Amy L. Goodman
John F. Olson

December 24, 2020

By email (rule-comments@sec.gov)

Re: File Number SR-NASDAQ2020-081
(Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity)

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

Dear Secretary Countryman:

We are writing to comment in support of Nasdaq's proposal related to board diversity (the "Proposal"). We write as lawyers and experts in corporate governance who have each spent the better part of the last half-century advising boards of directors on corporate governance matters. We are retired partners of Gibson, Dunn & Crutcher LLP who were involved in founding the firm's Securities Regulation and Corporate Governance practice group. We have been working, researching and writing in the area of corporate governance since it was a nascent field in the 1970's. We are founding members of the American College of Governance Counsel, an association of lawyers widely-recognized for their achievements in the field of governance. Amy has served as editor of several recurring publications and a seminal legal treatise on corporate governance, and led the Securities and Exchange Commission (the "Commission") Task Force on Corporate Accountability. John has spent over 15 years teaching governance, at Northwestern and Georgetown University law schools. Each of us has provided advice to many public company boards and board committees. Summaries of our experience in the governance field are attached as Appendix A.

As veteran legal advisors and students of corporate governance who have personally observed boardroom deliberations over a collective period of more than 80 years, we have the following comments:

1. *Based on our many years of experience in boardrooms, we believe diversity enhances the quality of board deliberations and decisions.*

Based on our observations of directors as they have engaged in deliberations and decision making in the boardroom, we strongly believe that increased diversity of backgrounds and life experiences of board members enhances both the quality of deliberations and the substance of the decisions that are made. Over the years, as we have worked closely with boards that have become more diverse, we have witnessed a discernible, positive impact on the boardroom environment. Deliberation and discussion have become more focused, and the group has benefited from the additional perspectives contributed by women and individuals from other historically underrepresented groups. In addition, we believe Nasdaq's proposal to elicit disclosure about a minimum of two directors who are "Diverse" (as defined in the Proposal) is an appropriate threshold. We have seen firsthand that the presence of at least two diverse directors in the boardroom is integral to creating a supportive environment that fosters full participation. A single director brought onto a board who is a woman or a member of another previously unrepresented group has a potentially lonely role and is less likely to be able to fully and effectively contribute to the quality of thought and decision making by the group.

As we have described above, our experience is also consistent with the sizeable body of academic research Nasdaq cites to support the Proposal and the benefits of diversity. In this regard, we agree that diversity is beneficial based on our many years of experience working with boards. We also note that we are unaware of any academic research, nor has it been our experience, that adding directors of diverse backgrounds impedes sound decision making.

2. *The Proposal simply requires more transparency. It is not a mandate or "quota."*

In recent years, investor interest in board diversity has grown exponentially and investors have sought more disclosure about this subject. The Proposal has been criticized by some commentators as a mandate by a "woke," activist regulator seeking to impose quotas on corporate boards. In our view, this criticism misunderstands the Proposal. The Proposal aims to increase transparency by eliciting and standardizing disclosures about diversity. The Proposal would do this by requiring disclosure based on the same categories companies already use to report workforce diversity data to the Equal Employment Opportunity Commission on the EEO-1 Report. Moreover, directors would not be required to provide companies with information about their diversity attributes, and for directors who choose not to self-identify as members of a qualifying group, companies could respect their privacy and note their status as "undisclosed."

The Proposal also aims to increase transparency by adopting a "comply-or-explain" framework. This is consistent with the approach to corporate governance taken in a number of other countries, including the United Kingdom, Canada, Australia, France and Germany. Under this framework, Nasdaq companies would not be required to have to at least two "Diverse" directors under the Nasdaq definition, but only to disclose whether their boards have at least two such directors and if not, why not. There is nothing in the Proposal that would preclude boards from considering attributes that go beyond those in the Nasdaq definition, such as being a veteran or having a disability, in determining their board composition.

Some commenters have suggested that the Proposal would result in the selection of directors who are unqualified or underqualified by prioritizing diversity above credentials. This is simply not borne out by our experience, which suggests that there is an abundance of qualified diverse candidates as many companies have discovered in recent years. In connection with the Proposal, Nasdaq has announced that it will offer resources to aid Nasdaq-listed companies in identifying diverse candidates. Diversity, of course, is not just a matter of personal identity and background. For years now, boards have increasingly realized that diversity of relevant experience is critical to success in a fast-changing global world. Thus, boards have increasingly realized that focusing their search on candidates who have CEO experience, most of whom have been male and not diverse, is not adequate. Increasingly, the most effective boards we have seen have recruited individuals with backgrounds in critically important fields such as science and technology, cybersecurity, risk management and government service, reaching out to candidates who occupy or have held relevant senior non-CEO corporate, academic or government positions and who are more likely than the current or former CEO candidates previously sought to be diverse in their gender, ethnic or other identities.

3. *The Proposal is consistent with the historical role of the stock exchanges in advancing the quality of corporate governance.*

Historically, Nasdaq and other stock exchanges have played an important role in fostering accountability, transparency and investor confidence in the securities and financial markets. The development of corporate governance listing standards covering matters ranging from financial statements to audit committees and director independence have been a key component of this role. As contemplated in the self-regulatory organization provisions of the Securities Exchange Act of 1934 (the "1934 Act"), which are the primary regulatory regime for the exchanges, the Commission has supported and encouraged stock exchange efforts to strengthen corporate governance at listed companies, including in connection with the extensive rulemakings undertaken by the exchanges to implement the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, where the Congress specifically expected that important governance reforms would be implemented by the exchanges under Commission oversight pursuant to the 1934 Act regime.

In this regard, the Proposal builds on prior work done by the stock exchanges to advance the quality of listed company corporate governance. In formulating the Proposal, Nasdaq has made a judgment that the Proposal would promote the public interest and the protection of investors. We believe the Commission should defer to this judgment, which is backed by the practical experience of Nasdaq listed companies and the exchange's market participants, as well as investor groups.

4. *Investor and other stakeholder interest in board diversity is significant.*

As noted above, in recent years, investor and other stakeholder interest in board diversity has grown exponentially, fueled in part by sentiments in some quarters that, as America has grown increasingly diverse, the pace of change in the boardroom has been relatively slow. Institutional investors are keenly focused on board composition and diversity, and they have become increasingly vocal in communicating their expectations about diversity practices and disclosures to the companies in which they invest. Boards, too, have increased their dialogue about diversity in the boardroom. In addition, state legislatures, as well as foreign governments, have turned their attention to board diversity. In its filing with the Commission seeking approval of the

Proposal, Nasdaq states that "during its discussions with stakeholders, Nasdaq found consensus across every constituency that there is inherent value in board diversity."

Given the continued, ongoing level of interest in this subject, we believe the Proposal is both timely and constructive. We believe it strikes an appropriate balance between providing investors and other stakeholders with additional information about diversity in a format that facilitates greater comparability across companies, and giving listed companies and boards needed flexibility to consider the particular mix of backgrounds, skills and experience that will work best for the growth and sustainability of their businesses within the Nasdaq disclosure framework, which provides ample room for individual variation within the proposed disclosure format. In this regard, the Proposal is also respectful of the developing state law experience as several states have adopted and others are considering statutory diversity standards for boards of directors.

* * * * *

For the reasons stated above, we support the Proposal and urge the Commission to approve it.

We note that these comments are our own views, and we do not speak for, or represent that they are, the views of the law firm from which we are retired, or any other association or organization with which we are affiliated. We have not been compensated by Nasdaq or any other entity for the preparation and submission of this letter.

Sincerely,

Amy L. Goodman/gm

John Olson

Appendix A

Amy L. Goodman—Biography

Amy Goodman is a retired former partner and co-chair of Gibson, Dunn & Crutcher LLP's Securities Regulation and Corporate Governance practice group. She advised clients with respect to corporate governance and securities law matters, including the representation of boards of directors and independent board committees. She has been recognized by the National Association of Corporate Directors, Chambers, and Euromoney, among others, as a preeminent corporate governance attorney.

Ms. Goodman is the founding editor *of INSIGHTS: The Corporate & Securities Law Advisor* and *The Corporate Governance Advisor*, published by WoltersKluwer, and is co-editor of the corporate governance treatise *Corporate Governance: Law and Practice,* published by LexisNexis. She is the former Chair of the Committee on Director and Officer Liability of the American Bar Association's Business Law Section and the former subcommittee chair of the Section's Corporate Governance Committee.

Ms. Goodman previously was with the Securities and Exchange Commission, and, among other positions, served as Chief of the Task Force on Corporate Accountability, which prepared the 1980 *Staff Report on Corporate Accountability* that was printed for the use of the Committee on Banking, Housing and Urban Affairs of the United States Senate. She was the recipient of the SEC's Distinguished Service Award and the Presidential Meritorious Executive Award.

Ms. Goodman received her Juris Doctorate degree *cum laude* from Boston University School of Law and an LL.M. with an emphasis in securities law from Georgetown University Law Center.

John F. Olson—Biography

John F. Olson is a retired former partner and founding partner of Gibson, Dunn & Crutcher's Washington, D.C. office. Mr. Olson has counseled many boards of directors and board committees of leading public companies in the United States and abroad on governance issues.

In 2006, Mr. Olson led a team of the firm's lawyers that advised the Board of the American Red Cross on a comprehensive audit of its governance practices. He has since advised the United States Olympic Committee and a number of other nonprofit organizations on governance issues.

Mr. Olson has served as Chairman of the ABA Business Law Section's Committees on Corporate Governance and Federal Regulation of Securities and on the Publications Board and Council of the Section. He was a member of the Presidential Task Force on Corporate Responsibility appointed by the President of the ABA. He has served for many years as a member of and liaison to the Business Law Section's Corporate Laws Committee. For the Section, he chaired a task force which prepared several editions of the *Corporate Director's Guidebook*.

Mr. Olson was elected to *NACD/Directorship Magazine*'s Corporate Governance Hall of Fame in 2013. He is regularly ranked among the top securities advisory attorneys in the District of Columbia by *Chambers USA* and has been listed every year since 2007 in Who's Who of Corporate Governance Lawyers by *Who's Who Legal*. He was named the Washington, DC Corporate Law Lawyer of the Year for 2013 and the Washington, DC Corporate Governance Law Lawyer of the Year for 2012 by *The Best Lawyers in America®*.

Mr. Olson has been selected by his peers for inclusion in *The Best Lawyers in America®* in every edition published since its inception 30 years ago.

A frequent lecturer at legal and business seminars, Mr. Olson is also the author of more than 100 articles and a member of the editorial advisory boards for a variety of securities and corporate law publications.

Mr. Olson was the Distinguished Visiting Practitioner in Residence at Cornell Law School in 2003, and from 2005 through 2007 taught corporate governance at Northwestern University School of Law. He is currently a Distinguished Visitor from Practice at Georgetown University Law Center, teaching courses in securities regulation and governance of nonprofit organizations. Mr. Olson was the founding Chair of the Board of Trustees of the American College of Governance Counsel (2015-2018).