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March 7, 2021

**Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, DC 20549-1090**

Re: Proposed Rule Change SR-NASDAQ-2020-081

Dear Secretary Countryman,

I write in response to the February 26 comment from NASDAQ's Senior Vice President Jeffrey S. Davis,¹ which lists my January 15 letter² among the 85% supporting the current rule's exclusion of persons with disabilities. I briefly address what seem to be recurring justifications for the exclusion below.

(1) Preferring LGBTQ+ to Disability Inclusion Studies

NASDAQ has observed that there is no good data on the relationship between company performance for either LGBTQ+-inclusive or disability-inclusive working environments.³ NASDAQ reported "studies demonstrating a positive association between board diversity and decision making, company performance and investor protection"⁴ as the reason it selected LGBTQ+ persons for inclusion on the board diversity rule. But as a commentator with a disability has pointed out, "[t]he positive association the NASDAQ cites to could easily apply to persons with disabilities however—inexplicably—NASDAQ has chosen to elide all other groups

¹ Letter from Jeffrey Davis, Sr. Vice Pres., NASDAQ, to Vanessa Countryman, Sec'y, Sec. & Exchan. Comm'n (Feb. 26, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf>

² Letter from Nicholas Lawson to Vanessa Countryman, Sec'y, Sec. & Exchan. Comm'n (Jan. 15, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8259889-227946.pdf>. [hereinafter Lawson Letter].

³ NASDAQ, Inc., *Filing by the Nasdaq Stock Market LLC Pursuant to Rule 19b-4 Under the Securities and Exchange Act of 1934*, at 83-84 (Dec. 1, 2020) <https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf> [hereinafter NASDAQ, *Board Diversity Rule*] ("Nasdaq's review of academic 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. Nasdaq acknowledges that there also is a lack of published research on the issue of LGBTQ+ representation on boards.") NASDAQ did not comment on the evidence it cited "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." *Id.* at 84, n. 218 (citing ACCENTURE, GETTING TO EQUAL: THE DISABILITY INCLUSION ADVANTAGE (2018), <https://www.accenture.com/acnmedia/PDF89/Accenture-Disability-Inclusion-Research-Report.pdf>.)

⁴ NASDAQ, *Board Diversity Rule*, *supra* note 3, at 83.

and has not shared the ‘studies demonstrating a positive association,’ which somehow privilege other groups ahead of persons with disabilities.’⁵

Surely a company as sophisticated as NASDAQ can come up with some statistical explanation for its preference. Were there methodological flaws in the disability research that were absent in the LGBTQ+ studies or inappropriate sampling methods used in the former?

(2) Corporations Are Used to Filing Out EEO-1 Forms

Mr. Davis seems to be suggesting that disability status (unlike LGBTQ+ or racial/ethnic demographics) would fit awkwardly within NASDAQ’s proposed board diversity matrix, reproduced below. But it is difficult for me to see why there is no room for people with disabilities below the LGBTQ+ row.

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	#			

(3) Disability Inclusion Hurts LGBTQ+ and Racial/Ethnic Minority Inclusion

NASDAQ has suggested that “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”⁶—“the more inclusive you try to make your diversity policies, then frankly, sometimes they don’t have

⁵ Letter from James Morgan to Vanessa Countryman, Sec’y, Sec. & Exchan. Comm’n 2-3 (Dec. 22, 2020), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8177977-227061.pdf>

⁶ NASDAQ, *Board Diversity Rule*, *supra* note 3, at 82. NASDAQ did not provide evidence suggesting that including disability in diversity definitions would hinder meaningful progress on improving diversity related to race, ethnicity, sexual orientation and gender identity.

the same impact.”⁷ Perhaps some supporters of the current rule fear that including persons with disabilities will lead to diversity/inclusion watering down with other categories like “religion, age, political affiliation, [or] geographic location.”⁸ But do persons with disabilities really pose a serious threat to inclusion of women, racial/ethnic minorities, or LGBTQ+ persons, so that including them won’t “promote the public interest”⁹? Is there good reason to worry that otherwise nondiverse persons claiming to have a “disability” will take up their board spots and prevent further inclusion?

Not right now at least. The best-guess estimates of the prevalence of persons with disabilities on corporate boards is less than 2%.¹⁰ Persons with disabilities also probably have the worst leadership representation and employment rates.¹¹ And it doesn’t appear that many applicants or employees are jumping to take advantage of disability affirmative action at federal contractors, which are subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. A 2019 survey of federal contractors found that nearly 50% of respondents “indicated that their organization/unit’s disability self-identification rate was 2% or less.”¹² As one executive put it:

We have 25,000 employees. As of today, just 44 have self-identified as having a disability.... We know that’s a ridiculous number, but we really hadn’t looked at it before this year or done anything to make it a better number.¹³

Even with these requirements, the percentage of law professors with a disability is 3.82% at UCLA, 1.8% at UC Berkeley, and 1.2% at Georgetown.¹⁴

It is possible that there may come a time in the future when disability is sufficiently destigmatized and the inclusion of persons with disabilities (many of whom are also racial/ethnic

⁷ *Nasdaq Exec Jeff Thomas on New Diversity Rules for Listed Companies*, AXIOS (Dec. 1, 2020), <https://www.axios.com/nasdaq-jeff-thomas-diversity-rules-listed-companies-cbf245b3-2888-49bf-b8e9-7f3ea388cb0a.html>

⁸ Letter from Sen. Pat Toomey to Allison Herren Lee, Chair, Sec’y, Sec. & Exchan. Comm’n 3 (Feb. 12, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8369379-229219.pdf>

⁹ NASDAQ, *Board Diversity Rule*, *supra* note 3, at 38.

¹⁰ Lisa Bertagnoli, *People with Disabilities: The New Diversity Frontier*, 40 CRAIN’S CHICAGO BUSINESS 10 (Mar 6, 2017), <https://www.chicagobusiness.com/article/20170227/NEWS07/170229905/people-with-disabilities-the-new-diversity-frontier> (“at nonprofits, people with disabilities account for maybe 2 percent of board members. Experts say that’s a generous guess”); Tara Deschamps, *Door to the C-Suite Still Locked for Many Diverse Candidates Amid Slow Pace of Change*, TORONTO STAR (Dec. 16, 2020), <https://www.thestar.com/business/2020/12/16/door-to-the-c-suite-still-locked-for-many-diverse-candidates-amid-slow-pace-of-change.html> (reporting on a 2020 survey of “205 [Canadian] companies that disclosed data ... five had people with disabilities in top positions.”)

¹¹ See generally Lawson Letter, *supra* note 2.

¹² Sarah von Schrader & Susanne Bruyère, *What Works? How Federal Contractors Are Implementing Section 503: Survey Report 20* (2018), <https://digitalcommons.ilr.cornell.edu/edicollect/1361/>

¹³ Mary B. Young & Michelle Kan, *Do Ask, Do Tell: Encouraging Employees with Disabilities to Self-Identify*, THE CONFERENCE BOARD, RES. REP. R-1569-14-RR 14 (2015), https://askearn.org/wp-content/uploads/docs/do_ask_do_tell.pdf

¹⁴ UCLA, 2016-2017 ACADEMIC AFFIRMATIVE ACTION PLAN 46 (Jul. 2016), <https://equity.ucla.edu/wp-content/uploads/2016/06/2016-17-UCLA-AAAP-Final-WEB-062216.pdf>; UC BERKELEY, 2017-2018 ACADEMIC AFFIRMATIVE ACTION PROGRAM FOR ACADEMIC EMPLOYEES, https://ofew.berkeley.edu/sites/default/files/ucb_aaap_2017-2018.pdf; Letter from Rebecca Cpin to author (Feb. 26, 2021) (on file with author)

