

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000

FAX: (202) 393-5760

www.skadden.com

DIRECT DIAL
202-371-7180
DIRECT FAX
202-661-9010
EMAIL ADDRESS
BRIAN.BREHENY@SKADDEN.COM

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

January 4, 2021

Via email to rule-comments@sec.gov

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

RE: Comments on Notice of Filing of Proposed Rule Change to Adopt Listing Rules
Related to Board Diversity
Release No. 34-90574; File No. SR-NASDAQ-2020-081

Dear Ms. Countryman:

We are pleased to submit this letter to the U.S. Securities and Exchange Commission (the “Commission”) in response to the Commission’s notice, contained in Release No. 34-90574; File No. SR-NASDAQ-2020-081 (the “Proposing Release”), for comments on the Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (the “Proposed Rules”) submitted by The Nasdaq Stock Market LLC (“Nasdaq”).¹ We commend and support Nasdaq’s efforts to promote the board diversity of its listed companies.

At Skadden, our diversity, equity and inclusion mission is to attract, hire and develop a workforce of attorneys and professional staff whose diverse experiences and perspectives enrich our culture and position us to provide clients with the most innovative solutions. These principles are part of the foundation on which Skadden was built and remain core to our values. Alongside our priorities to foster diversity, equity and inclusion within our firm is a mandate to advance equity in the communities of which we are a part. In summer 2020, Skadden spearheaded the launch of the Law Firm Antiracism Alliance, a partnership of more than 285 law firms aimed at tackling systemic racism in the law.

¹ Nasdaq’s parent, Nasdaq, Inc., has been a long standing client of our firm.

The Proposed Rules would impact our Nasdaq-listed company clients, which range across a wide spectrum from companies with highly diverse boards to companies with boards having less gender and/or racial diversity. We appreciate the opportunity to comment on the Proposed Rules, which we believe address an important topic that has become the focus of increasing expectations of investors and other stakeholders.

Growing Investor Focus and Expectations on Board Diversity

We strongly support Nasdaq’s objective to promote greater gender, racial and ethnic diversity in the boardrooms of Nasdaq-listed companies. The Proposing Release notes that investors, other stakeholders, and other interested parties are calling in greater numbers for gender and racial/ethnic diversity in corporate boardrooms and for enhanced corporate disclosures on board diversity. As discussed in the Proposing Release, BlackRock, State Street Global Advisors and Vanguard, among others, include their board diversity expectations in their engagement and proxy voting guidelines. Shortly after Nasdaq filed the Proposing Release with the Commission, BlackRock published updated guidance noting its raised expectations regarding board diversity. Specifically, BlackRock expects U.S. companies to disclose data on the race and ethnicity of their board members to enable investors to make informed diversity assessments and referenced its view towards increasing votes against non-diverse boards in 2022.² Similarly, Vanguard recently announced that board diversity will continue to be a focus in its stewardship activities and, beginning in 2021, Vanguard funds may vote against directors at companies where progress on board diversity falls behind market norms and expectations.³ We believe that the Proposed Rules should be considered by the Commission in the context of this broader movement and not in isolation.

Comments on the Proposed Rules

Comply or Explain. As an initial matter, we support Nasdaq’s “comply or explain” approach in the Proposed Rules as preferable to an absolute mandate. Nasdaq-listed companies face a wide variety of circumstances, and we do not believe a “one-size-fits-all” approach to board diversity would be appropriate. Nasdaq’s comply or explain approach will promote board diversity and, at the same time, respect the need for each company and its board to consider their unique facts and circumstances. Disclosure will allow companies to explain their particular circumstances and considerations and, in turn, allow for informed and productive investor-company engagement on the topic and, ultimately, informed proxy voting decisions.

Transition Periods. We believe the transition periods set forth in the Proposed Rules — having at least one diverse director two years after the rules take effect and two diverse directors either four or five years after the rules take effect (depending on market tier) — should provide an appropriate level of flexibility for most Nasdaq-listed companies. We acknowledge that there

² BlackRock, *Our 2021 Stewardship Expectations* (December 2020), available at <https://www.blackrock.com/corporate/literature/publication/our-2021-stewardship-expectations.pdf>.

³ See Vanguard Investment Stewardship Insights, *A Continued Call for Boardroom Diversity* (December 2020), available at https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/ISBOARD_122020.pdf.

likely will be a variety of views on an appropriate transition period, and that some may seek a shorter transition to drive change more quickly. At the same time, we appreciate the care and thoughtfulness typically taken by a board of directors and its nominating committee in considering the mix of skills and experience in the boardroom; identifying additional skills and experience that should be added, supplemented or replaced in the future as part of board succession planning; identifying, interviewing and recruiting desired candidates; and successfully onboarding a new director. To do this all well can take significant time, and to do it for multiple directors would take even more time. In our view, requiring a board to engage in this process on an accelerated basis—especially if a board is dealing with other significant matters, such as a pandemic, economic uncertainty, a cybersecurity breach or a transformative transaction—may compromise the likelihood of long-term success and would not be in the interests of Nasdaq-listed companies, their investors or other stakeholders.

Location of Disclosures. As proposed, Rule 5605(f)(3) would require a company with a board that does not meet the diversity requirements of the Proposed Rules to provide an explanation of why it does not have the minimum number of diverse directors, either (i) in its proxy or information statement for its annual meeting of shareholders or (ii) on its corporate website. Similarly, the new board diversity matrix disclosure would be required in either location under proposed Rule 5606. However, if the company does not file a proxy or information statement, such as a foreign private issuer, we recommend providing an additional option to provide such disclosure in the company’s annual report on Form 10-K, Form 20-F or Form 40-F. We believe this approach is consistent with the existing Nasdaq board independence disclosure requirements currently set forth in Rule 5605(b)(1).

Board Diversity Matrix Disclosures. We believe that the board diversity matrix set forth in proposed Rule 5606 and related instructions is a clear and appropriate format for providing the disclosure required by the Proposed Rules. We also believe that providing aggregated board-level disclosure, rather than individualized director disclosure, respects any individual director’s potential concerns or sensitivities about calling attention to the individual’s gender, race, ethnicity or LGBTQ+ status. However, we believe that in the event companies decide to provide disclosure beyond the minimum requirements, including disclosures of gender and race or ethnicity on an individual director basis in a matrix format, the rules should provide sufficient flexibility so that companies are not required to include multiple matrices in their disclosures.

In this regard, we note that some companies already (or may in the future) provide board diversity disclosures in a matrix format that allows investors to see which directors identify in the various gender, racial, ethnicity, LGBTQ+ status, or other categories included in the matrix. Requiring these companies to add a second matrix reflecting aggregated data pursuant to Rule 5606 would not provide investors with meaningful additional information. We recommend revising the instructions to Rule 5606 to explicitly state that companies may satisfy the rule in the event they disclose a matrix reflecting individual director gender, race, ethnicity and LGBTQ+ disclosure.

In addition, we recommend adding an instruction to permit companies to omit inapplicable columns or rows instead of requiring inclusion of those columns or rows and reporting zero or “not applicable.” Although we recognize that a standard matrix template arguably would provide maximum comparability among companies, we believe that clear disclosures in other formats—such as an abridged version of the matrix consisting of the applicable columns or rows, accompanied by footnote or narrative disclosure identifying the omitted columns or rows—can achieve the same objective with the potential for enhanced readability.

* * *

We appreciate the opportunity to comment on this important proposal and would be most pleased to discuss any questions the Commission or its staff may have with respect to this letter. Please do not hesitate to contact the undersigned at [REDACTED].

Very truly yours,



Brian V. Breheny

CC: Eric J. Friedman, Executive Partner