

The NASDAQ Stock Market LLC
File No. SR -2020 - 081

Jeffrey S. Davis
Senior Vice President, Senior Deputy General Counsel

[REDACTED]
[REDACTED]

December 14, 2020

Dear Mr. Davis:

I am opposed to the approval of your recent filing with the SEC referenced as File No. SR -2020 - 081. Your filing summary says, "A proposal to advance board diversity and enhance transparency of diversity statistics through new proposed listing requirements." More accurately, it is relating to mandatory requirements of appointing self-identified women, minorities, and LGBTQ+ members to the boards of NASDAQ-listed companies and the required reporting by those companies of compliance.

What is the real purpose of this filing? You do not show that any female, minority, or LGBTQ+ persons have experienced discrimination in appointing members to any board. In your 271 page application, you reference various studies where some show a positive correlation between investor confidence and the presence of women on boards and audit committees, but the same positive correlation is not largely supported when it comes to minorities, and there are not any studies at all which support LGBTQ+ members or those who identify with a gender different than on their birth certificate.

You report, "there is a lack of published research on the issue of LGBTQ+ representation on boards." So, the impropriety of a mandate on board composition that may be met by LGBTQ+ staffing should be clear to you.

You fail to show economic benefits of your proposal: "Pletzer et al. (2015) found that board gender diversity alone has a "small and non-significant" relationship with a company's financial performance.³⁸ Post and Byron (2014) found a "near zero" relationship with a company's market performance. Carter, D'Souza, Simkins and Simpson (2010) found that "[w]hen Tobin's Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity, neither positive nor negative." Your objectives are apparently different than those of shareholders.

You report, " NASDAQ undertook extensive research and analysis and has concluded that the proposal will fulfill the objectives of the Act in that it is designed to remove impediments to and perfect the mechanism of a **free and open market** and a national

market system, to prevent fraudulent and **manipulative acts and practices**, and to protect investors and the public interest." (Emphasis added.) How is it that you can both encumber companies with the manipulative act and practice of mandating board make up and say at the same time you are promoting a free and open market?

While diversity is a good goal, enforcing it goes down a road outside the realm of a stock exchange. Who chooses which under-represented groups will be included: gender, race, sexual identity, advanced age, poverty, religious faith, disabled, veteran, marital status, eye color....where does it stop? What verification will be required to document the person's status in the group and who has that responsibility? How is a violation of privacy avoided when requiring people to report their status in a group not necessarily known otherwise? Making board candidates disclose is the exact opposite of treating people impartially.

Rather than promote diversity, your proposed regulation opens the door to discrimination by making group affiliation public knowledge. It inadvertently also promotes discrimination of those who are not within the favored groups. For example, boards consisting of all black, lesbian women would meet your requirements; while a board of all white, heterosexual men would not. Replacing perceived discrimination with actual discrimination is what you are proposing.

The idea of a free market is that anyone can have a business and run it how they choose. There is nothing stopping anyone regardless of sexual orientation, gender identity, or ethnic background from starting their own business and running it however they choose....unless of course someone comes along and regulates them otherwise. But just like unfair tax practices, companies eventually go elsewhere where they can more fairly compete. You use words like diversity, public interest, and benefit, yet without a demonstrated problem, nor an economic improvement, it is confusing as to what you are actually trying to accomplish.

If it were the business of an exchange to support diversity, ensuring availability of a diverse workforce by funding education to underserved groups would be a start. After that it would be reasonable to advocate for diversity-blind hiring practices, but ironically that is the exact opposite of what you are proposing. And keep in mind that as the degree of proficiency required by the job increases as one rises to higher levels of responsibility within an organization, the members who can adequately perform those duties will be limited to the top performers. So one should not expect the makeup of the board to contain any specific number of members from a chosen group; so again, it makes no sense to specify that number.

So, when you say, "Leaders from across the spectrum of stakeholders with whom NASDAQ spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand," I suggest you leave those companies to do their jobs. Companies are well aware of the need and benefits of diversity, and we have a legal system to protect those who feel they have been discriminated against. Companies are rewarded financially

when they make good decisions and are better able to choose their board members without outside interference.

Efforts to increase the numbers of diverse groups within the pool of possible candidates for board positions is very different from mandating the number of appointments on boards. And with regard to requiring reporting on the diversity of board members, to consider it simple transparency for having to explain why you don't have a certain number of place holders on your board to the general public is naive. There is a vocal minority that will sit and wait at their social media terminals for the reports to come out about which companies were unable to fill their female-identifying, LGBTQ+, race-based seats and will bring a fire storm down on that company, demand action such as boycott their products, put pressure on lawmakers that they have supported, etc. Everyone knows this. Companies don't want to be in this position. So it is a dangerous precedent to put a spot light on companies for noncompliance that effectively bullies them into following an agenda that has no business purpose.

While perhaps good intentioned, everything about your proposed regulation is wrong. I have been invested in NASDAQ stocks for over 20 years, from before the so-called tech bubble until today. Your filing with the SEC is the first thing I have come across that makes me think it is time to move my money. Your proposal has nowhere to go but bring the market down and companies and investors alike to go elsewhere.

Sincerely,

A handwritten signature in black ink, appearing to read 'Walter Donnellan', with a long horizontal stroke extending to the right.

Walter Donnellan