

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-91286; File Nos. SR-NASDAQ-2020-081; SR-NASDAQ-2020-082)

March 10, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendments No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution to Help Advance Diversity on Company Boards

I. Introduction

On December 1, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt listing rules related to board diversity (“Board Diversity Proposal”). The proposed rule change was published for comment in the Federal Register on December 11, 2020.<sup>3</sup> On January 19, 2021, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472 (SR-NASDAQ-2020-081). Comments received on the Board Diversity Proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

rule change.<sup>5</sup> On February 26, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.<sup>6</sup>

On December 1, 2020, the Exchange also filed with the Commission, pursuant to Section 19(b)(1) of the Act<sup>7</sup> and Rule 19b-4 thereunder,<sup>8</sup> a proposed rule change to offer certain listed companies access to a complimentary board recruiting solution to help advance diversity on company boards (“Board Recruiting Service Proposal”). The proposed rule change was published for comment in the Federal Register on December 10, 2020.<sup>9</sup> On January 19, 2021,

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<sup>5</sup> See Securities Exchange Act Release No. 90951, 86 FR 7135 (January 26, 2021). The Commission designated March 11, 2021 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> In Amendment No. 1, the Exchange amended the Board Diversity Proposal to: (1) add a defined term for “Two or More Races or Ethnicities” to proposed Rule 5605(f)(1); (2) modify the application of proposed Rule 5605(f) to Foreign Issuers and clarify the scope of Exempt Companies; (3) provide a lower diversity objective for a company with five or fewer members on its board; (4) modify the disclosures required by proposed Rule 5606; (5) modify the process by which a company may provide public disclosure if it does not meet the applicable board diversity objectives of proposed Rule 5605(f)(2) and similarly conform the process for providing the public disclosures under proposed Rule 5606; (6) modify the phase-in periods for companies subject to proposed Rules 5605(f) and 5606; (7) provide a grace period for a company that no longer meets the board diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on its board and clarify the cure period for a company that does not satisfy proposed Rule 5605(f); (8) modify the effective dates and transition periods applicable to proposed Rules 5605(f) and 5606; (9) make conforming and clarifying changes throughout the description of the proposed rule change and the proposed rule text; and (10) provide additional justification and support for the proposed rule change. The full text of Amendment No. 1 to the Board Diversity Proposal is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf>.

<sup>7</sup> 15 U.S.C. 78s(b)(1).

<sup>8</sup> 17 CFR 240.19b-4.

<sup>9</sup> See Securities Exchange Act Release No. 90571 (December 4, 2020), 85 FR 79556 (SR-NASDAQ-2020-082). Comments received on the Board Recruiting Service Proposal are

pursuant to Section 19(b)(2) of the Act,<sup>10</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>11</sup> On February 26, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.<sup>12</sup>

The Commission is publishing this notice and order to solicit comments on the proposed rule changes, as modified by Amendments No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>13</sup> to determine whether to approve or disapprove the proposed rule changes, as modified by Amendments No.1.

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available on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2020-082/srnasdaq2020082.htm>.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> See Securities Exchange Act Release No. 90952, 86 FR 7148 (January 26, 2021). The Commission designated March 10, 2021 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>12</sup> In Amendment No. 1, the Exchange amended the Board Recruiting Service Proposal to: (1) make conforming changes to the proposal based on Amendment No. 1 to the Board Diversity Proposal; (2) specify the application of the proposal to a company with five or fewer members on its board; (3) provide additional justification for the proposal to allow eligible companies until December 1, 2022 to begin using the complimentary board recruiting solution; and (4) make additional clarifying changes throughout the description of the proposed rule change. The full text of Amendment No. 1 to the Board Recruiting Service Proposal is available on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2020-082/srnasdaq2020082-8425987-229599.pdf>.

<sup>13</sup> 15 U.S.C. 78s(b)(2)(B).

II. Description of the Proposed Rule Changes, as Modified by Amendments No. 1

A. The Board Diversity Proposal

1. Proposed Rule 5605(f)

The Exchange proposes to adopt new Rule 5605(f)(2), which would require each Nasdaq-listed company (other than a Foreign Issuer, Smaller Reporting Company, or Company with a Smaller Board, as discussed below) to have, or explain why it does not have, at least two members of its board of directors who are Diverse,<sup>14</sup> including at least one Diverse director who self-identifies as Female and at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.<sup>15</sup> Pursuant to proposed Rule 5605(f)(1), “Diverse” would be defined to mean an individual who self-identifies in one or more of the following categories: (i) Female, (ii) Underrepresented Minority, or (iii) LGBTQ+. Also pursuant to proposed Rule 5605(f)(1), “Female” would be defined to mean an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth; “Underrepresented Minority” would be defined to mean an individual who self-identifies as one

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<sup>14</sup> The Exchange states that it has published an FAQ on its 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. See Amendment No. 1 to the Board Diversity Proposal at 73 n.187.

<sup>15</sup> See proposed Rule 5605(f)(2)(A). The Exchange also states that it does not intend for the Board Diversity Proposal to preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status, in selecting board members; however, the company would still have to provide the required disclosure under proposed Rule 5605(f)(3) if the company does not meet the diversity objectives of proposed Rule 5605(f)(2). See Amendment No. 1 to the Board Diversity Proposal at 64. The Exchange also states that, although non-binary is included as a category in the Board Diversity Matrix under proposed Rule 5606 (as discussed in Section II.A.2 below), a company would not satisfy the diversity objectives in proposed Rule 5605(f)(2) to have a minimum number of Diverse directors if a director self-identifies solely as non-binary. See id. at 66 n.173.

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;<sup>16</sup> and “LGBTQ+” would be defined to mean an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.<sup>17</sup>

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<sup>16</sup> “Black or African American” would be defined to mean a person having origins in any of the Black racial groups of Africa (not of Hispanic or Latinx origin). See Amendment No. 1 to the Board Diversity Proposal at 327. “Hispanic or Latinx” would be defined to mean a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. See id. “Asian” would be defined to mean 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. See id. “Native American or Alaska Native” would be defined to mean a person having origins in any of the original peoples of North and South America (including Central America) and who maintains cultural identification through tribal affiliation or community recognition. See id. “Native Hawaiian or Pacific Islander” would be defined to mean a person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands. See id. “Two or More Races or Ethnicities” would be defined to mean 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. See id.; proposed Rule 5605(f)(1). “White (not of Hispanic or Latinx origin)” would be defined to mean a person having origins in any of the original peoples of Europe, the Middle East, or North Africa. See Amendment No. 1 to the Board Diversity Proposal at 327.

<sup>17</sup> See proposed Rule 5605(f)(1). The Exchange states that the categories it has proposed to comprise an Underrepresented Minority are consistent with the categories reported to the Equal Employment Opportunity Commission (“EEOC”) through the Employer Information Report EEO-1 Form (“EEO-1”) and should be construed in accordance with the EEOC’s definitions. See Amendment No. 1 to the Board Diversity Proposal at 9-10, 61. The Exchange also states that, while the EEO-1 report refers to “Hispanic or Latino” rather than “Latinx,” the Exchange 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. See id. at 61 n.160. The Exchange further states that the terms in the proposed definition of LGBTQ+ are similar to the identities defined in California’s A.B. 979, but have been expanded to include the queer community. See id. at 61.

The Exchange 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));<sup>18</sup> or (b) a company that (i) is considered a “foreign issuer” under Rule 3b-4(b) under the Act<sup>19</sup> and (ii) has its principal executive offices located outside of the United States.<sup>20</sup> For Foreign Issuers, the Exchange proposes to define “Diverse” to mean 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 (“Underrepresented Individual”).<sup>21</sup> For a Foreign Issuer that has a two-tiered board system, the Exchange proposes to define “board of directors” to mean the company’s supervisory or non-

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<sup>18</sup> Under Rule 5005(a)(19), the term Foreign Private Issuer has “the same meaning as under Rule 3b-4 under the Act.”

<sup>19</sup> See 17 CFR 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.”).

<sup>20</sup> According to the Exchange, this definition 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 Commission reports, and is designed to exclude companies that are domiciled in a foreign jurisdiction without having a physical presence in that country. See Amendment No. 1 to the Board Diversity Proposal at 83.

<sup>21</sup> See proposed Rule 5605(f)(2)(B)(i). The Exchange states that its proposed definition of an Underrepresented Individual 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. See Amendment No. 1 to the Board Diversity Proposal at 69 (citing G.A. Res. 47/135, art. 1.1 (December 18, 1992); G.A. Res. 61/295 (September 13, 2007)). The Exchange also states that, because the EEOC categories of race and ethnicity may not extend to all countries globally since each country has its own unique demographic composition, and because on average women tend to be underrepresented in boardrooms across the globe, proposed Rule 5605(f)(2)(B)(ii) would allow Foreign Issuers to satisfy the diversity objectives by having two Female directors. See id. at 81-82.

management board.<sup>22</sup> Proposed Rule 5605(f)(2)(B) would require each Foreign Issuer (other than a Company with a Smaller Board, as discussed below) to 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. As proposed, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Individual.<sup>23</sup>

The Exchange proposes to define a Smaller Reporting Company as set forth in Rule 12b-2 under the Act.<sup>24</sup> Proposed Rule 5605(f)(2)(C) would require each Smaller Reporting Company (other than a Company with a Smaller Board, as discussed below) to have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one

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<sup>22</sup> See proposed Rule 5605(f)(2)(B)(i). The Exchange states that this is consistent with Rule 10A-3(e)(2) under the Act. See Amendment No. 1 to the Board Diversity Proposal at 84 (citing 17 CFR 240.10A-3(e)(2)).

<sup>23</sup> The Exchange also proposes to amend 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. Specifically, the Exchange proposes to amend Rule 5615 and IM-5615-3 to add proposed Rule 5605(f) to the list of excluded corporate governance rules. The Exchange also proposes to amend Rule 5615 and IM-5615-3 to add proposed Rule 5606 (as discussed in Section II.A.2 below) to the list of excluded corporate governance rules. However, the Exchange states that 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. See Amendment No. 1 to the Board Diversity Proposal at 84.

<sup>24</sup> See proposed Rule 5605(f)(1). See also 17 CFR 240.12b-2 (defining a Smaller Reporting Company as “an issuer that is not an investment company, an asset-backed issuer . . . , 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”).

Diverse director who self-identifies as Female. As proposed, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Minority.<sup>25</sup>

Proposed Rule 5605(f)(2)(D) would require each company with a board of directors of five or fewer members (“Company with a Smaller Board”) to have, or explain why it does not have, at least one member of its board of directors who is Diverse.<sup>26</sup> As proposed, if a company had five members on its board of directors before becoming subject to proposed Rule 5605(f), it would not become subject to the objectives of proposed Rule 5605(f)(2)(A), (B), or (C) to have at least two Diverse directors if it then added one director to its board in order to satisfy proposed Rule 5605(f)(2)(D), thereby becoming a six-member board.<sup>27</sup> However, a Company with a

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<sup>25</sup> The Exchange states that, because smaller companies may not have the resources necessary to compensate an additional director or engage a search firm to search outside of directors’ networks, it proposes to provide each Smaller Reporting Company with additional flexibility (i.e., proposed Rule 5605(f)(2)(C) would allow these companies to satisfy the objective to have two Diverse directors by having two Female directors). See Amendment No. 1 to the Board Diversity Proposal at 84-85.

<sup>26</sup> The Exchange proposes this alternative diversity objective for Companies with a Smaller Board because, according to the Exchange, these companies may face similar resource constraints to those of Smaller Reporting Companies, but not all Companies with a Smaller Board are Smaller Reporting Companies, and therefore the alternative diversity objective that would be provided to Smaller Reporting Companies may not be available to them. See id. at 86. The Exchange further states that Companies with a Smaller Board may be disproportionately impacted by the proposed rule change if they plan to satisfy proposed Rule 5605(f)(2) by adding additional directors, which may impose additional costs in the form of director compensation and D&O insurance. See id.

<sup>27</sup> See proposed Rule 5605(f)(2)(D). The Exchange proposes this exception to avoid complexity for Companies with a Smaller Board that attempt to satisfy the diversity objectives by adding a Diverse director to their board, and to prevent such companies from thereby being subject to a higher threshold (i.e., that of proposed Rule 5605(f)(2)(A), (B), or (C)) as a result. See Amendment No. 1 to the Board Diversity Proposal at 86-87.



Smaller Board would become subject to proposed Rule 5605(f)(2)(A), (B), or (C) if it subsequently expands its board.<sup>28</sup>

If a company elects to satisfy the requirements of proposed Rule 5605(f)(2) by disclosing why it does not meet the applicable diversity objectives of proposed Rule 5605(f)(2), proposed Rule 5605(f)(3) would require the company to: (i) specify the requirements of proposed Rule 5605(f)(2) that are applicable (e.g., the applicable subparagraph and the applicable diversity objectives); and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for a Company with a Smaller Board).<sup>29</sup> The 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 a company does not file a proxy, in its Form 10-K or 20-F); or (b) on the company's website.<sup>30</sup> If the company provides the disclosure on its website, the company must submit such disclosure concurrently with the filing made pursuant to (a) above and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.<sup>31</sup>

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<sup>28</sup> See proposed Rule 5605(f)(2)(D).

<sup>29</sup> As proposed, a company would not need to provide any public disclosures pursuant to proposed Rule 5605(f) if the company demonstrates under proposed Rule 5606 (as discussed in Section II.A.2 below) that it meets the applicable diversity objectives of proposed Rule 5605(f)(2); however, if a company does not meet its applicable diversity objectives, it would be required to provide the additional public disclosure explaining why it does not meet the applicable objectives. See Amendment No. 1 to the Board Diversity Proposal at 73.

<sup>30</sup> See proposed Rule 5605(f)(3).

<sup>31</sup> See id. The Exchange states that it would not evaluate the substance or merits of a company's explanation provided pursuant to proposed Rule 5605(f)(3), 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). See Amendment No. 1 to the Board Diversity Proposal at 74. If the company

Proposed Rule 5605(f)(5) would specify the phase-in period for any company newly listing on the Exchange 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 another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on the Exchange or another exchange, or through a merger with an acquisition company listed under IM-5101-2 (“acquisition company”)) and any company that ceases to be a Foreign Issuer, a Smaller Reporting Company, or an Exempt Company.<sup>32</sup>

As proposed, any newly-listed company on the Nasdaq Global Select Market (“NGS”) or Nasdaq Global Market (“NGM”) would 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 information statement (or, if the company does not file a proxy, 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 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.<sup>33</sup> In addition, any newly-listed company on the Nasdaq Capital Market (“NCM”) would be permitted to satisfy the requirement of proposed Rule

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does not meet the applicable diversity objectives and has not provided any explanation, or has provided an explanation that does not satisfy proposed Rule 5605(f)(3)(i) and (ii), the company will be considered deficient with the requirements of proposed Rule 5605(f)(3). See id. at 74-75.

<sup>32</sup> See infra note 46 and accompanying text (describing Exempt Companies).

<sup>33</sup> See proposed Rule 5605(f)(5)(A).

5605(f)(2) to have, or explain why it does not have, at least two Diverse directors by the later of: (i) two years from the date of listing; or (ii) the date the company files its proxy statement or 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.<sup>34</sup> As proposed, any newly listed Company with a Smaller Board would 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: (i) two years from the date of listing, or (ii) the date the company files its proxy statement or 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.<sup>35</sup>

Proposed Rule 5605(f)(5)(C) would provide that any company that ceases to be a Foreign Issuer, Smaller Reporting Company, or Exempt Company would be permitted 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 Foreign Issuer, Smaller Reporting Company, or Exempt Company; or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10-K or 20-F) for the company's first annual meeting of shareholders subsequent to such event.

Proposed Rule 5605(f)(6)(A) would provide that if a company (i) does not meet the applicable diversity objectives 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 meet, or

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<sup>34</sup> See proposed Rule 5605(f)(5)(B).

<sup>35</sup> See proposed Rule 5605(f)(5)(D).

explain why it does not meet, the diversity objectives of proposed Rule 5605(f)(2), the Exchange’s Listing Qualifications Department would 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.<sup>36</sup> If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter.<sup>37</sup>

Moreover, proposed Rule 5605(f)(6)(B) would provide that a company that has satisfied the diversity objectives of proposed Rule 5605(f)(2) within the timeframes set forth in proposed Rule 5605(f)(7), but later ceases to meet the diversity objectives of proposed Rule 5605(f)(2) due to a vacancy on its board of directors, would 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, 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). As proposed, in lieu of providing the disclosure required by proposed Rule 5605(f)(3), a company relying on this rule may publicly disclose that it is relying on the grace period provided by proposed Rule 5605(f)(6)(B).<sup>38</sup> This disclosure must be provided in advance of the company’s next annual

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<sup>36</sup> The Exchange proposes to add a similar provision as Rule 5810(c)(3)(F). The Exchange also proposes to renumber existing Rules 5810(c)(3)(F) and (G) as Rules 5810(c)(3)(G) and (H), respectively, and to make a non-substantive change in Rule 5810(c)(2)(A)(iv) to clarify that Rule 5250(b)(3) is related to “Disclosure of Third Party Director and Nominee Compensation.”

<sup>37</sup> See Rule 5810(c)(3). A company that receives a Staff Delisting Determination can appeal the determination to the Hearings Panel through the process set forth in Rule 5815. See Amendment No. 1 to the Board Diversity Proposal at 88.

<sup>38</sup> See proposed Rule 5605(f)(6)(B).

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.<sup>39</sup> 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.<sup>40</sup>

Proposed Rule 5605(f)(7) would specify the transition period for the implementation of the requirements of proposed Rule 5605(f). As proposed, each company listed on the Exchange (including a Company with a Smaller Board) would be required to 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 of the proposal (“First Effective Date”); or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10-K or 20-F) for the company’s annual shareholders meeting during the calendar year of the First Effective Date.<sup>41</sup> In addition, each company listed on NGS or NGM 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 of the proposal (“Second NGS/NGM Effective Date”); or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, 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.<sup>42</sup> Moreover, each company listed on NCM must have, or explain why it does not have, at least two Diverse directors by the later of: (i) five calendar years

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<sup>39</sup> See id.

<sup>40</sup> See id.

<sup>41</sup> See proposed Rule 5605(f)(7)(A).

<sup>42</sup> See proposed Rule 5605(f)(7)(B).

after the approval date of the proposal (“Second NCM Effective Date”); or (ii) the date the company files its proxy statement or information statement (or, if the company does not file a proxy, its Form 10-K or 20-F) for the company’s annual shareholders meeting during the calendar year of the Second NCM Effective Date.<sup>43</sup> As proposed, a company would not be required to comply with the requirements of proposed Rule 5605(f) prior to the end of the phase-in periods under proposed Rule 5605(f)(5), if applicable.<sup>44</sup> Furthermore, a company listed on NCM that transfers to NGS or NGM after the approval date but prior to the end of the transition periods set forth in proposed Rule 5605(f)(7) would be required to satisfy the requirements of proposed Rule 5605(f) by the later of: (i) the periods set forth in proposed Rule 5605(f)(7)(C); or (ii) one year from the date of transfer.<sup>45</sup>

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<sup>43</sup> See proposed Rule 5605(f)(7)(C).

<sup>44</sup> See proposed Rule 5605(f)(7)(D). A company listing after the approval date, but prior to the end of the periods set forth in proposed Rule 5605(f)(7) would be required to fully satisfy the requirements of proposed Rule 5605(f) by the later of the periods under proposed Rule 5605(f)(7) or the two year phase-in periods under proposed Rule 5605(f)(5). See proposed Rule 5605(f)(7)(E). According to the Exchange, the proposed transition and phase-in periods are intended to provide newly-listed public companies with additional time to meet the diversity objectives of proposed Rule 5605(f)(2), as newly-listed 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 board’s composition. See Amendment No. 1 to the Board Diversity Proposal at 79. The Exchange further states that the proposed transition and phase-in periods are intended to provide additional flexibility to companies listed on NCM, as such companies are typically smaller and may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse. See id. The Exchange also states that its proposed phase-in periods are consistent with the phase-in periods it provides to companies for other board composition requirements. See id. at 81. See also, e.g., Rules 5615(b)(1), 5615(b)(3), and 5620.

<sup>45</sup> See proposed Rule 5605(f)(7)(F).

Proposed Rule 5605(f)(4) would exempt the following types of companies from the requirements of proposed Rule 5605(f) (“Exempt Companies”): (1) acquisition companies; (2) asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); (3) cooperatives (as set forth in Rule 5615(a)(2)); (4) limited partnerships (as set forth in Rule 5615(a)(4)); (5) management investment companies (as set forth in Rule 5615(a)(5)); (6) 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 the Exchange; and (7) issuers of securities listed under the Rule 5700 series.<sup>46</sup>

The Exchange states that it has published FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules in the Board Diversity Proposal, and represents that it will establish a dedicated mailbox for companies and their counsel to email additional questions to the Exchange regarding the application of such proposed rules.<sup>47</sup>

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<sup>46</sup> The Exchange states that these companies do not have boards, do not list equity securities, or are not operating companies. See Amendment No. 1 to the Board Diversity Proposal at 90. The Exchange also states that these companies are already exempt from certain corporate governance standards related to board composition, as described in Rule 5615. See id. The Exchange also states that, although it is exempting acquisition companies from the requirements of proposed Rule 5605(f), upon such a company’s completion of a business combination with an operating company, the post-business combination entity would be provided the same phase-in period as other newly listed companies to satisfy the requirements of proposed Rule 5605(f). See id. at 90-91, 151. The Exchange states that this approach is similar to other phase-in periods currently granted to acquisition companies. See id. at 90-91. See also, e.g., Rule 5615(b)(1).

<sup>47</sup> See Amendment No. 1 to the Board Diversity Proposal at 20.

2. Proposed Rule 5606

The Exchange proposes to adopt new Rule 5606, which would require each Nasdaq-listed company (other than Exempt Companies<sup>48</sup>) to publicly disclose in an aggregated form, to the extent permitted by applicable law, information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status of the company's board of directors.<sup>49</sup>

Specifically, pursuant to proposed Rule 5606(a), each Nasdaq-listed company would be required to annually disclose its board-level diversity data a substantially similar format<sup>50</sup> as the "Board Diversity Matrix" provided in proposed Rule 5606(a).<sup>51</sup> As proposed, companies would be required to provide the Board Diversity Matrix information at least once per year.<sup>52</sup> If, within the same year, a company changes its board composition after it publishes the matrix, the

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<sup>48</sup> See proposed Rule 5606(c).

<sup>49</sup> The Exchange states that its proposal would not 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. See Amendment No. 1 to the Board Diversity Proposal at 64.

<sup>50</sup> As proposed, 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 (e.g., 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. See id. at 326-27.

<sup>51</sup> Following the first year of disclosure of the Board Diversity Matrix, all companies would be required to include the current year and immediately prior year diversity statistics in the disclosure. See proposed Rule 5606(a). If a company publishes the Board Diversity Matrix on its website, the disclosure must remain accessible on the company's website. See Amendment No. 1 to the Board Diversity Proposal at 326.

<sup>52</sup> See Amendment No. 1 to the Board Diversity Proposal at 326.



company may, but is not required to, publish its updated information.<sup>53</sup> In addition, any publication of the information in the Board Diversity Matrix must be included in a searchable format and, if a company uses a graphic or image format (i.e., tif, jpg, gif, or png), the company must also include the same information as searchable text or in a searchable table.<sup>54</sup>

In the proposed Board Diversity Matrix, a company would be required to provide the total number of directors on its board and the company (other than a Foreign Issuer) would include the following information in accordance with the instructions accompanying the Board Diversity Matrix: (1) the number of directors based on gender identity (female, male, or non-binary<sup>55</sup>) and the number of directors who did not disclose gender; (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<sup>56</sup>), disaggregated by gender identity (or did not disclose gender); (3) the number of directors who self-identify as LGBTQ+; and (4) the number of directors who did not disclose a demographic background under item (2) or (3) above.<sup>57</sup> In the proposed Board Diversity Matrix,

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<sup>53</sup> See id. In addition, the Board Diversity Matrix must include the date the information was collected as the “as of date.” See id.

<sup>54</sup> The searchable information could be included, for example, together with the related graphic or in an appendix. See id.

<sup>55</sup> “Non-binary” refers to genders that are not solely man or woman; someone who is non-binary may have more than one gender, have no gender, or their gender may not be in relation to the gender binary. See id. at 327.

<sup>56</sup> 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. See id. at 66 n.174.

<sup>57</sup> The Exchange states that defined terms for the race and ethnicity categories in the instructions to the Board Diversity Matrix are substantially similar to the terms and definitions used in the EEO-1 report, as described above. See supra note 17. Also, in the instructions to the Board Diversity Matrix, LGTBQ+ is defined similarly to proposed

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 ethnicity or not to identify as LGBTQ+ would be included in the “Did Not Disclose Demographic Background” category.

A company that qualifies as a Foreign Issuer under proposed Rule 5605(f)(1) may elect to use an alternative Board Diversity Matrix format.<sup>58</sup> Similar to other companies, a Foreign Issuer would be required to provide the total number of directors on its board. The Foreign Issuer would also be required to provide the following in its Board Diversity Matrix: (1) its country of principal executive offices; (2) whether it is a Foreign Private Issuer; (3) whether disclosure is prohibited under home country law; (4) the number of directors based on gender identity (female, male, or non-binary) and the number of directors who did not disclose gender; (5) the number of directors who self-identify as Underrepresented Individuals in home country jurisdiction; (6) the number of directors who self-identify as LGBTQ+; and (7) the number of directors who did not disclose the demographic background under item (5) or (6) above.<sup>59</sup> In the proposed Board Diversity Matrix, 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 an Underrepresented Individual or not to identify as LGBTQ+ would be included in the “Did Not Disclose Demographic Background” category.

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Rule 5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender, or a member of the queer community.

<sup>58</sup> See proposed Rule 5606(a).

<sup>59</sup> See id.

Proposed Rule 5606(b) would require each company to provide the disclosure required under proposed Rule 5606 in the same manner as, and concurrently with, the disclosure required by proposed Rule 5605(f)(3).<sup>60</sup>

Proposed Rule 5606(d) would permit a company newly listing on the Exchange 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 another exchange or the over-the-counter market, in connection with a spin-off or carve-out from a company listed on the Exchange or another exchange, or through a merger with an acquisition company) to satisfy the requirement of proposed Rule 5606 within one year of listing on the Exchange.

Pursuant to Rule 5606(e), proposed Rule 5606 would become operative one year after a Commission approval of the proposal. A company would be required to be in compliance with proposed Rule 5606 by the later of: (i) one calendar year from the approval date (“Effective Date”); or (ii) 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.

The Exchange proposes to amend Rule 5810(c)(2)(A)(iv) to include a deficiency from the standards of proposed Rule 5606 as a deficiency for which a company may submit a plan of compliance for Exchange staff review. Accordingly, if a company fails to adhere to proposed Rule 5606, the Exchange would notify the company that it is not in compliance with a listing standard and allow the company 45 calendar days to submit a plan to regain compliance and,

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<sup>60</sup> See supra notes 30-31 and accompanying text.

upon review of such plan, the Exchange may provide the company with up to 180 days to regain compliance.<sup>61</sup> If the company does not submit a plan or regain compliance within the applicable time periods, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815.<sup>62</sup>

B. The Board Recruiting Service Proposal

In order to help advance diversity on company boards and to help companies prepare for and, if approved, comply with proposed Rules 5605(f) and 5606, the Exchange proposes to provide certain Nasdaq-listed companies with one-year of complimentary access for two users to a board recruiting solution, which would provide access to a network of board-ready Diverse candidates, allowing companies to identify and evaluate Diverse board candidates.<sup>63</sup> According to the Exchange, this service has an approximate retail value of \$10,000 per year.<sup>64</sup>

The Exchange proposes to offer this service to any “Eligible Company,” which would be defined to mean a listed company (except as described below) that represents to the Exchange 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,

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<sup>61</sup> See Rule 5810(c)(2).

<sup>62</sup> See id.

<sup>63</sup> See proposed IM-5900-9; Amendment No. 1 to the Board Recruiting Service Proposal at 10-11.

<sup>64</sup> See proposed IM-5900-9.

transgender, or as a member of the queer community.<sup>65</sup> A company that is (i) a Foreign Private Issuer (as defined in Rule 5005(a)(19)), or (ii) considered a foreign issuer under Rule 3b-4(b) under the Act and has its principal executive offices located outside of the United States, would be an Eligible Company if the company represents to the Exchange 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.<sup>66</sup> A company that is a Smaller Reporting Company (as defined in Rule 12b-2 under the Act) would be an Eligible Company if the company represents to the Exchange 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.<sup>67</sup>

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<sup>65</sup> See proposed IM-5900-9(a). The Exchange states that, although proposed Rule 5605(f)(2)(D) would require a Company with a Smaller Board to have, or explain why it does not have, at least one Diverse director on its board, such a company would be considered an Eligible Company if it does 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+, which the Exchange believes would help promote greater diversity on boards of all sizes. See Amendment No. 1 to the Board Recruiting Service Proposal at 11 n.20.

<sup>66</sup> See proposed IM-5900-9(b).

<sup>67</sup> See proposed IM-5900-9(c). The Exchange states that a company that is not an Eligible Company would be 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.,

As proposed, 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.<sup>68</sup> The Exchange states that it intends to evaluate the service and the progress made in enhancing diversity and may extend the program prior to its expiration through another proposed rule change filed with the Commission.<sup>69</sup> The Exchange states that no other company would be required to pay higher fees as a result of its Board Recruiting Service Proposal and represents that providing the proposed complimentary service would have no impact on the resources available for its regulatory programs.<sup>70</sup>

III. The Exchange's Arguments in the Proposals and the Comment and Response Letters Received on the Proposals

A. Summary of the Exchange's Arguments in the Proposals

1. The Board Diversity Proposal

In support of the Board Diversity Proposal, the Exchange states that it has 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.<sup>71</sup> While the Exchange acknowledges that some studies have mixed results on this

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including non-listed companies. See Amendment No. 1 to the Board Recruiting Service Proposal at 12 n.21.

<sup>68</sup> See proposed IM-5900-9.

<sup>69</sup> See Amendment No. 1 to the Board Recruiting Service Proposal at 12.

<sup>70</sup> See id.

<sup>71</sup> See Amendment No. 1 to the Board Diversity Proposal at 13. The Exchange states that studies have 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. See id. at 13, Section 3.a.III.A. The Exchange also points to a report that

issue – for example, some studies have found that board gender and ethnic diversity has a non-significant relationship or no relationship with a company’s performance<sup>72</sup> – the Exchange believes that, at a minimum, the academic and empirical studies support the conclusion that board diversity does not have adverse effects on company performance.<sup>73</sup>

The Exchange also states that there is substantial evidence that board diversity promotes investor protection, including by enhancing the quality of a company’s financial reporting, internal controls, public disclosures, and management oversight.<sup>74</sup> The Exchange states that more than a dozen studies have found a positive association between gender diversity and important investor protections,<sup>75</sup> and some academics assert that such findings may extend to

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suggests that the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity. See id. at 25.

<sup>72</sup> See id. at 25-27.

<sup>73</sup> See id. at 28. The Exchange also states that this is not the first time it 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. See id. The Exchange states that, for example, in 2003, notwithstanding the various findings of studies at the time regarding the relationship between company performance and board independence, it adopted listing rules requiring a majority independent board. See id.

<sup>74</sup> See id. at 29.

<sup>75</sup> See id. at 29, Section 3.a.III.B. The Exchange states that studies have found that 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. See id. at 13, Section 3.a.III.B. In addition, the Exchange states that 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. See id. at 13, Section 3.a.III.B, Section 3.b.II.B.

other forms of diversity, including racial and ethnic diversity.<sup>76</sup> The Exchange also states that it has reviewed studies suggesting that board diversity could enhance a company’s ability to monitor management by reducing “groupthink” and improving decision-making.<sup>77</sup>

The Exchange states that, while some companies have made progress in diversifying their boardrooms,<sup>78</sup> 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.<sup>79</sup> The Exchange states that its discussions with organizational leaders representing a broad spectrum of market participants and stakeholders (including business, investor, governance, legal, and civil rights communities) revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics.<sup>80</sup> The Exchange further states that such discussions reinforced the notion that if

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<sup>76</sup> See id. at 29, Section 3.a.III.B.

<sup>77</sup> See id. at Section 3.a.III.C.

<sup>78</sup> The Exchange believes that a supermajority of listed companies have at least one woman on the board and that listed companies are diligently working to add directors with other diverse attributes. See id. at 12, 41. The Exchange states that, 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 jurisdictions that have focused on board diversity. See id. at 12, Section 3.a.IV. The Exchange also states that progress toward bringing underrepresented racial and ethnic groups into the boardroom has been slower. See id. at 12, Section 3.a.IV.

<sup>79</sup> See id. at 8-9.

<sup>80</sup> See id. at Section 3.a.V. The Exchange also states that the majority of the 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. See id. at 46. According to the Exchange, some in the group pointed out that smaller companies and companies in certain industries may face challenges finding diverse board members. See id. In addition, the Exchange states that leaders from the legal community emphasized that any proposed rule change that imposed additional burdens beyond, or is inconsistent with, existing securities laws would present an



companies recruit by skill set and experience rather than title, they would find that there is more than enough diverse talent to satisfy demand.<sup>81</sup>

Moreover, the Exchange states that current reporting of board diversity data is not provided in a consistent manner or on a sufficiently widespread basis and, as such, investors are not able to readily compare board diversity statistics across companies.<sup>82</sup> In pointing out the “broad latitude” afforded to companies by Commission rules relating to board diversity and proxy disclosure, the Exchange states that the absence of a specific definition of “diversity” for such disclosures has resulted in current reporting of board-level diversity statistics being significantly unreliable and unusable to investors.<sup>83</sup> The Exchange states that the lack of transparency creates barriers to investment analysis, due diligence, and academic study, and is

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additional burden and potentially more legal liability for listed companies. See id. at 46-47.

<sup>81</sup> See id. at 19-20, 46. According to the Exchange, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions (e.g., directors looking within their own social networks for candidates with previous C-suite experience). See id. at 41-44, Section 3.b.II.A.

<sup>82</sup> See id. at 9. The Exchange also states that, while conducting research on the state of board diversity among its listed companies, it 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. See id. at 51. See also id. at 59, 107 (stating that the current lack of transparency and consistency makes it difficult for the Exchange and investors to determine the state of diversity among listed companies and each board’s philosophy regarding diversity; to the extent investors must obtain this information on their own through an imperfect process, this increases information asymmetries between larger and smaller stakeholders; and a broader definition of diversity may result in certain diverse candidates being overlooked and may hinder meaningful progress on improving diversity related to race, ethnicity, sexual orientation, and gender identity).

<sup>83</sup> See id. at Sections 3.a.VI.A-B.

impacting investors who are increasingly basing public advocacy, proxy voting, and direct shareholder-company engagement decisions on board diversity considerations.<sup>84</sup>

The Exchange states that it is well positioned to establish practices that would assist in carrying out its mandate to protect investors and remove impediments from the market through the Board Diversity Proposal.<sup>85</sup> The Exchange believes that it is well within its delegated authority to propose listing rules designed to enhance transparency, provided that they do not conflict with existing federal securities laws.<sup>86</sup> The Exchange also states that the proposal is related to corporate governance standards for listed companies and is therefore 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.<sup>87</sup> While the Exchange recognizes that U.S. states are increasingly proposing and adopting board diversity requirements, the Exchange states that certain of its current corporate governance listing rules relate to areas that are also regulated by

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<sup>84</sup> See id. at 51-52.

<sup>85</sup> See id. at 53. The Exchange also states that the Board Diversity Proposal leverages the Exchange's unique ability, as a self-regulatory organization ("SRO"), to influence corporate governance in furtherance of the goal of Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. See id. at 18.

<sup>86</sup> See id. at 58. The Exchange states that, for example, it already requires its 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. See id. at 58-59. The Exchange also states that it has designed the proposal to avoid a conflict with existing disclosure requirements under Regulation S-K and mitigate additional burdens for companies by providing them with flexibility to provide such disclosure on their website, in their proxy statement or information statement, or, if a company does not file a proxy, in its Form 10-K or 20-F, and by not requiring companies to adopt a diversity policy. See id. at 60.

<sup>87</sup> See id. at Section 3.b.II.E.

states (e.g., quorums, shareholder approval of certain transactions).<sup>88</sup> The Exchange also states that adopting Exchange rules relating to such matters (and the proposed rule changes described herein) would ensure uniformity of such rules among its listed companies.<sup>89</sup>

The Exchange believes that the disclosure-based framework of proposed Rule 5605(f) may influence corporate conduct if a company chooses to meet the proposed diversity objectives,<sup>90</sup> and could help increase opportunities for Diverse candidates who otherwise may be overlooked due to the impediments of the traditional director recruitment process.<sup>91</sup> The Exchange also believes that boards that choose to meet the proposed diversity objectives may experience benefits from diversity that perfect the mechanism of a free and open market and a national market system, and promote investor protection and the public interest.<sup>92</sup> Moreover, the

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<sup>88</sup> See id. at 155-56. The Exchange recognizes that several states have enacted or proposed legislation relating to board diversity and that Congress is considering legislation to require Commission-registered companies to provide board diversity statistics and disclose whether they have a board diversity policy. See id. at 16.

<sup>89</sup> See id. at 156.

<sup>90</sup> See id. at 121.

<sup>91</sup> See id. For these reasons, the Exchange believes that proposed Rule 5605(f) is designed to remove impediments to a free and open market and a national market system. See id. The Exchange also states that proposed Rule 5605(f) is not designed to create additional impediments to a free and open market and a national market system because it would empower companies to maintain decision-making authority over the composition of their boards. See id. at 122.

<sup>92</sup> See id. at Sections 3.b.II.B-C. The Exchange also 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” and enhancing the functioning of boards, and may reduce the likelihood of insider trading and other fraudulent and manipulative acts and practices. See id. at 123-29. In addition, the Exchange states that it recognizes that directors may bring diverse perspectives, skills, and experiences to the board, notwithstanding that they have similar attributes; therefore, the Exchange believes that it is in the public interest to permit a company to choose

Exchange believes that, to the extent a company chooses not to meet the proposed diversity objectives, the disclosure under proposed Rule 5605(f)(3) would provide analysts and investors with a better understanding about a company's reasons for not doing so and its philosophy regarding diversity.<sup>93</sup> The Exchange believes that this disclosure would enable the investment community to conduct more informed analyses of, and have more informed conversations with, companies, and improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.<sup>94</sup> In addition, the Exchange believes that the proposed disclosure framework and phase-in and transition periods under Rule 5605(f) recognize the differences (e.g., in demographics or resources) among different types of companies and would not unfairly discriminate among companies.<sup>95</sup>

The Exchange believes that the disclosures required by proposed Rule 5606 and the accompanying format requirements would protect investors by eliminating data collection inaccuracies, decreasing investors' costs, and enhancing investors' ability to utilize the

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whether to meet the proposed diversity objectives or explain why it does not. See id. at 129-30.

<sup>93</sup> See id. at 122. The Exchange also believes that the proposal could help lower information asymmetry and reduce the risk of insider trading or opportunistic insider behavior, which would help to make stock prices more informative and enhance stock liquidity, and is therefore designed to protect investors and promote capital formation and efficiency. See id. at 135.

<sup>94</sup> The Exchange believes that, therefore, the proposal is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to promote capital formation and efficiency. See id. at 122-23.

<sup>95</sup> See id. at Section 3.b.II.D. See also id. at 161-63 (stating that the proposal would not impose any burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act and would not impose any burden on competition among listing exchanges).

information disclosed.<sup>96</sup> The Exchange also believes that proposed Rule 5606 would protect investors that view information related to board diversity as material to their investment and voting decisions, and enhance investor confidence by assisting investors in making more informed decisions.<sup>97</sup> Moreover, the Exchange believes that the proposed annual disclosures would provide consistent information to the public and would enable investors to continually review the board composition of a company to track trends,<sup>98</sup> as well as simplify or eliminate the need for a company to respond to multiple investor requests for board diversity information.<sup>99</sup> The Exchange also believes that the proposed timing for the board composition disclosures would align with other governance-related disclosures (e.g., those provided in the proxy) and

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<sup>96</sup> See id. at 110. The Exchange also believes that it would be in the public interest to utilize the Board Diversity Matrix format because it would remove impediments in aggregating and analyzing data across all companies. See id. at 113. The Exchange additionally believes that it would be reasonable and in the public interest to allow companies the flexibility of supplementing their disclosure by providing additional information related to their directors (beyond what is required by proposed Rule 5606) in the Board Diversity Matrix. See id. The Exchange also states that its proposed definition of “Diverse” would be familiar to most companies and that the proposed Board Diversity Matrix would provide for standardized disclosures. See id. at 114. Moreover, the Exchange believes that prohibiting companies from providing the information through graphics and images would allow investors to easily disaggregate the data and track directors with multiple diversity characteristics. See id. at 113.

<sup>97</sup> See id. at 110-11. In addition, the Exchange states that the proposed disclosure format would provide a company with a uniform template with the flexibility to include any additional details about its board that the company believes would be useful to investors. See id. at 111.

<sup>98</sup> The Exchange also states that the disclosures under proposed Rule 5606 would provide a means for the Exchange to assess whether companies meet the diversity objectives under proposed Rule 5605(f), which would protect investors and the public interest. See id. at 116.

<sup>99</sup> See id. at 112. The Exchange also believes that the proposed disclosures would make information available to investors who otherwise would not be able to obtain individualized disclosures. See id.

would make it easier for investors to know where a company has provided the disclosures and give shareholders access to the information prior to a company’s annual shareholders meeting.<sup>100</sup> Finally, the Exchange believes that proposed Rule 5606 would provide appropriate flexibility for Foreign Issuers<sup>101</sup> and appropriate exceptions for certain types of Nasdaq-listed companies,<sup>102</sup> and would provide reasonable compliance periods because it would impose only a de minimis burden on companies.<sup>103</sup>

## 2. The Board Recruiting Service Proposal

In support of the Board Recruiting Service Proposal, the Exchange argues that offering a board recruiting solution would assist and encourage listed companies to increase diverse representation on their boards, which the Exchange believes could result in improved corporate governance, strengthening of market integrity, and improved investor confidence.<sup>104</sup> The

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<sup>100</sup> See id. at 115. See also id. at 135 (stating a similar belief with respect to the disclosures under proposed Rule 5605(f)). The Exchange also states that proposed Rule 5606(b) would closely align the timing for companies that choose to disclose the Board Diversity Matrix data on their websites and companies that choose to provide the data through a Commission filing. See id. at 115.

<sup>101</sup> See id. at 115-16.

<sup>102</sup> See id. at 117-18.

<sup>103</sup> See id. at 118. See also id. at 159-60 (stating that the Exchange faces competition in the market for listing services, and the Exchange’s belief that there would be a de minimis time and economic burden on listed companies to collect and disclose the diversity statistical data under proposed Rule 5606, and that any burden placed on companies to gather and disclose this information would be counterbalanced by the benefits that the information would provide to a company’s investors). In the Board Diversity Proposal, the Exchange also describes the alternatives that it considered, including: (1) mandate-based and disclosure-based approaches; (ii) higher and lower diversity objectives; (iii) longer and shorter compliance timeframes; and (iv) broader and narrower definitions of “Diverse.” See id. at Section 3.a.VII.D.

<sup>104</sup> See Amendment No. 1 to the Board Recruiting Service Proposal at 10. The Exchange reiterates that, in researching the Board Diversity Proposal, it has reviewed dozens of empirical studies and found that an extensive body of academic and empirical research

Exchange further states that offering this service would help companies to achieve compliance with the Board Diversity Proposal, if it were approved.<sup>105</sup> The Exchange also states that utilization of the complimentary board recruiting solution would be optional, and no company would be required to use the service.<sup>106</sup>

The Exchange further argues that it is reasonable and not unfairly discriminatory to offer the board recruiting solution only to Eligible Companies because the Exchange believes these companies have the greatest need to identify Diverse board candidates, particularly if these companies elect to meet the diversity objectives in the Board Diversity Proposal, if approved, rather than disclosing why they have not met the objectives.<sup>107</sup> Additionally, the Exchange believes that companies that already have two Diverse directors have demonstrated by their current board composition that they do not need additional assistance provided by the Exchange to identify Diverse candidates for their boards.<sup>108</sup> The Exchange also believes that offering this

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demonstrates diverse boards are positively associated with improved corporate governance and company performance. See id. at 6. Moreover, the Exchange states that investors and investor groups are calling for diversification in the boardroom, and legislators at the federal and state level are increasingly taking action to encourage or mandate corporations to diversify their boards and improve diversity disclosures. See id. at 9-10.

<sup>105</sup> See id. at 10.

<sup>106</sup> See id. at 13.

<sup>107</sup> See id.

<sup>108</sup> See id. at 13-14. As described above, although proposed Rule 5605(f)(2)(D) would require a Company with a Smaller Board to have, or explain why it does not have, at least one Diverse director on its board, such a company would be considered an Eligible Company if it does 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+, which the Exchange believes would help promote greater diversity on boards of all sizes. See id. at 11 n.20.

complimentary service would help it compete to attract and retain listings, particularly in light of the additional requirements in the Board Diversity Proposal that would apply to Exchange-listed companies, if it were approved.<sup>109</sup> The Exchange further represents that individual listed companies would not be given specially negotiated packages of products or services to list, or remain listed.<sup>110</sup>

B. The Comment and Response Letters Received on the Proposals

The Commission has received comment letters that support the proposals, comment letters that suggest changes to the proposals, and comment letters that oppose the proposals.<sup>111</sup> The Commission has also received two response letters from the Exchange.<sup>112</sup>

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2020-081 and SR-NASDAQ-2020-082, as Modified by Amendments No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>113</sup> to determine whether the proposed rule changes, as modified by Amendments No. 1, should be

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<sup>109</sup> See id. at 14.

<sup>110</sup> See id. at 15.

<sup>111</sup> Comments received on the Board Diversity Proposal are available on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081.htm>. Comments received on the Board Recruiting Service Proposal are available on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2020-082/srnasdaq2020082.htm>.

<sup>112</sup> See letter from Stephen J. Kastenberg, Ballard Spahr LLP, to Vanessa Countryman, Secretary, Commission, dated February 5, 2021 (submitted on behalf of the Exchange by its counsel), available at: <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8343758-228925.pdf>; letter from 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>.

<sup>113</sup> 15 U.S.C. 78s(b)(2)(B).



approved or disapproved. Institution of such proceedings is appropriate at this time in view of the issues raised by the proposed rule changes. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes, as modified by Amendments No. 1, to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes, as modified by Amendments No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>114</sup> the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange proposes in the Board Diversity Proposal to require each of its listed companies, subject to certain exceptions, to: (i) provide statistical information regarding the diversity characteristics among the members of the company's board of directors; and (ii) if the company does not meet the applicable board diversity objectives, to disclose an explanation as to why. Also as described above, the Exchange proposes in the Board Recruiting Service Proposal to provide certain Nasdaq-listed companies with one-year of complimentary access to a diverse board candidate recruiting solution. In addition, as stated above, the Commission has received comment letters that support the proposals, comment letters that suggest changes to the proposals, and comment letters that oppose the proposals, as well as two response letters from the Exchange. Moreover, on February 26, 2021, the Exchange submitted an amendment to each of the proposals.

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposals, as modified by Amendments

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<sup>114</sup>

Id.

No. 1, with Section 6(b)(5) of the Act,<sup>115</sup> which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, 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; and Section 6(b)(8) of the Act,<sup>116</sup> which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Commission is instituting proceedings to also allow for additional analysis of, and input from commenters with respect to, the consistency of the Board Recruiting Service Proposal, as modified by Amendment No. 1, with Section 6(b)(4) of the Act,<sup>117</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposals. In particular, the Commission invites the written

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<sup>115</sup> 15 U.S.C. 78f(b)(5).

<sup>116</sup> 15 U.S.C. 78f(b)(8).

<sup>117</sup> 15 U.S.C. 78f(b)(4).

views of interested persons concerning whether the proposals, as modified by Amendments No. 1, are consistent with Sections 6(b)(4),<sup>118</sup> 6(b)(5)<sup>119</sup> and 6(b)(8)<sup>120</sup> of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>121</sup> any request for an opportunity to make an oral presentation.<sup>122</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals, as modified by Amendments No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2020-081 or SR-NASDAQ-2020-082 on the subject line.

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<sup>118</sup> Id.

<sup>119</sup> 15 U.S.C. 78f(b)(5).

<sup>120</sup> 15 U.S.C. 78f(b)(8).

<sup>121</sup> 17 CFR 240.19b-4.

<sup>122</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 or 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 website

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should

submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2020-081 or SR-NASDAQ-2020-082 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>123</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>123</sup> 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).