



ARNOLD GOLUB
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NASDAQ.COM

February 26, 2021

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

Re: Amendment No. 1 (SR-NASDAQ-2020-082)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC filed the above-referenced filing on February 25, 2021.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Arnold Golub'.

Arnold Golub
Vice President
Deputy General Counsel

Required fields are shown with yellow backgrounds and asterisks.

Filing by The Nasdaq Stock Market LLC
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)		

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
Section 3C(b)(2) * <input type="checkbox"/>	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description
 Provide a brief description of the action (limit 250 characters, required when Initial is checked *).
 Proposal to offer certain listed companies access to a complimentary board recruiting solution to help advance diversity on company boards

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 * Arnold Last Name * Golub
 Title * Deputy General Counsel
 E-mail * [REDACTED]
 Telephone * [REDACTED] Fax [REDACTED]

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.
 (Title *)
 Date 02/26/2021 EVP and Chief Legal Officer
 By John Zecca [REDACTED]
 (Name *)

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.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information *

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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 *

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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 *

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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

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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

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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

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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

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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

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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 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal 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. This Amendment 1 replaces and supersedes the original filing in its entirety.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is set forth below. Proposed new language is underlined.

* * * * *

IM-5900-9. Board Diversity Services

On December 1, 2020, Nasdaq filed a proposal (SR-Nasdaq-2020-081) to require each listed Company, subject to certain exceptions, to have, or explain why it does not have, at least two diverse directors on its board (the “Diversity Objective”). A company with five or fewer directors on its board would have to have, or explain why it does not have, at least one diverse director on its board. In order to help advance diversity on Company boards and to help Companies prepare for and, if approved, comply with the Diversity Objective, Nasdaq offers Eligible Companies complimentary access to two seats of a board recruiting solution, which will allow Companies to identify and evaluate diverse board candidates. Until December 1, 2022, any Eligible Company that requests access to this service through the Nasdaq Listing Center will receive complimentary access for one-year from the initiation of the service. This service has a retail value of approximately \$10,000 per year.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

An Eligible Company is:

- (a) any listed Company, except as described below, that represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community;
- (b) a listed Company that (i) is a Foreign Private Issuer (as defined in Rule 5005(a)(19), or (ii) is considered a foreign issuer under Rule 3b-4(b) under the Act and has its principal executive offices located outside of the United States, if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices, or lesbian, gay, bisexual, transgender or as a member of the queer community; or
- (c) a listed Company that is a Smaller Reporting Company (as defined in Rule 12b-2 under the Act), if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female, and (ii) at least one director who self-identifies as one or more of the following: female, 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the "Board") on November 5, 2020. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

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

Arnold Golub
Deputy General Counsel
Nasdaq, Inc.
(301) 978-8075

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

a. Purpose

In a separate rule filing,³ Nasdaq is proposing to require each of its listed companies, subject to certain exceptions, to: (i) provide statistical information regarding diversity among the members of the company’s board of directors; and (ii) to have, or explain why the company does not have at least two “Diverse” directors on its board (or one “Diverse” director for companies with five or fewer directors). Under this proposed rule, “Diverse” means a director who self-identifies as: (i) female, (ii) an Underrepresented Minority, or (iii) LGBTQ+ (the “Diversity Objective”).⁴ Through the rule change proposed herein, Nasdaq proposes to provide companies that do not have at least two Diverse directors, or otherwise would need to take action to satisfy the Diversity Objective, if approved, with a service to help them recruit Diverse directors.

³ Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (December 11, 2020) (SR-Nasdaq-2020-081) (the “Nasdaq Diversity Proposal”). Amendment 1 to the Nasdaq Diversity Proposal was filed on February 26, 2020.

⁴ As defined in the proposed rule change, “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 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, two or more races or ethnicities; and “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

Nasdaq is filing this Amendment 1 to SR-Nasdaq-2020-082⁵ in order to make conforming changes to align with changes proposed in Amendment 1 of the Nasdaq Diversity Proposal.

In researching the Diversity Proposal, Nasdaq reviewed dozens of empirical studies and found that an extensive body of academic and empirical research demonstrates that diverse boards are positively associated with improved corporate governance and company performance.⁶ In particular, studies have found that companies with gender-diverse boards or audit committees are associated with: more transparent public disclosures⁷ and less information asymmetry;⁸ better reporting discipline by management;⁹ a lower likelihood of manipulated earnings through earnings

⁵ Securities Exchange Act Release No. 90571 (December 4, 2020), 85 FR 79556 (December 10, 2020).

⁶ See Nasdaq Diversity Proposal at Section III, Empirical Research: The Relationship between Diversity and Company Performance, Investor Protection and Decision Making.

⁷ 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).

⁸ See David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192 at 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)).

⁹ See Bin Srinidhi et al., *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610 at 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;

management;¹⁰ an increased likelihood of voluntarily disclosing forward-looking information;¹¹ a lower likelihood of receiving audit qualifications due to errors,¹² non-compliance or omission of information;¹³ and a lower likelihood of securities fraud.¹⁴ In addition, studies found that having at least one woman on the board is associated with a

“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”).

¹⁰ 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).

¹¹ See Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140 at 142-44 (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”).

¹² See Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information*. 25(4) Bus. Ethics: A European Rev. 363 at 368 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004-2011).

¹³ Id. at 363.

¹⁴ 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).

lower likelihood of material weaknesses in internal control over financial reporting,¹⁵ and a lower likelihood of material financial restatements.¹⁶ 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.¹⁷

¹⁵ 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”).

¹⁶ 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); See also 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).

¹⁷ See, generally, 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); 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); 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); Harvey M. Wagner, Catalyst, *The Bottom Line: Corporate Performance and Women’s*

In addition, investors and investor groups are calling for diversification in the boardroom¹⁸ and legislators at the federal and state level are increasingly taking action to

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); 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; 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); and 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.moody.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).

¹⁸ 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

encourage or mandate corporations to diversify their boards and improve diversity disclosures.¹⁹

Given the positive attributes associated with diverse boards and investor desire for greater diversity in the boardroom, Nasdaq wants to advance board diversity among its listed companies. Nasdaq believes that offering a board recruiting solution will assist and encourage listed companies to increase diverse representation on their boards, which can result in improved corporate governance, thus strengthening the integrity of the market and building investor confidence. Nasdaq also believes that offering this service will help aid compliance with the Nasdaq Diversity Proposal, if it is approved. Nasdaq

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_lkdn_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.

¹⁹ For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one 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 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/>.

therefore is proposing to provide companies that have not yet achieved a certain level of diversity with one-year complimentary access for two users to a board recruiting solution, which will provide access to a network of board-ready diverse candidates, allowing companies to identify and evaluate diverse board candidates, and a tool to support board benchmarking. This service has an approximate retail value of \$10,000.

Nasdaq will offer this service to any Eligible Company, which is a listed company (except as described below) that represents to Nasdaq that it does not have: (i) at least one director who self-identifies as female; and (ii) at least one director 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 or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.²⁰ A company that is a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or, (i) is considered a foreign issuer under Rule 3b-4(b) of the Act and (ii) has its principal executive offices located outside of the United States, will be an Eligible Company if the company represents to Nasdaq that it does not have: (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices, or lesbian, gay, bisexual, transgender or as a member of the queer community. A company that is a Smaller

²⁰ Under the Nasdaq Diversity Proposal, a company with five or fewer directors on its board would have to have, or explain why it does not have, at least one Diverse director on its board. Nonetheless, in order to promote greater diversity on boards of all sizes, these companies would be Eligible Companies if they do not have at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+.

Reporting Company (as defined in Rule 12b-2 under the Act), will be an Eligible Company if the company represents to Nasdaq that it does not have: (i) at least one director who self-identifies as female, and (ii) at least one director who self-identifies as one or more of the following: female, 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.²¹

Nasdaq will offer this one-year service to Eligible Companies that request it on or before December 1, 2022. Nasdaq intends to evaluate the service and the progress made in enhancing diversity and may extend the program prior to its expiration through another rule filing.

Nasdaq notes that no other company will be required to pay higher fees as a result of this proposal and represents that providing this service will have no impact on the resources available for its regulatory programs.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Exchange Act,²² in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²³ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and

²¹ A company that is not an Eligible Company is able to receive complimentary 90-day access to the board recruiting solution, which is being offered by Nasdaq's partner to all clients of Nasdaq, Inc., including non-listed companies.

²² 15 U.S.C. 78f(b).

²³ 15 U.S.C. 78f(b)(5).

open market and a national market system, and, in general to protect investors and the public interest. It is also consistent with this provision because it is not designed to permit unfair discrimination between issuers. Nasdaq also believes that the proposed rule change is consistent with the provisions of Sections 6(b)(4)²⁴ and 6(b)(8),²⁵ in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Nasdaq believes that research surrounding the value of diversity on a company's board and investor interest in more diverse boards supports the fact that the proposal to offer access to a board recruiting solution promotes just and equitable principles of trade and protects investors and the public interest. Nasdaq believes that by making this service available more companies will seek to enhance the diversity of their boards to achieve these benefits. However, no company is required to use this service.

Nasdaq also believes it is reasonable, and not unfairly discriminatory, to offer the board recruiting solution only to Eligible Companies because these companies have the greatest need to identify diverse board candidates. In addition, if the Nasdaq Diversity Proposal is approved, these companies will need to identify diverse board candidates if they wish to satisfy that requirement instead of explaining why they do not satisfy it. Further, Nasdaq believes that companies that already have two Diverse directors will

²⁴ 15 U.S.C. 78f(4).

²⁵ 15 U.S.C. 78f(8).

already be familiar with the benefits of board diversity and have demonstrated that they do not need Nasdaq's assistance in identifying diverse candidates.

If the Nasdaq Diversity Proposal is approved by the Commission, companies will have two calendar years from the date of approval to have at least one Diverse director and four calendar years to have at least two Diverse directors. Some Eligible Companies may request the service immediately, while other Eligible Companies may first use an alternate approach to identify a Diverse director. Therefore, to provide Eligible Companies with adequate time to determine whether to utilize the complimentary service, Nasdaq believes it is reasonable to allow companies until December 1, 2022 to begin using the service.

Nasdaq faces competition in the market for listing services,²⁶ and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to offer this complimentary service as a tool to attract and retain listings as part of this competition. In particular, Nasdaq believes some companies will view the proposed board recruiting solution as a valuable tool to help achieve diversity, to the potential benefit of the company and its investors. Nasdaq also believes that offering this complimentary service will help it compete to attract and retain listings in light of the additional requirements contained in the Nasdaq Diversity Proposal.

²⁶ The Justice Department has noted the intense competitive environment for exchange listings. See "NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

For these reasons, Nasdaq believes it is not an inequitable allocation of fees, unfairly discriminatory, nor an unnecessary or inappropriate burden on competition to offer the board recruiting solution only to Eligible Companies.

The Commission has previously indicated pursuant to Section 19(b) of the Exchange Act²⁷ that providing and updating the value of services offered to certain listed companies within the rulebook is necessary,²⁸ and Nasdaq does not believe this indication of value has an effect on the allocation of fees nor does it permit unfair discrimination, as all companies with fewer than two Diverse directors will receive the same services. Further, this provision will enhance the transparency of Nasdaq's rules and the value of the services it offers, thus promoting just and equitable principles of trade. As such, the proposed rule change is consistent with the requirements of Section 6(b)(4) and (5) of the Exchange Act.

Nasdaq represents, and this proposed rule change will help ensure, that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.²⁹

²⁷ 15 U.S.C. 78s(b).

²⁸ 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.")

²⁹ See Exchange Act Release No. 79366, 81 FR 85663 at 85665 (citing Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE-2011-20)).

4. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. As noted above, Nasdaq faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. The proposed rule change reflects that competition, but does not impose any burden on the competition with other exchanges. Rather, Nasdaq believes that some companies will find the proposed board recruiting solution an attractive offering and therefore make listing or remaining listed on Nasdaq more attractive, which will enhance competition for listings.

Other exchanges can also offer similar services to 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 Exchange Act, as amended.

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

Not applicable.

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.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-NASDAQ-2021-082)

February __, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution to Help Advance Diversity on Company Boards

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 offer certain listed companies access to a complimentary board recruiting solution to help advance diversity on company boards.

This Amendment 1 replaces and supersedes the original filing in its entirety.

The text of the proposed rule change is detailed below: proposed new language is underlined and proposed deletions are in brackets.

* * * * *

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

IM-5900-9. Board Diversity Services

On December 1, 2020, Nasdaq filed a proposal (SR-Nasdaq-2020-081) to require each listed Company, subject to certain exceptions, to have, or explain why it does not have, at least two diverse directors on its board (the “Diversity Objective”). A company with five or fewer directors on its board would have to have, or explain why it does not have, at least one diverse director on its board. In order to help advance diversity on Company boards and to help Companies prepare for and, if approved, comply with the Diversity Objective, Nasdaq offers Eligible Companies complimentary access to two seats of a board recruiting solution, which will allow Companies to identify and evaluate diverse board candidates. Until December 1, 2022, any Eligible Company that requests access to this service through the Nasdaq Listing Center will receive complimentary access for one-year from the initiation of the service. This service has a retail value of approximately \$10,000 per year.

An Eligible Company is:

- (a) any listed Company, except as described below, that represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community;

- (b) a listed Company that (i) is a Foreign Private Issuer (as defined in Rule 5005(a)(19), or (ii) is considered a foreign issuer under Rule 3b-4(b) under the Act and has its principal executive offices located outside of the United States, if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices, or lesbian, gay, bisexual, transgender or as a member of the queer community; or
- (c) a listed Company that is a Smaller Reporting Company (as defined in Rule 12b-2 under the Act), if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female, and (ii) at least one director who self-identifies as one or more of the following: female, 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.

* * * * *

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

In a separate rule filing,³ Nasdaq is proposing to require each of its listed companies, subject to certain exceptions, to: (i) provide statistical information regarding diversity among the members of the company’s board of directors; and (ii) to have, or explain why the company does not have at least two “Diverse” directors on its board (or one “Diverse” director for companies with five or fewer directors). Under this proposed rule, “Diverse” means a director who self-identifies as: (i) female, (ii) an Underrepresented Minority, or (iii) LGBTQ+ (the “Diversity Objective”).⁴ Through the rule change proposed herein, Nasdaq proposes to provide companies that do not have at least two Diverse directors, or otherwise would need to take action to satisfy the Diversity Objective, if approved, with a service to help them recruit Diverse directors.

Nasdaq is filing this Amendment 1 to SR-Nasdaq-2020-082⁵ in order to make

³ Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (December 11, 2020) (SR-Nasdaq-2020-081) (the “Nasdaq Diversity Proposal”). Amendment 1 to the Nasdaq Diversity Proposal was filed on February 26, 2020.

⁴ As defined in the proposed rule change, “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 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, two or more races or ethnicities; and “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

⁵ Securities Exchange Act Release No. 90571 (December 4, 2020), 85 FR 79556 (December 10, 2020).

conforming changes to align with changes proposed in Amendment 1 of the Nasdaq Diversity Proposal.

In researching the Diversity Proposal, Nasdaq reviewed dozens of empirical studies and found that an extensive body of academic and empirical research demonstrates that diverse boards are positively associated with improved corporate governance and company performance.⁶ In particular, studies have found that companies with gender-diverse boards or audit committees are associated with: more transparent public disclosures⁷ and less information asymmetry;⁸ better reporting discipline by management;⁹ a lower likelihood of manipulated earnings through earnings

⁶ See Nasdaq Diversity Proposal at Section III, Empirical Research: The Relationship between Diversity and Company Performance, Investor Protection and Decision Making.

⁷ 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).

⁸ See David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192 at 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)).

⁹ See Bin Srinidhi et al., *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610 at 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

management;¹⁰ an increased likelihood of voluntarily disclosing forward-looking information;¹¹ a lower likelihood of receiving audit qualifications due to errors,¹² non-compliance or omission of information;¹³ and a lower likelihood of securities fraud.¹⁴ 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,¹⁵ and

earnings fall marginally below the benchmarks have [an] incentive to manage earnings upwards so as to meet or beat previous earnings”).

¹⁰ 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).

¹¹ See Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140 at 142-44 (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”).

¹² See Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information*. 25(4) Bus. Ethics: A European Rev. 363 at 368 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004-2011).

¹³ Id. at 363.

¹⁴ 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).

¹⁵ 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”).

a lower likelihood of material financial restatements.¹⁶ 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.¹⁷

¹⁶ 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); See also 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).

¹⁷ See, generally, 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); 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); 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); 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); Credit Suisse ESG Research, *LGBT: the value of diversity* 1 (April 15, 2016), available at:

In addition, investors and investor groups are calling for diversification in the boardroom¹⁸ and legislators at the federal and state level are increasingly taking action to

doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=807075590&extdocid=807075590_1_eng_pdf&serialid=evu4wNcHexx7kusNLazQphUkT9naxi1PvptZQvPjr1k%3d; 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); and 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.moody.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).

¹⁸ 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.*

encourage or mandate corporations to diversify their boards and improve diversity disclosures.¹⁹

Given the positive attributes associated with diverse boards and investor desire for greater diversity in the boardroom, Nasdaq wants to advance board diversity among its listed companies. Nasdaq believes that offering a board recruiting solution will assist and encourage listed companies to increase diverse representation on their boards, which can result in improved corporate governance, thus strengthening the integrity of the market and building investor confidence. Nasdaq also believes that offering this service will help aid compliance with the Nasdaq Diversity Proposal, if it is approved. Nasdaq therefore is proposing to provide companies that have not yet achieved a certain level of diversity with one-year complimentary access for two users to a board recruiting solution, which will provide access to a network of board-ready diverse candidates, allowing

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.

¹⁹ For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one 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 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/>.

companies to identify and evaluate diverse board candidates, and a tool to support board benchmarking. This service has an approximate retail value of \$10,000.

Nasdaq will offer this service to any Eligible Company, which is a listed company (except as described below) that represents to Nasdaq that it does not have: (i) at least one director who self-identifies as female; and (ii) at least one director 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 or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.²⁰ A company that is a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or, (i) is considered a foreign issuer under Rule 3b-4(b) of the Act and (ii) has its principal executive offices located outside of the United States, will be an Eligible Company if the company represents to Nasdaq that it does not have: (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices, or lesbian, gay, bisexual, transgender or as a member of the queer community. A company that is a Smaller Reporting Company (as defined in Rule 12b-2 under the Act), will be an Eligible Company if the company represents to Nasdaq that it does not have: (i) at least one director who self-identifies as female, and (ii) at least one director who self-identifies as

²⁰ Under the Nasdaq Diversity Proposal, a company with five or fewer directors on its board would have to have, or explain why it does not have, at least one Diverse director on its board. Nonetheless, in order to promote greater diversity on boards of all sizes, these companies would be Eligible Companies if they do not have at least one director who self-identifies as female and at least one director who self-identifies as an Underrepresented Minority or LGBTQ+.

one or more of the following: female, 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.²¹

Nasdaq will offer this one-year service to Eligible Companies that request it on or before December 1, 2022. Nasdaq intends to evaluate the service and the progress made in enhancing diversity and may extend the program prior to its expiration through another rule filing.

Nasdaq notes that no other company will be required to pay higher fees as a result of this proposal and represents that providing this service will have no impact on the resources available for its regulatory programs.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Exchange Act,²² in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²³ in particular, in that it is designed to promote just and equitable principles of trade, 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. It is also consistent with this provision because it is not designed to permit unfair discrimination between issuers. Nasdaq also believes that the proposed rule

²¹ A company that is not an Eligible Company is able to receive complimentary 90-day access to the board recruiting solution, which is being offered by Nasdaq's partner to all clients of Nasdaq, Inc., including non-listed companies.

²² 15 U.S.C. 78f(b).

²³ 15 U.S.C. 78f(b)(5).

change is consistent with the provisions of Sections 6(b)(4)²⁴ and 6(b)(8),²⁵ in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Nasdaq believes that research surrounding the value of diversity on a company's board and investor interest in more diverse boards supports the fact that the proposal to offer access to a board recruiting solution promotes just and equitable principles of trade and protects investors and the public interest. Nasdaq believes that by making this service available more companies will seek to enhance the diversity of their boards to achieve these benefits. However, no company is required to use this service.

Nasdaq also believes it is reasonable, and not unfairly discriminatory, to offer the board recruiting solution only to Eligible Companies because these companies have the greatest need to identify diverse board candidates. In addition, if the Nasdaq Diversity Proposal is approved, these companies will need to identify diverse board candidates if they wish to satisfy that requirement instead of explaining why they do not satisfy it. Further, Nasdaq believes that companies that already have two Diverse directors will already be familiar with the benefits of board diversity and have demonstrated that they do not need Nasdaq's assistance in identifying diverse candidates.

²⁴ 15 U.S.C. 78f(4).

²⁵ 15 U.S.C. 78f(8).

If the Nasdaq Diversity Proposal is approved by the Commission, companies will have two calendar years from the date of approval to have at least one Diverse director and four calendar years to have at least two Diverse directors. Some Eligible Companies may request the service immediately, while other Eligible Companies may first use an alternate approach to identify a Diverse director. Therefore, to provide Eligible Companies with adequate time to determine whether to utilize the complimentary service, Nasdaq believes it is reasonable to allow companies until December 1, 2022 to begin using the service.

Nasdaq faces competition in the market for listing services,²⁶ and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to offer this complimentary service as a tool to attract and retain listings as part of this competition. In particular, Nasdaq believes some companies will view the proposed board recruiting solution as a valuable tool to help achieve diversity, to the potential benefit of the company and its investors. Nasdaq also believes that offering this complimentary service will help it compete to attract and retain listings in light of the additional requirements contained in the Nasdaq Diversity Proposal.

For these reasons, Nasdaq believes it is not an inequitable allocation of fees, unfairly discriminatory, nor an unnecessary or inappropriate burden on competition to offer the board recruiting solution only to Eligible Companies.

²⁶ The Justice Department has noted the intense competitive environment for exchange listings. See “NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit” (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

The Commission has previously indicated pursuant to Section 19(b) of the Exchange Act²⁷ that providing and updating the value of services offered to certain listed companies within the rulebook is necessary,²⁸ and Nasdaq does not believe this indication of value has an effect on the allocation of fees nor does it permit unfair discrimination, as all companies with fewer than two Diverse directors will receive the same services. Further, this provision will enhance the transparency of Nasdaq's rules and the value of the services it offers, thus promoting just and equitable principles of trade. As such, the proposed rule change is consistent with the requirements of Section 6(b)(4) and (5) of the Exchange Act.

Nasdaq represents, and this proposed rule change will help ensure, that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.²⁹

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. As noted above, Nasdaq faces competition in the market for listing

²⁷ 15 U.S.C. 78s(b).

²⁸ 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.")

²⁹ See Exchange Act Release No. 79366, 81 FR 85663 at 85665 (citing Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE-2011-20)).

services, and competes, in part, by offering valuable services to companies. The proposed rule change reflects that competition, but does not impose any burden on the competition with other exchanges. Rather, Nasdaq believes that some companies will find the proposed board recruiting solution an attractive offering and therefore make listing or remaining listed on Nasdaq more attractive, which will enhance competition for listings.

Other exchanges can also offer similar services to 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 Exchange Act, as amended.

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-2020-082 on the subject line.

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-2020-082. 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-2020-082 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.³⁰

J. Matthew DeLesDernier
Assistant Secretary

³⁰ 17 CFR 200.30-3(a)(12).

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 ~~stricken through~~.

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IM-5900-9. Board Diversity Services

On December 1, 2020, Nasdaq filed a proposal (SR-Nasdaq-2020-081) to require each listed Company, subject to certain exceptions, to have, or explain why it does not have, at least two diverse directors on its board (the “Diversity RuleObjective”). A company with five or fewer directors on its board would have to have, or explain why it does not have, at least one diverse director on its board. In order to help advance diversity on Company boards and to help Companies prepare for and, if approved, comply with the Diversity RuleObjective, Nasdaq offers Eligible Companies complimentary access to two seats of a board recruiting solution, which will allow Companies to identify and evaluate diverse board candidates. Until December 1, 2022, any Eligible Company that requests access to this service through the Nasdaq Listing Center will receive complimentary access for one-year from the initiation of the service. This service has a retail value of approximately \$10,000 per year.

An Eligible Company is:

- (a) any listed Company, except as described below, that represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community;
- (b) a listed Company that (i) is a Foreign Private Issuer (as defined in Rule 5005(a)(19), or (ii) is considered a foreign issuer under Rule 3b-4(b) under the Act and has its principal executive offices located outside of the United States, if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company’s principal executive offices~~home country jurisdiction~~, or lesbian, gay, bisexual, transgender or as a member of the queer community; or
- (c) a listed Company that is a Smaller Reporting Company (as defined in Rule 12b-2 under the Act), if it represents to Nasdaq that it does not have (i) at

least one director who self-identifies as female, and (ii) at least one director who self-identifies as one or more of the following: female, 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, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.

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