The Narrowing Definition of "Diversity and Inclusion"
Notice of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity
SR-NASDAQ-2020-081 (Dec. 4, 2020).

As a person with a disability ("PWD") with a professional degree, NASDAQ's efforts aimed at increasing the diversity of corporate boards are to be commended. While efforts aimed at including excluded groups, defining the "diversity" to exclude historically marginalized groups is problematic in that it will harm PWD, a group that has been systematically excluded from corporate boards and professional employment. Moreover, the Notice of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, ("Notice") (I) narrowly defines what constitutes "diversity," and by doing so purposefully excludes the most marginalized groups from this definition and (II) it infringes upon the efforts of the States to determine what "diversity" is and who shall be protected. Lastly, the Notice is constitutionally flawed to the point that it should be re-written.

I. Narrowing the Definition of Diversity

The Notice is impressive in that it relies upon recent social justice movements as the catalyst for its passage. Historically however social justice movements have sought redress for the needs of the poorest members of society. Martin Luther King's Poor People's Campaign and Gandhi's Salt March are two notable examples.

Disabled people are the most economically marginalized group in the United States. The general poverty rate in the United States hovers around 15% while the poverty rate for PWD is nearly double that amount at 29% . The unemployment rate is also much higher for PWD.

This Notice is logically flawed in it does not extend protections to PWD. On page 54, the Notice explains that while the rules established under the Notice do not preclude a company from considering additional diverse attributes [including disability]… the company would still have to prove the required disclosure under Rule 5605(f)(3) if the company does not have at least two directors who are otherwise considered Diverse under Rule 5605(f)(1)" This privileges groups that are defined as Diverse under the Notice over PWD. The net effect under this interpretation will be the continued marginalization of PWD even as companies are able to claim that their board of directors meets the definition of "diverse," as defined in this Notice.

The motivation—in part—for the definition of "diversity," may be found on pages 81-82 which states that a "homogenous board with respect to race, ethnicity, sexual orientation and gender identity that, by extension, does not reflect the diversity of a company's communities, employees, investors or other stakeholders." It bears emphasizing that PWD constitute over one-quarter of the American public. The Centers for Disease Control and Prevention ("CDC") recently found that 26% of adults in the United States have some type of disability.[1]

Even as the Notice intentionally excludes PWD from the definition of diversity, it cites to a footnote stating that "companies that offered inclusive working environments for employees with disabilities achieved [a variety of economic benefits when compared to their peer group]."[2] Under section iv. Broader vs. Narrow Definition of Diverse, on page 211, NASDAQ admits that there are no empirical analyses which correlate "investor protection and company performance," and either disabled or LGBTQ status. This Notice privileges LGBTQ status by making the unsupported logical transition to claim that having LGBTQ board members would somehow further "decision making, company performance, and investor protections," yet somehow extending this treatment to PWD would not. The Notice is internally inconsistent in that it cites studies which support both the conclusion of hiring PWD as well as persons with LGBTQ status but which inexplicably arrive at the conclusion that the Notice will not extend the same treatment to PWD.

This Notice represents an opportunity for both the NASDAQ and the SEC to "do the right thing." Even though PWD have been recognized as needing special consideration in both the Bible and in the Quran, when drafting "diversity and inclusion," policies PWD are the least likely to be included in such a definition. Specifically, the consulting firm KPMG found that when asked "which of the following [groups] are likely included in your organization's definitions of 'diversity,' and 'inclusion.'" Ninety-two percent of respondents identified gender, 86% identified race, 72% included

[1] United States Centers for Disease Control, Disability Impacts All of Us. https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (last accessed December 20, 2020).

[2] See footnote 218 at page 82.

sexual orientation, but only 70% thought to include disability as a category.[3] While the general public may not understand that PWD may have legitimate needs to be promoted within the private sector, this represents an opportunity for the SEC and NASDAQ to live up to their own standards and include the most disadvantaged groups within the definition of "diversity."

II. This Notice infringes upon State efforts to define the concept of "diversity" and who should be encompassed within that definition.

Moreover, there are already state laws in place to promote NASDAQ's definition of "diversity." The State of California recently passed AB-979 to have at least one member of their board of directors to have at least one historically "underrepresented community," on their board of directors.[4] This includes racial minorities as well as people with LGBTQ status. New York State is currently evaluating the viability of enacting such a quota-based system.[5] As such, the information that the Notice seeks to disseminate is currently available for benchmarking efforts to integrate LGBTQ employees onto a company's board of directors.

III. Constitutional Concerns

The Notice is constitutionally flawed under the Equal Protection Clause. In City of Richmond v. J.A. Croson Company, the Supreme Court found that a municipal regulation that required companies awarded city construction contracts to subcontract 30% of their business to minority business enterprises was a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment. The Court found that a "generalized assertion," as the policy motivating the Notice at issue, does not justify "rigid" racial quotas for the awarding of public contracts.

Writing for a 6-3 majority, Justice Sandra Day O'Connor found that the 30% quota could not be tied "to any injury suffered by anyone," and was an impermissible employment of a suspect classification. O'Connor further held that allowing claims of past discrimination to serve as the basis for racial quotas would actually subvert constitutional values."

The Notice before the SEC is analogous to Richmond v. Croson in that both employ quotas to award highly remunerated position a corporate board as a means to redress past wrongs. Moreover, the "generalized assertion," evinced in the Notice inexplicably ignored the needs of other groups that are equally in need of redress and the presence of whom on corporate boards would assist corporate boards to meet the needs of large groups of minorities—to wit persons with disabilities.

Along with the Equal Protection Clause, the Notice raises concerns under the "arbitrary and capricious," standard elaborated in Chevron U.S.A, v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984). In a unanimous decision, Justice Stevens held that the environmental regulation at issue was in fact a reasonable interpretation of the term "stationary source," in the Clean Air Act. As a result, the EPA's regulation was a reasonable policy choice.

The definition of "diversity," in this Notice however is an arbitrary and capricious regulation by the NASDAQ through the SEC in that it cites to evidence supporting the inclusion of persons with disabilities within its concept of "diversity," but discards this definition. On page 211 of the Notice, NASDAQ admits that "its review of academic research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities. NASDAQ acknowledges that there is also a lack of published research on the issue of LGBTQ+ representation on boards." On page 212 the NASDAQ inexplicably goes on to disregard its own findings to state, "[n]onetheless, NASDAQ believes it is reasonable in the public interest to include a reporting category for LGBTQ+ in recognition of the U.S. Supreme Court's recent affirmation that sexual orientation and gender identity are 'inextricably' intertwined with sex, and based on studies demonstrating a positive association between board diversity and decision making, company performance[,] and investor protections." The positive association the NASDAQ cites to could easily apply to persons with disabilities however—inexplicably—NASDAQ has chosen to elide all other groups and has not shared the

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[3] KPMG, Leading from the Front, Disability and the Role of the Board, https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/05/leading-from-the-front-disability-and-the-role-of-the-board.pdf, (last accessed December 22, 2020).

[4] S&P Global Market Intelligence, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/calif-legislature-passes-racial-lgbtq-corporate-board-diversity-mandate-60175769. (last accessed December 22, 2020).

[5] Office of the New York State Comptroller, https://comptroller.nyc.gov/newsroom/the-business-case-for-expanding-lgbt-diversity-on-corporate-boards/, (last accessed December 22, 2020).

“studies demonstrating a positive association,” which somehow privilege other groups ahead of persons with disabilities.

This Notice is both factually and constitutionally flawed. As a result, in the name of diversity, NASDAQ must re-write it to include persons with disabilities.

as well as under the arbitrary and capricious standard elaborated under Chevron U.S.A., v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984).

https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf

https://disabilityin.org/in-the-news/investor-statement/

https://www.accenture.com/_acnmedia/PDF-142/Accenture-Enabling-Change-Getting-Equal-2020-Disability-Inclusion-Report.pdf#zoom=40

Constitutionally Flawed:

I Arbitrary and Capricious, Chevron.
II. City of Richmond v. J.A. Croson Company, 488 US 469 (1989).

https://www.oyez.org/cases/1988/87-998

In a 6-3 Decision, the Supreme Court held that racial preferences in support of public contracts violated the Equal Protection Clause of the Constitution.

https://www.natlawreview.com/article/nasdaq-board-diversity-proposal

https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Matrix.pdf

https://www.sec.gov/cgi-bin/ruling-comments

https://www.sec.gov/rules/sro/nasdaq.htm#SR-NASDAQ-2020-081