuant to Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Standards").[19] Authored jointly by the Commission and five other financial regulators, the Standards seek to provide a framework for exchanges and financial services organizations "to create and strengthen [their] diversity policies and practices." Through these voluntary Standards, the Commission and other regulators "encourage each entity to use the[] Standards in a manner appropriate to its unique characteristics."[20] To that end, the proposed rule leverages the Exchange's unique ability to influence corporate governance in furtherance

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17 See Mary Jo White, Completing the Journey: Women as Directors of Public Companies (Sept. 16, 2014), available at: https://www.sec.gov/news/speech/2014-spch091614-mjw#.VBiLMhaaXDo.

18 See The Board Challenge, https://theboardchallenge.org/. See also Nasdaq, Inc., *Notice of 2020 Annual Meeting of Shareholders and Proxy Statement* 52 (Mar. 31, 2020), available at: https://ir.nasdaq.com/static-files/ce5519d4-3a0b-48ac-8441-5376ccbad4e5 (Nasdaq, Inc. believes that "[d]iverse backgrounds lead to diverse perspectives. We are committed to ensuring diverse backgrounds are represented on our board and throughout our organization to further the success of our business and best serve the diverse communities in which we operate.").

19 See Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016 (June 10, 2015).

20 Id. at 33,023.

of the goal of Section 342, which is to address the lack of diversity in the financial services industry.[21] Finally, while the Exchange recognizes the importance of maximizing company performance, its role as a listing venue is to establish and enforce substantive standards that promote investor protection. As a self-regulatory organization, the Exchange must demonstrate to the Commission that any proposed rule is consistent 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. The Exchange must also balance promoting capital formation, efficiency, and competition, among other things, alongside enhancing investor confidence.

With these objectives in mind, Nasdaq believes that a listing rule designed to enhance transparency related to board diversity will increase consistency and comparability of information across Nasdaq-listed companies, thereby increasing transparency and decreasing information collection costs. Nasdaq further believes that a listing rule designed to encourage listed companies to increase diverse representation on their boards will result in improved corporate governance, thus strengthening the integrity of the market, enhancing capital formation, efficiency, and competition, and building investor confidence. The proposal is a disclosure-based framework, not a mandate. To the extent a company chooses not to meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional transparency through disclosure explaining the company's reasons for not doing so. For example, the company may choose to disclose that it does

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[21] 156 Cong. Rec. H5233-61 (June 30, 2010).

not meet the diversity objectives of proposed Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to meet that standard instead, or has a board philosophy regarding diversity that differs from the diversity objectives set forth in proposed Rule 5605(f)(2), including an expanded or different definition of diversity. Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency.

Nasdaq plans to assist listed companies who choose to achieve the diversity objectives of this proposal. Nasdaq has observed that studies suggest that certain groups may be underrepresented on boards because the traditional director nomination process is limited by directors looking within their own social networks for candidates with previous C-suite experience.[22] Leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand. In order to assist companies that strive to meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq has proposed to provide listed companies that have not yet met diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking, and refreshment and has submitted a rule filing to the Commission regarding the provision of such services.[23] Nasdaq has also published FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for

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22 See infra Section II of the Statutory Basis section.

23 Securities Exchange Act Release No. 90571 (December 4, 2020), 85 FR 79556 (December 10, 2020) (SR-NASDAQ-2020-082).

companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

III. Empirical Research: The Relationship between Diversity and Company Performance, Investor Protection and Decision Making

A company's board of directors plays a critical role in formulating company strategy; appointing, advising, and overseeing management; and protecting investors. Nasdaq has recognized the importance of varied perspectives on boards since 2003, when the Exchange adopted a listing rule intended to enhance investor confidence by requiring listed companies, subject to certain exceptions and grace periods, to have a majority independent board.[24] Accompanying the rule are interpretive materials recognizing that independent directors "play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in the Companies they oversee and guard against conflicts of interest."[25]

A. *Diversity and Company Performance*

A significant body of research suggests a positive association between diversity and several measures of company performance.[26] In the words of SEC Acting Chair

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24 See The Nasdaq Stock Market Rulebook ("Rulebook"), Rules 5605(b), 5615(a), and 5605(b)(1)(A).

25 Id., IM-5605-1.

26 Some companies recently have expressed the belief that a company must consider the impact of its activities on a broader group of stakeholders beyond shareholders. See Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at: https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf. Commentators articulated this

Allison Herren Lee: "to the extent one seeks economic support for diversity and inclusion (instead of requiring economic support for the lack of diversity and exclusion), the evidence is in."[27]

The Carlyle Group (2020) found that its portfolio companies with two or more diverse directors had average earnings growth of 12.3% over the previous three years, compared to 0.5% among portfolio companies with no diverse directors, where diverse directors were defined as female, Black, Hispanic, or Asian.[28] "After controlling for industry, fund, and vintage year, companies with diverse boards generate earnings growth that's five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth."[29]

Several other studies found a positive association between diverse boards and other measures of company performance. McKinsey (2015) found that "companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial returns above their national industry median."[30] McKinsey reaffirmed their findings in a

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view as early as 1932. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1153 (1932).

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

28 See Jason M. Thomas and Megan Starr, The Carlyle Group, *Global Insights: From Impact Investing to Investing for Impact* 5 (Feb. 24, 2020), available at: https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf (analyzing Carlyle U.S. portfolio company data, February 2020).

29 Id.

30 See Vivian Hunt et al., McKinsey & Company, *Diversity Matters* (February 2, 2015), available at: https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/why%20diversity%20matters/diversity%20matters.pdf (analyzing 366 public companies in the United Kingdom, Canada, the United States, and Latin America in

2020 study, finding "a positive, statistically significant correlation between company financial outperformance and [board] diversity, on the dimensions of both gender and ethnicity," with companies in the top quartile for board gender diversity "28 percent more likely than their peers to outperform financially," and a statistically significant correlation between board gender diversity and outperformance on earnings before interest and taxation margin.[31] Carter, Simkins and Simpson (2003) found among Fortune 1000 companies "statistically significant positive relationships between the presence of women or minorities on the board and firm value."[32] Bernile, Bhagwat and Yonker (2018) found that greater diversity on boards—including gender, ethnicity, educational background, age, financial expertise, and board experience—is associated with increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, increased dividend payouts to shareholders, higher investment in R&D, and better innovation.[33] The authors observed that "[t]his is in line with the results

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industries for the years 2010 to 2013, using the ethnic and racial categories African ancestry, European ancestry, Near Eastern, East Asian, South Asian, Latino, Native American, and other).

31 See McKinsey & Company, *Diversity wins: How inclusion matters* 13 (May 2020), available at: https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf (analyzing 1,039 companies across 15 countries for the period from December 2018 to November 2019).

32 See David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*. 38(1) Fin. Rev. 33 (analyzing 638 Fortune 1000 firms in 1997, measuring firm value by Tobin's Q, with board diversity defined as the percentage of women, African Americans, Asians, and Hispanics on the board of directors).

33 See Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies,* Journal of Financial Economics 127(3), 588-612 (2018) (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat and Center for Research on Security Prices databases).

in Carter, Simkins, and Simpson (2003), which show a positive association between local demographic diversity and firm value."[34]

Several studies have found a positive association between gender diversity and company performance. Credit Suisse (2014) found companies with at least one woman on the board had an average sector-adjusted return on equity ("ROE") of 12.2%, compared to 10.1% for companies with no female directors, and average sector-adjusted ROEs of 14.1% and 11.2%, respectively, for the previous nine years.[35] MSCI (2016) found that U.S. companies with at least three women on the board in 2011 experienced median gains in ROE of 10% and earnings per share ("EPS") of 37% over a five year period, whereas companies that had no female directors in 2011 showed median changes of -1% in ROE and -8% in EPS over the same five-year period.[36] Catalyst (2011) found that the ROE of Fortune 500 companies with at least three women on the board (in at least four of five years) was 46% higher than companies with no women on the board, and return on sales and return on invested capital was 84% and 60% higher, respectively.[37] FCLTGlobal (2019) found that "the most diverse boards (top 20 percent)

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34 Id. at 604.

35 See Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), available at: https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/the-cs-gender-3000-women-in-senior-management.pdf (analyzing 3,000 companies across 40 countries from the period from 2005 to 2013).

36 See Meggin Thwing Eastman et al., MSCI, *The tipping point: Women on boards and financial performance* 3 (December 2016), available at: https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb (analyzing of U.S. companies that were constituents of the MSCI World Index for the entire period from July 1, 2011 to June 30, 2016).

37 See Harvey M. Wagner, Catalyst, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)* (March 1, 2011), available at: https://www.catalyst.org/research/the-bottom-line-corporate-performance-and-womens-representation-on-boards-2004-2008/ (analyzing gender diversity data from Catalyst's annual Fortune 500 Census of Women Board Directors report series for the years 2005 to

added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers (bottom 20 percent)."[38] Moody's (2019) found that greater board gender diversity is associated with higher credit ratings, with women accounting for an average of 28% of board seats at Aaa-rated companies but less than 5% of board seats at Ca-rated companies.[39]

Credit Suisse (2016) 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 6 years.[40] Further, "[a]gainst a custom basket of companies in North America, Europe and Australia, the LGBT 270 has outperformed by 140 bps annually."[41] Nasdaq acknowledges that this study focused on LGBTQ+ employees as opposed to directors, and that there is a lack of published research on the issue of LGBTQ+ representation on boards. However, Out Leadership (2019) suggests that the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity:

2009, and corresponding financial data from S&P's Compustat database for the years 2004 to 2008).

38 See FCLTGlobal, *The Long-term Habits of a Highly Effective Corporate Board* 11 (March 2019), available at: https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effective-corporate-boards.pdf (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data, with board diversity encompassing gender and age).

39 See Moody's Investors Service, *Gender diversity is correlated with higher ratings, but mandates pose short-term risk* 2 (Sept. 11, 2019), available at: https://www.moodys.com/research/Moodys-Corporate-board-gender-diversity-associated-with-higher-credit-ratings--PBC_1193768 (analyzing 1,109 publicly traded North American companies rated by Moody's).

40 See Credit Suisse ESG Research, *LGBT: the value of diversity* 1 (April 15, 2016), available at: https://research-doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=807075590&extdocid=807075590_1_eng_pdf&serialid=evu4wNcHexx7kusNLaZQphUkT9naxi1PvptZQvPjr1k%3d.

41 Id.

> While the precise reason for the positive correlation between gender diversity and better corporate performance is unknown, many of the reasons that gender diversity is considered beneficial are also applicable to LGBT+ diversity. LGBT+ diversity in the boardroom may create a dynamic that enables better decision-making, and it brings to the boardroom the perspective of a community that is a critical component of the company's consumer population and organizational talent.[42]

While the overwhelming majority of empirical studies Nasdaq reviewed present a compelling case that board diversity is positively associated with company performance, the results of some other studies on gender diversity are mixed. For example, Pletzer et al. (2015) found that board gender diversity alone has a "small and non-significant" relationship with a company's financial performance.[43] Post and Byron (2014) found a "near zero" relationship with a company's market performance, but a positive relationship with a company's accounting returns.[44] Carter, D'Souza, Simkins and Simpson (2010) found that "[w]hen Tobin's Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity,

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42 See Quorum, *Out Leadership's LGBT+ Board Diversity and Disclosure Guidelines* 3 (2019), available at: https://outleadership.com/content/uploads/2019/01/OL-LGBT-Board-Diversity-Guidelines.pdf.

43 See Jan Luca Pletzer et al., *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance – A Meta-Analysis* 1, PLOS One (June 18, 2015); see also Alice H. Eagly (2016), *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. Social Issues 199 (2016), available at https://doi.org/10.1111/josi.12163 (concluding that the "research findings are mixed, and repeated meta-analyses have yielded average correlational findings that are null or extremely small" with respect to board gender diversity and company performance).

44 See Corinne Post and Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis* 1 (2014). In 2016, the same authors, based on a review of the results for 87 studies, "found that board gender diversity is weakly but significantly positively correlated with [corporate social responsibility]," although they noted that "a significant correlational relationship does not prove causality." See Corinne Post and Kris Byron, *Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis*, 24(4) Corp. Governance: An Int'l Rev. 428 (July 2016), available at http://dx.doi.org/10.1111/corg.12165.

neither positive nor negative."[45] A study conducted by Campbell and Minguez-Vera (2007) "suggests, at a minimum, that increased gender diversity can be achieved without destroying shareholder value."[46] Adams and Ferreira (2009) found that "gender diversity has beneficial effects in companies with weak shareholder rights, where additional board monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights."[47] Carter et al. (2010)[48] and the U.S. Government Accountability Office ("GAO") (2015)[49] concluded that the mixed nature of various academic and empirical studies may be due to differences in methodologies, data samples, and time periods. Di Miceli and Donaggio (2018) concluded that "[t]he overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not

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45 See David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18(5) Corp. Governance 396, 410 (2010) (analysis of 541 S&P 500 companies for the years 1998-2002).

46 See Kevin Campbell and Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83(3) J. Bus. Ethics 13 (Feb. 2008) (analyzing 68 non-financial companies listed on the continuous market in Madrid during the period from January 1995 to December 2000, measuring firm value by an approximation of Tobin's Q defined as the sum of the market value of stock and the book value of debt divided by the book value of total assets).

47 See Renee B. Adams and Daniel Ferreira, *Women in the boardroom and their impact on governance and performance*, 94 J. Fin. Econ. 291 (2009) (analyzing 1,939 S&P 500, S&P MidCaps, and S&P SmallCap companies for the period 1996 to 2003, measuring company performance by a proxy for Tobin's Q (the ratio of market value to book value) and return on assets).

48 See Carter et al., supra note 45, at 400 (observing that the different "statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.").

49 See United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements* 5 (Dec. 2015) (the "GAO Report"), available at: https://www.gao.gov/assets/680/674008.pdf ("Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used").

impair corporate performance (virtually all studies find positive or non-statistically significant results)".[50]

While there are studies drawing different conclusions, Nasdaq believes that there is a compelling body of credible research on the association between company performance and board diversity. At a minimum, Nasdaq believes that the academic and empirical studies support the conclusion that board diversity does not have adverse effects on company performance. This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are a sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the varying findings of studies at the time regarding the relationship between company performance and board independence,[51] Nasdaq adopted listing rules requiring a majority independent board that were "intended to

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50 See Alexandre Di Miceli and Angela Donaggio, *Women in Business Leadership Boost ESG Performance: Existing Body of Evidence Makes Compelling Case*, 42 International Finance Corporation World Bank Group, Private Sector Opinion at 11 n.15 (2018), available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/private+sector+opinion/women+in+business+leadership+boost+esg+performance ("The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)").

51 See, e.g., Benjamin E. Hermalin and Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance*, 20 Fin. Mgmt. 101, 111 (1991) (finding that "there appears to be no relation between board composition and performance"); Sanjai Bhagat and Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54(3) Bus. Law. 921, 950 (1999) ("At the very least, there is no convincing evidence that increasing board independence, relative to the norms that currently prevail among large American firms, will improve firm performance. And there is some evidence suggesting the opposite—that firms with supermajority-independent boards perform worse than other firms, and that firms with more inside than independent directors perform about as well as firms with majority- (but not supermajority-) independent boards.").

enhance investor confidence in the companies that list on Nasdaq."[52] In its Approval Order, the SEC stated that "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets."[53]

Along the same lines, even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards. Therefore, Nasdaq believes that the proposal will enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by meeting the applicable diversity objective of proposed Rule 5605(f)(2) or by explaining their rationale for not meeting that objective. Further, Nasdaq believes that the proposal is consistent with the Act because it will not negatively impact capital formation, competition or efficiency among its public companies, and will promote investor protection and the public interest.[54]

B. *Diversity and Investor Protection*

There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures, and management

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52 See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,161 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

53 Id. at 64,176.

54 See also Lee, supra note 27 ("I could never quite buy in to the view that some 40 percent of the population in our country (if we're talking about minorities) or over half the country (if we're talking about women) must rationalize their inclusion in corporate boardrooms and elsewhere in economic terms instead of the reverse. How can one possibly justify—in economic terms—the systematic exclusion of a major portion of our talent base from the corporate pool?").

oversight. In reaching this conclusion, Nasdaq evaluated the results of more than a dozen studies spanning more than two decades that found a positive association between gender diversity and important investor protections, and the assertions by some academics that such findings may extend to other forms of diversity, including racial and ethnic diversity. The findings of the studies reviewed by Nasdaq are summarized below.

Adams and Ferreira (2009) found that women are "more likely to sit on" the audit committee,[55] and a subsequent study by Srinidhi, Gul and Tsui (2011) found that companies with women on the audit committee are associated with "higher earnings quality" and "better reporting discipline by managers,"[56] leading the authors to conclude that "including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements."[57]

A study conducted in 2016 by Pucheta-Martínez et al. concluded that gender diversity on the audit committee "improves the quality of financial information."[58] They found that "the percentage of females on [audit committees] reduces the probability of

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55 See Adams and Ferreira, supra note 47, at 292.

56 See Bin Srinidhi et al., *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610, 1612-16 (Winter 2011) (analyzing 3,132 firm years during the period from 2001 to 2007 based on S&P COMPUSTAT, Corporate Library's Board Analyst, and IRRC databases; "choos[ing] the accruals quality as the metric that best reflects the ability of current earnings to reflect future cash flows" (noting that it "best predicts the incidence and magnitude of fraud relative to other commonly used measures of earnings quality") and analyzing surprise earnings results that exceeded previous earnings or analyst forecasts, because "managers of firms whose unmanaged earnings fall marginally below the benchmarks have [an] incentive to manage earnings upwards so as to meet or beat previous earnings").

57 Id. at 1612.

58 See Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information.* 25(4) Bus. Ethics: A European Rev. 363, 378 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004-2011).

[audit] qualifications due to errors, non-compliance or the omission of information,"[59] and found a positive association between gender diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender diverse audit committees "ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion" when any uncertainties or scope limitations are identified.[60]

More recently, a study by Gull in 2018 found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management,[61] and a study conducted in 2019 by Bravo and Alcaide-Ruiz found "the disclosure of [financial forward-looking] information is associated with the presence of female audit committee members with financial expertise, especially accounting expertise."[62] Bravo and Alcaide-Ruiz concluded that "female [audit committee] members with financial expertise play an important role in influencing disclosure

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59 Id. at 363.

60 Id. at 368.

61 See Ammar Gull et al., *Beyond gender diversity: How specific attributes of female directors affect earnings management*, 50(3) British Acct. Rev. 255 (Sept. 2017), available at: https://ideas.repec.org/a/eee/bracre/v50y2018i3p255-274.html (analyzing 394 French companies belonging to the CAC All-Shares index listed on Euronext Paris from 2001 to 2010, prior to the implementation of France's gender mandate law that required women to comprise 20% of a company's board of directors by 2014 and 40% by 2016).

62 See Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140, 140 (2019) (analyzing companies included in the S&P 100 Index in 2016, "focus[ing] on the disclosure of financial forward-looking information (which is likely to require financial expertise), such as earnings forecasts, expected revenues, anticipated cash flows or any other financial indicator").

strategies that provide forward-looking information containing projections and financial data useful for investors."[63]

While the above studies demonstrate a positive association between gender diverse audit committees and the quality of a company's earnings, financial information, and public disclosures, other studies found a positive association between board gender diversity and important investor protections regardless of whether or not women are on the audit committee.

Abbott, Parker & Persley (2012) found, within a sample of non-Fortune 1000 companies, "a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement."[64] Their findings are consistent with a subsequent study by Wahid (2019), which concluded that "gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud."[65] Specifically, companies with female directors have "fewer irregularity-type [financial]

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63 Id. at 150.

64 See Lawrence J. Abbott et al., *Female Board Presence and the Likelihood of Financial Restatement*, 26(4) Accounting Horizons 607, 626 (2012) (analyzing a sample of 278 pre-SOX annual financial restatements and 187 pre-SOX quarterly financial restatements of U.S. companies from January 1, 1997 through June 30, 2002 identified by the U.S. General Accounting Office restatement report 03-138 (which only included "material misstatements of financial results"), and 75 post-SOX annual financial restatements from July 1, 2002, to September 30, 2005 identified by U.S. General Accounting Office restatement report 06-678 (which only included "restatements that were being made to correct material misstatements of previously reported financial information"), consisting almost exclusively of non-Fortune 1000 companies).

65 Further, these results hold whether firm governance is weak or strong, suggesting that benefits of gender-diverse boards can be realized even in already well-governed firms. See Aida Sijamic Wahid, The *Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, J Bus Ethics 159, 705–725 (2019) (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations).

restatements, which tend to be indicative of financial manipulation."[66] Wahid suggested that the implications of her study extend beyond gender diversity:

> If you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds . . . [and] [i]f we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.[67]

Cumming, Leung and Rui (2015) also examined the relationship between gender diversity and fraud, and found that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found "strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample."[68] The authors suggested that "other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud."[69]

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced weaknesses in internal control over financial reporting, noting that "prior literature has established a negative relationship between internal control weaknesses and earnings quality."[70] The authors found that having at least one

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66 Id. at 721.

67 See Barbara Shecter, *Diverse boards tied to fewer financial 'irregularities,' Canadian study finds*. Financial Post (Feb. 5, 2020), https://business.financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds (last accessed Nov. 27, 2020).

68 See Douglas J. Cumming et al., *Gender Diversity and Securities Fraud*, Academy of Management Journal Vol. 58, No. 5, 1572–1593 (2015) (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud, and 742 non-fraudulent companies for a control group).

69 Id. at 1588.

70 See Yu Chen et al., *Board Gender Diversity and Internal Control Weaknesses*, 33 Advances in Acct. 11 (2016) (analyzing a sample of 4267 firm-year observations during

woman on the board (regardless of whether or not she is on the audit committee) "may lead to [a] reduced likelihood of material weaknesses [in internal control over financial reporting]."[71]

Board gender diversity also was found to be positively associated with more transparent public disclosures. Gul, Srinidhi & Ng (2011) concluded that "gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms."[72] Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with "reducing the risk of informed trading and enhancing stock liquidity."[73]

Other studies have found that diverse boards are better at overseeing management. Adams and Ferreira (2009) found "direct evidence that more diverse boards are more likely to hold CEOs accountable for poor stock price performance; CEO turnover is more

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the period from 2004 to 2013, beginning "the first year internal control weaknesses were required to be disclosed under section 404 of SOX").

71 Id. at 18.

72 See Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?*, 51(3) J. Acct. & Econ. 314 (April 2011) (analyzing 4,084 firm years during the period from 2002 to 2007, excluding companies in the utilities and financial industries, measuring public information disclosure using "voluntary continuous disclosure of 'other' events in 8K reports" and measuring stock price informativeness by "idiosyncratic volatility," or volatility that cannot be explained to systematic factors and can be diversified away).

73 See David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192, 202 (July 2017) (analyzing 531 company-year observations from 2004 to 2009 of non-financial companies traded on the electronic trading platform of the Spanish Stock Exchange (SIBE)).

sensitive to stock return performance in firms with relatively more women on boards."[74] Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,[75] which may be an effective mechanism to deter opportunistic behavior by management and align their interests with shareholders.[76] A lack of diversity has been found to have the opposite effect. Westphal and Zajac (1995) found that "increased demographic similarity between CEOs and the board is likely to result in more generous CEO compensation contracts."[77]

C. *Diversity and Decision Making*

Wahid (2019) suggests that "at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards' ability to monitor firm management."[78] Nasdaq reviewed studies suggesting that board diversity can indeed enhance a company's ability to monitor management by reducing "groupthink" and improving decision making.

In 2009, the Commission, in adopting rules requiring proxy disclosure describing whether a company considers diversity in identifying director nominees, recognized the impact of diversity on decision making and corporate governance:

> A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards

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74 See Adams and Ferreira, supra note 47, at 292.

75 See Maria Encarnacion Lucas-Perez et al., *Women on the Board and Managers' Pay: Evidence from Spain*, 129 J. Bus. Ethics 285 (April 2014).

76 Id.

77 See James D. Westphal and Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40(1) Admin. Sci. Q. 60, 77 (March 1995).

78 See Wahid, supra note 65, at 707.

> branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board's decision making process by encouraging consideration of a broader range of views.[79]

Nasdaq agrees with the Commission's suggestion that board diversity improves board quality, governance, and decision making. Nasdaq is concerned that boards lacking diversity can inadvertently suffer from "groupthink," which is "a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members."[80] The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis, after which the IMF's Independent Evaluation Office concluded that "[t]he IMF's ability to correctly identify the mounting risks [as the crisis developed] was hindered by a high degree of groupthink."[81]

Other studies suggest that increased diversity reduces groupthink and leads to robust dialogue and better decision making. Dallas (2002) observed that "heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and

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

80 See Daniel P. Forbes and Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24(3) Acad. Mgmt. Rev. 489, 496 (Jul. 1999).

81 See International Monetary Fund, *IMF Performance in the Run-Up to the Financial and Economic Crisis* (August 2011), available at: https://www.elibrary.imf.org/view/IMF017/11570-9781616350789/11570-9781616350789/ch04.xml?language=en&redirect=true ("The evaluation found that incentives were not well aligned to foster the candid exchange of ideas that is needed for good surveillance—many staff reported concerns about the consequences of expressing views contrary to those of supervisors, [m]anagement, and country authorities.").

consequences."[82] Bernile et al. (2018) found that "diversity in the board of directors reduces stock return volatility, which is consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with 'groupthink.'"[83] Dhir (2015) concluded that gender diversity may "promote cognitive diversity and constructive conflict in the boardroom."[84] After interviewing 23 directors about their experience with Norway's board gender mandate, he observed:

> First, many respondents contended that gender diversity promotes enhanced dialogue. Interviewees frequently spoke of their belief that heterogeneity has resulted in: (1) higher quality boardroom discussions; (2) broader discussions that consider a wide range of angles or viewpoints; (3) deeper or more thorough discussions; (4) more frequent and lengthier discussions; (5) better informed discussions; (6) discussions that are more frequently brought inside the boardroom (as opposed to being held in spaces outside the boardroom, either exclusively or in addition to inside the boardroom); or (7) discussions in which items that directors previously took for granted are drawn out and addressed—where the implicit becomes explicit. Second, and intimately related, many interviewees indicated that diversification has led to (or has the potential to lead to) better decision making processes and/or final decisions.[85]

Investors also have emphasized the importance of diversity in decision making. A group of institutional investors charged with overseeing state investments and the retirement savings of public employees asserted that "board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are

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

83 See Bernile et al., supra note 33, at 608.

84 See Aaron A. Dhir, CHALLENGING BOARDROOM DIVERSITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 150 (2015) (emphasis removed) (sample included 23 directors of Norwegian corporate boards, representing an aggregate of 95 board appointments at more than 70 corporations).

85 Id. at 124 (emphasis removed).

not limited by gender, race, or ethnicity."[86]

Nasdaq believes that cognitive diversity is particularly important on boards in their advisory role, especially related to corporate strategy, because "the 'output' that boards produce is entirely cognitive in nature."[87] While in 1999, Forbes and Milliken characterized boards as "large, elite, and episodic decision making groups that face complex tasks pertaining to strategic-issue processing,"[88] over the past two decades, their role has evolved; boards are now more active, frequent advisors on areas such as cybersecurity, social media, and environmental, social and governance ("ESG") issues such as climate change and racial and gender inequality. Nasdaq believes that boards comprised of directors from diverse backgrounds enhance investor confidence by ensuring that board deliberations include the perspectives of more than one demographic group, leading to more robust dialogue and better decision making.

IV. Current State of Board Diversity and Causes of Underrepresentation on Boards

While the above studies suggest a positive association between board diversity, company performance, investor protections, and decision making, there is a noticeable lack of diversity among U.S. public companies. Nasdaq is a global organization and operates in many countries that already have implemented diversity-focused directives. In fact, Nasdaq-listed companies in Europe already are subject to diversity

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86 See Petition for Amendment of Proxy Rule (March 31, 2015), available at: https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.

87 See Forbes and Milliken, supra note 80, at 492.

88 Id.

requirements.[89] This first-hand experience provides Nasdaq with a unique perspective to incorporate global best practices into its proposal to advance diversity on U.S. corporate boards. Given that the U.S. ranks 53rd in board gender diversity, according to the World Economic Forum in its 2020 Global Gender Gap Report, Nasdaq believes advancing board diversity in the U.S. is a critical business and market imperative. This same report also found that "American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women."[90] As of 2019, women directors held 19% of Russell 3000 seats (up from 16% in 2018).[91] In comparison, women hold more than 30% of board seats in Norway, France, Sweden, and Finland.[92] At the current pace, the U.S. GAO estimates that it could take up to 34 years for U.S. companies to achieve gender parity on their boards.[93]

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89 On Nasdaq's Nordic and Baltic exchanges, large companies must comply with EU Directive 2014/95/EU (the "EU Directive"), as implemented by each member state, which requires companies to disclose a board diversity policy with measurable objectives (including gender), or explain why they do not have such a policy. On Nasdaq Vilnius, companies are also required to comply with the Nasdaq Corporate Governance Code for Listed Companies or explain why they do not, which requires companies to consider diversity and seek gender equality on the board. Similarly, on Nasdaq Copenhagen, companies are required to comply with the Danish Corporate Governance Recommendations or explain why they do not, which requires companies to adopt and disclose a diversity policy that considers gender, age and international experience. On Nasdaq Iceland, listed companies must have at least 40% women on their board (a government requirement) and comply with the EU Directive.

90 See World Economic Forum, *Global Gender Gap Report 2020* 33 (2019), available at: http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

91 See Kosmas Papadopoulos, ISS Analytics, *U.S. Board Diversity Trends in 2019* 4-5 (May 31, 2019), available at: https://www.issgovernance.com/file/publications/ISS_US-Board-Diversity-Trends-2019.pdf.

92 See Deloitte, *Women in the Boardroom: A global perspective* (6th ed. 2019), available at: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-the-boardroom-sixth-edition.pdf.

93 See GAO Report, supra note 49.

Progress toward greater racial and ethnic diversity in U.S. company boardrooms has been slower. Over the past ten years, the percentage of African American/Black directors at Fortune 500 companies has remained between 7 and 9%, while the percentage of women directors has grown from 16 to 23%.[94] In 2019, only 10% of board seats at Russell 3000 companies were held by racial minorities, reflecting an incremental increase from 8% in 2008.[95] Among Fortune 500 companies in 2018, there were fewer than 20 directors who publicly self-identified as LGBT+, and only nine companies reported considering sexual orientation and/or gender identity when identifying director nominees.[96]

Women and minority directors combined accounted for 34% of Fortune 500 board seats in 2018.[97] While women of color represent 18% of the U.S. population, they held 4.6% of Fortune 500 board seats in 2018.[98] Male underrepresented minorities held 11.5% of board seats at Fortune 500 companies in 2018, compared to 66% of board seats held by Caucasian/White men. Overall in 2018, 83.9% of board seats among Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of the U.S. population), 3.8% by Hispanic/Latino(a) individuals (who represent 19% of the

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94 See Russell Reynolds, *Ethnic & Gender Diversity on US Public Company Boards* 6 (September 8, 2020).

95 See Papadopoulous, supra note 91, at 5.

96 See Out Leadership, supra note 42.

97 See Deloitte, *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards* 9 (2018), available at: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf.

98 See Catalyst, *Too Few Women of Color on Boards: Statistics and Solutions* (Jan. 31, 2020), https://www.catalyst.org/research/women-minorities-corporate-boards/.

U.S. population), and 3.7% by Asian/Pacific Islander individuals (who represent 6% of the U.S. population).[99] In its analysis of Russell 3000 companies, 2020 Women on Boards concluded that "larger companies do better with their diversity efforts than smaller companies."[100]

Based on the limited information that is available, Nasdaq believes a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the board. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. Thus, and for the reasons discussed in this Section IV of the Purpose section, Nasdaq has concluded that a disclosure-based approach to encouraging greater diversity and data transparency would be beneficial.

Nasdaq reviewed academic and empirical studies on the causes of underrepresentation on boards and the approaches taken by other jurisdictions to remedy underrepresentation. Those studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions. Dhir (2015) explains that "[t]he presence of unconscious bias in the board appointment process, coupled with closed social networks, generates a complex set of barriers for diverse directors; these are the 'phantoms' that prevent entry."[101] In 2011, the Davies Review found that "informal networks influential in board appointments"

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99 See Deloitte, *Missing Pieces Report*, supra note 97; United States Census Bureau, *QuickFacts*, available at: https://www.census.gov/quickfacts/fact/table/US/PST045219.

100 See *2020 Women On Boards Gender Diversity Index* 4 (2019), available at: https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf.

101 See Dhir, supra note 84, at 47.

contribute to the underrepresentation of women in the boardrooms of U.K. listed companies.[102] In 2017, the Parker Review acknowledged that "as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom."[103] In 2020, the United Kingdom Financial Reporting Council commissioned a report to analyze barriers to LGBTQ+ inclusion and promotion in the workplace. Leaders who self-identified as LGBTQ+ expressed concerns about the current board nomination process, which includes "relying on personal recommendations without transparent competition or due process [and] informal 'interviewing' outside the selection process."[104]

These concerns are not unique to the United Kingdom. The U.S. GAO (2015) found that women's representation on corporate boards may be hindered by directors' tendencies to "rely on their personal networks to identify new board candidates."[105] Vell (2017) found that "92% of board seats [of public U.S. and Canadian technology companies] are filled through networking, and women have less access to these networks."[106] Deloitte and the Society for Corporate Governance (2019) found that this

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102 See Lord Davies of Abersoch, *Women on Boards* 17 (Feb. 2011), available at: https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf.

103 See Sir John Parker, *A Report into the Ethnic Diversity of UK Boards* 38 (Oct. 12, 2017), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf.

104 See Catriona Hay et al., The Financial Reporting Council, *Building more open business* 25 (2020), available at: https://www.frc.org.uk/getattachment/19f3b216-bd45-4d46-af2f-f191f5bf4a07/The-Good-Side-x-Financial-Reporting-Council-1811-AMENDED.pdf.

105 See GAO Report, supra note 49, at 15.

106 See Vell Executive Search, *Women Board Members in Tech Companies: Strategies for Building High Performing Diverse Boards* 6 (2017), available at:

is also common in other industries including media, communications, energy, consumer products, financial services and life sciences.[107] They observed that although 94% of companies surveyed were looking to increase diversity among their boards, 77% of those boards looked to referrals from current directors when identifying diverse director candidates, suggesting that "networking is still key to board succession."[108] Dhir (2015), in a qualitative study of Norwegian directors, observed that "[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background."[109]

Another contributing factor may be the traditional experience sought in director nominees. Rhode & Packel (2014) observed that:

> One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service. The primary route to board directorship has long been through experience as a CEO of a public corporation. . . . Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened.[110]

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https://www.vell.com/images/pdf/VELL%20Report%20Women%20Board%20Members%20on%20Tech%20Boards%202017%203%2029.pdf.

107 See Deloitte and the Society of Corporate Governance, *Board Practices Report: Common threads across boardrooms* 5 (2019), available at: https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/1202241_2018_Board_Practices_Report_FINAL.pdf.

108 Id. at 6.

109 See Dhir, supra note 84, at 52.

110 See Deborah Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39(2) Del. J. Corp. L. 377, 402-403 (2014); see also Dhir, supra note 84, at 39 ("[T]here is an apparent preference for either CEOs (whether current or retired) or senior management who have experience at the helm of a particular business stream or unit…. The fact that far fewer women than men have been CEOs has a potentially devastating effect on access to the boardroom, which in turn can have an effect on the number of women who rise to the level of CEO and to the executive suite.").

Hillman et al. (2002) found that while white male directors of public companies were more likely to have current or former experience as a CEO, senior manager or director, African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy.[111] Dhir (2015) suggests that "[c]onsidering persons from other, non-management pools, such as academia, legal and accounting practice, the not-for-profit sector and politics, may help create a broader pool of diverse candidates."[112] Directors surveyed by the U.S. GAO also "suggested, for example, that boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and government sectors. . . . [I]f boards were to expand their director searches beyond CEOs more women might be included in the candidate pool."[113]

Investors have begun calling for greater transparency surrounding ethnic diversity on company boards, and in the past several months as the U.S. has seen an uprising in the racial justice movement, there has been an increase in the number of African Americans appointed to Russell 3000 corporate boards.[114] In a five-month span, 130 directors appointed were African American, in comparison to the 38 African American directors who were appointed in the preceding five months.[115] Although tracking the acceleration

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111 See Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28(6) J. Mgmt. 747, 749, 754 (2002).

112 See Dhir, supra note 84, at 42.

113 See GAO Report supra note 49, at 18.

114 See Leslie P. Norton, *The Number of Black Board Members Surged After George Floyd's Death*, Barron's, Oct. 27, 2020, available at: https://www.barrons.com/articles/after-george-floyds-death-the-number-of-black-board-members-surges-51603809011.

115 Id.

in board diversity is feasible for some Russell 3000 companies, many of the companies do not disclose the racial makeup of the board, making it impossible to more broadly assess the impact of recent events on board diversity.

V. Stakeholder Perspectives

To gain a better understanding of the current state of board diversity, benefits of diversity, causes of underrepresentation on boards, and potential remedies to address underrepresentation, Nasdaq spoke with leaders representing a broad spectrum of market participants and other stakeholders. Nasdaq sought their perspectives to inform its analysis of whether the proposed rule changes would promote the public interest and protection of investors without unduly burdening competition or conflicting with existing securities laws. The group included representatives from the investor, regulatory, investment banking, venture capital and legal communities. Nasdaq also spoke with leaders of civil rights and corporate governance organizations, and organizations representing the interests of private and public companies, including Nasdaq-listed companies. Specifically, Nasdaq obtained their views on:

- the current state of board diversity in the U.S.;
- the inherent value of board diversity;
- increasing pressure from legislators and investors to improve diverse representation on boards and board diversity disclosure;
- whether a listing rule related to board diversity is in the public interest;
- how to define a “diverse” director; and
- the benefits and challenges of various approaches to improving board diversity disclosures and increasing diverse representation on boards, including mandates and disclosure-based models.

The discussions revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics. The majority of organizations also were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can accelerate the rate of change, they expressed that a disclosure-based approach is less controversial, would spur companies to take action, and make meaningful progress on board diversity. Business leaders also expressed concern that smaller companies would require flexibility and support to meet with any time-sensitive objectives to add diverse directors. Some stakeholders highlighted additional challenges that smaller companies, and companies in certain industries, may face finding diverse board members. Leaders from across the spectrum of stakeholders that Nasdaq surveyed reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand. Leaders from the legal community emphasized that any proposed rule that imposed additional burdens beyond, or is inconsistent with, existing securities laws—by, for example, requiring companies to adopt a diversity policy or include disclosure solely in their proxy statements—would present an additional burden and potentially more legal liability for listed companies.

VI. U.S. Regulatory Framework

As detailed above, diversity has been the topic of a growing number of studies over the past decade and, in recent years, investors have been increasingly advocating for

greater diversity among directors of public companies.[116] In recent years, diversity has become increasingly important to the public, including institutional investors, pension funds, and other stakeholders who believe that board diversity enhances board performance and is an important factor in the voting decisions of some investors.[117] Legislators increasingly are taking action to encourage corporations to diversify their boards and improve diversity disclosures.[118]

A. *SEC Diversity Disclosure Requirements – Background*

In 2009, the Commission sought comment on whether to amend Item 407(c)(2)(v) of Regulation S-K to require disclosure of whether a nominating committee considers

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116 In 2009, when the Commission proposed enhancements to proxy disclosures, including addressing board diversity disclosures, the Commission received over 130 comment letters related to its proposal, including from corporations, pension funds, professional associations, trade unions, accounting firms, law firms, consultants, academics, individual investors and other interested parties. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,335; see also David A. Katz and Laura McIntosh, *Raising the Stakes for Board Diversity*, Law.com (July 22, 2020), available at: https://www.law.com/newyorklawjournal/2020/07/22/raising-the-stakes-for-board-diversity/?slreturn=20201017021522; Office of the Illinois State Treasurer, *The Investment Case For Board Diversity: A Review of the Academic and Practitioner Research on the Value of Gender and Racial/Ethnic Board Diversity for Investors* 7 (Oct. 2020), available at: https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20(oct%202020).pdf.

117 See Comments on Proposed Rule: Proxy Disclosure and Solicitation Enhancements, available at: https://www.sec.gov/comments/s7-13-09/s71309.shtml. See also CGLytics, *Diversity on the Board? Metrics Used by Fortune 100 Companies* (June 29, 2020), available at: https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/; Office of the Illinois State Treasurer, supra note 116.

118 For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one director from an Underrepresented Community. See Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020). Washington requires companies headquartered in the state to have at least 25% women on the board by 2022 or provide certain disclosures. See Wash. Subst. S.B. 6037 (June 11, 2020). At least eleven states have proposed diversity-related requirements. See Hatcher and Latham, supra note 15.

diversity when selecting a director for a position on the board.[119] The Commission received more than 130 comment letters on its proposal. According to a University of Dayton Law Review analysis of those comment letters, most were submitted by groups with a specific interest in diversity, or by institutional investors, including mutual funds, pension funds, and socially responsible investment funds.[120] Further, the analysis showed that 56 commenters addressed the issue of diversity disclosures, and only five of those 56 commenters did not favor such disclosure.[121] Twenty-seven of the 56 mentioned gender diversity, 18 mentioned racial diversity, and 13 mentioned ethnic diversity. However, neither the proposed rule nor the final rule defined diversity.[122]

Ten years after adopting board diversity disclosure rules, the Commission staff revisited the rules by establishing new Compliance and Disclosure Interpretations ("C&DI").[123] However, the staff did not provide a definition of diversity, and therefore issuers currently are not required to disclose the race, ethnicity or gender of their directors or nominees.

Currently, Item 401(e)(1) of Regulation S-K requires a company to "briefly discuss the specific experience, qualifications, attributes or skills that led to the

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119 See Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076, 35,084 (July 17, 2009) (proposed rule).

120 See Thomas Lee Hazen and Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37:1 Univ. Dayton L. Review 41, 51, n. 82 (citing the comment letters).

121 Of the five comments that opposed diversity disclosure, three stated that diversity was an important value. See Comments on Proposed Rule, supra note 117; see also Hazen and Broome, supra note 120, at 54 n.88 (citing the 56 comment letters).

122 See Hazen and Broome, supra note 120, at 53 n. 84-86.

123 See Securities and Exchange Commission Compliance & Disclosure Interpretations, available at: https://www.sec.gov/divisions/corpfin/cfguidance.shtml.

conclusion that the person should serve as a director."[124] The C&DI, in response to Question 116.11, clarifies that if a board considered a director's self-identified diversity characteristics (*e.g.*, race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background) during the nomination process, and the individual consents to disclose those diverse characteristics, the Commission staff "would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered."[125]

Rather than providing a specific definition of diversity, the C&DI provides a non-exhaustive list of examples of diverse characteristics that a company could consider for purposes of Item 401(e)(1), including "race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background."[126] Additionally, the Commission staff stated that any description of a company's diversity policy would be expected to include "a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics."[127]

Item 407(c)(2)(vi) of Regulation S-K requires proxy disclosure regarding whether diversity is considered when identifying director nominees and, if so, how. In addition, if the board or nominations committee has adopted a diversity policy, the company must

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124 See 17 C.F.R. § 229.401(e)(1).

125 See Securities and Exchange Commission, Regulation S-K Compliance & Disclosure Interpretations (Sept. 21, 2020), Question 116.11 Answer, available at: https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

126 Id.

127 Id.

describe how the policy is implemented and its effectiveness is assessed.[128] When adopting Item 407(c)(2)(vi), the Commission explained:

> We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result, we have not defined diversity in the amendments.[129]

Moreover, Item 407(c)(2)(vi) does not require companies to adopt a formal policy and does not require them to explain why they have not. It also does not require public disclosure of board-level diversity statistics.

B. *Weaknesses of Current Diversity Disclosure Requirements*

Given the broad latitude afforded to companies by the Commission's rules related to board diversity and proxy disclosure, current reporting of board-level diversity statistics is unreliable and unusable to investors. This is due to myriad data collection challenges, including the scarcity of reported information, the lack of uniformity in the information that is disclosed and inconsistencies in the definitions of diversity characteristics across companies.[130] Nasdaq recently began examining the state of board diversity among its listed companies. While conducting that research, Nasdaq encountered multiple key challenges, such as: (1) inconsistent disclosure and definitions of diversity across companies; (2) limited data on diverse characteristics outside of gender; (3) inconsistent or no disclosure of a director's race, ethnicity, or other diversity

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128 See 17 C.F.R. § 229.407(c)(2)(vi).

129 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,344.

130 See Petition for Rulemaking (July 6, 2017), available at: https://www.sec.gov/rules/petitions/2017/petn4-711.pdf.

attributes (*e.g.*, nationality); (4) difficult-to-extract data because statistics are often embedded in graphics; and (5) aggregation of information, making it difficult to separate gender from other categories of diversity. Investors and data analysts have raised similar criticisms.

As the Illinois Treasurer observed, the paucity of data on race and ethnicity creates barriers to investment analysis, due diligence, and academic study.[131] For example, the scarcity of such data is an impediment to academics who want to study the performance impact of racially diverse boards.[132] Nasdaq is concerned that investors also face the many data collection challenges Nasdaq encountered, rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions. Acting Chair Allison Herren Lee expressed similar concerns, stating that the current SEC disclosure requirements have "led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. . . . And the current state of disclosure reveals the shortcomings of a principles-based materiality regime in this area."[133]

Some stakeholders believe there is a correlation between companies that disclose the gender, racial and ethnic composition of their board, and the number of diverse directors on those companies' boards.[134] Currently, the lack of reliable and consistent

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131 See Press Release, *Illinois State Treasurer Frerichs Calls on Russell 3000 Companies to Disclose Diversity Data* (Oct. 28, 2020), available at https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/october2020_russell3000.pdf.

132 See Office of Illinois State Treasurer, supra note 116, at 3-4.

133 See Lee, supra note 27.

134 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 ("Although the[se] amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition. A board may determine, in connection

data makes it difficult to measure diversity in the boardroom, and a common set of standards for diversity definitions and disclosure format is greatly needed. At present, U.S. companies must navigate a complex patchwork of federal and state regulations and disclosure requirements. The limited disclosure currently provided voluntarily, which is primarily focused on gender (due in part to that data being the most readily available), fails to provide the full scope of a board's diverse characteristics.[135] It is difficult to improve what one cannot accurately measure. This lack of transparency is impacting investors who are increasingly basing public advocacy, proxy voting and direct shareholder-company engagement decisions on board diversity considerations.[136]

C. *Widespread Support for Updating Diversity Disclosure Requirements*

Nasdaq's surveys of investors and reviews of their disclosed policies and actions show that board diversity is a priority when assessing companies, and investors report, in some cases, relying on intuition when there is a lack of empirical, evidenced-based data. Furthermore, the continued growth of ESG investing raises the importance of quality data, given the data-driven nature of investment products such as diversity-specific indices and broader ESG funds.

Shareholders have a unique platform from which to engage and influence a company's position on important topics like diversity. Similarly, Nasdaq, like other self-

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with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity."); see also Office of Illinois State Treasurer, supra note 116, at 3.

135 See, e.g., CGLytics, supra note 117, at https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/; Petition for Amendment of Proxy Rule, supra note 86; Office of Illinois State Treasurer, supra note 116.

136 See Office of the Illinois State Treasurer, *Russell 3000 Board Diversity Disclosure Initiative*, https://www.illinoistreasurer.gov/Financial_Institutions/Equity,_Diversity__Inclusion/Russell_3000_Board_Diversity_Disclosure_Initiative (last accessed Nov. 25, 2020).

regulatory organizations, is well positioned to establish practices that will assist in carrying out Nasdaq's mandate to protect investors and remove impediments from the market. Various stakeholders, including Nasdaq, believe that clear and concise annual disclosure of board diversity information that disaggregates the data by race, ethnicity, gender identity, and sexual orientation will provide the public, including key stakeholders, with a better sense of a company's approach to improving corporate diversity and the support needed to effectuate any changes. Required disclosures also would eliminate the number of shareholder proposals asking for these key metrics and the need for companies to respond to multiple investor requests for information.[137] Moreover, companies manage issues more closely and demonstrate greater progress when data is available.[138]

In 2015, nine large public pension funds that collectively supervised $1.12 trillion in assets at the time petitioned the Commission to require registrants to disclose information related to, among other things, the gender, racial, and ethnic diversity of the registrant's board nominees.[139] In 2017, Human Capital Management Coalition, which described itself as a group of institutional investors with $2.8 trillion in assets at the time, made a similar petition to the Commission.[140] Additionally, Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors.[141] More recently, in January 2021, Blackrock published its annual proxy voting guidelines

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137 See Petition for Rulemaking, supra note 130, at 2.

138 See, e.g., Gwen Le Berre, Parametric, *Investors Need Data to Make Diversity a Reality* (Aug. 24, 2020), https://www.parametricportfolio.com/blog/investors-need-data-to-make-diversity-a-reality.

139 See Petition for Amendment of Proxy Rule, supra note 86.

140 See Petition for Rulemaking, supra note 130.

141 See Vanguard 2020 Annual Report supra note 13.

encouraging boards to disclose demographics related to board diversity, including, but not limited to, gender, ethnicity, race, age, and geographic location.[142] In October 2020, the Illinois Treasurer spearheaded an initiative along with twenty other investor organizations, asking for all companies in the Russell 3000 Index to disclose the composition of their board, including each board member's gender, race, and ethnicity.[143] And in August 2020, State Street Global Advisors reiterated their call for U.S. companies in State Street's portfolio to disclose board-level diversity characteristics, including the racial and ethnic makeup of directors.[144]

The largest proxy advisory firms have aligned their voting policies to encourage increased board diversity disclosure. Institutional Shareholder Services ("ISS") recently adopted a new voting policy under which it will identify boards of companies in the Russell 3000 or S&P 1500 that "lack racial and ethnic diversity (or lack disclosure of such)" in 2021 and, beginning in 2022, will recommend voting against the chair of the nominating committee of such companies. The stated goal of the policy is "helping investors identify companies with which they may wish to engage and to foster dialogue between investors and companies on this topic."[145] In 2017, proxy advisory firm Glass Lewis announced a policy regarding board gender diversity that took effect in 2019.

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142 See Blackrock Investor Stewardship Proxy Voting Guidelines for U.S. Securities, available at https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

143 See Press Release, supra note 131.

144 See Richard, F. Lacaille, State Street Global Advisors, Diversity Strategy, Goals & Disclosure: Our Expectation for Public Companies, dated August 27, 2020, available at https://www.ssga.com/us/en/institutional/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies.

145 See ISS Governance, *ISS Announces 2021 Benchmark Policy Updates* (November 12, 2020), available at: https://www.issgovernance.com/iss-announces-2021-benchmark-policy-updates/.

Glass Lewis generally recommends voting against the nominating committee chair of a board that has no female members, and when making such a recommendation, the firm closely examines the company's disclosure of its board diversity considerations and other relevant contextual factors.[146] On November 24, 2020, Glass Lewis announced the publication of its 2021 Proxy Voting Policy Guidelines, which expand its board gender diversity policy to vote against nominating chairs if there are fewer than two female directors, beginning in 2022.[147] Most notably, beginning with the 2021 proxy season, the company will include an assessment report of company proxy disclosures relating to board diversity, skills and the director nomination process for companies in the S&P 500 index. According to Glass Lewis, it "will reflect how a company's proxy statement presents: (i) the board's current percentage of racial/ethnic diversity; (ii) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; (iii) whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (aka 'Rooney Rule'); and (iv) board skills disclosure."[148]

Congress and members of the Commission also have weighed in on the importance of improving board transparency. In 2017, Representative Carolyn Maloney introduced the "Gender Diversity in Corporate Leadership Act of 2017," which proposed

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146 See Glass Lewis, *2019 Policy Guideline Updates* (Oct. 24, 2018), available at: https://www.glasslewis.com/2019-policy-guideline-updates-united-states-canada-shareholder-initiatives-israel/.

147 See Glass Lewis, *2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice - United States* (2020), available at: https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b.

148 Id.

requiring public companies to provide proxy disclosure regarding the gender diversity of the board of directors and nominees.[149] In November 2019, the U.S. House of Representatives, with bipartisan support, passed the "Corporate Governance Through Diversity Act of 2019," which requires certain registrants annually to disclose the racial, ethnic, and gender composition of their boards and executive officers, as well as the veteran status of any of those directors and officers, in their proxy statements.[150] The bill also requires the disclosure of any policy, plan or strategy to promote racial, ethnic, and gender diversity among these groups. Legislators have proposed a companion bill in the U.S. Senate.[151]

The Council of Institutional Investors ("CII"), U.S. Chamber of Commerce,[152] National Urban League, Office of New York State Comptroller, and the National Association for the Advancement of Colored People praised the House of Representatives' for passing the 2019 legislation. According to the U.S. Chamber of Commerce's members and associations, it has become increasingly important to see improvements in board diversity.[153] Additionally, CII's General Counsel stated that the

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149 Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017).

150 Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019).

151 Improving Corporate Governance Through Diversity Act of 2019, S. 360, 116th Cong. (2019).

152 See Letter from Various U.S. Chamber of Commerce Associations and Members to Chairman Mike Crapo and Ranking Member Sherrod Brown, U.S. House Committee on Banking, Housing, and Urban Affairs (July 27, 2020), available at: https://www.uschamber.com/sites/default/files/200727_coalition_h.r._5084_senatesmallbusiness.pdf.

153 Id.

proxy statement disclosure requirement in the legislation "could contribute to enhancing U.S. public company board consideration of diversity."[154]

More recently, SEC Commissioners have called for greater transparency surrounding ethnic diversity on company boards. In a September 2020 speech titled "Diversity Matters, Disclosure Works, and the SEC Can Do More" given at the CII Fall Conference, Acting Chair Lee advocated advancing corporate diversity and for various approaches by which the Commission could promote diversity, including among other things, strengthening the Commission staff's C&DI's guidance related to disclosure of board candidate diversity characteristics.[155] Acting Chair Lee stated:

> [The SEC has] largely declined to require diversity-related disclosure. In 2009, we adopted a requirement for companies to disclose if and how diversity is considered as a factor in the process for considering candidates for board positions, including any policies related to the consideration of diversity. In 2018, we issued guidance encouraging the disclosure of self-identified characteristics of board candidates. While I appreciate these measures, given that women of color hold just 4.6% of Fortune 500 board seats and less than one percent of Fortune 500 CEOs are Black, it's time to consider how to get investors the diversity information they need to allocate their capital wisely.[156]

VII. Nasdaq's Proposal

A. *Overview of Disclosure* ***Requirements***

Disclosure of information material to an investor's voting and investment decision is the bedrock of federal securities laws. The Exchange's listing rules require companies to comply with federal securities laws, including the registration requirements under the Securities Act of 1933. Once listed, companies are obligated to solicit proxies and file all

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154 See Joe Mont, *SEC, Congress seek better diversity disclosures*, Compliance Week (Feb. 20, 2019), https://www.complianceweek.com/sec-congress-seek-better-diversity-disclosures/24802.article.

155 See Lee, supra note 27.

156 Id. Commissioner Crenshaw also expressed disappointment with the Commission's silence on diversity. See Crenshaw, supra note 8.

annual and periodic reports with the Commission under the Act at the prescribed times.[157] In discharging its obligation to protect investors, Nasdaq monitors listed companies for compliance with those disclosure obligations, and the failure to do so results in a notice of deficiency or delisting.

Proposing listing rules designed to enhance transparency is well within the Exchange's delegated regulatory authority, provided they do not conflict with existing federal securities laws. For example, Nasdaq already requires listed companies to publicly disclose compensation or other payments by third parties to a company's directors or nominees, notwithstanding that such disclosure is not required by federal securities laws. In approving that proposed rule, the Commission noted:

> To the extent there are certain factual scenarios that would require disclosure not otherwise required under Commission rules, we believe that it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Act, that are designed to improve transparency and accountability into corporate decision making and promote investor confidence in the integrity of the securities markets.[158]

Nasdaq is concerned that while investors have increasingly emphasized that they consider board diversity information to be material, the current lack of transparency and consistency makes it difficult for Nasdaq and investors to determine the state of diversity among listed companies as well as each board's philosophy regarding diversity. Investors also have voiced dissatisfaction about having to independently collect board-level data about race, ethnicity, and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.[159] Moreover, in some

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157 See Nasdaq Rulebook, Rules 5250(c) and (d).

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

159 See Petition for Amendment of Proxy Rule, supra note 86, at 2.

instances, based on Nasdaq's own investigation, such information is either unavailable, or, if available, not comparable across companies. To the extent investors must obtain this information on their own through an imperfect process, Nasdaq is concerned that it increases information asymmetries between larger stakeholders, who are able to collect this data directly from companies, and smaller investors, who must rely on incomplete public disclosures. For all investors who take on the burden of independently obtaining the current information, there is a cost and time burden related to the data collection.

Nasdaq believes that additional disclosure regarding a board's composition and philosophy related to board diversity will improve transparency and accountability into corporate decision making. Nasdaq proposes to improve transparency regarding board diversity by requiring all listed companies to publicly disclose unbundled, consistent data utilizing a uniform, transparent framework on their website or in their proxy statement or information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) under proposed Rule 5606. Similarly, Nasdaq proposes to promote accountability in corporate decision-making by requiring companies that do not meet the applicable diversity objectives of proposed Rule 5605(f)(2) to provide investors with an alternative public disclosure of the board's reasons for not doing so under proposed Rule 5605(f)(3). The proposal is a disclosure-based framework, not a mandate. Nasdaq designed the proposal to avoid a conflict with existing disclosure requirements under Regulation S-K and to mitigate additional burdens for companies by providing them with flexibility to provide such disclosure in advance of the company's next annual meeting of shareholders on their website, in their proxy statement or information statement, or, if the Company

does not file a proxy, in its Form 10-K or 20-F, and not requiring them to adopt a formal diversity policy.

Nasdaq proposes to foster consistency in board diversity data disclosure by defining "Diverse" under proposed Rule 5605(f)(1) as "an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+," and by adopting the following definitions under proposed Rule 5605(f)(1):

- "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.
- "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.
- "Underrepresented Minority" means 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.

The terms in the proposed definition of "Underrepresented Minority" reflect the EEOC's categories and are construed in accordance with the EEOC's definitions, which are set forth in Exhibit 3 - Board Diversity Matrix and Instructions.[160] The terms in the proposed definition of LGBTQ+ are similar to the identities defined in California's A.B.

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[160] While the EEO-1 report refers to "Hispanic or Latino" rather than Latinx, Nasdaq proposes to use the term Latinx to apply broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.

979, described below, but have been expanded to include the queer community based on Nasdaq's consultation with stakeholders, including human rights organizations.[161]

When defining "Diverse," Nasdaq considered various state and federal legislation, stakeholder sentiments, and academic and empirical studies. For example, California requires public companies headquartered in the state to have at least one individual who self-identifies as a female on the board by 2019 under S.B. 826[162] and at least one director who is a member of an "underrepresented community" by 2021 under A.B. 979.[163] S.B. 826 defines "Female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth," consistent with legislation proposed by New Jersey, Michigan and Hawaii related to board gender diversity.[164] A.B. 979 considers directors from underrepresented communities to be individuals who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender. Since S.B. 826 was passed, 669 women have joined public company boards in the state and the number of public companies with all male boards has declined from 30% in 2018 to 3% in 2020.[165]

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161 Nasdaq agrees with the United Kingdom Financial Reporting Council that the acronym LGBTQ+ "does not attempt to exclude other groups, nor does it imply that the experiences of people under its umbrella are the same." See Hay et al., supra note 104, at 14.

162 See Cal. S.B. 826, supra note 118.

163 See Cal. A.B. 979, supra note 118.

164 See Cal. S.B. 826, supra note 118. See also N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

165 See California Partners Project, *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards* 4 (2020), available at: https://www.calpartnersproject.org/claimyourseat.

The state of Washington requires public companies whose boards are not comprised of at least 25% directors who self-identify as women by January 1, 2022 to provide public disclosures related to the board's consideration of "diverse groups" during the director nomination process. The state considers "diverse groups" to include "women, racial minorities, and historically underrepresented groups."[166]

As discussed above, Congress has proposed legislation relating to disclosure of racial, ethnic, gender and veteran status among the company's directors. Section 342 of the Dodd-Frank Act defines "minority" as "Black American, Native American, Hispanic American, and Asian American,"[167] and the Diversity Assessment Report for Entities Regulated by the SEC requires the Exchange to report workforce composition data to the SEC based on the EEOC's categories.[168] Most companies are required by law to provide similar workforce data to the EEOC through the EEO-1 Report, which requires employers to report statistical data related to race, ethnicity and gender to the EEOC.[169]

Nasdaq has designed the proposed rule to require all companies to provide consistent, comparable data under proposed Rule 5606 by utilizing the existing EEO-1 reporting categories that companies are already familiar with, and by requiring companies to have, or publicly explain why they do not have, at least two directors who are diverse in terms of race, ethnicity, sexual orientation, or gender identity under proposed Rule

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166 See Wash. Subst. S.B. 6037, supra note 118. At least 11 states have proposed diversity-related requirements. See Hatcher and Latham, supra note 15.

167 See 12 U.S.C. § 5452(g)(3) and Pub. L. 101-73 § 1204(c)(3).

168 See Securities and Exchange Commission, Diversity Assessment Report for Entities Regulated by the SEC, available at: https://www.sec.gov/files/OMWI-DAR-FORM.pdf.

169 All companies with 100 or more employees are required to complete the EEO-1 Report. See U.S. Equal Employment Opportunity Commission, EEO-1: Who Must File, https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-who-must-file (last accessed Nov. 27, 2020).

5605(f)(2). While the EEO-1 report does not currently include sexual orientation or gender identity, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status in recognition of the U.S. Supreme Court's recent decision in *Bostock v. Clayton County* that sexual orientation and gender identity are "inextricably" intertwined with sex.[170]

The proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members. Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. However, the company would have to provide the disclosure under proposed Rule 5605(f)(3) if the company does not also meet the diversity objectives of proposed Rule 5605(f)(2). Nasdaq believes such disclosure would provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

Overall, Nasdaq believes the proposal will enhance investor confidence that board discussions at listed companies that meet the applicable diversity objectives of proposed Rule 5605(f)(2) include the perspectives of more than one demographic group. They will also be confident that boardrooms that do not meet the applicable diversity objectives are having a thoughtful discussion about their reasons for not doing so and publicly explaining those reasons. On balance, the proposal will advance the public interest and

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[170] See Bostock v. Clayton Cty., 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 or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

enhance investor confidence in the integrity of the securities markets by ensuring investors that Nasdaq is monitoring all listed companies to verify that they have the applicable number of Diverse directors under proposed Rule 5605(f) or explain why they do not, and by requiring all listed companies to provide consistent, comparable diversity disclosures.

B. *Board Statistical Disclosure*

Proposed Rule 5606(a) would require each company to publicly disclose, to the extent permitted by applicable law, information on the directors' voluntary self-identified gender and racial characteristics and LGBTQ+ status.

All Nasdaq-listed companies that are subject to proposed Rule 5605(f), whether they choose to have the applicable number of Diverse directors under proposed Rule 5605(f)(2) or to explain why they do not, would be required to make the proposed Rule 5606 disclosure. This proposed rule will assist the Exchange in assessing whether companies meet the diversity objectives of proposed Rule 5605(f)(2). Under proposed Rule 5606(e), Nasdaq proposes to make proposed Rule 5606 operative for listed companies by the later of (1) one calendar year from the Approval Date ("Effective Date"); or (2) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.[171]

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[171] Based on informal feedback requesting that the Exchange better align the compliance date for proposed Rule 5606 with its listed companies' annual shareholder meetings and proxy filings, Nasdaq is amending proposed Rule 5606(e). See Letter from Stephen J. Kastenberg, Ballard Spahr LLP, to Ms. Vanessa Countryman, dated January 14, 2021 ("Ballard Spahr Comment Letter"), available at: https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8245975-227819.pdf.

Pursuant to proposed Rule 5606(a), each company would annually provide its board-level diversity data in a format substantially similar to the Matrix in proposed Rule 5606(a) and attached as Exhibit 3. In accordance with the proposed accompanying instructions to the Matrix, companies are required to provide the Matrix information at least once per year. If, within the same year, a company changes its board composition after it publishes its Matrix, the company may, but is not required to, publish its updated information.

In accordance with proposed Rule 5606(a), a company would provide the total number of directors on its board and include the date the information was collected as the "As of Date." If a director voluntarily self-identifies, each company, other than a Foreign Issuer (as defined under proposed Rule 5605(f)(1)) or Foreign Private Issuer (as defined under Rule 3b-4(b) of the Act),[172] would include the following in a table titled "Board Diversity Matrix," in accordance with the instructions accompanying the proposed disclosure format: (1) the number of directors based on gender identity (female, male, or non-binary[173]); (2) the number of directors based on race and ethnicity (African American or Black, Alaskan Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities[174]); and (3) the number of directors who self-identify as LGBTQ+.

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172 See 17 C.F.R. § 240.3b-4.

173 Nasdaq received informal questions on the definition of "non-binary." As a result, Nasdaq is amending the Matrix to define non-binary as genders that are not solely man or woman; someone who is non-binary may have more than one gender, no gender, or their gender may not be in relation to the gender binary. Although non-binary is included as a category in the proposed Matrix, a company would not satisfy the diversity objectives proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

174 If a director self-identifies in the "Two or More Races or Ethnicities" category, the director must also self-identify in each individual category, as appropriate.

Any director who chooses not to disclose a gender would be included in the "Did Not Disclose Gender" category and any director who chooses not to identify as any race or not to identify as LGBTQ+ would be included in the "Did Not Disclose Demographic Background " category at the bottom of the table. The defined terms for the race and ethnicity categories in the instructions to the Matrix disclosure format are substantially similar to the terms and definitions used in the EEO-1 Report.[175] LGTBQ+ is defined similarly to proposed Rule 5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

In addition to providing the information included in the Matrix, the accompanying directions to the Matrix allows a company to supplement its disclosure including additional information related to its directors.[176] For example, a company may choose to provide the information on a director-by-director basis or may choose to include any skills, experience, and attributes of each of its directors that are relevant to the company.

Below is an example of a Matrix that companies may use, which is also attached as Exhibit 3:[177]

Board Diversity Matrix (As of [DATE])

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175 See supra note 169. Additionally, the EEOC does not categorize LGBTQ+ or any other sexual orientation identifier on its EEO-1 Report. The definitions of the EEO-1 race and ethnicity categories may be found in the appendix to the EEO-1 Report instructional booklet, available at https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-instruction-booklet.

176 While Nasdaq is not proposing to amend the information required by the Matrix, based on commenter feedback, Nasdaq is amending the instructions to clarify that a company is not limited to only providing the information required by the Matrix.

177 Nasdaq is proposing two non-substantive amendments to the Matrix that was provided in the Initial Proposal. First, Nasdaq has alphabetized the gender columns by listing "Female" before "Male." Nasdaq has also replaced the term "American Indian" with "Native American" to conform with the terms used in the EEO-1 report and proposed Rule 5605(f)(1).

Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

Nasdaq recognizes that some Foreign Issuers, including Foreign Private Issuers as defined by the Act,[178] may have their principal executive offices located outside of the United States and in jurisdictions that may impose laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race, ethnicity, or LGBTQ+ status. In such countries, a Foreign Issuer may be precluded by law from requesting diversity data from its directors. Moreover, Nasdaq's definition of Underrepresented Minority proposed in proposed Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Matrix data less relevant for such companies and not useful for investors.

As a result of these limitations, Nasdaq is proposing the option of a separate Matrix for Foreign Issuers and Foreign Private Issuers, as defined by Rule 3b-4(b) of the

[178] See 17 C.F.R. § 240.3b-4.

Act.[179] Similar to other companies, a Foreign Issuer would provide the total number of directors on its board. If a director voluntarily self-identifies, the company would include the following in a table titled "Board Diversity Matrix": (1) the country of its principal executive offices; (2) whether or not the company is a Foreign Private Issuer; (3) whether or not the disclosure is prohibited under the company's home country law; (4) the total number of directors; (5) the number of directors based on gender identity (female, male or non-binary[180]); (6) the number of directors who are considered underrepresented in the country of the principal executive office; and (7) the number of directors who self-identify as LGBTQ+. If a director chooses not to self-identify, the company would select "Did Not Disclose Gender" and/or "Did Not Disclose Demographic Background," as applicable. "Underrepresented Individual in Home Country Jurisdiction" is defined in the instructions to the Matrix as a person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Foreign Private Issuer or Foreign Issuer's principal executive offices (as reported on the Foreign Issuer's Forms F-1, 10-K, 20-F or 40-F).[181] Rule 5605(f)(2)(B)(i) also proposes the same definition for Diverse directors of Foreign Issuers. As described below in Section II.D.i of the Statutory Basis section, this definition is based on the United Nations *Declaration on the Rights of Persons Belonging*

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179 Id. Nasdaq has made a non-substantive amendment to the title of the Matrix for Foreign Issuers to further clarify that it is applicable to Foreign Issuers with a principal executive office outside of the United States.

180 Although non-binary is included as a category in the proposed Matrix, a company would not satisfy any aspect of the diversity objective proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

181 In an effort to provide more clarification, Nasdaq is amending the definition of "Underrepresented Individual in Home Country Jurisdiction" in Exhibit 3 by removing "a Foreign Issuer's home country jurisdiction" and replacing it with "the Foreign Issuer's principal executive office."

to National or Ethnic, Religious and Linguistic Minorities and the United Nations *Declaration on the Rights of Indigenous Peoples*.[182]

Nasdaq is also proposing new Rule 5606(b), under which each company would provide the disclosure described in proposed Rule 5606(a) in advance of the company's next annual meeting of shareholders: (1) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (2) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (1) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.[183] The proposed time period to submit information in the Matrix is aligned with the time period provided in proposed Rule 5605(f)(3) for a company to submit its explanation for why it does not have the applicable number of Diverse directors under proposed Rule 5605(f). Disclosure of the statistical data is not in lieu of any SEC requirements for a company to disclose any required information pursuant to Regulation S-K or any other federal, state or foreign laws or regulations. As described in the instructions to the Matrix and proposed Rule 5606(a), each year following the first year of the disclosure of the Matrix, all companies must include the current year and immediately prior year diversity statistics in its disclosure. If the company publishes the Matrix on its website, the disclosure must remain accessible on the company's website. Additionally, the instructions require companies to publish the Matrix information in a searchable format. If a company uses a graphic or image format

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182 See infra note 337.

183 Nasdaq is amending the proposed Rule 5606(b) to align the timing of this disclosure with the timing of other governance-related disclosures.

(*i.e.,* tif, jpg, gif, png), the company must also include the same information as searchable text or in a searchable table. The searchable information could be included, for example, together with the related graphic or in an appendix to the filing.[184]

Nasdaq is also proposing Rule 5606(c), which exempts the following types of companies from proposed Rule 5606(a): asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series. The exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition. Additionally, Nasdaq is proposing to exempt an acquisition company listed under IM-5101-2 from the requirements of proposed Rule 5606. This approach is similar to other phase-in periods granted to SPACs.

Nasdaq is also proposing Rule 5606(d) to allow newly listed Nasdaq companies to satisfy the requirement of proposed Rule 5606 within one year of listing on Nasdaq. Newly-listed companies include those listing through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2. A newly listed company would be required to provide the information proposed by proposed Rule 5606(a) in

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[184] Nasdaq's clarification on the manner in which companies must provide the Board Diversity Matrix information is a non-substantive amendment to the Initial Proposal.

advance of the company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

If a company does not timely provide the diversity disclosure, Nasdaq will notify the company that it is not in compliance with a listing requirement and begin its existing, standard process to allow the company to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,[185] Nasdaq proposes to amend Rule 5810(c)(2)(A)(iv) to provide companies that fail to adhere to proposed Rule 5606 with 45 calendar days to submit a plan in accordance with Rule 5810(c)(2) to regain compliance. Based on that plan, Nasdaq can provide the company with up to 180 days to regain compliance. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815.

Although proposed Rule 5606 is not identical to current Regulation S-K disclosure requirements, it is similar to, and does not deviate from, the Commission

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[185] Pursuant to Nasdaq Rule 5810(c)(2)(A)(iii), a company is provided 45 days to submit a plan to regain compliance with Rules 5620(a) (Meetings of Shareholders), 5620(c) (Quorum), 5630 (Review of Related Party Transactions), 5635 (Shareholder Approval), 5250(c)(3) (Auditor Registration), 5255(a) (Direct Registration Program), 5610 (Code of Conduct), 5615(a)(4)(D) (Partner Meetings of Limited Partnerships), 5615(a)(4)(E) (Quorum of Limited Partnerships), 5615(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 5640 (Voting Rights). Pursuant to Nasdaq Rule 5810(c)(2)(A)(iv), a company is also provided 45 days to submit a plan to regain compliance with Rule 5250(b)(3) (Disclosure of Third Party Director and Nominee Compensation). A company is generally provided 60 days to submit a plan to regain compliance with the requirement to timely file periodic reports contained in Rule 5250(c)(1).

staff's C&DI related to Items 401(e)(1) and 407(c)(2)(vi) of Regulation S-K. Moreover, the proposed rule provides clarity to the definition of diversity and streamlines investors' desire for clear, complete and consistent disclosures. Nasdaq believes that the format of the Matrix and the information that it will provide offers greater transparency into a company's board composition and will enable the data to be easily aggregated across issuers.[186] Nasdaq also believes that requiring annual disclosure of the data will ensure that the information remains current and easy for investors, data analysts and other parties to track.

C. *Diverse Board Representation or Explanation*

Nasdaq is proposing to adopt new Rule 5605(f)(2) to require each listed company to have, or explain why it does not have, the applicable number of Diverse directors. Generally, the diversity objectives under proposed Rule 5605(f)(2)(A) would include having at least two members of its board of directors who are Diverse, including at least one who self-identifies as Female and one who self-identifies as an Underrepresented Minority or LGBTQ+.[187] The proposal is a disclosure-based framework, not a mandate. A company does not need to provide additional public disclosures if the company demonstrates under proposed Rule 5606 that it meets the applicable diversity objectives of proposed Rule 5605(f)(2). The terms in the proposed definition of "Underrepresented Minority" reflect the EEOC's categories and are construed in accordance with the EEOC's definitions. Nasdaq has provided additional flexibility for Smaller Reporting

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186 Various stakeholders have requested easier aggregation. See Petition for Amendment of Proxy Rule, supra note 86, at 1.

187 Nasdaq has published an FAQ on the Listing Center clarifying that "two members of its board of directors who are Diverse" would exclude emeritus directors, retired directors and members of an advisory board.

Companies, Foreign Issuers (including Foreign Private Issuers), and each company with a board of directors of five or fewer members to meet alternative objectives.

Under proposed Rule 5605(f)(3), if a company chooses to satisfy proposed Rule 5605(f)(2) by explaining why it does not have the applicable number of Diverse directors under proposed Rule 5605(f)(2), the company must: (i) specify the requirements of proposed Rule 5605(f)(2) that are applicable (*e.g.*, the applicable subparagraph, the applicable diversity objectives, and the timeframe applicable to the company's market tier); and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for companies with five or fewer directors). Such disclosure must be provided: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website.[188] If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.[189]

Nasdaq will not evaluate the substance or merits of the company's explanation, but would verify that the company has provided one at the time it files its proxy statement or information statement (or, if the company does not file a proxy, at the time it files its

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188 Nasdaq is amending the proposed Rule 5605(f)(3) to align the timing of this disclosure with the timing of other governance-related disclosures, such as those provided in the proxy, to make it easier for investors to know where a company has provided the disclosure and to give shareholders have access to the information prior to the company's annual shareholder meetings.

189 Nasdaq's clarification on the timing in which a company must provide such disclosure on its website is an amendment to the Initial Proposal.

Form 10-K or 20-F).[190] If the company does not meet the diversity objectives and has not provided any explanation, or has provided an explanation that does not satisfy subparagraphs (i) and (ii) of proposed Rule 5605(f)(3), then the explanation will not satisfy proposed Rule 5605(f)(3). For example, it would not satisfy proposed Rule 5605(f)(3) merely to state that "the Company does not comply with Nasdaq's diversity rule." As described above, the company must specify the requirements of proposed Rule 5605(f)(2) that are applicable, which is intended to provide transparency to investors who are not familiar with Nasdaq's listing rules, and explain the reasons why it does not have the applicable number of Diverse directors. For example, a company could disclose the following to satisfy subparagraph (i) of proposed Rule 5605(f)(3): "As a Smaller Reporting Company listed on the Nasdaq Capital Market tier, the Company is subject to Nasdaq Rule 5605(f)(2)(C), which requires the company to have, or explain why it does not have, at least two Diverse directors, including at least one director who self-identifies as Female. Under Rule 5605(f)(7), the Company may have at least one Diverse director by March 10, 2023, and a second Diverse director by March 10, 2026, or explain its reasons for not doing so. 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."

i. Effective Dates and Phase-in Period

Proposed Rule 5605(f)(7) provides a transition period before companies must fully meet the diversity objectives or explain why they do not upon the initial

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190 Nasdaq's clarification on the timing in which Nasdaq will verify that the company has provided an explanation under proposed Rule 5605(f)(3) is an amendment to the Initial Proposal.

implementation of the rule. Under this transition rule, each NGS, NGM, and NCM listed company (including companies with smaller boards under proposed Rule 5606(f)(2)(D)) must have, or explain why it does not have, at least one Diverse director by the later of: (i) two calendar years after the Approval Date[191] (the "First Effective Date"); or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date. Each company listed on the NGS or NGM tiers must have, or explain why it does not have, two Diverse directors by the later of: (i) four calendar years after the Approval Date (the "Second NGS/NGM Effective Date"); or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date. Each company listed on the NCM tier must have, or explain why it does not have, at least two Diverse directors by the later of: (i) five calendar years after the Approval Date (the "Second NCM Effective Date") or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NCM Effective Date.[192]

For example, if the Approval Date is March 10, 2021, all companies (including companies with smaller boards under proposed Rule 5606(f)(2)(D)) would be required to

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191 The "Approval Date" is the date that the SEC approves the proposed rule.

192 Nasdaq's proposal to permit companies to satisfy Rule 5605(f)(2) by the later of: (i) each respective effective date described above; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of each respective effective date is an amendment to the Initial Proposal.

have, or explain why they do not have, one Diverse director by March 10, 2023 (the First Effective Date). Companies with boards of more than five members would be required to have, or explain why they do not have, two Diverse directors by March 10, 2025 (the Second NGS/NGM Effective Date applicable to NGS/NGM companies only) or March 10, 2026 (the Second NCM Effective Date applicable to NCM companies only). However, if a company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting after the anniversary of the Approval Date in the respective calendar year noted above, it would not be required to satisfy proposed Rule 5605(f)(2) until such filing date. This is intended to better to align listed companies' disclosure requirements with their annual meetings and proxy requirements.[193]

Under proposed Rule 5605(f)(5)(A), a newly listed company on the NGS or NGM tiers that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one Diverse director by the later of: (a) one year from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to the company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its

[193] See Ballard Spahr Comment Letter, supra note 171.

Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(B), a newly listed company on the NCM tier that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2) by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(D), any newly listed company on any market tier that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

These "phase-in" periods apply to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a business combination with a SPAC.

Under proposed Rule 5605(f)(7)(E), any company listing before the end of the phase-in periods described in proposed Rule 5605(f)(7) would have the remaining length of the phase-in periods to satisfy proposed Rule 5605(f)(2), or the two year period set forth in proposed Rule 5605(f)(5), whichever is longer. As a result, companies listing on the NGS or NGM tiers after the expiration of the phase-in periods provided by proposed Rule 5605(f)(7) would be provided with at least one year from the date of listing to satisfy the applicable requirement of proposed Rule 5605(f)(2) to have, or explain why they do not have, at least one Diverse director, and one additional year to satisfy the requirement to have, or explain why they do not have, at least two Diverse directors. Companies listing on the NCM tier after the expiration of the phase-in periods provided by proposed Rule 5605(f)(7) would be provided with at least two years from the date of listing to satisfy the applicable requirement of proposed Rule 5605(f)(2) to have, or explain why they do not have, at least two Diverse directors. This is intended to provide newly public companies with additional time to meet the diversity objectives of proposed Rule 5605(f)(2), recognizing that newly public companies may have unique governance structures, such as staggered boards or director seats held by venture capital firms, that require additional timing considerations when adjusting the composition of the board of directors. It is also intended to provide additional flexibility to companies on the NCM tier in recognition that such companies are typically smaller and may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For example, if the Approval Date is March 10, 2021, all companies (including companies with smaller boards) would be required to have, or explain why they do not

have, one Diverse director by March 10, 2023. Companies with boards of more than five members would be required to have, or explain why they do not have, at least two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies) (or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting in each respective year, whichever is later). If a company lists on the NGS or NGM tier on January 1, 2023, it would be required to have, or explain why it does not have, at least one Diverse director by the later of January 1, 2024 and the date it files its proxy statement for its 2024 annual shareholders meeting (or, if the Company does not file a proxy, in its Form 10-K or 20-F), rather than March 10, 2023. Similarly, if a company lists on the NCM tier on September 1, 2025 and has a board of more than five members, it would be required to have at least two Diverse directors by the later of September 1, 2027 and the date of the filing of the proxy statement for its 2027 annual shareholders meeting (or, if the company does not file a proxy, in its Form 10-K or 20-F), rather than March 10, 2026.

Under proposed Rule 5605(f)(7)(F), a company listed on the NCM tier that transfers to the NGS or NGM tiers after the Approval Date, but prior to the expiration of the phase-in periods provided by proposed Rule 5605(f)(7), would be provided with the later of the periods set forth in proposed Rule 5605(f)(7)(C) or one year from the date of transfer. As a result, if a company transfers from NCM to NGS/NGM, they still have the benefit of the phase-in for NCM, or one year from the date of transfer, whichever is later. For example, if a U.S. company with a board of more than five members transfers from the NCM tier to the NGS tier on August 1, 2024, and already has at least one Diverse

director, it would be required to have, or explain why it does not have, at least two Diverse directors by the later of August 1, 2025 and the date it files its proxy statement for its 2025 annual shareholders meeting, rather than March 10, 2025. However, if such company does not have at least one Diverse director, it would be required to have, or explain why it does not have, at least two Diverse directors by August 1, 2025 (or the date it files its proxy statement for its annual shareholders meeting in each respective year, whichever is later).

Nasdaq believes these proposed periods are consistent with the phase-in periods for Nasdaq's other board composition requirements. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and with the majority independent board requirement of proposed Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement. In addition, Rule 5620 and IM-5620 requires each new listing to hold its first annual shareholders within one-year after its first fiscal year-end following listing. Therefore, Nasdaq believes it is appropriate to provide each new listing additional time to satisfy proposed Rule 5605(f)(2) if the date it files its proxy statement for the company's annual shareholders meeting subsequent to the company's listing is later than the anniversary of listing.

ii. Foreign Issuers

Nasdaq recognizes that the EEOC categories of race and ethnicity may not extend to all countries globally because each country has its own unique demographic composition. However, Nasdaq observed that on average, women tend to be underrepresented in boardrooms across the globe, holding an estimated 16.9% of board seats in 2018.[194] As an official supporter of the United Nations Sustainable Stock Exchanges Initiative, Nasdaq recognizes that ensuring women have equal opportunities for leadership in economic decision making is one of the United Nations Sustainable Development Goals to be accomplished by 2030.[195] However, studies estimate that at current rates, it could take 18[196] to 34 years[197] for U.S. companies to achieve gender parity on their boards.

Accordingly, under proposed Rule 5605(f)(2)(B), each Foreign Issuer with a board of more than five members must have, or explain why it does not have, at least two Diverse directors on its board, including at least one Female. Nasdaq proposes to provide Foreign Issuers with additional flexibility in that Foreign Issuers may satisfy the diversity objective by having two Female directors. In addition, Foreign Issuers may also satisfy the diversity objective by having one Female director, and one individual who self-identifies as (i) LGBTQ+ or (ii) an underrepresented individual based on national, racial,

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194 See Deloitte, *Women in the Boardroom*, supra note 92.

195 See United Nations Sustainable Stock Exchanges Initiative, *Gender Equality*, https://www.un.org/sustainabledevelopment/gender-equality/ (last accessed Nov. 24, 2020).

196 See McKinsey & Company, supra note 31, at 17.

197 See GAO Report, supra note 49, at 9 (estimating "it could take about 10 years from 2014 for women to comprise 30 percent of board directors and more than 40 years for the representation of women on boards to match that of men").

ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form F-1, 10-K, 20-F or 40-F).[198] Alternatively, a company could satisfy proposed Rule 5605(f)(2)(B) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule.

Nasdaq proposes to define a Foreign Issuer under proposed Rule 5605(f)(1) as (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that: (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act;[199] and (ii) has its principal executive offices located outside of the United States. This definition will include all Foreign Private Issuers (as defined in Rule 5005(a)(19), regardless of where they are headquartered or whether they file domestic SEC reports),[200] and any foreign issuers that are not foreign private issuers so long as they are also headquartered outside of the United States. This is designed to recognize that companies that are not Foreign Private Issuers but are headquartered outside of the United States are foreign companies notwithstanding the fact that they file domestic SEC reports. It is also designed to exclude companies that are domiciled in a foreign jurisdiction without having a physical presence in that country.

Proposed Rule 5605(f)(5)(C) will allow any company that ceases to be a Foreign Issuer to satisfy the diversity objectives of proposed Rule 5605(f) by the later of: (i) one

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198 To provide more clarity, Nasdaq is amending the definition of "Diverse" by removing "a company's home country jurisdiction" and replacing it with "the company's principal executive office (as reported on the company's Form F-1, 10-K, 20-F or 40-F)."

199 See 17 C.F.R. § 240.3b-4(b) ("The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.").

200 Under Nasdaq Rule 5005(a)(19), the term Foreign Private Issuer has "the same meaning as under Rule 3b-4 under the Act."

year from the date that the company no longer qualifies as a Foreign Issuer; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event. Nasdaq proposes to define "board of directors" in proposed Rule 5605(f)(2)(B)(i)(b) to mean, in the case of a Foreign Issuer with a two-tiered board system, the company's supervisory or non-management board, which is consistent with the SEC's definition in Rule 10A-3(e)(2) of the Exchange Act.[201]

Nasdaq also proposes to revise Rule 5615 and IM-5615-3, which currently permit a Foreign Private Issuer to follow home country practices in lieu of the requirements set forth in the Rule 5600 Series, subject to several exclusions. Nasdaq proposes to revise Rule 5615 and IM-5615-3 to add Rules 5605(f) and 5606 to the list of excluded corporate governance rules. As a result, Foreign Private Issuers must satisfy the requirements of proposed Rules 5605(f) and 5606 and may not follow home country practices in lieu of such requirements. However, Foreign Private Issuers that elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, may satisfy the requirements of proposed Rule 5605(f) by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

iii. Smaller Reporting Companies

Smaller companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have

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[201] See 17 CFR § 240.10A-3(e)(2) ("In the case of foreign private issuers with a two-tier board system, the term board of directors means the supervisory or non-management board."). Nasdaq's clarification on the definition of "board of directors" for a Foreign Issuer is an amendment to the Initial Proposal.

the resources necessary to compensate an additional director or engage a search firm to search outside of directors' networks. Recognizing the resource constraints smaller companies face, Nasdaq proposes to provide each Smaller Reporting Company with additional flexibility. Specifically, these companies could satisfy the two Diverse directors objective under proposed Rule 5605(f)(2)(C) by having two Female directors.

Like other companies, Smaller Reporting Companies could also satisfy the diversity objectives by having one Female director and one director who self-identifies as either (i) an Underrepresented Minority, or (ii) a member of the LGBTQ+ community. Alternatively, a company could satisfy proposed Rule 5605(f)(2)(C) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule. Under proposed Rule 5605(f)(1), Nasdaq proposes to define a Smaller Reporting Company as set forth in Rule 12b-2 under the Act.[202]

Proposed Rule 5605(f)(5)(C) will allow any company that ceases to be a Smaller Reporting Company to satisfy the requirements of proposed Rule 5605(f) by the later of: (i) one year from the date that the company no longer qualifies as a Smaller Reporting Company; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event.

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[202] Under 12b-2 of the Act, a Smaller Reporting Company "means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than $250 million; or (2) Had annual revenues of less than $100 million and either: (i) No public float; or (ii) A public float of less than $700 million." See 17 C.F.R. § 240.12b-2.

iv. Companies with Smaller Boards

Nasdaq considered comments that it should "amend the proposed rules to allow greater flexibility for companies with relatively small boards."[203] Nasdaq believes that companies with smaller boards may face similar resource constraints to those of Smaller Reporting Companies. However, not all companies with small boards are Smaller Reporting Companies, and therefore the alternative diversity objective provided to Smaller Reporting Companies may not be available to them. Further, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy proposed Rule 5605(f)(2) by adding additional directors. For example, two Diverse directors on a five member board comprise 40% of the board, whereas two Diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two Diverse directors and expands its board to satisfy proposed Rule 5605(f)(2), it may require the company to incur additional costs through director compensation and D&O insurance.

Accordingly, Nasdaq proposes to adopt Rule 5605(f)(2)(D) to require a company with a board of directors of five or fewer members to have, or explain why it does not have, at least one member of its board of directors who is Diverse. Nasdaq seeks to avoid complexity for companies that attempt to satisfy the diversity objective by adding a Diverse director.[204] To prevent such companies from being subject to a higher threshold

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203 See Ballard Spahr Comment Letter, supra note 171.

204 See e.g. David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *Gender Diversity and Board Quotas*, New York Law Journal (July 25, 2018), available at: https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26150.18.pdf ("California legislators dispute that the bill requires men to be displaced by women, noting that boards can simply increase their size. This may be easier said than done, however: Because the required quota increases with board size, a company with a four-

by virtue of adding directors, Nasdaq proposes to clarify in proposed Rule 5605(f)(2)(D) that if a company has five members on its board of directors before becoming subject to proposed Rule 5605(f), then it shall not become subject to the requirement of subparagraphs (A), (B), or (C) to have, or explain why it does not have, at least two members of its board of directors who are Diverse if it adds one director to satisfy subparagraph (D), thereby becoming a six member board. However, a company would become subject to proposed Rule 5605(f)(2)(A), (B), or (C) if it subsequently expands its board.

v. Cure Period and Grace Period

Nasdaq proposes to adopt Rule 5605(f)(6)(A) and a new Rule 5810(c)(3)(F) to specify what happens if a company (i) does not meet the applicable diversity objectives set forth under proposed Rule 5605(f)(2) and fails to provide the disclosure required by proposed Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in proposed Rule 5605(f)(5) or (7) and therefore fails to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2).[205] In these circumstances, the Listing Qualifications Department will promptly notify the company that it has until the later of its next annual shareholders meeting, or 180 days from the event that caused the deficiency, to cure the deficiency. The company can cure the deficiency either by nominating additional directors so that it satisfies the diversity objective of proposed Rule 5605(f)(2) or by providing the disclosure required by proposed Rule 5605(f)(3). If a company does not regain

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man board that did not wish to force out a current director would need to add three women to accommodate the requirements of the law by 2021.”).

[205] Nasdaq proposes that existing Rules 5810(c)(3)(F) and (G) be renumbered as Rules 5810(c)(3)(G) and (H) respectively.

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. Nasdaq also proposes revising Rule 5810(c)(2)(A)(iv) to make a non-substantive change clarifying that Rule 5250(b)(3) is related to "Disclosure of Third Party Director and Nominee Compensation."

Nasdaq proposes to adopt Rule 5605(f)(6)(B) to provide a grace period for a company that no longer meets the diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on the board of directors.[206] A company that met the diversity objectives of proposed Rule 5605(f)(2) within the timeframes set forth in proposed Rule 5605(f)(7), but no longer meets the diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on its board of directors (for example if a diverse director falls ill or resigns), shall have until the later of: (i) one year from the date of vacancy; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy, to satisfy proposed Rule 5605(f)(2) or (3). In lieu of providing the disclosure required by proposed Rule 5605(f)(3), a company relying on this provision may publicly disclose that it is relying on the grace period provided by proposed Rule 5605(f)(6)(B). Such disclosure must be provided: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. If the company provides such disclosure on its website, then the company must submit such disclosure concurrently with the filing made pursuant to (a)

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[206] Nasdaq's proposed grace period is an amendment to the Initial Proposal.

and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting. This is intended to notify stakeholders of the company's change in board composition without imposing an additional, unexpected disclosure burden on the company.

For example, if the Approval Date is March 10, 2021, all companies (including companies with smaller boards) would be required to have, or explain why they do not have, one Diverse director by March 10, 2023. Companies with boards of more than five members would be required to have, or explain why they do not have, two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies). Company ABC had one Female director on March 10, 2023, and she self-identified as Female in the company's Board Diversity Matrix published in the company's proxy statements for its 2023 and 2024 annual shareholders meetings. She unexpectedly resigned from the company's board on March 10, 2024, prior to April 30, 2024, which is the date the company files its proxy statement for its annual shareholders meeting to be held on June 10, 2024. The company would have until March 10, 2025, to satisfy the diversity objectives of proposed Rule 5605(f)(2), rather than April 30, 2024.

The company could disclose in its 2025 proxy statement or on its website at the time it files its 2025 proxy statement, "The Company is relying on the grace period provided by Nasdaq Rule 5605(f)(6)(B) related to diverse board representation."

vi. Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of proposed Rule 5605(f) ("Exempt Companies"): SPACs, asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule

5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series.

Proposed Rule 5605(f)(5)(C) will allow any company that ceases to be an Exempt Company to satisfy the requirements of proposed Rule 5605(f) by the later of: (i) one year from the date that the company no longer qualifies as an Exempt Company; or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event.

Nasdaq believes it is appropriate to exempt these types of companies from the proposed rule because such companies do not have boards, do not list equity securities, or are not operating companies. These companies are already exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615. Nasdaq is also proposing to exempt SPACs from the requirements of proposed Rule 5605(f), and the post-business combination entity would have at least two years after they complete a business combination. This approach is similar to other phase-in periods granted to SPACs. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering, including a SPAC, one year to fully comply with the independent compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, Rule 5615(b)(1) and SEC Rule 10A-3(b)(1)(iv)(A) allow a newly listed company, including a SPAC, up to one year from the date its registration statement

is effective to fully comply with the applicable audit committee composition requirements.

Under proposed Rule 5605(f)(5)(A) or (B), a newly listed company, including through a business combination with a SPAC, would be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2) by the later of two years from the date of listing or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones depending on the company's market tier. Nasdaq believes it is not appropriate to subject SPACs to proposed Rule 5605(f) prior to completing a business combination because SPACs are shell companies until they complete an acquisition of an operating company. Rather, Nasdaq believes it is appropriate to provide SPACs with the same phase-in provided to other newly listed companies upon completing a business combination, because a SPAC must satisfy all of Nasdaq's initial listing requirements upon completing a business combination, including its requirements related to committee composition and majority independent board.

D. *Alternatives Considered*

Nasdaq considered multiple alternatives in determining whether requiring listed companies to have, or explain why they do not have, a minimum number of diverse directors would better promote the public interest. Nasdaq's reasoned decision-making process included considering: (i) mandate and disclosure-based approaches; (ii) higher and lower diversity objectives; (iii) longer and shorter timeframes; and (iv) broader and narrower definitions of "Diverse."

i. Mandate vs. Disclosure Based Approach

The proposal is a disclosure-based framework, not a mandate. Globally, gender mandates range from requiring at least one woman on the board,[207] requiring two or more women based on board size,[208] or requiring 30 to 50% women on the board.[209] Some

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207 For example, the Securities and Exchange Board of India requires public companies to have at least one woman on the board. See Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, Regulation 17(1)(a) (2015), available at: https://www.sebi.gov.in/legal/regulations/jan-2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-10-2020-_37269.html. Similarly, the Israeli Companies Law requires public companies to have at least one woman on the board. See Paul Hastings, *Breaking the Glass Ceiling: Women in the Boardroom* 139 (2018), available at: https://www.paulhastings.com/genderparity/. In the United States, California's S.B. 826 requires public companies headquartered in California to have at least one woman on the board. See Cal. S.B. 826, supra note 118, at § 301.3(b)(3).

208 For example, California's S.B. 826 requires public companies headquartered in California to have at least two women on the board if their board is comprised of five directors, and at least three women on the board if their board is comprised of six or more directors. See Cal. S.B. 826, supra note 118, at § 301.3(b)(1) and (2). Similar legislation has been proposed in New Jersey, Michigan and Hawaii. See N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

209 For example, Norway imposes a gender quota ranging from 33%-50% depending on board size. See Paul Hastings, supra note 207, at 103. Portugal requires listed companies to have at least 33.3% women on boards by 2020. See Deloitte, *Women in the Boardroom*, supra note 92, at 143. Germany requires public companies with co-determined boards (at least 50% employee representation) to have at least 30% women, and all other listed companies to establish a company-defined target. See Ulrike Binder and Guido Zeppenfeld, Mayer Brown, *Germany Introduces Rules on Female Quota for Supervisory Boards and Leadership Positions* (March 13, 2015), available at https://www.mayerbrown.com/en/perspectives-events/publications/2015/03/germany-introduces-rules-on-female-quota-for-super. Belgium requires listed companies to have at least 33% women on the board. See Deloitte, *Women in the Boardroom*, supra note 92, at 85. Austria requires listed companies with more than 1,000 employees to have at least 30% women on the board. See id. at 81. Iceland requires public companies with more than 50 employees to have at least 40% women on the board. See Act respecting Public Limited Companies No. 2/199, Article 63, available at: https://www.government.is/publications/legislation/lex/2018/02/06/TRANSLATION-OF-RECENT-AMENDMENTS-OF-ICELANDIC-PUBLIC-AND-PRIVATE-LIMITED-COMPANIES-LEGISLATION-2008-2010-including-Acts-13-2010-sex-ratios-and-68-2010-minority-protection-remuneration/. France and Italy both require public companies to have at least 40% women on their boards. See Paul Hastings, supra note 207, at 91; White & Case, *Italy increases gender quotas in corporate boards of listed companies*

mandates vary by board size—for example, Norway imposes different standards for boards of two to three directors, four to five directors, six to eight directors, nine directors and ten or more directors.[210] California imposes a higher standard for gender diversity that boards with five directors or six or more directors must satisfy by the end of 2021 under S.B. 826, and a higher standard for underrepresented communities that boards with five to eight directors and nine or more directors must satisfy by the end of 2022 under A.B. 979. Nasdaq did not observe a common denominator among the mandates applicable to varying board sizes. However, Nasdaq considered observations that a model based on various board sizes could subject companies to a higher threshold by virtue of adding directors.[211] Based on Nasdaq data, the average board size of its listed companies is eight directors.

Soft targets ranging from 25% to 40% women on boards have been suggested by various corporate governance codes and corporate governance organizations. For example, Rule 4.1 of the Swedish Corporate Governance Code (the "Code") provides that listed companies are to "strive for gender balance on the board."[212] Each company's nominations committee is to publish a statement on its website at the time it issues notice of its shareholders meeting "with regard to the requirement in rule 4.1, that the proposed composition of the board is appropriate according to the criteria set out in the Code and

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(Jan. 29, 2020), available at: https://www.whitecase.com/publications/alert/italy-increases-gender-quotas-corporate-boards-listed-companies).

210 See Paul Hastings, supra note 207, at 103.

211 See David A. Katz and Laura A. McIntosh, infra note 204.

212 See Swedish Corporate Governance Board, *The Swedish Corporate Governance Code* §4.1 17 (eff. Jan. 1, 2020), available at: http://www.bolagsstyrning.se/UserFiles/Koden/The_Swedish_Corporate_Governance_Code_1_January_2020.pdf.

that the company is to strive for gender balance."[213] Companies are not required to comply with the Code, "but are allowed the freedom to choose alternative solutions which they feel are better suited to their particular circumstances, as long as they openly report every deviation, describe the alternative solution they have chosen and explain their reasons for doing so."[214] Signifying progress, in 2019, 7% of nominations committees did not issue a statement on board gender balance, compared to 58% in 2013.[215]

In 2015, the Swedish Corporate Governance Board, which is responsible for administering the Code, established a goal to achieve representation of women on boards of small/mid cap (and Swedish companies listed on NGM Equity) and large cap companies of 30% and 35%, respectively, by 2017. Further, the Board aimed to achieve 40% representation of women on boards of all listed Swedish companies by 2020.[216] Based on data as of June 30, 2020, among listed companies, women accounted for 32.7% of board seats on small/mid cap companies and NGM Equity, 38.6% of large cap companies and 34.7% of all listed companies.[217]

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213 See Swedish Corporate Governance Board, *Annual Report 2020* 22 (August 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3930/kodkoll_arsrapport-2020_eng.pdf.

214 See Swedish Corporate Governance Board, *Gender balance on boards of listed companies: The Swedish Corporate Governance Board assesses the situation ahead of this year's AGMs* (February 3, 2015), available at: http://www.bolagsstyrning.se/userfiles/archive/3856/pressrelease_gender_2014-02-03.pdf.

215 See Swedish Corporate Governance Board, *Annual Report 2020*, supra note 213, at 22.

216 See Swedish Corporate Governance Board, *Gender balance*, supra note 214.

217 See Swedish Corporate Governance Board, *Statistics regarding gender balance* (July 15, 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3922/200715_gender_balance_on_boards.pdf; see also *Sammanfattning*, available at http://www.bolagsstyrning.se/userfiles/archive/3922/statistik_konsfordelning_2020.pdf.

In the United Kingdom, the Financial Conduct Authority requires companies with a premium listing on the London Stock Exchange to publicly disclose whether or not they comply with the Financial Reporting Council's U.K. Corporate Governance Code (the "U.K. Code"), and if not, to explain their reasons for non-compliance.[218] Provision 23 of the U.K. Code requires each company to publicly describe "the work of the nomination committee, including . . . the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives,"[219] and Principle J states that board appointments and succession planning should, among other things, "promote diversity of gender, social and ethnic backgrounds."[220] In addition, the Companies Act requires companies to disclose gender diversity statistics among the board, management and employees.[221] In 2018, the Financial Reporting Council reported that 83% of FTSE 100 and 74% of FTSE 250 companies had established a board diversity policy specifying gender, with approximately 1/3 specifying ethnicity.[222] More recently, a report commissioned by the

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218 See Financial Conduct Authority, LR 9.8.6(6), available at: https://www.handbook.fca.org.uk/handbook/LR/9/8.html; see also Financial Reporting Council, *The UK Corporate Governance Code* 3 (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF. In addition, "[i]n 2016, the [UK] Government also implemented the relevant provision of the EU Non-Financial Reporting Directive with a new reporting requirement in the FCA's Disclosure and Transparency Rules. This requires issuers (excluding [small and medium-sized enterprises]) admitted to trading on an EU regulated market to disclose their diversity policy in the corporate governance statement." See Financial Reporting Council, *Board Diversity Reporting* 5 (September 2018), available at: https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf.

219 See Financial Reporting Council, *The UK Corporate Governance Code*, supra note 218, at 9.

220 Id. at 8.

221 See UK Companies Act 2006, § 414C.

222 See Financial Reporting Council, Board Diversity Reporting, supra note 218, at 9.

Financial Reporting Council concluded that there is a lack of public disclosure regarding the LGBTQ+ status among directors and executives of public companies. While the report did not recommend amending Principle J of the U.K. Code to consider sexual orientation or gender identity, it emphasized that the U.K. Code "seeks to promote diversity and inclusion of all minority groups within business"[223] and suggested that the government "update corporate reporting requirements to require companies to demonstrate how they intend to capture data on the sexual orientation and gender identity of staff."[224]

In 2011, the Davies Review called on FTSE 100 boards to achieve 25% women on boards by 2015.[225] After that milestone was achieved, the Hampton Alexander Review encouraged FTSE 350 boards to have 1/3 women by 2020, and it has been achieved by FTSE 100 companies.[226] In 2017, the Parker Review called on FTSE 100 and 250 companies to have at least one director of color by 2021 and 2024, respectively.[227] As of February 2020, approximately 37% of FTSE 100 companies surveyed and 69% of FTSE 250 companies surveyed did not have one director of color on their board.[228]

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223 See Hay et al., supra note 104, at 37.

224 Id.

225 See *Women on boards*, supra note 100.

226 See *Hampton-Alexander Review: FTSE Women Leaders* (November 2016), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf.

227 See Parker, supra note 103.

228 See Sir John Parker, *Ethnic Diversity Enriching Business Leadership* 19 (Feb. 5, 2020), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2020-report-final.pdf.

Australian Securities Exchange ("ASX")-listed companies must comply with the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (the "ASX Recommendations") or explain why they do not. The ASX Recommendations require companies to have and disclose a diversity policy with measurable objectives and report on progress towards meeting those objectives. If the company is in the ASX/S&P 300, its objective for achieving gender diversity should be at least 30%.[229] The Australian government also requires companies with 100 or more employees to provide an annual report about gender equality indicators, including the gender composition of the board and the rest of the workforce.[230] In 2015, the ASX and KPMG found that 99% of S&P/ASX 200 companies and 88% of ASX 201-500 companies disclosed establishing a diversity policy rather than explaining why they do not have one.[231] As of July 2020, women account for 28.4% and 31.8% of board seats among ASX 300 and ASX 100 companies, respectively.[232]

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229 See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* 9 (4th ed. Feb. 2019), available at: https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf.

230 Workplace Gender Equality Act 2012, Part IV § 13 (March 25, 2015), available at: https://www.legislation.gov.au/Details/C2015C00088.

231 See KPMG and ASX, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended 1 January 2015 and 31 December 2015* 4 (2016) available at: https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf.

232 See KPMG and 30% Club, *Building Gender Diversity on ASX 300 Boards: Seven Learnings from the ASX 200* 4 (July 2020), available at: https://assets.kpmg/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf. The report also noted that diversity counteracts groupthink and that ASX 201-299 companies with at least 30% female directors "are more likely than not to [have seen] market capitalisation increases over the past 12 months." Id. at 6.

Nasdaq observed that women account for at least 30% of the boards of the largest companies in Australia, Sweden, and the United Kingdom, and in three other countries that have implemented disclosure requirements or suggested milestones on a comply-or-explain basis: Finland, New Zealand, and Canada.[233] Nasdaq considered that countries that have implemented mandates have also seen progress in women's representation on boards, including, for example, Austria, Iceland, Belgium, France, Germany, Italy, and Portugal.[234] On average, women account for 31% of board seats in countries with gender mandates.[235] Albertine d'Hoop-Azar et al. (2017) compared gender diversity on boards in countries with varying requirements and enforcement measures and concluded that external pressures—"progressive societal norms" and regulations—are needed to increase board diversity.[236]

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233 See The Conference Board of Canada, *Data Dashboard* (Sept. 23, 2020), available at: https://www.conferenceboard.ca/focus-areas/inclusion/2020/aob-comparisons-around-the-world-table?AspxAutoDetectCookieSupport=1; see also Andrew MacDougall et al., Osler, *Diversity Disclosure Practices* 4 (2020), available at https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf. But see Heike Mensi-Klarbach et al., *The Carrot or the Stick: Self-Regulation for Gender-Diverse Boards via Codes of Good Governance*, J. Bus. Ethics 11 (2019), available at: https://doi.org/10.1007/s10551-019-04336-z (reviewing longitudinal data from 2006 to 2016 on listed and state-owned companies in Austria and concluding that "self-regulation of gender diversity on boards is ineffective if merely based on recommendations in codes of good governance"). Mensi-Klarbach recommends setting concrete targets and providing public monitoring to improve the effectiveness of comply-or-explain frameworks.

234 See Paul Hastings, supra note 207; see also Deloitte, *Women in the Boardroom*, supra note 92.

235 See Paul Hastings, supra note 207; The Conference Board of Canada, supra note 233.

236 See Albertine d'Hoop-Azar et al., Gender Parity on Boards Around the World, Harv. L. Sch. Forum on Corp. Governance (January 5, 2017), available at: https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/ (comparing gender diversity on boards in countries with varying requirements and enforcement measures and concluding that external pressures—"progressive societal norms" and regulations—are needed to increase board diversity).

Nasdaq discussed the benefits and challenges of mandate and comply-or-explain models with over a dozen stakeholders, and while the majority of organizations were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, the majority also stated that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. Most organizations Nasdaq spoke with expressed general discomfort with mandates, although they acknowledged that opposition is lessening in the wake of California's S.B. 826[237] and A.B. 979.[238] While many recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial, would spur companies to take action and would make meaningful progress on board diversity. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. In contrast, a disclosure-based framework that provides companies with flexibility would empower companies to maintain decision-making authority over their board's composition while providing stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity. This approach would better inform the investment community and enable more informed analysis of, and conversations with, companies. Nasdaq believes that these goals will be achieved through the disclosure of consistent, comparable data across companies, as would be required by the Exchange's proposed definition of Diverse. The Exchange is therefore proposing a disclosure-based framework rather than a mandate.

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[237] See Cal. S.B. 826, supra note 118.

[238] See Cal. A.B. 979, supra note 118.

For example, if, under Israeli law regarding board diversity, an Israeli company is required only to have a minimum of one woman on the board and such Israeli company chooses to meet the requirements under Israeli home country law in lieu of meeting the diversity objectives of proposed Rule 5605(f)(2)(B), it may choose to disclose that "the Company is incorporated in Israel and required by Israeli law to have a minimum of one woman on the board, and satisfies home country requirements in lieu of Nasdaq Rule 5605(f)(2)(B), which requires each Foreign Issuer to have at least two Diverse directors." If a U.S. company had two Diverse directors but one resigned due to unforeseen circumstances, and it is not eligible for the grace period under proposed Rule 5605(f)(6), it could disclose, for example: "Due to the unexpected resignation of Ms. Smith this year, the Company does not have at least one director who self-identifies as Female and one director who self-identifies as an Underrepresented Minority or LGBTQ+. We intend to undertake reasonable efforts to meet the diversity objectives of proposed Rule 5605(f)(2)(A) prior to our next annual shareholder meeting and have engaged a search firm to identify qualified Diverse candidates. However, due to unforeseen circumstances, we may not achieve this goal." Or a U.S. company may disclose that it chooses to define diversity more broadly than Nasdaq's definition by considering national origin, veteran status or individuals with disabilities when identifying nominees for director because it believes such diversity brings a wide range of perspectives and experiences to the board. In each case, investors will have a better understanding of the company's reasons for not meeting the applicable diversity objectives and can use that information to make an informed investment or voting decision.

ii. Higher and Lower Diversity Objectives

Nasdaq observed that existing empirical research spanned companies across several countries, including the United States, Spain, China, Canada, France, and Norway. Nasdaq considered that the studies related to company performance and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board,[239] two or more diverse directors (with diverse considered female, Black, Hispanic, or Asian),[240] at least three women on the board[241] and being in the top quartile for gender and ethnic diversity.[242]

Nasdaq considered that the academic and empirical studies related to investor protection and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board[243] or up to 50% women on the board, and the assertions of certain academics that their findings may extend to other forms of diversity, including racial and ethnic diversity.[244] Nasdaq also reviewed academic and empirical research suggesting that "critical mass" is achieved by having three or more women on the board, and that having only one diverse director on the board risks "tokenism."[245] Nasdaq considered that although the legislation enacted by

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239 See Credit Suisse, supra note 35, at 16.

240 See Thomas and Starr, supra note 28, at 5.

241 See Eastman et al., supra note 36, at 3; Wagner, supra note 37.

242 See McKinsey, supra note 31.

243 See Abbott et al., supra note 64; Chen et al., supra note 70.

244 See Wahid, supra note 65; Cumming et al., supra note 68, at 1588 (observing that previous studies considered directors' independence, experience and education, and "further research is warranted on the comparison of different forms of diversity with respect to securities fraud.").

245 See Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37(2) Org. Dynamics 145 (April 2008); Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, 52(2) J. Fin. & Quant.

Norway and California, and proposed by several other states, varies based on board size, the academic and empirical research considered companies across a spectrum of sizes and board sizes, including Fortune 500, S&P 500, Fortune 1000 and smaller (non-Fortune 1000) companies.

Nasdaq concluded that there is no "one-size fits all" approach to promoting board diversity and that the academic and empirical studies regarding the relationship between board diversity, company performance and investor protections is continuing to evolve. However, in Nasdaq's survey of academic studies described above—and of the targets or mandates promulgated by regulatory bodies and organizations worldwide—Nasdaq observed a common denominator of having at least one woman on the board. Similarly, Nasdaq observed a common denominator of having at least one director who is diverse in terms of race, ethnicity or sexual orientation among the requirements related to, and academic research considering, board diversity beyond gender identity. Nasdaq therefore believes that a diversity objective of at least two Diverse directors provides a reasonable baseline for comparison across companies. However, Nasdaq considered comments that it should "amend the proposed rules to allow greater flexibility for companies with relatively small boards."[246] Nasdaq considered that, based on the requirement of proposed Rule 5605(c)(2) for each listed company to have an audit committee composed of at least three independent directors,[247] the minimum board size of a company listed on Nasdaq must be at least three directors. Based on Nasdaq data, the average board size of

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Analysis 751 (April 2017); Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102(2) J. Bus. Ethics. 299 (Feb. 25, 2011), available at https://ssrn.com/abstract=1858347.

246 See Ballard Spahr Comment Letter, supra note 171.

247 See Nasdaq Rulebook, Rule 5605(c)(2).

all listed companies is eight directors, with an average board size of 7.3 for Smaller Reporting Companies and Foreign Issuers. However, not all companies with small boards are Smaller Reporting Companies, and therefore the alternative diversity objective provided to Smaller Reporting Companies may not be available to them. Further, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy proposed Rule 5605(f)(2) by adding additional directors. For example, two Diverse directors on a five member board comprise 40% of the board, whereas two Diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two Diverse directors and expands its board to satisfy proposed Rule 5605(f)(2), it may require the company to incur additional costs through director compensation and D&O insurance. Accordingly, Nasdaq proposes to adopt Rule 5605(f)(2)(D) a company with a board of directors of five or fewer members to have, or explain why it does not have, at least one member of its board of directors who is Diverse.

Nasdaq considered criticisms levied against other models that base board diversity objectives on board size. For example, such models may create complexity for companies by subjecting them to a higher diversity objective for larger boards if they add diverse directors.[248] In California under S.B. 826, a five member board is required to have at least two female directors, and a board of six or more members must have at least three female directors. Therefore, if a five member board adds two female directors to comply with S.B. 826, it becomes a seven member board subject to the higher threshold to have at least three female directors, and must add another female director. Therefore,

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[248] See David A. Katz and Laura A. McIntosh, supra note 204.

Nasdaq proposes to clarify in proposed Rule 5605(f)(2)(D) that if a company has five members on its board of directors before becoming subject to proposed Rule 5605(f), it shall not become subject to the requirement of subparagraphs (A), (B), or (C) to have at least two members of its board of directors who are Diverse if it adds one director to satisfy subparagraph (D), thereby becoming a six member board. However, a company would become subject to proposed Rule 5605(f)(2)(A), (B) or (C) if it subsequently expands its board.

Companies are not precluded from meeting a higher or lower alternative measurable objective. For example, a company may choose to disclose that it does not meet the diversity objectives under proposed Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in Nasdaq's proposed rule. Nasdaq believes that providing flexibility and clear disclosure when the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.

iii. Longer and Shorter Timeframes

Nasdaq considered whether an alternative timeframe for satisfying the diversity objectives of proposed Rule 5605(f)(2) would better promote the public interest than the timeframe Nasdaq has proposed under Rule 5605(f)(7). While companies are not precluded from adding additional directors to their boards to meet the diversity objectives of proposed Rule 5605(f)(2) sooner than contemplated by the proposed rule, Nasdaq understands that some companies may need to obtain shareholder approval to amend their governing documents to allow for board expansion. Other companies may choose to

replace an existing director on the board with a Diverse director, and board turnover may be low.[249] Nasdaq recognizes that it also takes substantial lead time to identify, interview, and select board nominees. To provide companies with sufficient time to meet the diversity objectives of proposed Rule 5605(f)(2), while recognizing that investors are calling for expedient change, Nasdaq has structured its proposal similarly to the approach taken by California, where companies with larger boards must achieve one target by an earlier date and satisfy the entire diversity objective at a later date. Nasdaq also considered the approaches taken by foreign jurisdictions to implement diversity objectives. For example, Belgium and France implemented diversity objectives under a phased approach that provided companies with at least five years to fully satisfy the objectives,[250] whereas Iceland and Portugal provided companies with three years or less.[251]

While companies may choose to satisfy proposed Rule 5605(f)(2) on an alternative timeframe, a company that chooses a timeframe that is longer than the timeframes set forth in proposed Rule 5605(f)(7) also must publicly explain its reasons for doing so. For example, an NGM-listed company that chooses to comply with the NCM timeframe may disclose the following: "While the Company is listed on NGM, the Company believes that it is similarly situated to companies listed on NCM in terms of its annual revenues and public float, and therefore has chosen to meet the objectives of Rule

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249 See Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, Harv. L. Sch. Forum on Corp. Governance (Oct. 18, 2020), https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/ (last accessed Nov. 24, 2020).

250 See Paul Hastings, supra note 207, at 79 and 90; see also supra note 209.

251 See Deloitte, Women in the Boardroom, supra note 92, at 115 and 143; see also supra note 209.

5605(f)(2)(C) in lieu of Rule 5605(f)(2)(A). The company has met these objectives by having at least two Diverse directors on the board who self-identify as Female within the timeframe provided under Rule 5605(f)(7) applicable to NCM-listed companies."

iv. Broader and Narrower Definition of Diverse

Nasdaq considered whether the definition of Diverse should include broader characteristics than those reported on the EEO-1 report, such as the examples provided by the Commission staff's C&DI, including LGBTQ+, nationality, veteran status, and individuals with disabilities. During its stakeholder outreach, Nasdaq inquired whether a broad definition of Diversity would promote the public interest. While recognizing the diverse perspectives that different backgrounds can provide, most stakeholders supported a narrower definition of Diversity focused on gender, race and ethnicity, with several supporting broadening the definition to include the LGBTQ+ community.

As discussed above, companies currently are permitted to define diversity "in ways they consider appropriate" under federal securities laws. One of the challenges of this principles-based approach has been the disclosure of inconsistent and noncomparable data across companies. However, most companies are required by law to report data on race, ethnicity and gender to the EEOC through the EEO-1 Report. Nasdaq believes that adopting a broad definition of Diverse would maintain the status quo of inconsistent, noncomparable disclosures, whereas a narrower definition of Diverse focused on race, ethnicity, sexual orientation and gender identity will promote the public interest by improving transparency and comparability. Nasdaq also is concerned that the broader definitions of diversity utilized by some companies may result in Diverse candidates being overlooked, and may be hindering meaningful progress on improving diversity related to race, ethnicity, sexual orientation and gender identity. For example, a company

may consider diversity to include age, education, and board tenure. While such characteristics may provide laudable cognitive diversity, this focus may result in a homogenous board with respect to race, ethnicity, sexual orientation, and gender identity that, by extension, does not reflect the diversity of a company's communities, employees, investors, or other stakeholders.

Nasdaq also believes that a transparent, consistent definition of Diverse would provide stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity if it does not meet the diversity objectives of proposed Rule 5605(f)(2). This would enable the investment community to conduct more informed analysis of, and have more informed conversations with, companies. To the extent a company chooses to satisfy proposed Rule 5605(f)(2) by meeting the applicable diversity objectives, it will have the ancillary benefit of making meaningful progress in improving board diversity related to race, ethnicity, sexual orientation and gender identity.

Nasdaq's review of academic and empirical research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities.[252] Nasdaq acknowledges that there also is a lack of published research

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[252] KPMG (2020) states that veterans are underrepresented in boardrooms, with retired General and Flag Officers ("GFOs") occupying less than 1% of Fortune 500 board seats. See KPMG, *The value of veterans in the boardroom* 1 (2020), available at: https://boardleadership.kpmg.us/content/dam/boardleadership/en/pdf/2020/the-value-of-veterans-in-the-boardroom.pdf (noting that "[r]etired GFOs who have honed their leadership and critical decision-making skills in a high-threat environment can bring extensive risk oversight experience to the board, which may be especially valuable in the context of today's risk landscape"). Accenture (2018) observed that companies that offered inclusive working environments for employees with disabilities achieved an average of 28% higher revenue, 30% higher economic profit margins, and 2x net income

on the issue of LGBTQ+ representation on boards.[253] This 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. In any event, it is evident that while "[b]oardroom diversity is a topic that has gained significant traction . . . LGBT+ diversity, however, has largely been left out of the conversation."[254]

Nonetheless, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ in recognition of the U.S. Supreme Court's recent affirmation that sexual orientation and gender identity are "inextricably" intertwined with sex,[255] and based on studies demonstrating a positive association between board diversity and decision making, company performance and investor protections. Nasdaq also believes that the proposed rule would foster the development of data to conduct meaningful assessments of the association between LGBTQ+ board diversity, company performance, and investor protections.

As noted above, the proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, company would still have to provide the required disclosure under proposed Rule 5605(f)(3) if the company does not also have at least two directors who are Diverse (or one Diverse director for companies with a board of directors of five

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than their industry peers. See Accenture, *Getting to Equal: The Disability Inclusion Advantage* (2018), available at: https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf.

253 See Credit Suisse ESG Research, supra note 40, at 1; see also Out Leadership, supra note 42.

254 See Out Leadership, supra note 42, at 3.

255 See Bostock v. Clayton Cnty., supra note 170.

or fewer members). Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would help inform the evolving body of research on the relationship between broader diverse attributes, company performance and investor protection and provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[256] in general, and furthers the objectives of Section 6(b)(5) of the Act,[257] in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest, for the reasons set forth below. Further, Nasdaq believes the proposal is not designed to permit unfair discrimination between issuers or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange, for the reasons set forth below.

I. Board Statistical Disclosure

Nasdaq has proposed what it believes to be a straightforward and clear approach for companies to publish their statistical data pursuant to proposed Rule 5606. This disclosure requirement will protect investors that view information related to board

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[256] See 15 U.S.C. § 78f(b).

[257] Id. § 78f(b)(5).

diversity as material to their investment and voting decisions. The proposed disclosure format prescribed by the rule also protects investors by eliminating data collection inaccuracies and decreasing costs, while enhancing investors' ability to utilize the information. Nasdaq also believes that the rule will enhance investor confidence by assisting investors in making more informed decisions through Nasdaq's efforts to require meaningful, consistent, reliable and comparable data readily available and in a clear and comprehensive manner. Nasdaq also believes that the disclosure format provides a company with a uniformed template with the flexibility to include any additional details about its board that the company believes would be useful to investors.

As a threshold matter, as discussed above, diversity has become an increasingly important subject and, in recent years, investors increasingly have been advocating for greater board diversity and for the disclosure of board diversity statistics.[258] The current board diversity disclosure regime is lacking in several respects, and Nasdaq believes that its proposed Rule 5606 addresses many of the current concerns and responds to investors' demands for greater transparency into the diversity characteristics of a company's board composition by mandating disclosure and curing certain deficiencies that exist within the current SEC disclosure requirements.

Investors have expressed their dissatisfaction with having to independently collect board-level data about race, ethnicity, and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.[259] The lack of consistency and specificity in Regulation S-K has been a major impediment for many

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[258] See Petition for Amendment of Proxy Rule, supra note 86; see also Office of Illinois State Treasurer, supra note 116.

[259] See Petition for Amendment of Proxy Rule, supra note 86, at 2.

investors and data collectors. As a general matter, the Commission's requirements have not addressed the concerns expressed by commenters that "disclosure about board diversity was important information to investors."[260] Nasdaq believes that its proposed Rule 5606 addresses many of the concerns that have been raised.

Nasdaq also believes that requiring the annual disclosure of a company's board diversity, as proposed in Rule 5606(a), will provide consistent information to the public and will enable investors to continually review the board composition of a company to track trends and simplify or eliminate the need for a company to respond to multiple investor requests for information about the diverse characteristics of the company's board. Requiring annual disclosures also would make information available to investors who otherwise would not be able to obtain individualized disclosures.[261] Moreover, consistent disclosures may encourage boards to consider a wider range of board candidates in the nomination process, including candidates with fewer ties to the current board.[262]

The Commission's 2009 amendments to Regulation S-K provide no definition for diversity and do not explicitly require disclosures specifically related to details about the board's gender, racial, ethnic and LGBTQ+ composition. Additionally, the Commission staff's C&DI does not address the definition of diversity, and it requires a registrant to disclose diversity information only in certain limited circumstances. Investors have

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260 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,343-44 (amending Item 407(c)(2)(vi) of Regulation S-K, codified at 17 C.F.R. § 229.407(c)(2)(vi)).

261 See Petition for Rulemaking, supra note 130.

262 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 ("To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent."); Hazen and Broome, supra note 120, at 57-58.

expressed that current regulations and accompanying interpretations impair their ability to obtain clear and consistent data.[263] As a result, Nasdaq believes that proposed Rule 5606(a) protects investors and the public interest by making clear that a company's annual diversity data disclosure must include information related to gender identity, race, ethnicity and LGBTQ+ status, thereby leaving less discretion for companies to selectively disclose certain diversity information and enhancing the comparability of such data across companies. Moreover, it is in the public interest to provide clear requirements for diversity disclosure, and Nasdaq's proposed Matrix format provides such clarity.

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 directors 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 categorize such directors in the "Did Not Disclose Gender" and "Did Not Disclose Demographic Background" sections of the Matrix.

Nasdaq believes that it is in the public interest to utilize the Matrix format for all companies as proposed in Rule 5606(a). Additionally, Nasdaq believes that the format removes impediments to aggregating and analyzing data across all companies by requiring each company to disclose separately the number of female, male, and non-binary directors, the number of female, male, and non-binary directors that fall into certain racial and ethnic categories, and the number of directors that identify as LGBTQ+. In addition to the format, Nasdaq believes that prohibiting companies from

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263 See Petition for Amendment of Proxy Rule, supra note 86, at 2; Petition for Rulemaking, supra note 130, at 7.

providing the information through graphics and images will allow investors to easily disaggregate the data and track directors with multiple diversity characteristics. Nasdaq also believes that it is reasonable and in the public interest to allow companies the flexibility of a supplementing their disclosure by providing additional information related to its directors in the Matrix, beyond what is required by proposed Rule 5606(a).

As discussed above, most listed companies are required by law to complete an EEOC Employer Information Report EEO-1 Form. Although outside directors generally are not employees and therefore are not covered in the EEO-1,[264] Nasdaq believes that collecting the information required by proposed Rule 5606(a) is familiar to most companies, and that it is reasonable to require disclosure of the additional board information.

Further, Nasdaq believes that the disclosure proposed under Rule 5606(a) will remove impediments to shareholders by making available information related to board-level diversity in a standardized manner, thereby enhancing the consistency and comparability of the information and helping to better protect investors. The proposed disclosure will also help protect investors and the public interest by enabling investors to determine the total number of diverse directors, which is information that is not consistently available in existing proxy disclosures in cases where a single director has multiple diverse characteristics. Nasdaq believes it is in the public interest to allow companies the option to provide the disclosure in a way they believe will be most meaningful to their shareholders. Therefore, Nasdaq has proposed Rule 5606(b) to provide companies the option of electing to provide the information in the same manner

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[264] The EEO-1 Form does not require a company to disclose data for outside directors because such directors are not company employees.

as, and concurrently with, the disclosure required by proposed Rule 5605(f)(3). Specifically, such disclosure must be provided in advance of the company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website. Aligning the timing for providing the board composition disclosure with other governance-related disclosures, such as those provided in the proxy, makes it easier for investors to know where a company has provided the proposed Rule 5606(b) disclosure and gives shareholders access to the Matrix information prior to a company's annual shareholder meeting.

Moreover, Nasdaq believes it is reasonable to request that companies that publish their Matrix data on their website also submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting because this closely aligns the timing for companies who opt to disclose via their website and companies who choose to provide the disclosure through an SEC filing. In the interest of providing companies flexibility, Nasdaq has not required companies that publish their Matrix data on their websites to publish the data in a specified location on their websites.

Nasdaq believes it is reasonable, and not unfairly discriminatory, to provide a separate Matrix to Foreign Issuers. Nasdaq recognizes that the proposed definition of Underrepresented Minority in proposed Rule 5605(f)(1) may not apply to companies outside of the United States because each country has its own unique demographic composition. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5605(f)(1) may be inapplicable to a Foreign Issuer, making this Matrix data less

relevant for such companies and not useful for investors. Therefore, Nasdaq believes that offering Foreign Issuers the option of a separate template that requires different disclosure categories will provide investors with more accurate disclosures related to the diversity of directors among the board of a Foreign Issuer. Additionally, Nasdaq believes that providing an "Underrepresented Individual in Home Country Jurisdiction" category provides Foreign Issuers with more flexibility to identify and disclose diverse directors within their home countries.

The annual requirement in proposed Rule 5606(a) will guarantee that the information is available to the public on a continuous and consistent basis. As described in the instructions to the Matrix disclosure form and proposed Rule 5606(a), each year following the first year of disclosure of the Matrix, all companies must include the current year and immediately prior year diversity statistics in its disclosure. If the company publishes the Matrix on its website, the disclosure must remain accessible on the company's website. Nasdaq believes that disclosing at least two years of data allows the public to view any changes and track a board's diversity progress. Moreover, requiring the disclosure to remain accessible on the company's website will allow investors to maintain access to the disclosure in the same manner as they would for companies who opt to provide the disclosure in an SEC filing.

In addition to providing a means for shareholders to assess a company's board-level diversity and measure its progress in improving that diversity over time, Nasdaq believes that proposed Rule 5606 will provide a means for Nasdaq to assess whether companies meet the diversity objectives of proposed Rule 5605(f). The ability to

determine satisfaction of the proposed listing rule's diversity objectives will protect investors and the public interest.

Moreover, the proposed rule provides transparency into diversity based not only on race, ethnicity, and gender identity, but also on a director's self-identified sexual orientation. Nasdaq believes that expanding the diversity characteristics beyond those which are commonly reported by companies currently will broaden the way boards view diversity and ensure that board diversity is occurring across all protected groups.

Nasdaq believes that the proposal is not unfairly discriminatory because proposed Rule 5606 will apply to all Nasdaq-listed companies, except for the following companies exempt pursuant to proposed Rule 5606(c): SPACs; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series—which meet the definition of Exempt Companies as defined under proposed Rule 5605(f)(4). Nasdaq believes it is reasonable and not unfairly discriminatory to exempt these companies from the proposed rule because the exemption of these companies, except for SPACs, is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition. Nasdaq believes it is not unfairly discriminatory to exempt SPACs from the requirements of proposed Rule 5605(f) because this approach is similar to other phase-in periods granted to SPACs. For example, Rule 5615(b)(1) provides a company listing in

connection with its initial public offering, including a SPAC, one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, Rule 5615(b)(1) and SEC Rule 10A-3(b)(1)(iv)(A) allows a newly listed company, including a SPAC, up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Moreover, the post-business combination entity would be required to satisfy proposed Rule 5605(f) by the later of two years from the date of listing or the date the Company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones depending on the company's market tier.

Finally, Nasdaq believes it is reasonable under proposed Rule 5606(e) to allow companies the later of (1) one calendar year from the Approval Date, which is the Effective Date; or (2) the date the Company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the Company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date. Nasdaq believes proposed Rule 5606(e) is reasonable because there is only a *de minimis* burden placed on companies to collect the board data and prepare the Matrix given that most companies already collect similar information for certain employees. Additionally, most companies are required to prepare an annual proxy statement and update the Commission within four business days when a new

director is appointed to the board.[265] Proposed Rule 5606(e) also aligns the operative date for proposed Rule 5606 with Nasdaq's listed companies' annual shareholder meetings and proxy filings with the uncertainty of when the Commission may take action on the proposed changes. Therefore, Nasdaq believes that at least a minimum of one year is sufficient time for companies to incorporate their directors into their data collection.

II. Diverse Board Representation or Explanation

E. *Removes Impediments to and Perfects the Mechanism of a Free and Open Market and a National Market System*

As discussed above, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions by limiting the search for director nominees to existing directors' social networks and candidates with C-suite experience.[266] As noted in Section IV of the Purpose section, women hold more than 30% of board seats in Norway, France, Sweden, and Finland.[267] As noted in Section IV of the Purpose section, in analyzing Norway's experience in implementing a gender mandate, Dhir (2015) observed that "[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background."[268] Dhir concluded that broadening the search for directors outside of traditional networks "is unlikely to occur without some form of regulatory intervention, given the prevalence of homogenous social networks and

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265 See SEC Form 8-K, available at: https://www.sec.gov/files/form8-k.pdf.

266 See GAO Report, supra note 49; Vell, supra note 106; Rhode & Packel, supra note 110, at 39; Deloitte, *Women in the Boardroom*, supra note 92; see also Parker, supra note 103, at 38 (acknowledging that, "as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom").

267 See supra note 92.

268 See Dhir, supra note 84, at 52.

in-group favoritism."[269] He also observed that regulatory action was effective in increasing the representation of women on boards in Norway by "democratiz[ing] access to a space previously unavailable to women."[270] One Norwegian director "grudgingly accept[ed] that the free market principles she held so dearly had disappointed her—and that the [mandate] was a necessary correction of market failure."[271]

In contrast, Nasdaq observed that other countries have made comparable progress using a disclosure-based model. Women account for at least 30% of the largest boards of companies in six countries using comply-or-explain models:[272] Australia, Finland, Sweden, New Zealand, Canada, and the United Kingdom.[273] Nasdaq discussed the benefits and challenges of mandate and disclosure-based models with over a dozen stakeholders, and the majority of organizations were in agreement that companies would benefit from a disclosure-based, business-driven framework to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial, would spur companies to take action and would make meaningful progress on board diversity. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. However, leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the

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269 Id. at 51. See also Albertine d'Hoop-Azar et al., supra note 236.

270 See Dhir, supra note 84, at 101.

271 See Dhir, supra note 84, at 116.

272 See Paul Hastings, supra note 207; Deloitte, *Women in the Boardroom*, supra note 92.

273 See Conference Board of Canada, supra note 233; Osler, supra note 233, at 4.

notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand. The Exchange is therefore proposing a disclosure-based framework, not a mandate.

Nasdaq also considered Acting Chair Lee's observation that disclosure "gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value. Importantly, it can also drive corporate behavior." Specifically, she observed that:

> For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the "what gets measured, gets managed" phenomenon. Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company. The Commission has long-recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that "disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct" and that "[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws."[274]

Nasdaq believes that a disclosure-based framework may influence corporate conduct if a company chooses to meet the diversity objectives of proposed Rule 5605(f)(2). A company may satisfy that objective by broadening the search for qualified candidates and considering candidates from other professional pathways that bring a wider range of skills and perspectives beyond traditional C-suite experience.[275] Nasdaq believes that this will help increase opportunities for Diverse candidates that otherwise may be overlooked due to the impediments of the traditional director recruitment process, and therefore the proposed rule is designed to remove impediments to a free and open

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[274] See Lee, supra note 27.

[275] See, e.g., Hillman et al., supra note 111 (finding that African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy).

market and a national market system. Further, boards that choose to meet the applicable diversity objectives may experience other benefits from diversity that perfect the mechanism of a free and open market and national market system. As discussed above in Section 3.a.III.B of the Purpose section (*Diversity and Investor Protection*), and further discussed below in Section 3.b.II.B of the Statutory basis section (*Prevents Fraudulent and Manipulative Acts and Practices*), studies suggest that diversity is positively associated with reduced stock volatility,[276] more transparent public disclosures,[277] and less information asymmetry,[278] leading to stock prices that better reflect public information, and therefore Nasdaq believes the proposed rule is designed to remove impediments to and perfecting a free and open market and a national market system. Importantly, Nasdaq believes that the disclosure-based framework proposed under proposed Rule 5605(f) is not designed to create additional impediments to a free and open market and a national market system because it will empower companies to maintain decision-making authority over the composition of their boards.

To the extent a company chooses not to meet the applicable diversity objectives of proposed Rule 5605(f)(2), Nasdaq believes that proposed Rule 5605(f)(3) will provide analysts and investors with a better understanding about the company's reasons for not doing so and its philosophy regarding diversity. Proposed Rule 5605(f) is thus designed to remove impediments to a free and open market and a national market system by enabling the investment community to conduct more informed analyses of, and have more informed conversations with, companies. Nasdaq believes that such analyses and

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[276] See Bernile et al., supra note 33.

[277] See Gul et al., supra note 72; Bravo and Alcaide-Ruiz, supra note 62.

[278] See Abad et al., supra note 73.

conversations will be better informed by consistent, comparable data across companies, which Nasdaq proposes to achieve by adopting a consistent definition of "Diverse" under proposed Rule 5605(f)(1). Nasdaq further believes that providing such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, and is therefore designed to promote capital formation and efficiency and perfect the mechanism of a free and open market and a national market system.

F. *Prevents Fraudulent and Manipulative Acts and Practices*

As discussed above in Section III of the Purpose section, Nasdaq is concerned that the failure of homogenous boards to consider a broad range of viewpoints can result in "groupthink," which may lead to suboptimal decisions that have adverse effects on company performance, board performance and stakeholders. Nasdaq believes that including diverse directors with a broader range of skills, perspectives and experiences may help detect and prevent fraudulent and manipulative acts and practices by mitigating "groupthink." Increased board diversity also may reduce the likelihood of insider trading and other fraudulent and manipulative acts and practices.

Nasdaq reached this conclusion by reviewing public statements by investors and organizations regarding the impact of groupthink on decision making processes, as well as academic and empirical studies on the relationship between diversity, groupthink and fraud. Nasdaq observed that groupthink can result in "self-censorship"[279] and failure to voice dissenting viewpoints in pursuit of "consensus without critical evaluation and

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[279] See Forbes and Milliken, supra note 80, at 496.

without considering different possibilities."[280] In contrast, "board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity."[281]

Dhir (2015) concluded that gender diversity may "promote cognitive diversity and constructive conflict in the boardroom" and gender diverse boards may be more effective at overseeing management.[282] One respondent in Dhir's survey of Norwegian directors observed that:

> I've seen situations where the women were more willing to dig into the difficult questions and really go to the bottom even if it was extremely painful for the rest of the board, but mostly for the CEO . . . when it comes to the really difficult situations, [where] you think that the CEO has . . . done something criminal . . . [o]r you think that he has done something negligent, something that makes it such that you . . . are unsure whether he's the suitable person to be in the driving seat.[283]

Another director observed that "[i]f you have different experiences and a more diversified board, you will have different questions asked."[284] Dhir concluded that "women directors may be particularly adept at critically questioning, guiding and advising management without disrupting the overall working relationship between the board and management."[285]

Pucheta-Martínez et al. (2016) reasoned that questioning management is a critical part of the audit committee's oversight role, along with ensuring that management does

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280 See Dhir, supra note 84, at 124.

281 See Petition for Amendment of Proxy Rule, supra note 86, at 4.

282 See Dhir, supra note 84, at 150.

283 Id. at xiv.

284 Id. at 120.

285 Id. at 35.

not pressure the external auditor to issue a clean audit opinion notwithstanding the identification of any uncertainties or scope limitations.[286] Otherwise, "[a]uditors may accept the demands of management for a clean audit report when the firm deserves a scope limitation and an uncertainty qualification."[287] The authors found that "the percentage of female [directors] on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,"[288] and further found that:

> The percentage of female directors on [audit committees], the proportion of independent female directors on [audit committees] and [audit committees] chaired by women, impact positively on the likelihood of disclosing scope limitations and uncertainties qualifications, suggesting an improvement of the quality of financial information.[289]

The authors concluded that this suggests that gender-diverse audit committees better "ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion" when any uncertainties or scope limitations are identified.[290]

Nasdaq also reviewed studies that found a positive association between board gender diversity and important investor protections regardless of whether women are on the audit committee, and considered the assessment of some academics that their findings may extend to other forms of diversity, including racial and ethnic diversity. Nasdaq therefore believes that such findings with respect to audit committees would be expected to be more broadly applicable to the quality of the broader board's decision-making

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286 See Pucheta-Martínez et al., supra note 58, at 368.

287 Id. at 364.

288 Id. at 363.

289 Id. at 378.

290 Id. at 368.

process, and to other forms of diversity, including diversity of race, ethnicity and sexual orientation.

In examining the association between broader board gender diversity and fraud, Cumming, et al. observed that "[g]ender diversity, in particular, has been found to facilitate more effective monitoring by the board and protection of shareholder interests by broadening the board's expertise, experience, interests, perspectives and creativity."[291] They observed that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found "strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample."[292] The authors suggested that "other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud."[293]

Similarly, Wahid (2019) noted that board gender diversity may "lead to less biased and superior decision-making" because it "has a potential to alter group dynamics by affecting cognitive conflict and cohesion."[294] Wahid (2019) concluded that "gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud,"[295] finding that companies with female directors have "fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation."[296] Wahid also suggested that other forms of diversity, including racial diversity, could introduce

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291 See Cumming et al., supra note 68, at 1574.

292 Id. at 1589.

293 Id. at 1588.

294 See Wahid, supra note 65, at 707.

295 Id. at 705.

296 Id. at 721.

additional perspectives to the boardroom,[297] which Nasdaq believes could further mitigate groupthink.

Abbott, Parker and Persley (2012) posited that "a female board presence contribut[es] to the board's ability to maintain an attitude of mental independence, diminish[es] the extent of groupthink and enhance[es] the ability of the board to monitor financial reporting."[298] They noted that "poorer [internal] controls and the lack of an independent and questioning board-level attitude toward accounting judgments can create an opportunity for fraud."[299] They observed a lower likelihood of a material financial restatements stemming from fraud or error in companies with at least one woman on the board.[300]

Nasdaq believes that these studies provide substantial evidence suggesting an association between gender diverse boards or audit committees and a lower likelihood of fraud; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a greater likelihood of disclosing audit reports with uncertainties and scope limitations. Moreover, academics have suggested that other forms of diversity, including racial and ethnic diversity, may reduce fraud and mitigate

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297 Id. at 24-25; see also Shecter, supra note 67 (quoting Wahid as saying that "[i]f you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds…. If we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.").

298 See Abbott et al., supra note 64, at 607.

299 Id. at 610.

300 Id. at 613 ("The previously discussed lines of research lead us to form our hypothesis. In summary, restatements may stem from error or fraud. In either instance, the internal control system (to which the board of directors contributes by setting the overall tone at the top) has failed to detect or prevent a misstatement. Ineffective internal controls may stem from insufficient questioning of assumptions underlying financial reporting, inadequate attention to the internal control systems, or insufficient support for the audit committee's activities.").

groupthink. Further, while homogenous boards may unwittingly fall into the trap of groupthink due to a lack of diverse perspectives, "heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences."[301] Nasdaq therefore believes that the proposed rule is designed to reduce groupthink, and otherwise to enhance the functioning of boards, and is therefore designed to prevent fraudulent and manipulative acts and practices.

Further, the Commission has suggested that in seeking board diversity, "[t]o the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent."[302] Nasdaq believes that the benefits of the proposed rule are analogous to the benefits of Nasdaq's rules governing and requiring director independence. In 2003, Nasdaq adopted listing rules requiring, among other things, that independent directors comprise a majority of listed companies' boards, which were "intended to enhance investor confidence in the companies that list on Nasdaq."[303] The Commission observed that self-regulatory organizations "play an important role in assuring that their listed issuers establish good governance practices," and concluded that the proposed rule changes would secure an "objective oversight role" for issuers' boards of directors, and "foster greater transparency, accountability, and objectivity" in that role."[304] Along the same lines, in approving Nasdaq's application for registration as a

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301 See Dallas, supra note 82, at 1391.

302 See Proxy Disclosure Enhancements, supra note 79, 74 Fed. Reg. at 68,355.

303 See Order Approving Proposed Rule Changes, supra note 52, at 64,161.

304 Id. at 64, 175.

national securities exchange, the Commission found Nasdaq's rules governing the independence of members of boards and certain committees to be consistent with Section 6(b)(5) of the Act because they advanced the "interests of shareholders" in "greater transparency, accountability, and objectivity" in oversight and decision-making by corporate boards.[305] Nasdaq proposes to promote accountability in corporate decision-making by requiring companies that do not have the applicable number of Diverse directors under proposed Rule 5605(f)(2) to provide investors with a public explanation of the board's reasons for not doing so under proposed Rule 5605(f)(3).

Nasdaq believes it is critical to the detection and prevention of fraudulent and manipulative acts and practices to have directors on the board who are willing to critically question management and air dissenting views. Nasdaq believes that boards comprised of directors from Diverse backgrounds enhance investor confidence by ensuring that board deliberations consider the perspectives of more than one demographic group, leading to robust dialogue and better decision making. However, Nasdaq recognizes that directors may bring diverse perspectives, skills and experiences to the board, notwithstanding that they have similar attributes. Nasdaq therefore believes it is in the public interest to permit a company to choose whether to meet the diversity objectives of proposed Rule 5605(f)(2) or to explain why it does not, in accordance with proposed Rule 5605(f)(3). For example, it may believe that defining diversity more broadly than Nasdaq (by considering national origin, veteran status and disabilities) brings a wide

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[305] See In re Nasdaq Stock Market, 71 Fed. Reg. 3550, 3565 (Jan. 23, 2006). See also 68 Fed. Reg. 18,788, 18,815 (April 16, 2003) (in adopting Rule 10A-3, setting standards for the independence of audit committee members, the Commission concluded that such standards would "enhance the quality and accountability of the financial reporting process and may help increase investor confidence, which implies increased efficiency and competitiveness of the U.S. capital markets").

range of perspectives and experiences to the board. Nasdaq believes such disclosure will provide investors with a better understanding of the company's philosophy regarding diversity. This would better inform the investment community and enable more informed analyses of, and conversations with, companies. Therefore, Nasdaq believes satisfying proposed Rule 5605(f)(2) through disclosure pursuant to proposed Rule 5605(f)(3) is consistent with Section 6(b)(5) of the Act because it is designed to advance the "interests of shareholders" in "greater transparency, accountability, and objectivity" of boards and their decision-making processes.[306] In addition, as discussed further in Section 3.b.II.C of the Statutory Basis section (*Promotes Investor Protection and the Public Interest*) below, Nasdaq believes that proposed Rule 5605(f) could help to reduce information asymmetry, and thereby reduce the risk of insider trading or other opportunistic insider behavior.

G. *Promotes Investor Protection and the Public Interest*

Substantial evidence exists that board diversity is positively associated with more transparent public disclosures and higher quality financial reporting, and therefore Nasdaq believes the proposal is designed to promote investor protection. Specifically, studies have concluded that companies with gender-diverse boards are associated with more transparent public disclosures and less information asymmetry, leading to stock prices that better reflect public information. Gul, Srinidhi & Ng (2011) found that "gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection

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[306] Id.

in small firms."[307] Bravo and Alcaide-Ruiz (2019) concluded that "female [audit committee] members with financial expertise play an important role in influencing disclosure strategies that provide forward-looking information containing projections and financial data useful for investors."[308] Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with "reducing the risk of informed trading and enhancing stock liquidity."[309]

Nasdaq believes that one consequence of information asymmetry is that insiders may engage in opportunistic behavior prior to a public announcement of financial results and before the market incorporates the new information into the company's stock price. This can result in unfair gains or an avoidance of losses at the expense of shareholders who did not have access to the same information. This may exacerbate the principal-agent problem, in which the interests of a company's board and shareholders are not aligned. Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,[310] which may be an effective mechanism to deter opportunistic behavior by management and better align their interests with those of their company's shareholders.[311]

Another concern is that "[w]hen information asymmetry is high, stakeholders do not have sufficient resources, incentives, or access to relevant information to monitor

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307 See Gul et al., supra note 72, at 2.

308 See Bravo and Alcaide-Ruiz, supra note 62, at 151.

309 See Abad et al., supra note 73, at 202.

310 See Lucas-Perez et al., supra note 75.

311 Id.

managers' actions, which gives rise to the practice of earnings management."[312] Earnings management "is generally defined as the practice of using discretionary accounting methods to attain desired levels of reported earnings."[313] Manipulating earnings is particularly concerning to investors because "[i]f users of financial data are 'misled' by the level of reported income, then investors' allocation of resources may be inappropriate when based on the financial statements provided by management,"[314] which could undermine the efficacy of the capital formation process for investors who rely on such information to make informed investment and voting decisions.

Gull et al. (2018)[315] observe that overseeing management is a crucial component of investor protection, particularly with regard to earnings management:

> The role of the board of directors and board characteristics (*i.e.* board independence and gender diversity) is usually associated with the protection of shareholder interests…. This role is particularly crucial with regard to the issue of earnings management, in that one of the responsibilities of boards is to monitor management.[316]

The authors of that study found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management. Srinidhi, Gul and Tsui (2011) observed that better oversight of management combined with lower information asymmetry leads to better earnings quality. They noted that "[e]arnings quality is an important outcome of good governance demanded by investors and therefore its improvement constitutes an important objective

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312 See Vernon J. Richardson, *Information Asymmetry and Earnings Management: Some Evidence*, 15 Rev. Quantitative Fin. and Acct. 325 (2000).

313 See Gull et al., supra note 61, at 2.

314 Id.

315 See generally id.

316 Id. at 6 (citations omitted).

of the board."[317] They found that companies with women on the board, specifically on the audit committee, exhibit "higher earnings quality" and "better reporting discipline by managers."[318] They concluded that "including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements."[319]

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced internal control weaknesses, noting that "prior literature has established a negative relationship between internal control weaknesses and earnings quality."[320] Internal control over financial reporting are procedures designed "to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP."[321] Weaknesses in internal controls can "lead to poor financial reporting quality" and "more severe insider trading"[322] or failure to detect a material misstatement. According to the PCAOB:

> A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a

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317 See Srinidhi et al., supra note 56, at 1638.

318 Id. at 1612. The authors used two measures of earnings quality: discretionary accruals quality "computed as the absolute value of the estimation error in accruals after controlling for current, past, and future cash flows, sales and long-term assets, and operating cycle and volatility in sales" and "the lower propensity among firms whose unmanaged earnings are just shy of earnings benchmarks to manage earnings and beat the benchmarks by a small amount."

319 Id.

320 See Chen et al., supra note 70, at 18.

321 See Public Company Accounting Oversight Board, *Auditing Standard No. 5: Appendix A*, A5 available at: https://pcaobus.org/oversight/standards/archived-standards/details/Auditing_Standard_5_Appendix_A.

322 See Chen et al., supra note 70, at 12.

> material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.[323]

A material misstatement can occur "as a result of some type of inherent risk, whether fraud or error (*e.g.*, management's aggressive accounting practices, erroneous application of GAAP)."[324] The failure to prevent or detect a material misstatement before financial statements are issued can require the company to reissue its financial statements and potentially face costly shareholder litigation. Chen et al. found that having at least one woman on the board (regardless of whether or not she is on the audit committee) "may lead [a] to reduced likelihood of material weaknesses [in internal control over financial reporting],"[325] and Abbott, Parker and Persley (2012) found "a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement."[326] Notably, while the Sarbanes-Oxley Act ("SOX") implemented additional measures to ensure that a company has robust internal controls, the findings of Abbott et al. were consistent among a sample of pre- and post-SOX restatements, suggesting that "an additional, beneficial layer of independence in group decision-making is associated with gender diversity."[327]

Nasdaq believes that the proposal to require listed companies to have, or explain why they do not have, the applicable number of Diverse directors under proposed Rule 5605(f) could help to lower information asymmetry and reduce the risk of insider trading or other opportunistic insider behavior, which would help to increase stock price

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323 See Public Company Accounting Oversight Board, supra note 321, at A7.

324 See Abbott et al., supra note 64, at 609-10.

325 See Chen et al., supra note 70, at 18.

326 See Abbott et al., supra note 64, at 607.

327 Id. at 609.

informativeness and enhance stock liquidity, and is therefore designed to protect investors and promoting capital formation and efficiency. Nasdaq believes that information asymmetry could also be reduced by permitting companies to satisfy proposed Rule 5605(f)(2) by publicly disclosing their reasons for not meeting the applicable diversity objectives in accordance with proposed Rule 5605(f)(3), because the requirement will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, and is therefore designed to protect investors and promote capital formation and efficiency. Aligning the timing for companies to provide an explanation in accordance with 5605(f) with other governance-related disclosures, such as those provided in the proxy, will make it easier for investors to know where a company has provided the proposed Rule 5605(f) disclosure and gives shareholders access to the information prior to a company's annual shareholder meeting.

Moreover, Nasdaq believes that proposed Rule 5605(f) could foster more transparent public disclosures, higher quality financial reporting, and stronger internal control over financial reporting and mechanisms to monitor management. This could be particularly beneficial for Smaller Reporting Companies that are not subject to the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting, which is therefore designed to promote investor protection.

Nasdaq believes that the body of research on the relationship between company performance and board diversity summarized under Section III.A of the Purpose section above provides substantial evidence supporting the conclusion that board diversity does

not have adverse effects on company performance, and therefore Nasdaq believes the proposal is designed to not negatively impact capital formation, competition or efficiency among its public companies.[328] Nasdaq considered that some studies on gender diversity alone have had mixed results,[329] and that the U.S. GAO (2015) and Carter et al. (2010) concluded that the mixed results are due to differences in methodologies, data samples and time periods.[330] This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the mixed results of studies regarding the relationship between company performance and board independence,[331] Nasdaq adopted listing rules requiring a majority independent board that were "intended to enhance investor confidence in the companies that list on Nasdaq."[332] In its Approval Order, the SEC noted that "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets;" the Commission concluded that the independence rules would

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328 See Di Miceli and Donaggio, supra note 50 ("The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)"). See also Wahid, supra note 65, at 707 (suggesting that "at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards' ability to monitor firm management").

329 See, e.g., Pletzer et al., supra note 43; Post and Byron, supra note 44; Adams and Ferreira, supra note 47.

330 See GAO Report, supra note 49, at 5 ("Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used"); Carter (2010), supra note 45, at 400 (observing that the different "statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.").

331 See supra note 50.

332 See Order Approving Proposed Rule Changes, supra note 52, at 64,161.

secure an "objective oversight role" for issuers' boards, and "foster greater transparency, accountability, and objectivity" in that role.[333] Nasdaq believes this reasoning applies to the current proposed rule as well. Even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards.[334] Legislators are increasingly taking action to encourage corporations to diversify their boards and improve diversity disclosures.[335] Moreover, during its discussions with stakeholders, Nasdaq found consensus across every constituency that there is inherent value in board diversity. Lastly, it has been a longstanding principle that "Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process."[336]

For all the foregoing reasons, Nasdaq believes that proposed Rule 5605(f) is designed to promote investor protection and the public interest by enhancing investor confidence that all listed companies are considering diversity in the context of selecting directors, either by meeting the applicable diversity objectives of proposed Rule 5605(f)(2) or by explaining their rationale for not doing so. To the extent a company chooses not to meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional disclosure about the

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333 Id. at 64,176.

334 See supra notes 4 and 8.

335 See supra note 118.

336 See Nasdaq Rulebook, Rule 5101.

company's reasons for doing so under proposed Rule 5605(f)(3). For example, the company may choose to disclose that it does not meet the diversity objectives of proposed Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in our proposed rule. Nasdaq believes that providing such flexibility and clear disclosure where the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency, and further promoting the public interest.

H. *Not Designed to Permit Unfair Discrimination between Customers, Issuers, Brokers, or Dealers*

Nasdaq believes that proposed Rule 5605(f) is not designed to permit unfair discrimination among companies because it requires all companies subject to the rule to meet the applicable diversity objectives under proposed Rule 5605(f)(2) or explain why they do not, which could include describing a different approach. While the proposal provides different objectives for the second Diverse director among Smaller Reporting Companies, Foreign Issuers, and other companies, Nasdaq believes that the rule is not designed to permit unfair discrimination among companies. In all cases, a company can choose to meet the diversity objectives of the entire rule or to satisfy only certain elements of the rule. Further, while the proposal provides an alternative objective for companies with smaller boards, the proposed rule does not limit board sizes—if a board chooses to nominate a Diverse individual to the board to meet the diversity objectives of the proposed rule, it is not precluded from also nominating a non-Diverse director for an

additional board seat. Lastly, the proposal is a disclosure-based framework, not a mandate, and companies can choose to explain their reasons for not meeting the proposed diversity objectives.

i. Rule 5605(f)(2)(B): Foreign Issuers

Similar to all other companies subject to proposed Rule 5605(f), the proposal requires all Foreign Issuers with boards of more than five members to have, or explain why they do not have, at least two Diverse directors, including one director who self-identifies as Female. Foreign Issuers with boards of five or fewer members could meet an alternative objective of one Diverse director. However, Nasdaq proposes to provide Foreign Issuers with boards of more than five members with additional flexibility with regard to the second Diverse director. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form 10-K, 20-F or 40-F). While the proposal provides a different objective for the second Diverse director for Foreign Issuers with larger boards, Nasdaq believes it is not designed to permit unfair discrimination between Foreign Issuers and other companies because it recognizes that the unique demographic composition of the United States, and its historical marginalization of Underrepresented Minorities and the LGBTQ+ community, may not extend to all countries outside of the United States. Further, Nasdaq believes that it is challenging to apply a consistent definition of minorities to all countries globally because "[t]here is no internationally agreed definition as to which groups constitute

minorities."[337] However, Nasdaq observed that the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* states that:

> States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. [Article 1.1]
>
> Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. [Article 2.1]

Similarly, "there is no universally accepted international definition of indigenous peoples."[338] Rather, the United Nations *Declaration on the Rights of Indigenous Peoples* recognizes "that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration."[339] Accordingly, Nasdaq believes that it is not unfairly discriminatory to allow an alternative mechanism for Foreign Issuers to satisfy proposed Rule 5605(f)(2) in recognition that the U.S.-based EEOC definition of Underrepresented Minorities is not appropriate for every Foreign Issuer. In addition, Foreign Issuers have the ability to satisfy proposed Rule

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337 See United Nations, *Minority Rights: International Standards and Guidance for Implementation* 2 (2010), available at: https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf. See also G.A. Res. 47/135. art. 1.1 (Dec. 18, 1992) ("States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."). The preamble to the Declaration also "[r]eaffirm[s] that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion."

338 See id. at 3.

339 See G.A. Res. 61/295 (Sept. 13, 2007).

5605(f)(2)(B) by explaining that they do not satisfy this alternative definition. Similarly, any company that is not a Foreign Issuer, but that prefers the alternative definition available for Foreign Issuers, could follow proposed Rule 5605(f)(2)(B) and disclose its reasons for doing so.

Under the proposal, Foreign Issuer means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act, and (ii) has its principal executive offices located outside of the United States. For example, a company that is considered a "foreign issuer" under Rule 3b-4(b) under the Act and has its principal executive offices located in Ireland would qualify as a Foreign Issuer for purposes of proposed Rule 5605(f)(2), even if it is not considered a Foreign Private Issuer under Nasdaq or SEC rules. Nasdaq proposes to define "board of directors" in proposed Rule 5605(f)(2)(B)(i)(b) to mean, in the case of a Foreign Issuer with a two-tiered board system, the company's supervisory or non-management board, which is consistent with the SEC's definition in Rule 10A-3(e)(2) of the Exchange Act.[340]

Nasdaq recognizes that Foreign Issuers may be located in jurisdictions that impose privacy laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race or ethnicity. In such countries, a company may not be able to determine each director's self-identified Diverse attributes due to restrictions on the collection of personal information. The company may instead publicly disclose pursuant to proposed Rule 5605(f)(3) that "Due to privacy laws in the company's home country

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[340] See 17 CFR § 240.10A-3(e)(2) ("In the case of foreign private issuers with a two-tier board system, the term board of directors means the supervisory or non-management board.").

jurisdiction limiting its ability to collect information regarding a director's self-identified Diverse attributes, the company is not able to determine that it has two Diverse directors as set forth under Rule 5605(f)(2)(B)(ii)."

ii. Rule 5605(f)(2)(C): Smaller Reporting Companies

While the proposal provides a different objective for the second Diverse director for Smaller Reporting Companies with boards of more than five members, Nasdaq believes that this distinction is not designed to permit unfair discrimination among companies. Nasdaq has designed the proposed rule to ensure it does not have a disproportionate economic impact on Smaller Reporting Companies by imposing undue costs or burdens. Nasdaq recognizes that Smaller Reporting Companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources to compensate an additional director or engage a search firm to find director candidates outside of the directors' traditional networks. Nasdaq believes that this is a reasonable basis to distinguish Smaller Reporting Companies from other companies subject to the rule.

Smaller Reporting Companies already are provided certain exemptions from Nasdaq's listing rules. For example, under proposed Rule 5605(d)(3), Smaller Reporting Companies must have a compensation committee comprised of at least two independent directors and a formal written compensation committee charter or board resolution that specifies the committee's responsibilities and authority, but such companies are not required to grant authority to the committee to retain or compensate consultants or advisors or consider certain independence factors before selecting such advisors,

consistent with Rule 10C-1 of the Act.[341] In its approval order, the SEC concluded as follows:

> The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C-1 requirements, it makes sense for Nasdaq to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further . . . in view of the potential additional costs of an annual review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.[342]

The Commission also makes accommodations for Smaller Reporting Companies based on their more limited resources, allowing them to comply with scaled disclosure requirements in certain SEC reports rather than the more rigorous disclosure requirements for larger companies. For example, Smaller Reporting Companies are not required to include a compensation discussion and analysis in their proxy or Form 10-K describing the material elements of the compensation of its named executive officers.[343] Eligible Smaller Reporting Companies also are relieved from the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting.[344] In each case, companies may choose to satisfy the more rigorous requirements in lieu of relying on the exemptions.

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341 See Nasdaq Rulebook, Rule 5605(d)(3).

342 See Order Granting Accelerated Approval of Proposed Rule Change, 78 Fed. Reg. 4,554, 4,567 (Jan. 22, 2013).

343 See 17 C.F.R. § 229.402(l).

344 See Accelerated Filer and Large Accelerated Filer Definitions, 85 Fed. Reg. 17,178 (March 26, 2020).

Any company that is not a Smaller Reporting Company, but prefers the alternative rule available for Smaller Reporting Companies, could follow proposed Rule 5605(f)(2)(C) and disclose their reasons for doing so. In addition, companies with boards of five or fewer members could meet an alternative objective of one Diverse director. As such, Nasdaq believes that the proposed alternative rule for Smaller Reporting Companies is not designed to, and does not, unfairly discriminate among companies. Lastly, Nasdaq believes that proposed Rule 5605(f)(2)(C) is not designed to permit unfair discrimination among companies because it requires Smaller Reporting Companies to have, or explain why they do not have, at least one director who self-identifies as Female, similar to other companies subject to Rule 5065(f).

iii. Rule 5605(f)(2)(D): Companies with Smaller Boards

While Nasdaq proposes to permit each company with a board of directors of five or fewer members to satisfy proposed Rule 5605(f)(2) by having, or explaining why it does not have, at least one member of its board of directors who is Diverse, Nasdaq believes that this distinction does not unfairly discriminate among issuers.

Nasdaq considered comments that it should "amend the proposed rules to allow greater flexibility for companies with relatively small boards."[345] Based on Nasdaq data, the average board size of all listed companies is eight directors, with an average board size of 7.3 for Smaller Reporting Companies and Foreign Issuers. The average market value of all companies with five or fewer directors is $706,062,658, with a median market value of $72,087,090, which is similar to the SEC's thresholds for Smaller

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[345] See Ballard Spahr Comment Letter, supra note 171.

Reporting Companies and non-accelerated filers, respectively.[346] Under 12b-2 of the Act, a company may qualify as a Smaller Reporting Company if it has: (1) public float of less than $250 million; or (2) annual revenues of less than $100 million and either: (i) no public float; or (ii) public float of less than $700 million.[347] A company may qualify as a non-accelerated filer if it has less than $75 million public float.[348]

Based on these thresholds, while a company with a smaller board and $706 million public float may be similarly situated with a company with a public float of $699 million, it would not qualify as a Smaller Reporting Company under the Act. In contrast, a company with a smaller board and a public float of $72 million would qualify as a Smaller Reporting Company and as a non-accelerated filer, providing it with additional time to file its periodic reports and exempting it from the requirement to provide an auditor's attestation of management's assessment of ICFR.

Nasdaq believes that companies with smaller boards may face similar resource constraints to those of Smaller Reporting Companies. However, the alternative diversity objective Nasdaq proposes to provide Smaller Reporting Companies may not be available to them because not all companies with small boards qualify as Smaller Reporting Companies. Nasdaq believes that providing companies with boards of five or fewer with an alternative diversity objective recognizes that they are similarly situated with Smaller Reporting Companies without disproportionately impacting board composition. For example, companies with smaller boards may be disproportionately impacted by the proposed rule if they plan to satisfy proposed Rule 5605(f)(2) by adding additional

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346 Compared to an average market value of approximately $8,483,965,004 and median market value of $615,940,923 for all companies with more than five directors.

347 See 17 C.F.R. § 240.12b-2.

348 Id.

directors. Two Diverse directors on a five member board comprise 40% of the board, whereas two Diverse directors on an eight member board comprise 25% of the board. Alternatively, if a five-member board does not have two Diverse directors and expands its board to satisfy proposed Rule 5605(f)(2), it may require the company to incur additional costs through director compensation and D&O insurance. Nasdaq seeks to avoid creating complexity for companies that attempt to meet the alternative diversity objective by subjecting them to a higher diversity objective.

Nasdaq believes that proposed Rule 5605(f)(2)(D) therefore recognizes that companies with smaller boards are not similarly situated with companies with larger boards, and has designed the proposal to avoid imposing undue costs and burdens on them. Further, companies with smaller boards are not precluded from satisfying the higher objective to have, or explain why they do not have, at least two Diverse directors, nor are companies with larger boards precluded from satisfying a lower objective, provided they transparently explain their reasons for doing so.

iv. Rule 5605(f)(3): Alternative Public Disclosure

The proposal is a disclosure-based framework, not a mandate. Under proposed Rule 5605(f)(3), a company may choose to meet the diversity objectives of proposed Rule 5605(f) or choose to explain its reasons for not meeting the applicable objective, which could include describing a different approach. Nasdaq designed the proposal to avoid unduly burdening competition or efficiency, or conflicting with existing securities laws, by providing all companies subject to proposed Rule 5605(f) with the option to make the public disclosure required under proposed Rule 5605(f)(3) in the company's proxy statement or information statement for its annual meeting of shareholders (or, if the

company does not file a proxy, in its Form 10-K or 20-F). Alternatively, such disclosure may be provided on the company's website concurrently with the filing of the company's proxy statement or any information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F), provided the company submits a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting. Nasdaq believes proposed Rule 5605(f)(3) is not designed to permit unfair discrimination among companies because the proposed rule provides all companies subject to proposed Rule 5605(f) the option to disclose an explanation rather than meet the diversity objectives of proposed Rule 5605(f)(2). Additionally, all companies who choose to explain their reason for not meeting the applicable objective are given the same options for providing the disclosure.

Certain federal securities laws similarly permit companies to satisfy corporate governance requirements through disclosure of reasons for not meeting the applicable requirement. For example, under Regulation S-K, Item 407 requires a company to disclose whether or not its board of directors has determined that the company has at least one audit committee financial expert. If a company does not have a financial expert on the audit committee, it must provide an explanation.[349] Item 406 requires a company to disclose whether it has adopted a written code of ethics that applies to the chief executive officer and senior financial or accounting officers. If a company has not adopted such a code of ethics, it must disclose the reasons why not.[350] Item 402 regarding pay ratio disclosure defines how total compensation for employees should be calculated, but

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349 See 17 C.F.R. § 229.407(d)(5).

350 Id. § 229.406(a).

permits companies to use a different measure as long as they explain their approach.[351] In addition, under Nasdaq's listing rules, foreign private issuers may choose to follow home country practice in lieu of the corporate governance standards set forth in the Rule 5600 series, provided that a company publicly discloses in its annual reports or on its website "each requirement that it does not follow and describe the home country practice followed by the Company in lieu of such requirements."[352]

Nasdaq rules and SEC guidance already recognize that website disclosure can be a method of disseminating information to the public. For example, in addition to permitting foreign private issuers to provide website disclosures related to home country practices,[353] Nasdaq listing rules also provide such flexibility for disclosures regarding third party director compensation[354] and reliance on the exception relating to independent compensation committee members.[355] The SEC has recognized that "[a] company's web site is an obvious place for investors to find information about the company"[356] and permits companies to make public disclosure of material information through website disclosures if, among other things, the company's website is "a recognized channel of distribution of information."[357]

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351 Id. § 229.402.

352 See Nasdaq Rulebook, Rule 5615(a)(3)(B)(i).

353 Id., Rule 5615(a)(3)(B) and IM-5615-3.

354 See Nasdaq Rulebook, Rule 5250(b)(3)(A).

355 Id., Rules 5605(d)(2)(B) (non-independent compensation committee member under exceptional and limited circumstances) and 5605(e)(3) (non-independent nominations committee member under exceptional and limited circumstances).

356 See Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,864 (Aug. 7, 2008).

357 Id. at 45,867.

v. Rule 5605(f)(4): Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of proposed Rule 5605(f) (defined as "Exempt Companies"): SPACs; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series. Each of the types of Exempt Companies either has no board of directors, lists only securities with no voting rights towards the election of directors, or is not an operating company, and the holders of the securities they issue do not expect to have a say in the composition of their boards. As such, Nasdaq believes the proposal is not designed to permit unfair discrimination by excluding Exempt Companies from the application of proposed Rule 5605(f). These companies, other than SPACs, already are exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615.

Nasdaq is also proposing to exempt SPACs from the requirements of proposed Rule 5605(f), and the post-business combination entity would have at least two years after they complete a business combination. This approach is similar to other phase-in periods granted to SPACs. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering, including a SPAC, one year to fully comply with the independent compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, Rule 5615(b)(1) and SEC Rule 10A-3(b)(1)(iv)(A) allows a newly

listed company, including a SPAC, up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements.

Under proposed Rule 5605(f)(5)(A) or (B), a newly listed company, including through a business combination with a SPAC, would be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have, the applicable number of Diverse directors under proposed Rule 5605(f)(2) by the later of two years from the date of listing or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing, with differing milestones depending on the company's market tier. Nasdaq believes it is not appropriate to subject SPACs to proposed Rule 5605(f) prior to completing a business combination because SPACs are shell companies until they complete an acquisition of an operating company. Rather, Nasdaq believes it is appropriate to provide SPACs with the same phase-in provided to other newly listed companies upon completing a business combination, because a SPAC must satisfy all of Nasdaq's initial listing requirements upon completing a business combination, including its requirements related to committee composition and majority independent board.

vi. Rule 5605(f)(5): Phase-in Period

Under proposed Rule 5605(f)(5)(A), a newly listed company on the NGS or NGM tiers that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one Diverse director by the later of: (a) one year from the date of listing; or (b) the date the company files its

proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to the company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(B), a newly listed company on the NCM tier that was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

Under proposed Rule 5605(f)(5)(D), any newly listed company on any market tier that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange will be permitted to satisfy the requirement of proposed Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's second annual meeting of shareholders subsequent to the company's listing.

These "phase-in" periods apply to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a business combination with a SPAC.

Nasdaq believes this approach is not designed to permit unfair discrimination because it provides all companies that become newly subject to the rule the same time period within which to satisfy proposed Rule 5605(f)(2), while providing additional flexibility to companies on the NCM tier and companies with smaller boards in recognition that such companies are typically smaller and may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

In addition, this approach is similar to other phase-in periods granted to companies listing on or transferring to Nasdaq. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of proposed Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

vii. Rule 5605(f)(7): Effective Dates/Transition

Under proposed Rule 5605(f)(7), each company (including a company with a smaller board under proposed Rule 5606(f)(2)(D)) must have, or explain why it does not

have, at least one Diverse director by the later of: (i) the First Effective Date;[358] or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the First Effective Date.

Each company listed on the NGS or NGM tiers must have, or explain why it does not have, two Diverse directors by the later of: (i) the Second NGS/NGM Effective Date;[359] or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date. Each company listed on the NCM tier must have, or explain why it does not have, at least two Diverse directors by the later of: (i) the Second NCM Effective Date[360] or (ii) the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual shareholders meeting during the calendar year of the Second NCM Effective Date.

Nasdaq believes this approach is not designed to permit unfair discrimination because it recognizes that companies listed on the NCM tier may not have the resources necessary to compensate an additional director or engage a search firm to search for director candidates outside of the directors' traditional networks. Therefore, Nasdaq believes it is in the public interest to provide such companies with one additional year to meet the diversity objectives of proposed Rule 5605(f), should they choose to do so. Nasdaq notes that all companies may choose to follow a timeframe applicable to a

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358 The "First Effective Date" is two calendar years after the Approval Date.

359 The "Second NGS/NGM Effective Date" is four calendar years after the Approval Date.

360 The "Second NCM Effective Date" is five calendar years after the Approval Date.

different market tier, provided they publicly describe their explanation for doing so. They also may construct their own timeframe for meeting the diversity objectives of proposed Rule 5605(f), provided they publicly disclose their reasons for not abiding by Nasdaq's timeframe.

I. *Not Designed to Regulate by Virtue of any Authority Conferred by the Act Matters Not Related to the Purposes of the Act or the Administration of the Exchange*

Nasdaq believes that the proposal is not designed to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.[361] The proposal relates to the Exchange's corporate governance standards for listed companies. As discussed above, "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets."[362] And because "it is not always feasible to define . . . every practice which is inconsistent with the public interest or with the protection of investors," the Act leaves to SROs "the necessary work" of rulemaking pursuant to Section 6(b)(5).[363]

Nasdaq recognizes that U.S. states are increasingly proposing and adopting board diversity requirements, and because corporations are creatures of state law, some market participants may believe that such regulation is best left to states. However, Nasdaq considered that certain of its listing rules related to corporate governance currently relate to areas that are also regulated by states. For example, states impose standards related to

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361 See 15 U.S.C. § 78f(b)(5).

362 See Order Approving Proposed Rule Changes, supra note 52, at 64,161.

363 See Heath v. SEC, 586 F.3d 122, 132 (2d Cir. 2009) (citing Avery v. Moffat, 55 N.Y.S.2d 215, 228 (Sup. Ct. 1945)).

quorums[364] and shareholder approval of certain transactions,[365] which also are regulated under Nasdaq's listing rules.[366] Nasdaq has adopted rules relating to such matters to ensure uniformity of such rules among its listed companies. Similarly, Nasdaq believes that the proposed rule will create uniformity among listed companies by helping to assure investors that all non-exempt companies meet the applicable diversity objectives of proposed Rule 5605(f)(2) or publicly describe why they do not.

Further, Nasdaq believes the proposal will enhance investor confidence that listed companies that meet the diversity objectives of proposed Rule 5605(f)(2) are considering the perspectives of more than one demographic group, leading to robust dialogue and better decision making, as well as the other corporate governance benefits of diverse boards discussed above in Section II of the Purpose section. To the extent companies choose to disclose their reasons for not meeting the diversity objectives of proposed Rule 5605(f)(2) pursuant to proposed Rule 5605(f)(3), Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make an informed voting decision, thereby promoting capital formation and efficiency. It has been the Exchange's longstanding principle that "Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process."[367]

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364 See, e.g., 8 Del. Code § 216 (providing that a quorum at a shareholder's meeting shall consist of no less than 1/3 of the shares entitled to vote at such meeting).

365 See, e.g., id. §§ 251, 271 (providing that shareholder approval by a majority of the outstanding voting shares entitled to vote is required for mergers and the sale of all or substantially all of a corporation's assets).

366 See, e.g., Nasdaq Rulebook, Rules 5620(c) and 5635(a).

367 Id., Rule 5101.

In addition, as discussed in Section II of the Purpose section, in passing Section 342 of the Dodd-Frank Act, Congress recognized the need to respond to the lack of diversity in the financial services industry, and the Standards designed by the Commission and other financial regulators provide a framework for addressing that industry challenge. The Standards themselves identify several focus areas, including the importance of "Organizational Commitment," which speaks to the critical role of senior leadership—including boards of directors—in promoting diversity and inclusion across an organization. In addition, like the proposed rule, the Standards also consider "Practice to Promote Transparency," and recognize that transparency is a key component of any diversity initiative. Specifically, the Standards provide that the "transparency of an entity's diversity and inclusion program promotes the objectives of Section 342," and also is important because it provides the public with necessary information to assess an entity's diversity policies and practices.[368]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Nasdaq reviewed requirements related to board diversity in two dozen foreign jurisdictions, and almost every jurisdiction imposes diversity-focused requirements on listed companies, either through a securities exchange, financial regulator or the government. Nasdaq competes for listings globally, including in countries that have implemented a more robust regulatory reporting framework for diversity and ESG disclosures. Nasdaq carefully considered the competitive implications of the proposal.

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[368] Final Interagency Policy Statement, supra note 19.

While Nasdaq would regret losing even a single valued issuer, experience and empirical data demonstrate that neither the listings contract nor listings fees prevents issuers from switching listings markets. Moreover, based on public comments, Nasdaq believes that a significant body of issuers supports the proposal, and that some issuers share these values so strongly that they may choose to list on Nasdaq because of it.

Currently in the U.S., the Long-Term Stock Exchange ("LTSE"), which has established a coalition of "asset owners and asset managers representing a combined $7 trillion in assets under management,"[369] seeks to distinguish itself by focusing on long-term elements of corporate governance, including, for example, diversity and inclusion. Under Rule 14.425, companies listed on LTSE must adopt and publish a long-term stakeholder policy that explains, among other things, "the Company's approach to diversity and inclusion."[370]

III. Board Statistical Disclosure

The Exchange does not believe that proposed Rule 5606 will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the adoption of Rule 5606 will not impose any undue burden on competition among listed companies for the reasons set forth below.

With a few exceptions, all companies would be required to make the same disclosure of their board-level statistical information. The average board size of a company that is currently listed on the Exchange is eight directors. Although a company would be required to disclose its board-level statistical data, directors may choose to opt

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369 See Long-Term Stock Exchange, *A coalition of long-term company builders*, available at: https://ltse.com/coalition.

370 See Long-Term Stock Exchange Rule Book, Rule 14.425.

out rather than reveal their diversity characteristics to their company. A company would identify such directors in the "Did Not Disclose Demographic Background" category. For directors who voluntarily disclose their diversity characteristics, the company would collect their responses and disclose the information in either the company's proxy statement, information statement of shareholder meeting, any other disclosure form filed with the SEC or on the company's website, using Nasdaq's required format. While the time and economic burden may vary based on a company's board size, Nasdaq does not believe there is any significant burden associated with gathering, preparing and reporting this data. Therefore, Nasdaq believes that there will be a *de minimis* time and economic burden on listed companies to collect and disclose the diversity statistical data.

Some investors value demographic diversity, and list it as an important factor influencing their director voting decisions.[371] Investors have stated that consistent data would make its collection and analysis easier and more equitable for investors that are not large enough to demand or otherwise access individualized disclosures.[372] Therefore, Nasdaq believes that any burden placed on companies to gather and disclose their board-level diversity statistics is counterbalanced by the benefits that the information will provide to a company's investors.

Moreover, as discussed above, most listed companies are required to submit an annual EEO-1 Report, which provides statistical data related to race and gender data among employees similar to the data required under proposed Rule 5606(a). Because most companies are already collecting similar information annually to satisfy their EEOC requirement, Nasdaq does not believe that adding directors to the collection will place a

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371 See Hunt et al., supra note 30.

372 See Petition for Rulemaking, supra note 130, at 2.

significant burden on these companies. Additionally, the information requested from Foreign Issuers is limited in scope and therefore does not impose a significant burden on them.

Nasdaq faces competition in the market for listing services. Proposed Rule 5606 reflects that competition, but it does not impose any burden on competition with other exchanges. As discussed above, investors have made clear their desire for greater transparency into public companies' board-level diversity as it relates to gender identity, race, and ethnicity. Nasdaq believes that the proposed rule will enhance the competition for listings. Other exchanges can set similar requirements for their listed companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

IV. Diverse Board Representation or Explanation

Nasdaq believes that proposed Rule 5605(f) will not impose burdens on competition among listed companies because the Exchange has constructed a framework for similarly-situated companies to satisfy similar requirements (*i.e.*, Foreign Issuers, Smaller Reporting Companies, companies with smaller boards, and other companies), and has provided all companies with the choice of satisfying the requirements of proposed Rule 5605(f)(2) by having the applicable number of Diverse directors, or by explaining why they do not. Nasdaq believes that this will avoid imposing undue costs or burdens on companies that, for example, cannot afford to compensate an additional director or believe it is not appropriate, feasible or desirable to meet the diversity

objectives of proposed Rule 5605(f) based on the company's particular circumstances (for example, the company's size, operations, or current board composition). Rather than requiring a company to divert resources to compensate an additional director, and place the company at a competitive disadvantage with its peers, the rule provides the flexibility for such company to explain why it does not meet the diversity objectives. The proposal further mitigates the burden imposed on companies with smaller boards by providing them with flexibility to have, or explain why they do not have, one Diverse director.

The cost of identifying director candidates can range from nothing or a nominal fee (via personal, work or school-related networks, or board affinity organizations, as well as internal research by the corporate secretary's team) to amounts that can vary widely depending on the specific search firm and the size of the company. Some industry observers estimate board searches for independent directors cost about one-third of a director's annual compensation, while others estimate it costs between $75,000 and $150,000. The underlying figures vary; for example, one search firm generally charges $25,000 to $50,000. Nasdaq observes that total annual director compensation can range widely; median director pay is estimated at $134,000 for Russell 3000 companies and $232,000 for S&P 500 companies. Moreover, there is a wider range of underlying compensation amounts. For example, Russell 3000 directors may receive approximately $32,600 (10th percentile), or up to $250,000 (90th percentile) or more. S&P 500 directors may receive approximately $100,000 (10th percentile) or up to $310,000 (90th percentile) or more.[373] Most, if not all, of these costs would be borne in any event in the

[373] Total annual director compensation varies by compensation elements and structure as well as amount, which is generally based on the size, sector, maturity of the company, and company specific situation. See Mark Emanuel et al., Semler Brossy and the

search for new directors regardless of the proposed rule. While the proposed rule might lead some companies to search for director candidates outside of already established networks, the incremental costs of doing so would be tied directly to the benefit of a broader search.

To reduce costs for companies that do not currently meet the diversity objectives of proposed Rule 5605(f)(2), Nasdaq has proposed to provide listed companies that have not yet met their diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment.[374] This offering is designed to ease the search for diverse nominees and reduce the costs on companies that choose to meet the diversity objectives of proposed Rule 5605(f)(2). Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of such services. Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

Nasdaq also has structured the proposed rule to provide companies with at least four years from the Approval Date to satisfy proposed Rule 5605(f)(2) so that companies do not incur immediate costs striving to meet the diversity objectives of proposed Rule 5605(f)(2). Nasdaq also has reduced the compliance burden on Smaller Reporting

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Conference Board, *Director Compensation Practices in the Russell 3000 and S&P 500* (2020 ed.), available at https://conferenceboard.esgauge.org/directorcompensation/report.

374 See supra note 23.

Companies and Foreign Issuers by providing them with additional flexibility when satisfying the objective related to the second Diverse director. Smaller Reporting Companies could satisfy the proposed diversity objective to have two Diverse directors under proposed Rule 5605(f)(2)(C) with two Female directors. Like other companies, Smaller Reporting Companies also could satisfy the second director objective by including an individual who self-identifies as an Underrepresented Minority or a member of the LGBTQ+ community. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form F-1, 10-K, 20-F or 40-F). Companies with smaller boards could satisfy the diversity objective with one Diverse director. Nasdaq has further reduced the compliance burdens on companies listed on the NCM tier by providing them with five years from the Approval Date to satisfy proposed Rule 5605(f)(2), recognizing that such companies may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For the foregoing reasons, Nasdaq does not believe that proposed Rule 5605(f) will impose any burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act. Further, Nasdaq does not believe the proposed rule will impose any burden on competition among listing exchanges. As described above, Nasdaq competes with other exchanges globally for listings, including exchanges based in jurisdictions that have implemented disclosure requirements related to diversity. Within the United States, LTSE requires listed companies to adopt and publish a long-

term stakeholder policy that explains, among other things, "the Company's approach to diversity and inclusion."[375] Other listing venues within the United States may propose to adopt rules similar to LTSE's requirements or the Exchange's proposal if they believe companies would prefer to list on an exchange with diversity-related listing standards.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2020-081 on the subject line.

[375] See Long-Term Stock Exchange Rule Book, Rule 14.425.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2020-081. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2020-081 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[376]

J. Matthew DeLesDernier
Assistant Secretary

[376] 17 CFR 200.30-3(a)(12).

EXHIBIT 3

Instructions:

1. All Nasdaq listed companies, except those that are exempt under Nasdaq Listing Rule 5605(f)(4) are required to disclose board level diversity statistics using the format below. The disclosure must be titled "Board Diversity Matrix" and include the date the information was collected as the "As of Date".
2. Companies are required to provide the Board Diversity Matrix information at least once per year. If, within the same year, a company changes its board composition after it publishes its Matrix, the company may, but is not required to, publish its updated information.
3. When completing the table, enter the number of directors that self-identify in each category. If a director self-identifies in the "Two or More Races or Ethnicities" category, the director must also self-identify in each individual category, as appropriate. For more details on the categories, refer to the definitions below.
4. The information provided below must be based on the voluntary self-identification of each member of the company's board of directors. For a U.S. incorporated company, any director who chooses not to disclose a gender should be included under "Did Not Disclose Gender" and any director who chooses not to identify as any race or not to identify as LGBTQ+ should be included in the "Did Not Disclose Demographic Background" category.
5. A company that qualifies as a Foreign Issuer (as defined under Rule 5605(f)(1)) or a Foreign Private Issuer may elect to use the format below for a Foreign Issuer. Any director who chooses not to disclose a gender should be included under "Did Not Disclose Gender" and any director who chooses not to identify as an "Underrepresented Individual in Home Country Jurisdiction" or LGBTQ+ should be included in the "Did Not Disclose Demographic Background" category.
6. A company may publish the information in advance of its next annual meeting of shareholders by using either of the following methods: (a) in any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company's website. If the Company provides such disclosure on its website, then the Company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.
7. Any publication of the information in the Board Diversity Matrix must be included in a searchable format. If a company uses a graphic or image format (*i.e.,* tif, jpg, gif, png), the company must also include the same information as searchable text or in a searchable table. The searchable information could be included, for example, together with the related graphic or in an appendix.
8. Following the first year of disclosure of the Matrix, all companies must include the current year and immediately prior year diversity statistics in its disclosure. If the company publishes the Matrix on its website, the disclosure must remain accessible on the company's website.
9. A company may not substantially alter the Board Diversity Matrix. However, a company may supplement its disclosure by providing additional information related to its directors. For example, a company may choose to provide the information on a director-by-director

basis or may choose to include any skills, experience and attributes of each of its directors that are relevant to the company. Supplemental information may be included below the information required by the Board Diversity Matrix or in a separate table.

Definitions:

- **Non-Binary** – Refers to genders that are not solely man or woman. Someone who is non-binary may have more than one gender, no gender, or their gender may not be in relation to the gender binary.
- **African American or Black** (not of Hispanic or Latinx origin) – A person having origins in any of the Black racial groups of Africa.
- **Alaskan Native or Native American** – A person having origins in any of the original peoples of North and South America (including Central America), and who maintain cultural identification through tribal affiliation or community recognition.
- **Asian** – A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- **Hispanic or Latinx** – A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. The term Latinx applies broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.
- **Native Hawaiian or Pacific Islander** – A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
- **White** (not of Hispanic or Latinx origin) – A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.
- **Two or More Races or Ethnicities** – A person who identifies with more than one of the above categories.
- **Underrepresented Individual in Home Country Jurisdiction** – A person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Foreign Issuer's principal executive offices (as reported on the Foreign Issuer's Forms F-1, 10-K, 20-F or 40-F).
- **LGBTQ+** – A person who identifies as any of the following: lesbian, gay, bisexual, transgender or as a member of the queer community.

Board Disclosure Format

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

Board Diversity Matrix (As of [DATE]) To be completed by Foreign Issuers (with principal executive offices outside of the U.S.) and Foreign Private Issuers				
Country of Principal Executive Offices:	[Insert Country Name]			
Foreign Private Issuer	Yes/No			
Disclosure Prohibited Under Home Country Law	Yes/No			
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
Underrepresented Individual in Home Country Jurisdiction	#			
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

EXHIBIT 4

Changes to the Proposed Rule Text

Text is marked to show changes to proposed rule language in the original filing. Additions to original filing are double underlined; deletions from original filing are ~~striken through~~.

The Nasdaq Stock Market LLC Rules

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5605. Board of Directors and Committees

(a) – (e) No change.

(f) Diverse Board Representation

(1) Definitions

For purposes of this Rule 5605(f):

"Diverse" means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+.

"Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

"Foreign Issuer" means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)); or (b) a company that (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act and (ii) has its principal executive offices located outside of the United States.

"LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

"Approval Date" means the date that the Commission issues an order granting the approval of this proposed Rule 5605(f).

"Smaller Reporting Company" has the definition set forth in Rule 12b-2 under the Act.

"Underrepresented Minority" means 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.

"Two or More Races or Ethnicities" means a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander.

(2) Diversity ~~Requirement~~Objective

(A) General ~~Requirement~~Objective

Each Company, except as described below in (B), ~~or~~ (C) or (D), must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.

(B) Foreign Issuers

(i) ~~In the case~~For purposes of ~~a Foreign Issuer, in lieu of the definition in~~this Rule 5605(f)(~~1~~2)(B), (a) "Diverse" means an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the ~~Company's home country jurisdiction~~country of the Company's principal executive offices (as reported on the Company's Form F-1, 10-K, 20-F or 40-F); and (b) "board of directors" means, in the case of a Foreign Issuer with a two-tier board system, the Company's supervisory or non-management board.

(ii) Subject to subparagraph (D) below, ~~E~~each Foreign Issuer must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Company's ~~home country jurisdiction~~principal executive offices.

(C) Smaller Reporting Companies

Subject to subparagraph (D) below, e~~E~~ach Smaller Reporting Company must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Minority.

(D) Companies with Smaller Boards

Each Company with a board of directors of five or fewer members must have, or explain why it does not have, at least one member of its board of directors who is Diverse. If a Company has five members on its board of directors before becoming subject to this Rule 5605(f), it shall not become subject to the

requirement of subparagraphs (A), (B) or (C) to have at least two members of its board of directors who are Diverse if it adds one director to satisfy this subparagraph (D), thereby becoming a six member board. However, a company would become subject to Rule 5605(f)(2)(A), (B) or (C) if it subsequently expands its board.

(3) Alternative Public Disclosure~~ of Non-Diverse Board~~

If a Company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not ~~have two Diverse directors~~meet the applicable diversity objectives of Rule 5605(f)(2), the Company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable; and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for Companies subject to Rule 5606(f)(2)(D)). Such disclosure must be provided~~: (i)~~ in advance of the Company's next annual meeting of shareholders: (a) in any proxy statement or any information statement ~~for~~ (or, if the Company does not file a proxy, in its ~~annual meeting of shareholders; or (ii)~~Form 10-K or 20-F); or (b) on the Company's website. If the Company provides such disclosure on its website, then the Company must ~~also notify Nasdaq of the location where~~submit such disclosure concurrently with the ~~information is available by submitting the~~ filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center~~ no later than 15 calendar days~~, within one business day after ~~the Company's annual shareholders meeting~~such posting.

(4) Exempt Companies

The following types of companies are exempt from the requirements of this Rule 5605(f) ("Exempt Companies"): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series.

(5) Phase-in Period

(A) Any Company newly listing on The Nasdaq Global Select Market or The Nasdaq Global Market that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted ~~one year from the date of listing to satisfy the requirements of Rule 5605(f). This phase-in period will apply after the end of the transition periods provided in Rule 5605(f)(7)~~to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one

Diverse director by the later of: (a) one year from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's first annual meeting of shareholders subsequent to the Company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(B) ~~Any Company that ceases to be a Foreign Issuer, a Smaller Reporting Company or an Exempt Company shall be permitted~~Any Company newly listing on The Nasdaq Capital Market that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(C) Any Company that ceases to be a Foreign Issuer, a Smaller Reporting Company, or an Exempt Company shall be permitted to satisfy the requirements of Rule 5605(f) by the later of: (i) one year from the date that the Company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively~~, to satisfy the requirements of Rule 5605(f)~~; or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's first annual meeting of shareholders subsequent to such event.

(D) Any Company newly listing on The Nasdaq Global Select Market, The Nasdaq Global Market and The Nasdaq Capital Market that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not

file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(6) Cure Period and Grace Period

(A) If a Company (i) does not ~~have at least two Diverse directors as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3)~~meet the applicable diversity objectives set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in Rule 5605(f)(5) or (7) and therefore fails to meet, or explain why it does not meet, the diversity objectives of Rule 5605(f)(2), the Listing Qualifications Department will promptly notify the Company and inform it that it has until the lat~~t~~er of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

(B) A Company that satisfied the diversity objectives of Rule 5605(f)(2) within the timeframes set forth in Rule 5605(f)(7), but ceases to meet the diversity objectives of Rule 5605(f)(2) due to a vacancy on its board of directors, shall have until the later of: (i) one year from the date of vacancy; or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy, to satisfy Rule 5605(f)(2) or (3). In lieu of providing the disclosure required by Rule 5605(f)(3), a Company relying on this provision may publicly disclose that it is relying on the grace period provided by this Rule 5605(f)(6)(B). Such disclosure must be provided in advance of the Company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company's website. If the Company provides such disclosure on its website, then the Company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

(7) Effective Dates/Transition

(A) Each Company listed on The Nasdaq Global Select Market, The Nasdaq Global Market, and The Nasdaq Capital Market (including a Company with a smaller board under Rule 5606(f)(2)(D)) must have, or explain why it does not have, at least one Diverse director by the later of: (i) two calendar years after the Approval Date (the "First Effective Date"); or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the First Effective Date.

(B) Each Company listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least ~~one Diverse director no later than two calendar years after the Approval Date and at least~~ two Diverse directors ~~no~~by the later ~~than~~of: (i) four calendar years after the Approval Date (the "Second NGS/NGM Effective Date"); or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date.

(C) Each Company listed on The Nasdaq Capital Market must have, or explain why it does not have, at least ~~one Diverse director no later than two calendar years after the Approval Date and at least~~ two Diverse directors ~~no~~by the later ~~than~~of: (i) five calendar years after the Approval Date (the "Second NCM Effective Date") or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NCM Effective Date.

(D) Notwithstanding the foregoing, a Company is not required to comply with the requirements of this Rule 5605(f) prior to the end of the phase-in periods described in Rule 5605(f)(5), if applicable.

(E) A company listing after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must fully satisfy the requirements of this Rule 5605(f) by the later of the periods set forth in this subparagraph (7) or the two year phase-in periods set forth in Rule 5605(f)(5).

(F) A company listed on The Nasdaq Capital Market that transfers to The Nasdaq Global Select Market or The Nasdaq Global Market after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must satisfy the requirements of this Rule 5605(f) by the lat~~t~~er of: (i) the periods set forth in this subparagraph (7)(C); or (ii) one year from the date of ~~listing~~transfer.

5606. Board Diversity Disclosure

(a) Each Company must annually disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified characteristics in a substantially ~~the~~similar format below. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

Board Diversity Matrix (As of [DATE])	
~~**Board Size:**~~	
Total Number of Directors	#

Gender:	**FemMale**	**FemMale**	**Non-Binary**	**UnDid Not Disclose Gender**
Part I: Gender Identity				
Number of dDirectors based on gender identity	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not UndDisclosed Demographic Background	#			

However, a Company that qualifies as a Foreign Issuer under Rule 5605(f)(1) may elect to use the format below:

Board Diversity Matrix (As of [DATE]) Foreign Issuer under Rule 5605(f)(1)To be completed by Foreign Issuers (with principal executive offices outside of the U.S.) and Foreign Private Issuers				
Country of Principal Executive OfficesIncorporation	[Insert Country Name]			
Foreign Private Issuer	Yes/No			
Disclosure Prohibited under Home Country Law	Yes/No			
Board Size:				
Total Number of Directors	#			
Gender:	**FemMale**	**FemMale**	**Non-Binary**	**Did Not Disclose Gender Undisclosed**
Part I: Gender Identity				

~~Number of d~~Directors ~~based on gender identity~~	#	#	#	#
Part II: Demographic Background				
Underrepresented Individual in Home Country Jurisdiction~~LGBTQ+~~	#			
LGBTQ+~~Underrepresented Individual in Home Country Jurisdiction~~	#			
Did Not ~~Und~~Disclose~~d~~ Demographic Background	#			

(b) The disclosure required by this Rule 5606 must be provided ~~(i)~~ in the ~~Company's proxy statement or information statement for its annual meeting of shareholders or (ii) on~~same manner as, and concurrently with, the ~~Company's website. If the Company provides such disclosure on its website, the Company must also submit such disclosure and include a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the Company's annual shareholders meeting~~required by Rule 5605(f)(3).

(c) This Rule 5606 shall not apply to Exempt Companies as defined in Rule 5605(f)(4).

(d) A Company newly listing on Nasdaq that was not previously subject to a substantially similar requirement of another national securities exchange, including ~~a company~~ through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a ~~business combination~~spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, must satisfy the requirement of this Rule 5606 within one year of listing.

(e) This Rule 5606 will be operative one year after the ~~date that the~~ Commission issues an order granting the approval of this proposed Rule 5606 ("Approval Date"). A Company must be in compliance with this Rule 5606 by the later of: (1) one calendar year from the Approval Date ("Effective Date"); or (2) the date the Company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the Company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.

* * * * *

5615. Exemptions from Certain Corporate Governance Requirements

* * * * *

(a) Exemptions to the Corporate Governance Requirements

(1) – (2) No change.

(3) Foreign Private Issuers

(A) A Foreign Private Issuer may follow its home country practice in lieu of the requirements of the Rule 5600 Series, the requirement to disclose third party director and nominee compensation set forth in Rule 5250(b)(3), and the requirement to distribute annual and interim reports set forth in Rule 5250(d), provided, however, that such a Company shall: comply with the Notification of Noncompliance requirement (Rule 5625), the Voting Rights requirement (Rule 5640), the Diverse Board Representation Rule (Rule 5605(f)), the Board Diversity Disclosure Rule (Rule 5606), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii). Except as provided in this paragraph, a Foreign Private Issuer must comply with the requirements of the Rule 5000 Series.

(B) No change.

IM-5615-3. Foreign Private Issuers

A Foreign Private Issuer (as defined in Rule 5005) listed on Nasdaq may follow the practice in such Company's home country (as defined in General Instruction F of Form 20-F) in lieu of the provisions of the Rule 5600 Series, Rule 5250(b)(3), and Rule 5250(d), subject to several important exceptions. First, such an issuer shall comply with Rule 5625 (Notification of Noncompliance). Second, such a Company shall have an audit committee that satisfies Rule 5605(c)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). Fourth, such an issuer shall comply with Rule 5605(f) (Diverse Board Representation) and Rule 5606 (Board Diversity Disclosure). Finally, a Foreign Private Issuer that elects to follow home country practice in lieu of a requirement of Rules 5600, 5250(b)(3), or 5250(d) shall submit to Nasdaq a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing Companies, the certification is required at the time the Company seeks to adopt its first noncompliant practice. In the interest of transparency, the rule requires a Foreign Private Issuer to make appropriate disclosures in the Company's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the Company's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, a Company that is not required to file an annual report on Form 20-F may provide these disclosures in English on its website in addition to, or instead of, providing these disclosures on its registration statement or annual report. The Company shall disclose each requirement that it does not follow and include a brief statement of the home country practice the Company follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the website, the annual report and

registration statement should so state and provide the web address at which the information may be obtained. Companies that must file annual reports on Form 20-F are encouraged to provide these disclosures on their websites, in addition to the required Form 20-F disclosures, to provide maximum transparency about their practices.

(4) - (6) No change.

(b) – (c) No change.

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5810. Notification of Deficiency by the Listing Qualifications Department

When the Listing Qualifications Department determines that a Company does not meet a listing standard set forth in the Rule 5000 Series, it will immediately notify the Company of the deficiency. As explained in more detail below, deficiency notifications are of four types:

(1) – (4) No change.

Notifications of deficiencies that allow for submission of a compliance plan or an automatic cure or compliance period may result, after review of the compliance plan or expiration of the cure or compliance period, in issuance of a Staff Delisting Determination or a Public Reprimand Letter.

(a) – (b) No change.

(c) Types of Deficiencies and Notifications

No change.

(1) No change.

(2) Deficiencies for which a Company may Submit a Plan of Compliance for Staff Review

> **(A)** Unless the Company is currently under review by an Adjudicatory Body for a Staff Delisting Determination, the Listing Qualifications Department may accept and review a plan to regain compliance when a Company is deficient with respect to one of the standards listed in subsections (i) through (vi) below. In accordance with Rule 5810(c)(2)(C), plans provided pursuant to subsections (i) through (iv) and (vi) below must be provided generally within 45 calendar days, and in accordance with Rule 5810(c)(2)(F), plans provided pursuant to subsection (v) must be provided generally within 60 calendar days. If a Company's plan consists of transferring from the Nasdaq Global or Global Select Market to the Nasdaq Capital Market, the Company should submit its application and the applicable application fee at the same time as its plan to regain compliance.

(i) – (ii) No change.

(iii) deficiencies from the standards of Rules 5620(a) {Meetings of Shareholders}, 5620(c) {Quorum}, 5630 {Review of Related Party Transactions}, 5635 {Shareholder Approval}, 5250(c)(3) {Auditor Registration}, 5255(a) {Direct Registration Program}, 5610 {Code of Conduct}, 5615(a)(4)(D) {Partner Meetings of Limited Partnerships}, 5615(a)(4)(E) {Quorum of Limited Partnerships}, 5615(a)(4)(G) {Related Party Transactions of Limited Partnerships}, or 5640 {Voting Rights};[or]

(iv) failure to make the disclosure required by Rule 5250(b)(3)[.] {Disclosure of Third Party Director and Nominee Compensation} or Rule 5606 {Board Diversity Disclosure};

(v) failure to file periodic reports as required by Rules 5250(c)(1) or (2)[.]; or

(vi) failure to meet a continued listing requirement contained in the Rule 5700 Series.

IM-5810-2. Staff Review of Deficiencies

No change.

(B) – (G) No change.

(3) Deficiencies for which the Rules Provide a Specified Cure or Compliance Period

With respect to deficiencies related to the standards listed in (A) – [(F)](G) below, Staff's notification will inform the Company of the applicable cure or compliance period provided by these Rules and discussed below. If the Company does not regain compliance within the specified cure or compliance period, the Listing Qualifications Department will immediately issue a Staff Delisting Determination letter.

(A) Bid Price

A failure to meet the continued listing requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(i) – (iv) No change.

(B) Market Makers

No change.

(C) Market Value of Listed Securities

A failure to meet the continued listing requirements for Market Value of Listed Securities shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(D) Market Value of Publicly Held Shares

A failure to meet the continued listing requirement for Market Value of Publicly Held Shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(E) Independent Director and Audit Committee Rules

No change.

(F) Diverse Board Representation Rule

If a Company, that is not relying on the grace period set forth in Rule 5605(f)(6)(B), (i) does not ~~have at least two Diverse directors~~meet the applicable diversity objectives as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in Rule 5605(f)(5) or (7) and therefore fails to meet, or explain why it does not meet, the diversity objectives of Rule 5605(f)(2), the Company shall be notified promptly and shall have until the lat~~t~~er of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

[(F)](G) Market Value/Principal Amount Outstanding of Non-Convertible Bonds

A failure to meet the continued listing requirement for non-convertible bonds, as set forth in Rule 5702(b)(1) (requiring non-convertible bonds to have at least $400,000 in market value or principal amount outstanding) shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a

period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during this 180 calendar day compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

[(G)](H) Staff Discretion Relating to the Price-based Requirements

No change.

(4) Public Reprimand Letter

No change.

(d) Additional Deficiencies

No change.

* * * * *

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market LLC Rules

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5605. Board of Directors and Committees

(a) – (e) No change.

(f) Diverse Board Representation

(1) Definitions

For purposes of this Rule 5605(f):

"Diverse" means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+.

"Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

"Foreign Issuer" means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)); or (b) a company that (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act and (ii) has its principal executive offices located outside of the United States.

"LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

"Approval Date" means the date that the Commission issues an order granting the approval of this proposed Rule 5605(f).

"Smaller Reporting Company" has the definition set forth in Rule 12b-2 under the Act.

"Underrepresented Minority" means 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.

"Two or More Races or Ethnicities" means a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander.

(2) Diversity Objective

(A) General Objective

Each Company, except as described below in (B), (C) or (D), must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.

(B) Foreign Issuers

(i) For purposes of this Rule 5605(f)(2)(B), (a) "Diverse" means an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Company's principal executive offices (as reported on the Company's Form F-1, 10-K, 20-F or 40-F); and (b) "board of directors" means, in the case of a Foreign Issuer with a two-tier board system, the Company's supervisory or non-management board.

(ii) Subject to subparagraph (D) below, each Foreign Issuer must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Company's principal executive offices.

(C) Smaller Reporting Companies

Subject to subparagraph (D) below, each Smaller Reporting Company must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Minority.

(D) Companies with Smaller Boards

Each Company with a board of directors of five or fewer members must have, or explain why it does not have, at least one member of its board of directors who is Diverse. If a Company has five members on its board of directors before becoming subject to this Rule 5605(f), it shall not become subject to the requirement of subparagraphs (A), (B) or (C) to have at least two members of its board of directors who are Diverse if it adds one director to satisfy this subparagraph (D), thereby becoming a six member board. However, a company would become subject to Rule 5605(f)(2)(A), (B) or (C) if it subsequently expands its board.

(3) Alternative Public Disclosure

If a Company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not meet the applicable diversity objectives of Rule 5605(f)(2), the Company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable; and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for Companies subject to Rule 5606(f)(2)(D)). Such disclosure must be provided in advance of the Company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company's website. If the Company provides such disclosure on its website, then the Company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

(4) Exempt Companies

The following types of companies are exempt from the requirements of this Rule 5605(f) ("Exempt Companies"): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series.

(5) Phase-in Period

> **(A)** Any Company newly listing on The Nasdaq Global Select Market or The Nasdaq Global Market that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one Diverse director by the later of: (a) one year from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's first annual meeting of shareholders subsequent to the Company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(B) Any Company newly listing on The Nasdaq Capital Market that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(C) Any Company that ceases to be a Foreign Issuer, a Smaller Reporting Company, or an Exempt Company shall be permitted to satisfy the requirements of Rule 5605(f) by the later of: (i) one year from the date that the Company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively; or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's first annual meeting of shareholders subsequent to such event.

(D) Any Company newly listing on The Nasdaq Global Select Market, The Nasdaq Global Market and The Nasdaq Capital Market that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(6) Cure Period and Grace Period

(A) If a Company (i) does not meet the applicable diversity objectives set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in Rule 5605(f)(5) or (7) and therefore fails to meet, or explain why it does not meet, the diversity objectives of Rule 5605(f)(2), the Listing Qualifications Department will promptly notify the Company and inform it that it

has until the later of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

(B) A Company that satisfied the diversity objectives of Rule 5605(f)(2) within the timeframes set forth in Rule 5605(f)(7), but ceases to meet the diversity objectives of Rule 5605(f)(2) due to a vacancy on its board of directors, shall have until the later of: (i) one year from the date of vacancy; or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy, to satisfy Rule 5605(f)(2) or (3). In lieu of providing the disclosure required by Rule 5605(f)(3), a Company relying on this provision may publicly disclose that it is relying on the grace period provided by this Rule 5605(f)(6)(B). Such disclosure must be provided in advance of the Company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company's website. If the Company provides such disclosure on its website, then the Company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

(7) Effective Dates/Transition

(A) Each Company listed on The Nasdaq Global Select Market, The Nasdaq Global Market, and The Nasdaq Capital Market (including a Company with a smaller board under Rule 5606(f)(2)(D)) must have, or explain why it does not have, at least one Diverse director by the later of: (i) two calendar years after the Approval Date (the "First Effective Date"); or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the First Effective Date.

(B) Each Company listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least two Diverse directors by the later of: (i) four calendar years after the Approval Date (the "Second NGS/NGM Effective Date"); or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date.

(C) Each Company listed on The Nasdaq Capital Market must have, or explain why it does not have, at least two Diverse directors by the later of: (i) five calendar years after the Approval Date (the "Second NCM Effective Date") or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's

annual shareholders meeting during the calendar year of the Second NCM Effective Date.

(D) Notwithstanding the foregoing, a Company is not required to comply with the requirements of this Rule 5605(f) prior to the end of the phase-in periods described in Rule 5605(f)(5), if applicable.

(E) A company listing after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must fully satisfy the requirements of this Rule 5605(f) by the later of the periods set forth in this subparagraph (7) or the two year phase-in periods set forth in Rule 5605(f)(5).

(F) A company listed on The Nasdaq Capital Market that transfers to The Nasdaq Global Select Market or The Nasdaq Global Market after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must satisfy the requirements of this Rule 5605(f) by the later of: (i) the periods set forth in this subparagraph (7)(C); or (ii) one year from the date of transfer.

5606. Board Diversity Disclosure

(a) Each Company must annually disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified characteristics in a substantially similar format below. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			

Did Not Disclose Demographic Background	#

However, a Company that qualifies as a Foreign Issuer under Rule 5605(f)(1) may elect to use the format below:

Board Diversity Matrix (As of [DATE]) To be completed by Foreign Issuers (with principal executive offices outside of the U.S.) and Foreign Private Issuers				
Country of Principal Executive Offices	[Insert Country Name]			
Foreign Private Issuer	Yes/No			
Disclosure Prohibited under Home Country Law	Yes/No			
Total Number of Directors	#			
	Female	**Male**	**Non-Binary**	**Did Not Disclose Gender**
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
Underrepresented Individual in Home Country Jurisdiction	#			
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

(b) The disclosure required by this Rule 5606 must be provided in the same manner as, and concurrently with, the disclosure required by Rule 5605(f)(3).

(c) This Rule 5606 shall not apply to Exempt Companies as defined in Rule 5605(f)(4).

(d) A Company newly listing on Nasdaq that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, must satisfy the requirement of this Rule 5606 within one year of listing.

(e) This Rule 5606 will be operative one year after the Commission issues an order granting the approval of this proposed Rule 5606 ("Approval Date"). A Company must be in compliance with this Rule 5606 by the later of: (1) one calendar year from the Approval Date ("Effective Date"); or (2) the date the Company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the Company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.

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5615. Exemptions from Certain Corporate Governance Requirements

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(a) Exemptions to the Corporate Governance Requirements

(1) – (2) No change.

(3) Foreign Private Issuers

(A) A Foreign Private Issuer may follow its home country practice in lieu of the requirements of the Rule 5600 Series, the requirement to disclose third party director and nominee compensation set forth in Rule 5250(b)(3), and the requirement to distribute annual and interim reports set forth in Rule 5250(d), provided, however, that such a Company shall: comply with the Notification of Noncompliance requirement (Rule 5625), the Voting Rights requirement (Rule 5640), the Diverse Board Representation Rule (Rule 5605(f)), the Board Diversity Disclosure Rule (Rule 5606), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii). Except as provided in this paragraph, a Foreign Private Issuer must comply with the requirements of the Rule 5000 Series.

(B) No change.

IM-5615-3. Foreign Private Issuers

A Foreign Private Issuer (as defined in Rule 5005) listed on Nasdaq may follow the practice in such Company's home country (as defined in General Instruction F of Form 20-F) in lieu of the provisions of the Rule 5600 Series, Rule 5250(b)(3), and Rule 5250(d), subject to several important exceptions. First, such an issuer shall comply with Rule 5625 (Notification of Noncompliance). Second, such a Company shall have an audit committee that satisfies Rule 5605(c)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). Fourth, such an issuer shall comply with Rule 5605(f) (Diverse Board Representation) and Rule 5606 (Board Diversity Disclosure). Finally, a Foreign Private Issuer that elects to follow home country practice in lieu of a requirement of Rules 5600, 5250(b)(3), or 5250(d) shall submit to Nasdaq a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing Companies, the certification is required at the time the Company seeks to adopt its first noncompliant practice. In the interest of transparency, the rule requires a Foreign Private Issuer to make appropriate

disclosures in the Company's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the Company's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, a Company that is not required to file an annual report on Form 20-F may provide these disclosures in English on its website in addition to, or instead of, providing these disclosures on its registration statement or annual report. The Company shall disclose each requirement that it does not follow and include a brief statement of the home country practice the Company follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the website, the annual report and registration statement should so state and provide the web address at which the information may be obtained. Companies that must file annual reports on Form 20-F are encouraged to provide these disclosures on their websites, in addition to the required Form 20-F disclosures, to provide maximum transparency about their practices.

(4) - (6) No change.

(b) – (c) No change.

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5810. Notification of Deficiency by the Listing Qualifications Department

When the Listing Qualifications Department determines that a Company does not meet a listing standard set forth in the Rule 5000 Series, it will immediately notify the Company of the deficiency. As explained in more detail below, deficiency notifications are of four types:

(1) – (4) No change.

Notifications of deficiencies that allow for submission of a compliance plan or an automatic cure or compliance period may result, after review of the compliance plan or expiration of the cure or compliance period, in issuance of a Staff Delisting Determination or a Public Reprimand Letter.

(a) – (b) No change.

(c) Types of Deficiencies and Notifications

No change.

(1) No change.

(2) Deficiencies for which a Company may Submit a Plan of Compliance for Staff Review

> **(A)** Unless the Company is currently under review by an Adjudicatory Body for a Staff Delisting Determination, the Listing Qualifications Department may accept and review a plan to regain compliance when a Company is deficient with respect

to one of the standards listed in subsections (i) through (vi) below. In accordance with Rule 5810(c)(2)(C), plans provided pursuant to subsections (i) through (iv) and (vi) below must be provided generally within 45 calendar days, and in accordance with Rule 5810(c)(2)(F), plans provided pursuant to subsection (v) must be provided generally within 60 calendar days. If a Company's plan consists of transferring from the Nasdaq Global or Global Select Market to the Nasdaq Capital Market, the Company should submit its application and the applicable application fee at the same time as its plan to regain compliance.

(i) – (ii) No change.

(iii) deficiencies from the standards of Rules 5620(a) {Meetings of Shareholders}, 5620(c) {Quorum}, 5630 {Review of Related Party Transactions}, 5635 {Shareholder Approval}, 5250(c)(3) {Auditor Registration}, 5255(a) {Direct Registration Program}, 5610 {Code of Conduct}, 5615(a)(4)(D) {Partner Meetings of Limited Partnerships}, 5615(a)(4)(E) {Quorum of Limited Partnerships}, 5615(a)(4)(G) {Related Party Transactions of Limited Partnerships}, or 5640 {Voting Rights};[or]

(iv) failure to make the disclosure required by Rule 5250(b)(3)[.] <u>{Disclosure of Third Party Director and Nominee Compensation} or Rule 5606 {Board Diversity Disclosure};</u>

(v) failure to file periodic reports as required by Rules 5250(c)(1) or (2)[.]<u>; or</u>

(vi) failure to meet a continued listing requirement contained in the Rule 5700 Series.

IM-5810-2. Staff Review of Deficiencies

No change.

(B) – (G) No change.

(3) Deficiencies for which the Rules Provide a Specified Cure or Compliance Period

With respect to deficiencies related to the standards listed in (A) – [(F)]<u>(G)</u> below, Staff's notification will inform the Company of the applicable cure or compliance period provided by these Rules and discussed below. If the Company does not regain compliance within the specified cure or compliance period, the Listing Qualifications Department will immediately issue a Staff Delisting Determination letter.

(A) Bid Price

A failure to meet the continued listing requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and

shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(i) – (iv) No change.

(B) Market Makers

No change.

(C) Market Value of Listed Securities

A failure to meet the continued listing requirements for Market Value of Listed Securities shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(D) Market Value of Publicly Held Shares

A failure to meet the continued listing requirement for Market Value of Publicly Held Shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(E) Independent Director and Audit Committee Rules

No change.

(F) Diverse Board Representation Rule

If a Company, that is not relying on the grace period set forth in Rule 5605(f)(6)(B), (i) does not meet the applicable diversity objectives as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in Rule 5605(f)(5) or (7) and therefore fails to meet, or explain why it does not meet, the diversity objectives of Rule 5605(f)(2), the Company shall be notified promptly and shall have until the later of its next annual

shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

[(F)](G) Market Value/Principal Amount Outstanding of Non-Convertible Bonds

A failure to meet the continued listing requirement for non-convertible bonds, as set forth in Rule 5702(b)(1) (requiring non-convertible bonds to have at least $400,000 in market value or principal amount outstanding) shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during this 180 calendar day compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

[(G)](H) Staff Discretion Relating to the Price-based Requirements

No change.

(4) Public Reprimand Letter

No change.

(d) Additional Deficiencies

No change.

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