CFA Institute

[redacted] [redacted]

January 4, 2021

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
By Email: (rule-comments@sec.gov)

Re: File No. SR-NASDAQ-2020-081, Release No. 34-90574; The Nasdaq Stock Market LLC, Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity

Dear Ms. Countryman:

CFA Institute appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "SEC" or the "Commission") regarding Nasdaq's proposed listing rules related to board diversity (the "Proposal").[1] CFA Institute[2] speaks on behalf of its members and advocates for investor protection and market integrity before standard setters, regulatory authorities, and legislative bodies worldwide.

CFA Institute supports the Proposal's stated goal to "provide stakeholders with a better understanding of [a] company's current board composition and enhance investor confidence that all [Nasdaq-] listed companies are considering diversity in the context of selecting directors."[3]

In our view, the Proposal is a measured and appropriate response to growing market demand for meaningful disclosure regarding board composition and diversity policies of U.S.-listed public companies. It accurately and thoughtfully reflects the shared interest of the financial community and U.S. policymakers in the diversity and inclusion imperative. The proposed requirements of Board Diversity Disclosure (Rule 5606) and Diverse Board Representation (Rule 5605(f)) are consistent with the historical role of stock exchanges in advancing corporate governance standards.

Accordingly, and as further described below, CFA Institute supports Nasdaq's Proposal, with some suggested modifications and additional considerations.

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[1] Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, **U.S. Securities and Exchange Commission, Exchange Act Release No. 34-90574, 85 Fed Reg** 80472 (Dec. 11, 2020) (the "Proposal").

[2] CFA Institute is a global, not-for-profit association of investment professionals. Our membership includes nearly 185,400 investment professionals in 165 countries, of whom more than 178,500 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 154 member societies in 77 countries and territories.

[3] Nasdaq, *Nasdaq to Advance Diversity Through New Proposed Listing Requirements* **[Press release] (Dec. 1, 2020).**

Our response is organized as follows:

- *Proposal Reflects Market Demand on Critical Corporate Governance Matter;*
- *Board Diversity Disclosure Relies on Existing Framework to Close Information Gap;*
- *Comply-or-Explain is a Flexible, Appropriate Approach to Diverse Board Representation;*
- *Commission's Role as the "Disclosure Agency."*

Proposal Reflects Market Demand on Critical Corporate Governance Matter

CFA Institute believes increased investor demand for board diversity and specific disclosure regarding board composition,[4] particularly as evidenced by recent proxy seasons[5] and evolving stewardship policies,[6] investor initiatives,[7] as well as stronger commitments from public

[4] For 2020 survey data of institutional investors, corporate executives, board members, and other constituencies on racial and ethnic diversity, *see* ISS Governance, *2020 Global Benchmark Policy Survey, Summary of Results* (Sept. 24, 2020), at 6-7, 18-19 (for example, finding 61% of investors indicated "boards should aim to reflect the company's customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups"; 73% of investors indicated all boards should disclose its demographics, including race/ethnicity information to the "full extent possible and permitted under relevant laws."). For 2019 survey data on gender diversity, *see* ISS Governance, *2019 Global Benchmark Policy Survey, Summary of Results* (Sept. 25, 2019), at 9-10 (finding 61% of investors and 55% of non-investors agreed that "board gender diversity is an essential attribute of effective board governance regardless of the company or its market."). For survey of comments by institutional investors and pension fund fiduciaries on the importance of diversity as a governance imperative, *see* NACD NXT (National Association of Corporate Directors in collaboration with Deloitte), *Investor Perspectives on Board Diversity* (2018).

[5] Regarding 2019 and 2020 proxy season activity, *see* Glass Lewis, *2020 Proxy Season Review* ("… companies are continuing to respond to the increased shareholder focus on board diversity…Gender diversity concerns was the most frequent driver of majority opposition to directors this year."); *see also* Orowitz, Rosati, *An Early Look at the 2020 Proxy Season*, Harv. L. Sch. Forum on Corp. Governance (Jun. 10, 2020) ("... an examination of environmental and social (E&S) shareholder proposals [in 2020] generally shows that diversity-focused proposals are also garnering significant shareholder support this season."); Karpf, Flow, Kalra, *Board Composition and Shareholder Proposals*, Harv. L. Sch. Forum on Corp. Governance (May 12, 2020) (In 2019, "[d]iversity maintained its place among the forefront of social and governance issues facing corporate boards …primary focus remained board gender diversity…a greater focus on racial and ethnic diversity…").

[6] *See* ESGAUGE and The Conference *Board, Corporate Board Practices IN THE RUSSELL 3000 AND S&P 500 (2020)* ("More and more institutional investors are following the lead of prominent asset managers such as State Street, Vanguard, and BlackRock, moving diversity to the front and center of their corporate stewardship initiatives."). For impact of policies of BlackRock, State Street and Vanguard ("The Big Three") on board gender diversity, *see* Gormley, Gupta, Amtsa, Mortal, Yang *The Big Three and Board Gender Diversity The Effectiveness of Shareholder Voice* (Nov. 6, 2020) ("Even our most conservative estimates imply that The Big Three's campaigns [on gender diversity] led firms to add 2.5 times as many female directors in 2019 as they had in 2016, accounting for almost half of the total 2016-to-2019 increase in gender diversity and about a third of the decline in all-male boards over that same period."). For results of the Boardroom Accountability Project 3.0 of the New York City Comptroller Scott M. Stringer and the New York City Retirement System (NYCRS), *see* Sullivan & Cromwell *NYC Comptroller Announces Results of Board/CEO Diversity Search Policy Campaign* (Apr. 2020) ("Most Companies Receiving a 2020 Proxy Season Shareholder Proposal From the NYC Comptroller Have Implemented a Policy Requiring Consideration of Qualified Women and People of Color as Candidates in Director and External CEO Searches."). For updated diversity policies of "The Big Three," *see* Vanguard, *Investment Stewardship 2020 Annual Report* (2020) ("We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis."); BlackRock Investment Stewardship, *Proxy voting guidelines for U.S. securities, effective as of January 2021* (Dec. 2020) (BlackRock encourages boards to disclose "[d]emographics related to board diversity, including, but not limited to, gender, ethnicity, race, age, and geographic location, in addition to measurable milestones to achieve a boardroom reflective of multi-faceted racial, ethnic, and gender representation….To the extent that a company has not adequately accounted for diversity in its board composition within a reasonable timeframe, based on our assessment, we may vote against members of the nominating/governance committee for an apparent lack of commitment to board effectiveness."); State Street Global Advisors, *Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines* (2020) (Starting in 2020 in the U.S., State Street will "vote against the entire slate of incumbent board members on the nominating committee if a company does not have at least one woman on its board, and has not engaged in successful dialogue on State Street Global Advisors' board gender diversity program for four consecutive years.").

[7] *See* Office of the Illinois State Treasurer and 22 Investor Organizations, *Russell 3000 Board Diversity Disclosure Initiative*. **See also** 30 Percent Coalition ("…coalition for U.S board diversity with members representing $7 trillion in assets under management").

companies[8] and other market participants[9] to diversity and inclusion, speak to the relevance of board diversity characteristics.

The Proposal concludes that there is increasing convergence in the financial community and among policymakers around the board diversity imperative. It cites substantial evidence that gender and demographic diversity improve board effectiveness and company performance, and help foster stronger alignment between management and shareholder, stakeholder interests.[10]

In our view, the Proposal helps formalize a disclosure-driven framework around this market demand and builds on current market best practices. For example, the two largest proxy advisory firms, Institutional Shareholder Services (ISS) and Glass Lewis, recently adopted benchmark policies of, beginning in 2022, generally recommending voting against nominating chairs if the company in question lacks racial and ethnic diversity or does not provide sufficient disclosure[11] or has fewer than two female directors.[12] Similarly, the Proposal builds on and standardizes reporting already provided by some companies, including under the voluntary disclosure frameworks of the Sustainability Accounting Standards Board (SASB) and the Global Reporting Initiative (GRI). In this way, the Proposal helps mitigate the problem of uneven disclosure of issues material to investors, public companies and the market while providing investors, stakeholders, regulators, and the public with systematic disclosure so they can assess, benchmark and evaluate the quality of the disclosure.

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[8] *See* Business Roundtable, *Business Leaders Add Boardroom Diversity to Best Practices List* [Press release] (Apr 2016) ("CEOs announced that they are putting diversity front and center in their search for boards of directors to help lead their companies"). *See also* Chamber of Commerce, *Statement on NASDAQ Corporate Board Diversity* [Press release] (Dec. 1, 2020) ("[The Nasdaq] proposal will help accelerate the developments that are already underway and is a positive and balanced way to get to the end result of allowing boards to be more representative of a business's consumer and employee base."); *See also* Society for Corporate Governance, Deloitte, *Board Practices Quarterly* (Sep. 2020) (finding that among public company respondents, 64% have included or plan to include at least one underrepresented minority in every slate of candidates for every open board position; 57% have or plan to link executive compensative to diversity and inclusion metrics and performance.).

[9] *See* Institutional Limited Partners Association (ILPA), *ILPA Announces Founding Signatories to New Diversity in Action Initiative* [Press release] (Dec. 7, 2020) ("Signatories undertake four essential DEI actions and at least two additional actions, from an optional set of nine." Two of nine relate to board diversity.) *See also* Goldman Sachs, *Goldman Sachs' Commitment to Board Diversity* [Press release] (Feb. 4, 2020) ("Effective July 1 [2020], Goldman Sachs will only underwrite IPOs in the US and Europe of private companies that have at least one diverse board member. And starting in 2021, we will raise this target to two diverse candidates for each of our IPO clients.")

[10] Without pointing to any one particular study, we refer to the rich empirical evidence provided in Section II of the Proposal ("Academic Research: The Relationship between Diversity and Shareholder Value, Investor Protection and Decision Making"); this is also consistent with CFA Institute industry surveys and observations. *See* CFA Institute, *Driving Change Diversity & Inclusion in Investment Management* (2018) (CFA Institute survey reporting "83% said gender diversity is important to them: The majority (55%) believed that gender diversity in investment teams leads to better performance through diverse viewpoints…For financial services firms in general, PwC reported in May 2017 that 88% have diversity and inclusion as a stated value or priority…. The two greatest motivations for firms' efforts around diversity and inclusion were improved business outcomes (80%) and talent acquisition (71%).")

[11] *See* ISS Governance, *ISS Announces 2021 Benchmark Policy Updates* (Nov. 12, 2020) ("For 2022, for companies in the Russell 3000 or S&P 1500 where the board has no apparent racial or ethnically diverse members, and no mitigating factors are identified, ISS' policy will provide for recommending voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis).").

[12] *See* Glass Lewis, *2021 Proxy Paper Guidelines An Overview of the Glass Lewis Approach to Proxy Advice - United States* (2020) ("…when making these voting recommendations, we will carefully review a company's disclosure of its diversity considerations and may refrain from recommending that shareholders vote against directors of companies outside the Russell 3000 index, or when boards have provided a sufficient rationale or plan to address the lack of diversity on the board"; Beginning in 2021, Glass Lewis also "will reflect how a company's proxy statement presents: (i) the board's current percentage of racial/ethnic diversity; (ii) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; (iii) whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (aka 'Rooney Rule'); and (iv) board skills disclosure.").

Further, the Proposal reflects the recognition by SEC commissioners, over the years, of the value of board diversity and of greater transparency into board diversity data.[13]

Insofar as the Proposal is disclosure-driven, we believe it promotes corporate governance standards that foster investor protection and a continuous flow of more transparent and complete information. The Commission has recognized the value of this approach. In approving corporate governance listing standards relating to board independence, the Commission stated: "Through their corporate governance listing standards, the [self-regulatory organizations] SROs play an important role in assuring that their listed issuers establish good governance practices…[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets."[14] We agree that the Proposal is consistent with the historical role of stock exchanges in furthering good corporate governance.

Board Diversity Disclosure Relies on Existing Framework to Close Information Gap

If adopted, Rule 5606 (Board Diversity Disclosure) will (a) establish a uniform, non-exclusive definition of "diversity"; (b) require regular collection of board diversity data based on voluntary self-identification, which is consistent with the collection of workforce diversity data already required of many companies, and improve upon existing voluntary reporting regimes by requiring regular collection of board diversity data; and (c) provide the public with this data in a standardized form through the Board Diversity Matrix.[15]

We support Nasdaq's goal of creating a uniform, non-exclusive definition of "diversity" as necessary for more "clear, complete and consistent disclosures."[16] As Nasdaq summarizes in the

[13] *See* Commissioner Allison Herren Lee, *Regulation S-K and ESG Disclosures An Unsustainable Silence* (Aug. 26, 2020) ("There is ever-growing recognition of the importance of diversity from all types of investors…. And large numbers of commenters on this rule proposal emphasized the need for specific diversity disclosure requirements."); Com. Lee, *Remarks at the Council of Institutional Investors Fall 2020 Conference Diversity Matters, Disclosure Works, and the SEC Can Do More* (Sept. 22, 2020) ("There are many different approaches to promoting diversity….The most obvious tool in the SEC's toolkit is disclosure."); Com. Caroline Crenshaw, *Statement on the "Modernization" of Regulation S-K Items 101, 103, and 105* (Aug. 26, 2020) ("…the final [SEC] rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation. The failure to grapple with these issues is, quite simply, a failure to modernize."); former SEC Chair Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non- GAAP, and Sustainability* (June 27, 2016) ("As a former member of a public company board and its audit committee, I have seen first-hand what the research is telling us – boards with diverse members function better and are correlated with better company performance. This is precisely why investors have – and should have – an interest in diversity disclosure about board members and nominees."); former SEC Chair White, Editorial in American Banker, *Board Diversity Is the Right Thing to Do SEC Chair Mary Jo White* (Sep. 25, 2016) ("…the ability of companies and shareholders to establish their preferred governance framework is a hallmark of our capital markets and long thought to be a source of their strength. The time is right to amplify that strength through board diversity. It is an easy business decision to make and the right thing to do."); former Com. Luis Aguilar, *Diversity in the Boardroom Yields Dividends* (Sep. 10, 2009) ("Given the apparent lack of diversity and the many studies that indicate the real economic benefits of diverse boards, it should be no surprise that many investors — from individual investors to sophisticated institutions — have asked the Commission to provide for disclosures about the diversity of corporate boards and a company's policies related to board diversity."); former Com. Aguilar, *Merely Cracking the Glass Ceiling is Not Enough Corporate America Needs More than Just A Few Women in Leadership* (May 22, 2013) ("I commend the companies that are bringing greater transparency to their diversity, including their board diversity – and I look forward to 100% of the companies doing so. Given the evidence of the impact diversity on boards has on the bottom line and the boardroom changes taking place with our counter-parts across the globe, gender diversity – and diversity in general – should be a priority for U.S. companies and their boards.").

[14] Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,161 (Nov.12, 2003).

[15] Proposal at 3. Rule 5606 (Board Diversity Disclosure) "would require Nasdaq-listed companies, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+."

[16] Proposal at 61.

Proposal, current disclosure requirements have resulted in incomplete and unworkable disclosure: "reporting of board-level diversity statistics has been significantly unreliable and unusable to investors…due to myriad data collection challenges, including the scarcity of reported information, the lack of uniformity in the information that is disclosed and inconsistencies in the definitions of diversity characteristics across companies."[17] This is in large part because under the Commission's 2019 Compliance and Disclosure Interpretations ("C&DI") regarding board candidate diversity characteristics, companies are permitted to define diversity "in ways they consider appropriate."[18] We believe the Proposal's more prescriptive disclosure structure will help close the current disclosure gap and contribute to more informed investment decision-making.

With respect to operationalizing data collection and reporting, CFA Institute agrees that the Proposal is workable and appropriate. Under Title VII of the Civil Rights Act of 1967, as amended by the Equal Employment Opportunity Act of 1972, all companies with 100 or more employees must annually submit to the U.S. Equal Employment Opportunity Commission (EEOC) a workforce survey (EEO-1 report) that categorizes employee data by race/ethnicity, gender and job category. Outside directors are not employees, however, so companies are not required to gather or report data for the board. The Proposal builds on the EEO-1 reporting requirements,[19] applies the requirements to boards of directors and makes public the board diversity data. We agree that this additional transparency will benefit investors and the market. Because companies are already familiar with the reporting and because the reporting is published on an aggregate basis and is rooted in voluntary self-identification, we believe the compliance burden is minimized, including from privacy and legal concerns.

While Nasdaq does not preclude companies from communicating other diverse attributes of its board members, we encourage Nasdaq and the Commission to consider whether the proposed diversity definition[20] would benefit from formally incorporating other factors, such as disability and veteran status. This expanded definition would be consistent with state legislation and legislation considered or passed in the U.S. Congress on a bipartisan basis, as well as with our own observations of the investment management industry's experience in defining diversity.[21] We also encourage Nasdaq and the Commission to consider whether the disclosure requirements

[17] Proposal at 43.

[18] Commission Compliance & Disclosure Interpretations.

[19] Nasdaq's proposed Board Diversity Matrix builds on the EEO-1 reporting requirements; among the additional categories, the matrix proposes a wider selection of gender categories (male, female, nonbinary, gender undisclosed), adds categories for "two or more races or ethnicities" and LGBTQ+ status.

[20] Proposal at 52. Defines "diverse" is "an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+." "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community. "Underrepresented Minority" means an individual who self-identifies as one or more of the following: 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.

[21] CFA Institute, *Driving Change Diversity & Inclusion in Investment Management* (2018).

should extend to board nominees, which would be consistent with the recent recommendations issued by the Office of the Investor Advocate.[22]

Comply-or-Explain is a Flexible, Appropriate Approach to Diverse Board Representation

If adopted, Rule 5605(f) (Diverse Board Representation) will require Nasdaq-listed companies to have at least two members of the board who are "diverse": (a) at least one director who self-identifies as female and (b) at least one director who self-identifies as an underrepresented minority or as LGBTQ+.[23] If a company is unable to meet these minimum "floor" requirements, it must explain why it does not meet the objective.

CFA Institute supports the two-pronged board diversity objective of this rule. We believe setting the "floor" requirements will likely accelerate board diversity and enhance board refreshment, both positive developments. The proposed comply-or-explain mechanism codifies that diversity is a factor in the search for board directors while providing companies with the flexibility to communicate how they consider and approach board diversity. Given that public companies are increasingly vocal about their commitments to greater diversity, including at the executive and board levels, this rule effectively requires companies to comply with their own or market best practices, or explain why they do not. It spurs companies to walk the walk, not just talk the talk.

The flexibility afforded under the Proposal's comply-or-explain framework is consistent with the objections of CFA Institute to board diversity "quotas", unless the quota is the product of issuer-shareholder engagement. Therefore, to the extent the "floor" requirements under the Proposal are perceived as quotas or, worse, a check-the-box exercise, we emphasize that the decision-making authority regarding nominee qualifications and board composition remains in the hands of company shareholders and its board.

Commission's Role as the "Disclosure Agency"

CFA Institute encourages the Commission to consider its role as the "disclosure agency" in the context of the Proposal, specifically whether to formally revisit its C&DI's guidance and the Commission's long-term agenda on corporate board diversity; as well as its own role in advancing diversity within the financial services industry under the Commission's diversity standards issued pursuant to Section 342 of Dodd-Frank.

[22] Office of the Investor Advocate, U.S. Securities and Exchange Commission, *Report on Activities, Fiscal Year 2020* (Dec. 29, 2020). ("To make fully informed investment decisions, investors generally would benefit from greater insight into the diversity characteristics of a company's current board, as well as its policies designed to promote diversity in board composition going forward. Thus, to be listed on a national exchange, a company should be required to provide more fulsome disclosure regarding the composition of its board of directors, nominees for director positions, and executive officers. The company should also provide greater transparency around its nominating process for director and officer selection, and any initiatives it has in place to increase board diversity…listing standards could help ensure that more companies make this information publicly available on a basis that enables investors to draw comparisons.").

[23] Proposal at 3, 7. Rule 5605(f) (Diverse Board Representation) would require Nasdaq- listed companies, subject to certain exceptions, (A) to have at least one director who self- identifies as a female, and (B) to have at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+, or (C) to explain why the company does not have at least two directors on its board who self-identify in the categories listed above.…each company must have, or explain why it does not have, two Diverse directors no later than: (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select or Global Market tiers; or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market tier."

Further, we encourage the Commission to take a holistic policy approach and weigh the potential impact of its recent and future relevant policy proposals against the aims of this Proposal, should the Commission approve the proposed changes, and investor demand for meaningful disclosure of diversity data across all levels of a company. For example, the Commission should consider whether its recently adopted changes to Rule 14a-8 and human capital disclosure under Regulation S-K support meaningful disclosure of, and whether they create impediments to, robust engagement between public companies and their shareholders on diversity issues. Accordingly, what if any, additional guidance or changes are necessary.

Conclusion

By establishing a uniform framework for board diversity reporting for Nasdaq-listed companies, the Proposal will improve upon existing disclosure of corporate commitments to diversity and inclusion. We believe such standardization and transparency will benefit investors, companies, regulators, and the market. For all of the foregoing reasons, we reaffirm our support for the Proposal and encourage the Commission to consider additional measures to support the Proposal's objectives, consistent with the Commission's tripartite mission.

Thank you for considering our letter and we welcome the opportunity to discuss our comments with you. Please do not hesitate to reach out to Kurt Schacht, CFA, at [redacted] or Karina Karakulova, a [redacted].

Sincerely,

/s/ Kurt Schacht

Kurt Schacht, CFA, JD
Head of Advocacy
CFA Institute Advocacy

/s/ Karina Karakulova

Karina Karakulova
Sr. Manager
Capital Markets Policy – Americas