December 22, 2020

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

Re: Exchange Act Release No. 90574, File No. SR-NASDAQ-2020081

Dear Secretary Countryman:

The UAW Retiree Medical Benefits Trust (the "Trust") writes in strong support of the proposal by The Nasdaq Stock Market LLC ("Nasdaq"), in Exchange Act Release No. 90574/File No. SR-NASDAQ-2020-081 (the "Release"), to adopt listing rules related to board diversity (the "Proposed Rules"). Nasdaq has submitted the Proposed Rules for approval by the U.S. Securities and Exchange Commission (the "Commission") pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (the "Exchange Act").

Established in 2010, the Trust is among the largest non-governmental providers of retiree health benefits in the country, with approximately $60 billion in assets under management and over 600,000 plan participants. From inception, the Trust's oversight Committee has demonstrated a commitment to diversity and inclusion as core to the Trust's business and investment activities.

As Chief Investment Officer, I oversee the Trust's investment strategies. Our approach to diversity and inclusion is designed to ensure that our asset managers understand and appreciate the Trust's commitment to diversity within the financial services industry and our views on the importance of board diversity and disclosure by public and private portfolio companies. In our view, diversity and inclusion is not an end in itself, and an organization need not sacrifice prudent fiscal management and investment strategies to satisfy diversity goals. To the contrary, our experience confirms that the inclusion of diverse asset managers is an important part of the Trust's overall strategy for ensuring long-term financial success.

The Trust's corporate governance engagements on board diversity also inform our support for the Proposed Rules. In 2016, the Trust help found the Midwest Investors Diversity Initiative ("MIDI"), a coalition of 14 investors with $810 billion in assets under management. MIDI was the first investor coalition dedicated to increasing racial, ethnic and gender diversity on corporate boards. The coalition's efforts to identify boards lacking diversity would have undoubtedly benefited from the disclosures proposed by NASDAQ.

In addition to our initiatives to improve board diversity, we also recognize the critical juncture on gender, race, and ethnicity in the U.S. and the imperative for corporate board leadership to rise to the demands of our time. The U.S. is in the midst of what Commissioner Allison Herren Lee recently called "an unprecedented national conversation on racial injustice that also highlights the urgency of ensuring diverse perspectives and representation at all levels of decision-making."[1]

Below are our specific comments on the proposal's alignment with the intent of the Exchange Act and with institutional investors' interests.

The Standard for Approval by the Commission

To support approval by the Commission, the Proposed Rules must be consistent with section 6(b) of the Exchange Act, which requires that exchange rules be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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."[2] For the reasons discussed below, the Proposed Rules satisfy that standard and should be approved.

The Proposed Rules Strike a Reasonable Balance Between Encouraging Diversity and Improved Disclosure and Giving Boards and Shareholders Latitude to Select Suitable Directors

Nasdaq states in the Release that it "endeavored to provide a regulatory impetus to enhance board diversity that balances the need for flexibility with each company's particular circumstances."[3] We believe that the Proposed Rules strike an appropriate balance between these competing considerations. Some early criticism of the Proposed Rules rests on the notion that they would establish a "quota" or a "mandate" compelling boards to include diverse directors under penalty of delisting.[4] The Proposed Rules have also been attacked as an "assault on the free market."[5]

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[1] https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922

[2] 15 U.S.C. section 78f(b)(5).

[3] Release, at 12.

[4] See, e.g., https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-226255.htm; similar https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-226217.htm; https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-226218.htm; https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-typea.htm

[5] https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-typea.htm

Those objections misread the Proposed Rules, which would not compel companies to add diverse directors to their boards or impede the free market. Instead, they would:

- Provide that a listed company may have at least two "Diverse" directors, defined as directors who self-identify as female, members of an Underrepresented Minority[6] or LGBTQ+; **or** explain why it does not;
- Require disclosure regarding aggregate board diversity characteristics; and
- Allow foreign and smaller reporting companies to avoid explanation by having two female directors.

The Trust applauds Nasdaq for giving listed companies access to services, including benchmarking and a roster of diverse candidates, to help them diversify their boards. Smaller companies, which may rely heavily on existing directors' informal networks to identify new nominees, will especially benefit from these resources. The availability of Nasdaq guidance in implementing the Proposed Rules will also lessen the burden on listed companies.

<u>Increased Diversity and Disclosure About Diversity Characteristics Would Promote Investor Confidence and Capital Market Efficiency</u>

As the Release describes in detail, a diverse board confers numerous benefits, which improve financial performance and market integrity:

- Empirical studies overwhelmingly support the proposition that a more diverse board is associated with higher corporate performance as measured by metrics including return on equity, return on invested capital, asset valuation multiples, dividend payouts, innovation, earnings per share, and EBIT margin.[7]
- Studies also show that companies with gender-diverse boards make more complete disclosures, including forward-looking information; are less likely to manipulate earnings or receive certain kinds of qualified audit opinions; and are less likely to have material weaknesses in internal controls, materially restate earnings, or commit securities fraud.[8] These kinds of integrity- and transparency-boosting effects are essential to promote investor confidence in both individual companies and the markets more generally.

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[6] "Underrepresented Minority" is defined, consistent with categories reported to the Equal Employment Opportunity Commission, as someone who self-identifies as 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. (Release, at 7)

[7] <u>See</u> Release, at 16-22.

[8] <u>See</u> Release, at 23-28.

- Finally, research shows that companies with diverse boards are better governed: both CEO turnover and compensation is more performance-sensitive.[9]

Non-quantitative research also provides support for diversifying boards. Studies show that diverse boards are less likely to suffer from "groupthink," which is "a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members."[10]

A study of Norway's gender board diversity mandate found that a more heterogeneous board may "promote[s] cognitive diversity and constructive conflict in the boardroom," by, among other things, making implicit assumptions explicit and considering a more comprehensive range of angles or viewpoints.[11] Investors' real-world experience bears this out. Jared Landaw, COO and general counsel at activist fund Barington Capital Group, L.P., has noted that "a cognitively and demographically diverse board is best equipped to perform its obligations and help a company compete, innovate and respond to disruption in today's challenging international markets."[12]

Investors Support Efforts to Increase Diversity on Boards

Investors are keenly interested in increasing board diversity. In 2019, shareholder proposals seeking adoption of a board diversity proposal or the issuance of a report on board diversity efforts received 37.2% support on average; that number was 51.9% in 2019.[13] Three and two proposals obtained majority support in 2019 and 2020, respectively, an impressive result for a proposal often classified as "social" rather than "governance." Outside of the voting context, Goldman Sachs Group Inc. announced that it will not take a company public if it has no diverse directors.[14]

Investor expressions of support are not limited to votes on shareholder proposals, however. For example, BlackRock, the largest U.S. asset manager, votes against nominating and governance committee members if boards have fewer than two women.[15] Beginning in 2022, proxy advisor Institutional Shareholder Services

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[9] See Release, at 28.
[10] Release, at 28-29.
[11] See Release, at 30.
[12] https://corpgov.law.harvard.edu/2020/07/14/maximizing-the-benefits-of-board-diversity-lessons-learned-from-activist-investing/
[13] https://www.gibsondunn.com/wp-content/uploads/2020/08/shareholder-proposal-developments-during-the-2020-proxy-season.pdf p.18.
[14] https://www.washingtonpost.com/business/2020/01/23/goldman-sachs-ceo-says-it-wont-take-companies-public-without-diverse-board-member/
[15] https://corpgov.law.harvard.edu/2020/01/28/board-composition-and-shareholder-proposals/

will recommend that clients vote against or withhold support from the chair of the nominating committee "where the board has no apparent racially or ethnically diverse members."[16] (ISS's use of the word "apparent" highlights the inadequacy of disclosure.) Many asset owners, including the Trust, include similar provisions in their proxy voting guidelines.

Investors are increasingly seeking disclosure on board diversity characteristics. Vanguard and State Street, two of the largest U.S. asset managers, have endorsed aggregate board diversity disclosure, including disclosure of racial and ethnic characteristics, as a minimum standard.[17] Recently, the Russell 3000 Board Diversity Disclosure Initiative sent letters signed by 21 investor organizations—including the Trust—representing over $3 trillion in assets under management, urging Russell 3000 companies to disclose the racial/ethnic and gender composition of their boards in their 2021 proxy statements.[18]

According to Nasdaq, stakeholders other than investors consulted in Nasdaq's stakeholder outreach, including businesses, regulators, and the governance community, also favored increasing board diversity.[19] Corporate governance organizations such as the International Corporate Governance Network (ICGN) and the Council of Institutional Investors (CII) support diverse boards: ICGN states that they "enhance corporate governance and the overall success of companies"[20] and CII's Corporate Governance Policies assert that "a diverse board has benefits that can enhance corporate financial performance, particularly in today's global market place."[21]

Support among non-investor stakeholders for improved disclosure is growing as well. Legislation has been introduced in Congress to require disclosure by issuers of the racial, ethnic, and gender composition of their boards.[22] Former SEC Commission Chair Mary Jo White expressed the view in 2016 that the Commission's disclosure requirements around board diversity "need to be re-focused

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[16] https://cooleypubco.com/2020/10/19/iss-proposes-voting-policy-changes-2021/

[17] See https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf, p.18; https://www.ssga.com/us/en/institutional/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies

[18] https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/october2020_russell3000.pdf

[19] Release, at 11.

[20] http://icgn.flpbks.com/icgn_diversity-on-boards/files/extfile/DownloadURL.pdf, p.5;

[21] https://www.cii.org/corp_gov_policies#BOD

[22] https://www.congress.gov/bill/116th-congress/house-bill/1018

in order to better serve and inform investors."[23] More recently, Commissioners Lee and Crenshaw have advocated for more robust diversity disclosure requirements.[24]

Comprehensive and consistent disclosure will facilitate further empirical research on board diversity, allow more reliable identification of companies for engagement and voting purposes, and support investment strategies that seek to take board diversity into account. The Commission's current disclosure requirements focus on narrative discussion of how diversity is considered when selecting nominees and allow companies to define diversity in "ways that they consider appropriate," which has led to incomplete and inconsistent disclosure.

As a result, datasets built from these disclosures and others, where companies voluntarily disclose, do not lend themselves well to benchmarking or comparisons between companies. The data is also likely to be somewhat unreliable, given that data providers often attempt to discern directors' racial or ethnic background from proxy statement photos; investors are understandably wary to engage companies if there is a possibility they are misrepresenting a director's racial/ethnic background. The Proposed Rules would eliminate that problem by using directors' self-identifications and by establishing a consistent disclosure methodology.

The explanations provided by companies that do not have two or more diverse directors under the Proposed Rules would also contribute to the total mix of information available to investors. Such explanations would reasonably be expected to provide insights into company strategy, the board's role and responsibilities, and the process by which nominees are recruited and selected. Finally, a uniform approach to diversity disclosure would allow automated extraction and significantly reduce the cost of accessing and using the data. In sum, the reduction in information asymmetry occasioned by the Proposed Rules would increase efficiency and improve the functioning of the capital markets.

The Proposed Rules are a thoughtful, reasonable, and well-supported approach to encouraging board diversity and improving diversity disclosure. The Trust urges the Commission to approve them.

Sincerely,

Hershel Harper
Chief Investment Officer

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[23] https://www.sec.gov/news/speech/chair-white-icgn-speech.html
[24] https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26; https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k