soundboard governance

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Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File Number SR-NASDAQ-2020-081

Secretary Countryman:

I am writing in support of The Nasdaq Stock Market's ("Nasdaq") proposed rule change to adopt listing rules related to board diversity (Release No. 34-90574; File No. SR-NASDAQ-2020-081, Dec. 4, 2020) (the "Proposal"). I believe the Proposal is very much in the public interest of ensuring efficient and well-functioning capital markets in the United States and protecting the investors that participate in them.

I write in my capacity as President of Soundboard Governance, LLC, a sole-proprietor corporate governance consulting firm based in Princeton, New Jersey. My experience includes over 20 years of practice in the fields of corporate law, securities regulation, and corporate governance as an attorney at global law firms in New York City and Hong Kong; Assistant General Counsel, Corporate of Tyco International; Assistant General Counsel and Corporate Secretary of Johnson & Johnson; and Executive Director of The Conference Board ESG Center. I have also held prominent leadership positions in these fields, including Chair of the Board of the Society for Corporate Governance; President of the Stockholder Relations Society of New York; a member of the New York Stock Exchange (NYSE) Corporate Governance Commission; and a member of the Corporate Laws Committee of the American Bar Association. Most recently, I was elected as a member of the American Law Institute. I am currently teaching corporate law and governance at Rutgers Law School and the Fordham University School of Law.

The many arguments in favor of the Proposal that I could make here are laid out in compelling fashion and with extensive support in the Proposal itself, and thus I need not summarize all of them here. I write to draw attention to several point that I believe are particularly important for the Commission to consider:

1. **Nasdaq's proposed rules are purely disclosure-based.** The new rules would require listed companies to disclose information about the gender, ethnicity, and sexual orientation of their boards.[1] This is *disclosure* about a board's diversity or lack thereof. It would in no way impose what some detractors characterize as a "quota" for board composition. Calling it a quota misrepresents the substance of the Proposal. Many jurisdictions[2] do have laws that require public company boards to include certain numbers of women or members of underrepresented groups. Without debating the merits of that type of requirement, the Proposal is anything but that.

2. **Board diversity data are important to investors.** In the past, one major criticism of proposals to require companies to disclose board diversity data was that either no investors were asking for these data, or the investors that were asking for them represented a tiny fraction of the market, and these investors wanted the information mainly to further their social agendas—not for purposes of making investment decisions. That can no longer be said, as the world's largest asset managers and asset owners have made clear calls for board diversity data to factor into their analyses of company-specific and systemic risk for purposes of making investment decisions involving trillions of dollars.

3. **Diversity data are necessary to understand important trends and factors affecting our capital markets.** Without comprehensive, standardized disclosures, trends and factors related to the demographics of public company boards are difficult to identify and examine on an accurate and objective basis. Similar to national census data, definitive demographic data on corporate boards are critical to discussions over whether diversity does in fact impact board and firm performance. Both people who argue that it does and those who make arguments to the contrary would be better equipped to have this debate when using the same data, as opposed to non-standardized data from only a self-selecting portion of the market. While there are currently data on board diversity, those data are gathered in different ways and from different sources.

4. **Collecting the data is not burdensome**. In fact, it is easy. According to the 2020 U.S. Spencer Stuart Board Index,[3] the boards of companies in the S&P 500 index range in size from five to 22 members with an average of 11. Asking five to 22

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[1] It is worth noting that the required disclosure would be of board-level data, as opposed to director-specific data, thus allowing individual directors to maintain a level of privacy.
[2] Predominantly, but not exclusively, outside the United States.
[3] Available at https://www.spencerstuart.com/research-and-insight/us-board-index.

people three multiple-choice questions about gender, ethnicity, and sexual orientation would require no additional time on the part of a company's management or its directors, especially when directors already complete annual questionnaires to gather other information required for disclosure under existing SEC and Nasdaq rules.

5. **Disclosing the data is not burdensome.** The Proposal gives companies the option to disclose the required data on their websites, thereby avoiding any incremental costs from printing an extra page or two in their annual reports or proxy statements. Furthermore, this type of disclosure would not expose companies to competitive harm. And failure to disclose would not expose companies to severe penalties without ample opportunity to remediate.

6. **Explaining why not is not difficult.** Some disclosure requirements can become creative writing assignments. This is not one of them. It is not hard for a company to give an explanation why its board does not include certain types of directors. One explanation could be that they have tried to find diverse directors to join their board, but it has been more difficult than they anticipated. Another explanation could be that the board does not see any value in having a diverse membership. In that case, it could simply copy or paraphrase what one high-profile company already says in its proxy statement: "In identifying director nominees, the Governance Committee does not seek diversity, however defined. Instead,… the Governance Committee looks for individuals who have very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company."[4] It is also important to note that the explanations elicited for why companies' boards are not diverse will also be useful to the public interest and capital markets. They can help us understand the reasons behind why diversity in corporate boardrooms continues to lag behind other areas of industry and society.

The view that board diversity is purely a social issue persists in portions of corporate America. However, that view is now outdated. More and more studies show strong correlations of board diversity to board and firm performance and positive impacts of leadership diversity on corporate decision-making. There is now a widespread and growing consensus among investors and business industry groups on the importance of board diversity. Today, board diversity is no longer just a social issue; it's a *governance* issue. As such, it is appropriate for Nasdaq to require listed companies to make

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[4] Berkshire Hathaway Inc. has included this language in its proxy statements for many years, including those, such as this year, in which its board had numerous diverse directors. Berkshire Hathaway's stock is listed on the NYSE.

disclosures related to board diversity. For this reason, as well as the reasons I have discussed above, I urge the Commission to approve the Proposal.[5]

Respectfully,

Douglas K. Chia

[5] I also urge the incoming Biden Administration to consider the diversity of the Commission as it makes appointments to this important policy-making body over the next four years.