**Via E-mail to rule-comments@sec.gov**

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

Re: File No. SR-NASDAQ-2020-081

Dear Ms. Countryman:

Thank you very much for the opportunity to submit this letter in response to the request for comments from the Securities and Exchange Commission's ("SEC") regarding the above-referenced release on the NASDAQ Stock Market's ("Nasdaq") new proposed listing rules to promote more effective disclosure related to corporate board diversity and to promote more meaningful board diversity. Based on my considerable research and experiences related to corporate governance best practices and board composition and diversity, Nasdaq's proposal is a welcome and timely reform that will enhance investor confidence and protection, improve the transparency of public company disclosure, augment board-decision making and more effective corporate governance, strengthen market efficiency, and facilitate more effective capital formation.

I am the Alexander Hamilton Professor of Business Law and the Founder and Director of the Governance Initiative at George Washington University Law School. I teach courses in the business and securities arena. My research and scholarship focuses on corporate governance, board decision-making, board composition and diversity, board-shareholder relations, shareholder activism and engagement, and securities law and regulation. I have researched and written extensively on the intersection of board diversity and good corporate governance. My teaching, research, and scholarship have given me an in-depth understanding of the empirical and theoretical research in the above-mentioned fields.

I am currently the board chair of a non-profit and serve on the board of DirectWomen, an organization focused on increasing public company board diversity. A newly elected member of the American Law Institute ("ALI"), I am a member of the Advisory Group for the ALI Restatement of Law, Corporate Governance, and a member of the SEC Historical Society Board of Trustees. I am a former member of the SEC's Investor Advisory Committee as well as a former member of both the National Adjudicatory Council of the Financial Industry Regulation Authority ("FINRA") and FINRA's NASDAQ Market Regulation Committee. I also served on the Committee on Corporate Laws of the Business Law Section of the American Bar Association, which has jurisdiction over the Model Business Corporation Act. I am a former chair of both the Securities Regulation Section and the Business Associations Section of the American Association of Law Schools ("AALS"). In combination with my teaching, research, and scholarship, each of these experiences have provided me with a keen awareness of corporate governance trends, along with an appreciation of how those trends align with the mission of upholding investor protection, facilitating capital formation, and maintaining market efficiency.

Nasdaq's proposal aligns well with a growing consensus within the investor and corporate community around the importance of board diversity to corporate governance and firm performance. This summer highlighted the importance of engaging around race and diversity as corporations and their boards struggled to manage the negative reputational, governance, operational, human capital and other related financial risks and impacts associated with the failure to meaningfully grapple with race and diversity. As a result, this summer investors, asset managers, corporations, and other corporate stakeholders accelerated their calls for enhanced disclosure and meaningful reform around corporate diversity efforts, up to and including efforts related to boards. Nasdaq's proposal is a timely response to increased investor and corporate demands for more meaningful board diversity and more robust, consistent, and reliable diversity disclosures. As a result, Nasdaq's proposal will strengthen investor protection and investor confidence, enhance corporate governance, board decision-making, firm performance, and improve capital market efficiency.

Alignment with Good Corporate Governance

By responding to the increased emphasis on board diversity by corporations, boards and their nominating committees, Nasdaq's proposal appropriately acknowledges and embraces an emerging corporate governance best practice. The vast majority of corporations, boards, and their nominating committees have begun to view board diversity as a critical component of good corporate governance. Proxy data from 2016 reveals that 97% of public companies disclose that they consider diversity in their board nomination process.[1] A 2017 Deloitte survey found that 95% of surveyed boards agree on the need for diverse board candidates.[2] A 2018 Deloitte survey found that 94% of surveyed boards were looking to increase board diversity.[3] Spencer Stuart's most recent annual survey of S&P 500 boards revealed that corporations ranked adding female directors to their board as their highest recruiting priority for 2019 and the next three years.[4] Similarly, in 2019 some two/thirds of nominating committees ranked enhancing gender diversity and racial/ethnic diversity on their board as within their top five recruiting priorities for the next three years.[5] This research around the corporate focus on the need for board diversity confirms the emergence of board diversity as a core aspect of good corporate governance.[6]

As Nasdaq's proposal makes clear, corporations, boards, and nominating committees consistently prioritize board diversity based on their belief that board diversity enhances board and corporate performance. Such corporations embrace the contention that board diversity improves the quality of board decision-making and monitoring by enhancing the board's ability to consider a broader range of perspectives.[7] Corporations and boards also believe that board diversity

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[1] *See* Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 Ind. L. J. 145, 185 (2019) (such percentages do not necessarily include specific consideration of race or gender).

[2] *See* Deloitte, *2017 Board Survey: Seeing is Believing*, 7, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-board-diversity-survey-seeing-is-believing.pdf [hereinafter 2017 Deloitte Board Survey].

[3] *See* Deloitte and Society for Corporate Governance, *Board Practices Report: Common Threads Across Boardrooms*, 2018, 6, https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/us-board-practices-report-common-threads html [hereinafter 2018 Deloitte Board Practices Report]

[4] *See* SpencerStuart, *2019 U.S. Spencer Stuart Board Index*, 37, https://www.spencerstuart.com/research-and-insight/us-board-index [hereinafter 2019 Spencer Stuart Board Index]

[5] *See id.*

[6] *See* Deborah L. Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make*?, 39 Del. J. Corp. L. 377, 382 (2014) (noting "growing consensus within the corporate community" that board diversity is an important goal); David A. Carter, et.al, *Corporate Governance, Board Diversity and Firm Value*, 38 Fin. Rev. 33, 34 (2003) (referring to gender, racial and cultural board diversity as "[o]ne of the most significant governance issues facing the managers, directors, and shareholders of the modern corporation").

[7] *See* Nili, *supra* note 1 at 183 (citing example of proxy disclosure); Rhode and Packel, *supra* note 6 *at* 393 (emphasizing view that diversity enhances board decision-making and monitoring); Carter, *supra* note 6at 34 (noting that many corporations see board diversity as significant because of its impact on the board deliberation process). *See Self-Regulatory Organizations: The Nasdaq Stock Market LLC: Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity,* Securities Exchange Act Release No. 90574 (December 4, 2020), 85 FR 80472, 80479-80480 (December 11, 2020) [hereinafter *Nasdaq Proposal*] (citing research on decision-making); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306–08 (2003) (noting that "diversity may enhance board effectiveness"); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837, 840-41 (2003); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391-96 (2002); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000); Daniel P.

promotes a better understanding of the increasingly diverse customer, client, consumer, and supplier markets, thereby increasing the corporation's ability to access and penetrate those markets.[8] Corporations link board diversity with human capital management, highlighting both the benefits of board diversity for facilitating more effective management of an increasingly diverse workforce as well as the costs and risks associated with the failure to effectively manage such diversity.[9] As Nasdaq's proposal and the discussion below indicate, corporations and boards also believe that board diversity increases corporations' ability to more effectively respond to its shareholders and other stakeholders, all of whom increasingly view board diversity as linked to good governance. Corporations and their boards have embraced theoretical and empirical research indicating that these and other benefits ultimately mean that board diversity improves corporate and firm performance.[10] Even before this summer's racial reckoning, corporations, boards, and nominating committees had come to view board diversity as a corporate governance imperative. Nasdaq's proposal thus appropriately responds to a clear corporate and board governance priority.

Importantly, the status of the empirical evidence is not, and should not be viewed as, a barrier to regulatory reform in this area. As the Nasdaq proposal notes, some characterize the empirical evidence on the relationship between board diversity and financial performance as mixed, while others have even referred to it as weak or non-existent. However, this characterization does not and should not serve as an impediment to regulatory reform, nor should it be used to undermine the legitimacy of board diversity as a corporate governance best practice. First, as Nasdaq's proposal makes clear, there is considerable empirical evidence demonstrating a link between board diversity and improved board performance, board decision-making, and corporate performance measured along a variety of different metrics.[11] Second, the corporate community has embraced this research.[12] Third, any empirical evidence always has inherent limitations or otherwise may be conditional on other factors.[13] In this regard, the empirical evidence may simply reflect the fact that many of the benefits of board diversity (such as its impact on board and corporate culture) may be difficult to measure, or that the effectiveness of board diversity is conditional on other important governance measures such as critical mass.[14]

Fourth, and perhaps most importantly, examination of corporate governance trends and regulatory responses to those trends, not only clearly reveals that practices can emerge as good governance even in the face of equivocal or relatively non-existent empirical support, but also that the SEC, Nasdaq, and other regulatory bodies have embraced corporate governance reforms despite such equivocal support. The most recent and visible example of this relates to director independence. There is a clear consensus that director independence is consistent with good corporate governance.[15] However, the empirical evidence supporting the link between director

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Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489 (1999).

[8] *See* Carter, *supra* note 6 at 36; Dallas, *supra* note 7 at 107.

[9] See Carter, supra note 6 at 37; Dallas, supra note 7 at 1384-85.

[10] *See* Diana C. Nicholls Mutter, *Crashing the Boards: A Comparative Analysis of the Boxing Out of Women on Boards in the United States and Canada*, 12 J. Bus. Entrepreneurship & L. 1, 18 (2019) (noting that corporations embrace the empirical case for board diversity); Nili, *supra* note 1 at 183; Carter, *supra* note 6 at 35, 51; *Nasdaq Proposal*, *supra* note 7 at 80475-80477.

[11] *See Nasdaq Proposal, supra* note 7 at 80477-80480 (citing studies). *See also* Carter, *supra* note 6 at 36-37; Mutter, *supra* note 10 at 11-13 (describing studies demonstrating positive link between diversity and firm financial performance); Rhode and Packel, *supra* note 6 at 384-387 (same).

[12] *See* Mutter, *supra* note 10 at 18 (noting corporate community embrace of business case despite mixed research).

[13] *See id*. at 15-18 (noting inherent methodological difficulties with empirical research and the failure to consider other key measures such as critical mass and shareholder protections); Rhode and Packer, *supra* note 6 at 390-392, 409-410; Vicki W. Kramer, et. al., *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* 34 (Wellesley Ctrs. For Women, 2006).

[14] *See* Mutter, *supra* note 10 at 18; Rhode and Packer, *supra* note 6 at 409-410; Kramer, *supra* note 13 at 34.

[15] *See* Yaron Nili, *The Fallacy of Director Independence*, 2020 Wis. L. Rev. 491, 491 ("Director independence has become a "key cornerstone of the contemporary corporate governance landscape."); Usha Rodrigues, *The Fetishization of Independence*,

independence and corporate or firm performance has been characterized as mixed or weak.[16] Importantly, as the Nasdaq proposal correctly points out, the SEC, Nasdaq, and other listing agencies embraced director independence despite this mixed/weak empirical support.[17] Our experience with director independence makes clear that mixed or weak empirical support is not a barrier to the embrace of a corporate governance best practice either by the corporate community or by regulatory agencies.

Alignment with Investor Priorities

Nasdaq's proposal also appropriately acknowledges and aligns with investor priorities around board diversity, thereby promoting investor confidence and investor protection. While other stakeholders clearly view board diversity as a priority, survey data consistently reveals that a significant number of the nation's largest investors identify board diversity as a top priority for the companies in which they invest.[18] The three largest shareholders and asset managers have been very intentional about their desire for enhanced engagement related to board diversity.[19] In addition, a 2019 investor survey from the EY Center for Board Matters found that 53% of surveyed investors indicated that boards should make gender, race, and ethnic diversity a top focus in 2019.[20] Reflecting this prioritization, board composition and diversity is the most common topic around which shareholders seek engagement.[21] Shareholders also have made it clear that a corporation's board diversity policies and practices will significantly influence their voting and investment

33 J. Corp. L. 447, 447, 458 (2008) (independent board of directors is the "ideal corporate governance structure"); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 Stan. L. Rev. 1465, 1468 (2007); Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1864 (2007) (noting near consensus that independent directors is a corporate governance best practices).

[16] *See* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 Iowa L. Rev. 127, 174-175 (2010); Gordon, *supra* note 15 at 1500 (noting that evidence connecting independent directors to shareholder benefit is "weak at best"); Eric M. Fogel & Andrew M. Geier, *Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors*, 32 DEL. J. CORP. L. 33, 52 (2007) (indicating no connection between shareholder financial return and director independence); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1530-32 (2005) (suggesting empirical research does not support director independence and other corporate governance reforms); Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 235 (2002); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 921-922, 932-33 (1999); April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275, 277 (1998);; Idalene F. Kesner, Bart Victor & Bruce T. Lamont, *Board Composition and the Commission of Illegal Acts: An Investigation of Fortune 500 Companies*, 29 ACAD. MGMT. J. 789, 794–96 (1986).

[17] *See* Romano, *supra* note 16 at 1530-32; Bhagat and Black, *supra* note 16 at 235; Bhagat and Black, *supra* note 16 at 932-33.

[18] *See* J.P. Morgan, *2020 Proxy Season Report, 13, https://www.jpmorgan.com/content/dam/jpm/cib/complex/content/investment-banking/2020-proxy-season/pdf-0.pdf* [hereinafter Morgan 202 Proxy Report] (noting that gender diversity in the boardroom "continues to be under intense investor scrutiny); EY Center for Board Matters, *Five Takeaways from the 2019 Proxy Season*, July 2019, 4, https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/cbm/ey-cbm-2019-proxy-season-preview.pdf [hereinafter Five Takeaways]; Sullivan & Cromwell LLP, 2019 Proxy Season Review, 20, https://www.sullcrom.com/files/upload/SC-Publication-2019-Proxy-Season-Review-Part-1-Rule-14a-8-Shareholder-Proposals.pdf [hereinafter Sullivan 2019 Proxy Season Review]; Sullivan & Cromwell LLP, 2018 Proxy Season Review, July 12, 2018, 56, https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf [hereinafter Sullivan 2018 Proxy Season Review].

[19] *See Sullivan 2019 Proxy Season Review, supra* note 18 at 20*;* Liam Kennedy, *Top 400 Asset Managers 2018: 10 Years of Asset Growth*, IPE (June 2018), https://www.ipe.com/reports/special-reports/top-400-asset-managers/top-400-asset-managers-2018-10-years-of-asset-growth/10025004.article; Amy Whyte, *State Street to Turn Up the Heat on All-Male Boards*, INSTITUTIONAL INV. (Sept. 27, 2018), https://www.institutionalinvestor.com/article/b1b4fh28ys3mr9/State-Street-to-Turn-Up-the-Heat-on-All-Male-Boards; Sarah Krouse, *BlackRock: Companies Should Have At Least Two Female Directors*, WALL STREET J. (Feb. 2, 2018), https://www.wsj.com/articles/blackrock-companies-should-have-at-least-two-female-directors-1517598407.

[20] *See Five Takeaways, supra* note 18 at 4.

[21] *See id*. at 6; *2018 Deloitte Board Practices Report, supra* note 3 at 7.

decisions.[22] Like corporations and their boards, shareholders emphasize board diversity based on their belief that such diversity is critical to good corporate governance and to enhancing the long-term health and stability of the corporation.[23] As the Nasdaq proposal reveals, investors have embraced research indicating a link between board diversity and the quality of public disclosures, financial reporting, and internal controls, as well as the quality of board oversight and decision-making.[24] Importantly, while investor focus on board diversity increased in 2020, the focus on racial/ethnic board diversity particularly intensified in 2020.[25] Experts predict a further increased focus on racially diverse boards in the 2021 proxy season.[26] The investor focus on the importance of board diversity means that Nasdaq's effort to promote board diversity will boost investor confidence that boards are following governance practices aimed at enhancing the board's functions and improving both corporate and firm performance.

Nasdaq's proposal also boosts investor confidence and protection because it aligns with investor demands for more board diversity disclosure. At shareholder request, dozens of corporations are being asked to publish standardized disclosures related to board diversity.[27] Recently a group of investors representing $3 trillion in assets under management sent letters to companies on the Russell 3000 index asking them to disclose racial, ethnic, and gender data for their board.[28] Nasdaq's proposal for standardized demographic data appropriately aligns with investor sentiments in this area. Shareholders have pushed for enhanced disclosure because without access to appropriate, consistent, and comparable disclosures about a corporation's board diversity, investors cannot effectively engage with corporations or otherwise monitor and hold boards accountable for their diversity efforts.[29] Thus, Nasdaq's disclosure provisions serve to boost investor confidence and protect investors that view information related to board diversity as material to their investment and voting decisions, thereby also promoting capital formation and market efficiency.

Nasdaq's proposal also aligns with the goal of market efficiency. While some progress has been made with respect to board diversity, there is both a meaningful deficit with respect to corporate diversity disclosures as well as considerable numbers of companies that have not made meaningful progress with respect to board diversity, particularly with respect to race and

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[22] *See* EY Center for Board Matters, *Four ESG Highlights from the 2020 Proxy Season*, July 2020, 6 https://www.ey.com/en_us/board-matters/four-esg-highlights-from-the-2020-proxy-season [hereinafter Four Highlights] (describing increase in votes against non-diverse boards); *Sullivan 2019 Proxy Season Report, supra* note 18 at 20 (discussing adoption of policies whereby investors vote against directors on boards with inadequate board diversity); 2019 Proxy Season Review, ProxyPulse, 3, https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2019-review.pdf [hereinafter *ProxyPulse*] (highlighting investor votes against directors on companies with inadequate board diversity); *Five Takeaways, supra* note 18 at 3 (noting increasing in investor votes against nominating chairs, nominating members, and the entire board of all male boards); Whyte, *supra* note 19 (highlighting investor policies to vote against directors at companies with inadequate board diversity); GOVERNANCE INSIGHTS CTR., PWC'S 2018 ANNUAL CORPORATE DIRECTORS SURVEY 20 (2018), https://www.pwc.com/us/en/governance-insights-center/annual-corporate-directors-survey/assets/pwc-annual-corporate-directors-survey-2018.pdf (highlighting investor voting policies related to board diversity).

[23] Sullivan and Cromwell, LLP, *2020 Proxy Season Review*, 28, https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf [hereinafter Sullivan 2020 Proxy Season Review]; (noting investor contention that board diversity is key to their investment decision because it leads to better decision-making); *Four Highlights, supra* note 22 at 6 (noting investor belief that board diversity is "foundational to enhancing board perspectives, deliberations and decision-making", and is crucial for setting a "tone at the top" for broader workforce diversity).

[24] *See Nasdaq Proposal, supra* note 7 at 80477-80479.

[25] *See Sullivan 2020 Proxy Season Review, supra* note 23 at 28; *Morgan 2020 Proxy Report, supra* note 18 at 13-14 (noting that corporations have responded to the call to address systemic racism by focusing on ways to promote racial equality including adding Blacks and minorities to their board); *Four Highlights, supra* note 22 at 6.

[26] *See Morgan 2020 Proxy Report, supra* note 18 at 15.

[27] *See Sullivan 2018 Proxy Season Review, supra* note 18 at 19.

[28] *See* Kelsey Butler, *Investors Overseeing $3 Trillion Push for Board Racial Diversity*, Bloomberg, October 28, 2020, https://www.bloomberg.com/news/articles/2020-10-28/investors-overseeing-3-trillion-push-for-board-racial-diversity

[29] *See Five Takeaways, supra* note 18 at 4.

ethnicity.[30] Both shareholders and corporations have made strides to overcome these deficits. However, the considerable deficits with respect to data has meant that data collection occurs on a company-by-company basis and is therefore time consuming, expensive, and potentially inaccurate and misleading, making such a process extremely inefficient. The company-by-company engagement effort to determine whether and to what extent boards promote diversity on their board is similarly time consuming, expensive, inaccurate and ultimately inefficient. This effort also creates informational asymmetries, particularly for investors without the time or resources to effectively engage in this manner. A disclosure-based rule that requires accurate and consistent statistical information while also giving corporations the flexibility to comply or explain their current diversity practices therefore serves efficiency goals as well as those associated with investor protection and capital formation.

## The Importance of Regulatory Reform

### A. Promoting Board Diversity

Nasdaq's proposal is critical for promoting more meaningful progress in the area of board diversity. As the Nasdaq proposal correctly points out, despite investor and corporate emphasis on board diversity, the pace of progress has been relatively slow, especially with respect to racial and ethnic board diversity.[31] While women have made considerable gains, more progress is still needed. Indeed, in 2019, for the first time in history, every S&P 500 corporation had at least one female director.[32] Moreover, in 2019 44% of new director appointments were women.[33] However, only 26% of S&P 500 directors are women.[34] Progress for people of color on boards has been both less robust and slower. Only 19% of directors at the 200 largest S&P 500 companies are people of color.[35] One 2019 study found that 37% of S&P 500 boards did not have any Black directors.[36] Recent studies have referred to board diversity improvements with respect to racial and ethnicity as "disappointing," noting that "little progress" has been made with respect to racial and ethnic diversity on large boards.[37] A policy aimed at promoting board diversity may help to alter these trends.

Such a policy may be especially important for Nasdaq listed companies. Indeed, recent research reveals that Nasdaq listed companies lag behind companies in the NYSE with respect to

[30] *See* Sherly Estrada, *More Women Selected as Fortune 500 board directors, but racial diversity lags*, Sept. 23, 2020, https://www hrdive.com/news/women-fortune-500-board-directors-racial-diversity/585738/; *Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds*, NY Times, Sept. 15, 2020, https://www nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors html; Heidrick & Struggles, *Board Monitor US 2020*, 4, https://www heidrick.com/Knowledge-Center/Publication/Board_Monitor_US_2020 [hereinafter Board Monitor 2020] (noting slow rate of change for racial and ethnic minorities on boards, and that racial or ethnic diversity improvements have been "disappointing"); *2019 Spencer Stuart Board Index, supra* note 4 at 1 (same).

[31] *See supra* note 30.

[32] *See* Jeff Green, *After Adding More Women to Boards, Companies Pivot to Race*, Bloomberg, August 19, 2020, https://www.bloomberg.com/news/essays/2020-08-19/companies-seek-more-black-directors-after-adding-women?srnd=premium;

[33] *See Board Monitor 2020, supra* note 30 at 4.

[34] *See 2019 Spencer Stuart Board Index, supra* note 4 at 20.

[35] *See* Green, *supra* note 32; *2019 Spencer Stuart Board Index, supra* note 4 at 21.

[36] *See* Cydney Posner, *Addressing the Challenge of Board Racial Diversity*, Aug. 25, 2020, https://cooleypubco.com/2020/08/25/board-racial-diversity/; Companies without Black Directors, Black Enterprise, https://www.blackenterprise.com/lists/2019-companies-without-black-directors/.

[37] *See Board Monitor 2020, supra* note 30 at 4, 11; *2019 Spencer Stuart Board Index*, at 1;*see also Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds*, *supra* note 30.

board diversity. Thus, the percentage of Nasdaq board seats held by women was 18.5% in 2019 and 22.3% in 2019 and 2020, while NYSE had 22.3% in 2019 and 24.9% in 2020.[38]

B. Enhanced Transparency Around Disclosure

Unfortunately, the current environment lacks needed transparency around board diversity. Because neither federal nor state law requires corporations to report information around the demographic characteristics of their boards, the current state of such information is woefully inconsistent and incomplete, making it difficult to precisely determine the amount of diversity on corporate boards. Companies voluntarily disclose board diversity information in many different ways,[39] making it difficult to compare companies and leading to potential confusion about their actual levels of diversity. Moreover, many companies do not disclosure any data, or only disclose data with respect to particular groups. A 2016 Deloitte survey found that 53% of large-cap and 45% of mid-cap companies voluntarily disclosed gender diversity information related to their boards.[40] However, that same survey found that only 18% of large-cap and 9% of medium-cap companies disclosed such information related to race.[41] A 2019 survey found that close to 45% of *Fortune* 100 companies disclose data on their board's racial/ethnic diversity.[42] This number rose to 50% in 2020.[43] A 2020 Russell Reynolds report found that only 10% of S&P 500 companies explicitly disclose the race and ethnic identities of their directors.[44] Perhaps more importantly, recent data suggest that corporations may be slow to respond to these transparency deficits. Thus, a 2018 board practices survey revealed that 78% of companies anticipated that their level of transparency and disclosure for the next 12-18 months related to director information such as race and ethnicity would remain the same.[45]

Accurate information related to demographic data provides investors with valuable information about a board's diversity practices, while ensuring that investors can monitor and hold boards accountable for making improvements. The lack of sufficient transparency around boardroom demographics thus makes it difficult for investors to understand a corporation's diversity practices, and challenging for investors to monitor and hold boards accountable for those practices, thereby undermining investor confidence and protections. The EY Center for Board Matters survey noted that investors are particularly concerned about the lack of disclosure related to racial and ethnic board diversity, noting that the current lack of disclosure poses a real challenge for assessing racial and ethnic board diversity and that explicit disclosure is needed for reliable racial and ethnic information.[46]

Nasdaq's proposal addresses the lack of sufficient data related to board diversity, and is therefore particularly crucial for investor protection and confidence. By requiring standardized disclosures, the proposal also addresses the lack of consistent, comparable disclosure, which is especially important for shareholders seeking to compare corporations.

Of note, neither the disclosure requirements nor the timing for disclosure is unduly burdensome. First, most corporations already understand how best to collect the kind of

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[38] *See 2020 Women on Boards: Gender Diversity Index*, 4, https://2020wob.com/wp-content/uploads/2020/10/2020-GDI-FINAL.pdf.
[39] *See* Nili, *supra* note 1 184-85.
[40] *See 2017 Deloitte Board Survey*, *supra* note 2 at 7 (citing 2016 survey).
[41] *See id.*
[42] *See Five Takeaways*, *supra* note 18 at 4.
[43] *See Four Highlights*, *supra* note 22 at 7.
[44] *See* Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500: 2020 Edition*, 3, https://conferenceboard.esgauge.org/boardpractices/report.
[45] *See 2018 Deloitte Board Practices Report*, *supra* note 3 at 53.
[46] *See Five Takeaways*, *supra* note 18 at 4.

demographic information required under Nasdaq's proposal because most of the information being requested is consistent with data required to be reported to the Equal Employment Opportunity Commission on the EEO-1 Report. Second, since the average board size is between 10-12 directors, requesting such information from those directors is not a significant burden, and thus can be complied with within the calendar year. Third, corporations already report information about individual directors each year in their annual report, and thus seeking this additional information should not prove challenging. Fourth, consistent with diversity best practices and privacy concerns, Nasdaq's proposal not only enables directors to self-identify, but also enables individual directors to decline to respond to requests for demographic information. Thus, compliance should not create an undue hardship for corporations.

C. The Essential Need for Defining Diversity

Nasdaq's proposal to define diversity in a manner that includes specific categories such as gender and race is *absolutely essential* to any effort aimed at promoting board diversity and enhancing needed transparency related to race/ethnicity, gender, or LGBTQ identity. Studies indicate that the failure to define board diversity with a specific criteria not only has negative repercussions for meaningful progress related to the diversity of underrepresented communities on boards, but also undermines transparency.[47] The SEC's current board diversity rule does not define diversity but instead allows companies to define diversity "in ways that they consider appropriate."[48] This failure undermines the impact of the rule's effectiveness in two respect. First, it severely undermines transparency. Research reveals that some corporations define their boards as diverse even when they do not include any diversity with respect to gender, race, or ethnicity.[49] However, when corporations can define boards as diverse using different definitions and criteria, diversity disclosures become inconsistent, confusing, and potentially misleading. Any failure to define diversity with specificity therefore would undermine the disclosure goals embedded in Nasdaq's rule. Indeed, the SEC has implicitly acknowledged the problems associated with the lack of any specific reference to race or gender in its diversity definition. While the SEC's most recent guidance on its board diversity rule continues to fall short of defining diversity, it nevertheless specifically references specific demographic information in order to provide guidance to boards around best disclosure practices in this area. The need for additional guidance in this area underscores the confusion and murkiness created by the current lack of a diversity definition. Rather than refusing to define diversity, Nasdaq's comply or explain provision appropriately balances the goal of corporate flexibility with the goal of more accurate and transparent disclosures. The comply or explain provision ensures that if corporations do not agree with a definition of diversity that captures race, ethnicity, gender or LGBTQ status, they can explain this disagreement while simultaneously providing investors with reliable and consistent disclosure around board diversity practices.

Second, a board diversity rule that does not define diversity with reference to specific identities undermines the corporate and shareholder desire to promote greater board diversity with respect to those identities. Research reveals when companies define diversity with a specific criteria, they are much more likely to enhance their numbers related to that criteria, especially as compared to companies that do not define diversity with specific criteria.[50] A board diversity rule that fails to define diversity in a manner that embraces race and gender therefore significantly

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[47] *See* Nili, *supra* note 1 at 183-85.
[48] *See* Proxy Disclosure Enhancements, Exchange Act Release No. 33-9089, (2010).
[49] *See* Nili, *supra* note 1 at 186.
[50] *See id.* at 186-187.

impedes the ability to alter the status quo with respect to racial and gender board diversity while also undermining transparency of the data.

It is especially important to point out that the focus on gender, race and ethnicity in the proposed diversity definition appropriately responds to shareholder demands for diversity of perspective, backgrounds, and experiences on the board. Recent surveys reveal that 95% of respondents agree on the need for board candidates with diverse skills and perspectives.[51] Proxy disclosures also reveal that 89% of companies define diversity to include diverse perspectives/viewpoints or diverse backgrounds and experiences.[52] However, some contend that such diversity can occur without a focus on gender, race and ethnicity. Thus, in the same survey in which a vast majority of directors emphasized a need for diversity in skills and perspectives, 90% of surveyed directors expressed a belief that gender and racial diversity alone does not produce these varying perspectives and skills.[53] Moreover, recently a few shareholders have submitted so-called "true diversity" shareholder proposals seeking to ensure that boards focus on skills, ideology, and experiences rather than race or gender in their nomination process.[54] In fact, the SEC's reluctance to define diversity with greater specificity appears premised on the notion that boards should have the flexibility to define diversity with reference to these other characteristics, presumably based on the notion that these other characteristics are unconnected to race, ethnicity, or gender. However, these proposals and sentiments inaccurately presume that diversity of skills, background, and perspectives can come without gender and racial diversity. That presumption is inconsistent with research in this area. Such research reveals that a corporation is much more likely to have diversity of backgrounds, skills, and experience when they also have racial and gender diversity. This is because boards without racial and gender diversity tend to have much less diversity in terms of background and experiences.[55] By sharp contrast, when boards diversify by adding female directors or directors of different races and ethnicities, corporations are much more likely to have a board that includes directors with different types of corporate leadership experiences and a wider array of professional experience.[56] Adding race and gender board diversity means that boards are also significantly more likely to have directors with diverse industry perspectives and experience.[57] Boards with greater racial and gender diversity also bring greater age diversity as such directors tend to be younger.[58] Then too, demographic diversity such as race and gender are "key determinants of a person's experiences, attitudes, frame of reference, and point of view."[59] Thus, there is a significantly greater likelihood that racial, ethnic, and gender board diversity will bring differences in perspectives and views than boards that do not have such diversity. As this suggests, racial, ethnic, and gender diversity has been the primary mechanism by which boards introduce directors with diverse perspectives, backgrounds, and experiences. Nasdaq's rule is therefore entirely consistent, and in fact

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[51] *See 2017 Deloitte Board Survey, supra* note 2 at 7.
[52] *See* Nili, *supra* note 1 at 185.
[53] *See 2017 Deloitte Board Survey, supra* note 2 at 7, 26.
[54] *See Sullivan 2019 Proxy Season Report, supra* note 18 at 22.
[55] *See 2019 Spencer Stuart Board Index, supra* note 4 at 2-3; Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28(6) J. Mgmt. 747, 749, 754 (2002); *see also Board Monitor 2020, supra* note 30 at 10-11 (noting that recruiting more women and directors of color requires recruiting directors from different backgrounds and with different operational experiences).
[56] *See supra* note 55.
[57] *See 2019 Spencer Stuart Board Index, supra* note 4 at 2-3.
[58] *See id.*
[59] *See 2017 Deloitte Board Survey, supra* note 2 at 7; Lani Guinier, *The Pigment Perplex: The Complexity of Race Reveals the Inefficacy of Conventional Admissions Criteria and Demonstrates the Vital Importance of Diversity*, AM. LAW, Aug. 2002, at 61 (noting that people from the same racial groups share perspectives and experiences irrespective of factors shared with other groups); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1236–37 (2003) (noting shared racial perspective, particularly on matters related to race).

inextricably linked, with boards' expressed desire to enhance the diversity of experiences and perspectives within the boardroom.

D. Benefits of Comply or Explain

The law's comply or explain provision is consistent with the SEC's disclosure-based regulatory approach rather than serving as a quota or mandate. Indeed, the proposal is modeled after other SEC rules related to board composition that have comply or explain provisions. For example, the SEC's existing board diversity rule requires public companies to disclose "whether and to what extent" their nominating committee considers diversity in the process of nominating candidates to the board of directors.[60] As one scholar observes, this regulatory approach "stands in sharp contrast to the mandatory diversity quotas" in other countries.[61] The SEC has a similar rule around financial experts and the audit committee, requiring that public corporations disclose whether at least one member of their audit committee qualifies as a financial expert, or disclose the reason for not having such a financial expert.[62] Such comply or explain rules balance granting flexibility to corporations with the desire to promote an important corporate governance practice. Because the Nasdaq rule is modeled after these rules, it is clear that it is not a mandate, and instead provides corporations with the option of complying or explaining their lack of compliance.

Importantly, surveys of the impact of the SEC's diversity rule demonstrate the discretion afforded companies under this comply or explain regulatory approach. In direct response to the SEC's diversity rule, some corporations indicated that they did not consider diversity when evaluating director nominees.[63] Such a response underscores the fact that comply or explain rules are not mandates, but instead grant corporations the discretion to explain their policies and practices around diversity, including the lack thereof.

Another important benefit of Nasdaq's disclosure-based approach is that it gives corporations the opportunity to explain how the demographic composition of their board aligns with their governance policies and practices, information that shareholders have made clear is relevant to their voting and investment decisions. Indeed, the comply or explain approach mirrors public engagement that is already occurring. Investors have made it clear that companies without sufficient diversity will be asked to explain how their board policies align with long-term strategic objectives.[64] For companies that believe in the importance of board diversity but have legitimate reasons for their lack of diversity, the rule provides them with the opportunity to clearly explain those reasons, and thus get out in front of shareholder demands in this area. For companies with a different philosophy around board diversity, particularly with respect to race and gender, this disclosure-based approach provides important information to investors.

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[60] *See* Proxy Disclosure Enhancements, Exchange Act Release No. 33-9089, (2010).
[61] *See* Nili, *supra* note 1 at 183. .
[62] *See* Pub. L. 107-204, July 30, 2002, 116 Stat. 745, 15 U.S. C. 7201, 17 CFR §229.407
[63] *See* Nili, s*upra* note 1 at 185 (revealing that in 2016, 3% of surveyed companies indicated that they did not consider diversity of director nominees); Calvert Asset Management Company Inc., *Corporate Board Diversity Disclosure Scorecard*, March 2010, 6.
[64] *See Sullivan 2018 Proxy Season Review*, *supra* note 18 at 23.

Additional Compliance Concerns

A. Board Turnover Concerns

While research reveals that low board turnover can be a hurdle for board diversity efforts,[65] research also reveals that turnover issues can be overcome in a number of ways. First, each year some board turnover does occur, allowing corporations to alter their composition after board turnover.[66] Second, corporations have managed to change board composition despite low turnover rates. Sixty percent of S&P 500 companies and 54% of Russell 3000 companies had some change in their composition in the past year.[67] Additionally, 56% of S&P 500 companies added at least one new independent director, and 22% appointed two or more directors.[68] These statistics reveal that low board turnover rates do not undermine corporations ability to make changes to their board composition. Third, a growing number of companies have mandatory retirement policies, leading to increased board turnover. For example, 71% of S&P 500 boards have a mandatory retirement policy.[69] In 2019, three quarters of directors who stepped down from the board did so because of retirement.[70] These policies significantly increase turnover and thus the potential for boards to change their composition. Fourth, and perhaps most notably, many companies increase diversity on their boards by expanding their boards rather than waiting for turnover. Thus, 60% of the seats gained by women were additional board seats.[71] The most recent Spencer Stuart Study found that 31% of companies increased the number of women directors by expanding their boards.[72] The combination of director turnover, increased retirement policies, and board expansion has enabled boards to achieve their diversity goals, suggesting that board turnover does not significantly undermine boards ability to alter their composition. Finally, the benefit of Nasdaq's comply or explain approach is that if turnover concerns serve to impede diversity efforts, corporations have the opportunity to explain that impediment. Hence those concerns should not pose an undue burden on corporations.

B. Board Displacement Concerns

To the extent there is concern that compliance with Nasdaq's rule will require boards to displace existing directors, research negates that concern. This is because, as indicated above, companies increase diversity either by expanding their board, or by filling seats that are left vacant due to turnover. Research reveals that since 2012, boards primarily add seats to accommodate diversity rather than waiting for men to step down.[73] Research also reveals that, even in the face of increased emphasis on board diversity, men are chosen to join boards more frequently than women.[74] Hence, board diversity efforts do not need to involve displacement, and thus those concerns should not impede enactment of Nasdaq's rule.

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[65] *See 2019 Spencer Stuart Board Index, supra* note4 at 1.
[66] *See* Tonello, *supra* note 44 at 14.
[67] *See id.*
[68] *See 2019 Spencer Stuart Board Index, supra* note 4 at 4.
[69] *See id.*
[70] *See id.*
[71] *See 2020 Women on Boards, supra* note 38 at 3, 5.
[72] *See 2019 Spencer Stuart Board Index, supra* note 4 at 1.
[73] *See 2020 Women on Boards, supra* note 38 at 5.
[74] *See id.*

C. Talent Concerns

The Nasdaq rule also should not be unduly burdensome with respect to a corporation's ability to secure talented board candidates. Some have raised the concern that that there are insufficient female or candidates from underrepresented communities to serve on boards. However, research and experiences associated with board diversity policies and practices suggest that concerns around a talent or pipeline shortage have been vastly overstated, particularly with respect to race and ethnicity.

First, research indicates that when boards prioritize their diversity efforts they achieve results. Boards have placed considerable emphasis on gender diversity, and that emphasis has resulted in considerable gains for gender diversity on boards. Consistent with this phenomenon, California's experience reveals that when companies emphasize diversity they can overcome perceived talent concerns. When California's legislation was passed in September 2018, 93 California-based members of the Russell 3000 had all male boards, and as of November 2019, that number had dropped to 17.[75] Moreover, since the law went into effect, 244 California companies added at least one female director while 41 added two.[76] Then too, 85% of the California companies who disclose their gender diversity demographics reported being in compliance with the rule by the end of 2019.[77] Finally, in 2020 California had the largest increase in companies with 20% or more board seats held by women, accounting for 113 companies reaching that milestone in 2020.[78] This reveals that corporations can and do overcome perceived talent concerns when they prioritize diversity.

Second, research indicates that boards may be able to overcome perceived talent concerns by more effectively taking advantage of resources aimed at enhancing board diversity. A 2018 survey found that even when seeking to diversify their boards, 77% of corporations look to referrals from current directors.[79] Similarly, Deloitte's 2016 Board Practices Report found that 84% of large-cap and 90% of mid-cap organizations most often rely on current director recommendations when seeking to diversify their boards.[80] Researchers and commentators consistently maintain that reliance on current directors, most of whom are white men, "will generally produce candidates much like those directors."[81] Hence, this board recruitment technique is flawed. Indeed, researchers and commentators agree that reliance on current directors and their relatively insular networks and recruitment practices are a significant obstacle to increasing board diversity.[82] Notably, one survey revealed that only 8% of corporations relied on organizations focused on board diversity when seeking to recruit diverse board candidates.[83] This research suggests that if corporations broaden their recruitment practices, they may experience significantly more success in securing diverse board candidates. Fortunately, there are a number of organizations dedicated specifically to enhancing board diversity. These include Alliance for Board Diversity, Catalyst, DirectWomen, Executive Leadership Council, Leadership Education for Asian Pacific, Thirty Percent Coalition, Board Diversity Action Alliance, and 2020 Women on

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[75] *See* Rachel Feintzeig, *California Law Spurs Companies to Add Female Directors*, Dec. 18, 2019, Wall St. J, https://www.wsj.com/articles/california-law-spurs-companies-to-add-female-directors-11576665000.
[76] *See id.*
[77] While California's report counts 625 companies impacted by the rule, only 330 companies filed disclosure documents related to their gender diversity. Of those, 282 reported being in compliance. *See* Women on Boards, March 2020 Report, https://bpd.cdn.sos.ca.gov/women-on-boards/WOB-Report-04.pdf.
[78] *See 2020 Women on Boards, supra* note 38 at 6.
[79] *See 2018 Deloitte, Board Practices Report, supra* note 3 at 6, 8.
[80] *See 2017 Deloitte Board Survey, supra* note 2 at 10.
[81] *See id.*
[82] *See Five Takeaways, supra* note 18 at 3 (noting importance of prioritizing building diverse networks and focusing on nontraditional sources for candidates).
[83] *See 2018 Deloitte, Board Practices Report, supra* note 3 at 6, 8.

Boards. Reliance on these and other organizations should greatly facilitate corporation's ability to pinpoint viable board candidates.

Finally, the timing and phase-in feature of the Nasdaq rule significantly eases the burden of compliance. The rule's four to five year time frame for compliance means that boards have a considerable amount of time to locate diverse directors. Research indicates that 21% of directors are older than 70, and thus within two to five years of most mandatory retirement.[84] On the one hand, one has to wonder how the proposal's four to five year compliance timeframe is consistent with the proposal's explicit concern about the slow pace of change. The fact that many corporations have begun pledging to diversify their boards within the year begs the question about whether the compliance period is overly generous. On the other hand, the anticipated increased turnover from mandatory requirements, coupled with the length of time afforded corporations to comply with the rule, gives corporations considerable opportunity to engage with other networks and organizations in a manner that surfaces available board candidates.

Of course, to the extent corporations experience stumbling blocks resulting from a lack of available talent, the benefit of Nasdaq's comply or explain disclosure approach is that it provides such corporations with the opportunity to explain any challenges in their disclosure.

## Conclusion

I fully support the proposed rule as a vital step towards increasing transparency around board diversity and promoting greater board diversity. We are witnessing an unprecedented moment in our nation's history and the history of corporate governance—Nasdaq has shown itself as a leader in this moment. I applaud Nasdaq's willingness to take initiative in this area and align its rules with prevailing corporate governance best practices. This willingness will inure to the benefit of investors, corporations, other corporate stakeholders, and the broader securities market.

Sincerely,

Lisa M. Fairfax
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George Washington University Law School
[redacted]

[84] *See id.*