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Vanessa Countryman
Secretary
Securities and Exchange Commission,
100 F Street, NE
Washington, DC 20549-1090

Via e-mail: rule-comments@sec.gov

**Re: The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity
File Number SR-NASDAQ-2020-081 (the “Proposal”)**

Ms. Countryman:

I appreciate the opportunity to comment on the Nasdaq Stock Market LLC (“NASDAQ”)’s recently amended proposed rule change to adopt listing rules relating to board diversity (the “**Proposed Rule**”). I previously submitted comments opposing the Proposed Rule, and I have reviewed the NASDAQ’s response to comments (the “**NASDAQ Response**”).¹ I find their response unconvincing, and I continue to urge the Securities and Exchange Commission (“**SEC**” or the “**Commission**”) to deny NASDAQ’s application.

The NASDAQ Response did not address the substance of some of objections to and concerns about the Proposed Rule. In an effort to aid the Commission in its review, I propose that the Commission require direct and satisfactory answers to the following two simple questions as a precondition to approving the Proposed Rule.

If the Proposed Rule is merely a “disclosure framework,” why did the NASDAQ opt to include diversity “objectives” in lieu of a proposal that only required disclosure?

The NASDAQ repeatedly insists that the Proposed Rule is not a mandate and is instead a “disclosure framework;” however, the NASDAQ specifically stated that one of the purposes underlying the Proposed Rule is to “by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards.”² The regulatory impetus is the scarlet letter that would attach to companies required to include the “explanation.” Requiring explanation is a firm statement that something is wrong, that a company does not meet

¹ John A. Zecca, Executive Vice President, Chief Legal Officer, and Chief Regulatory Officer, Nasdaq, to Vanessa A. Countryman, Secretary, Commission, dated February 26, 2021, available at: <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf>

² The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, SEC Rel. No 34-90574 (Dec. 4, 2020) (the “Rule Proposal”) at 4.

the standards and should therefore be required to explain why they are deficient. I presume that a mere statement of board selection, e.g., “Our board does not meet the diversity objectives because it does not have at least one woman and underrepresented minority;” instead, the company will need to provide its rationale for failing to meet this objective. How is this **not** a de facto quota?

Should the NASDAQ honestly be interested in providing only a “disclosure framework,” I propose that they file amendments to remove the diversity objectives and instead merely require disclosure (i.e., disclose the percentage of your board that is women or underrepresented minorities). The NASDAQ could also require **all** issuers to disclose the explanation for the constitution of their boards, e.g., provide any information regarding the constitution of your board, including the considerations of female and underrepresented minorities. This approach would clearly convert the Proposed rule from a requirement to a disclosure framework, but based on the NASDAQ’s response to date, they seem to believe that merely insisting this requirement is not a requirement will make it so.

Alternatively, I submit should the NASDAQ’s goal to be a “regulatory impetus” to increase woman and minority representation on corporate boards, then the NASDAQ should formulate their regulation as a mandate. Disguising a mandate as a “disclosure framework” is misleading to the public.

How, specifically, will board diversity “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?”

In the Proposed Rule and the NASDAQ Response, the NASDAQ cites a body of studies that establish, on balance, that successful companies have diverse boards. Assuming that finding is true and correct (setting aside many of the challenges associating with that research), there is **nothing** in the body of research that suggests that the diverse board is the **cause** of the improved performance. If board diversity does not, in and of itself, promote the permissible objectives under Section 6(b)(5) of the Securities Exchange Act of 1934, as amended, then this Proposed Rule is outside the scope of the NASDAQ’s authority and the application should be denied.

I offer an alternative, better explanation for the evidence that companies with diverse boards perform better. Diverse individuals are in high demand for board seats, and those individuals will gravitate towards the more successful companies. As I noted in my prior letter, 59% of board appointments in 2020 went to women and minority men.³ Given the demand for diverse individuals to serve on these boards, is it not more likely that the boards of successful companies are better able to attract qualified diverse individuals to serve on their boards? If this explanation is true, then the diversity objectives championed by the NASDAQ do not meet the requirements of the Exchange Act.

³ Connely, Courtney. “For the first time in over 20 years, all S&P 500 boards have at least one woman”, CNBC.com. Dec. 15, 2020 (available at: <https://www.cnbc.com/2020/12/15/all-sp-500-boards-have-at-least-1-woman-first-time-in-over-20-years.html>)

Further, the explanation underlying the Proposed Rule, that the mere appointment of a diverse member improves corporate performance and helps achieve the objectives note above is – frankly – absurd. It suggests that all a failing company need do to turn the tide and to ensure success is to appoint a women or underrepresented minority to their board.

* * *

To be clear, I support improving the representation of women and minorities on corporate boards; however, unlike NASDAQ, I don't believe that today's underrepresentation is the result of implicit bias or racism on the part of existing boards and their nominating committees such that a "regulatory impetus" is required to change behavior. Instead, I believe this lack of representation is more a result of fewer opportunities for underrepresented minorities to have careers that provide opportunities to sit on corporate boards. We should be investing in revitalizing minority neighborhoods, providing ready access to quality education, providing families, especially single-parent families, with resources to ensure their children have every opportunity to succeed. By making investments in these communities, we can improve every aspect of the lives of underrepresented minorities, including representation on corporate boards.

Proposals such as this one, however, distract from that goal and create resentment and accusations of "tokenism". In fact, proposals such as this one pre-suppose that women and underrepresented minorities cannot achieve success (in this case, a board seat) without "regulatory impetus". Further, this Proposed Rule will lead to white, cisgendered males being disfavored (i.e. discriminated against) for board seats solely on the basis of their race, sexual orientation and gender, especially among those companies who do not meet or just meet the NASDAQs "objectives."

I, again, reject this casual racism and misogyny and again urge the SEC to deny the NASDAQ's application.

Sincerely,

A handwritten signature in black ink, appearing to read "Publius Oeconomicus", written over a light gray grid background.

Publius Oeconomicus
(pseudonym)