Akin Gump
STRAUSS HAUER & FELD LLP

January 4, 2021

Sent via email: 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:

Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") appreciates the opportunity to submit this letter in response to the Securities and Exchange Commission's (the "SEC") request for comment on that certain proposal by Nasdaq Stock Market LLC ("Nasdaq" or the "Exchange") to adopt listing rules related to the advancement of corporate board diversity and standardized disclosure requirements. In pertinent part, Nasdaq's proposal would require, subject to certain exceptions, that each Nasdaq-listed company either (A) have (i) at least one director who self-identifies as a female, and (ii) 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+ (for purposes herein, "diverse"), or, alternatively, (B) explain why the company does not have at least two directors on its board who self-identify in the categories identified in (A)(i) and (ii) (the "Nasdaq Diversity Proposal").

Akin Gump is a global law firm with more than 900 lawyers and a demonstrated commitment to diversity and inclusion. Our comments on the Nasdaq Diversity Proposal are based principally on our extensive experience gained serving as independent legal advisors to public companies, boards of directors of public companies and investors in public companies. In preparing our comments, we considered, among other things:

- compelling research on the association between corporate financial performance and board diversity;

- increasing investor interest in board diversity;

- the positive impact of board diversity on corporate culture and reputation;

- the fact that similar laws and exchange requirements relating to board diversity have been adopted previously, including internationally; and

- our belief that compliance with the Nasdaq Diversity Proposal will neither be difficult nor harmful to individuals who do not self-identify as female or diverse.

We believe that the Nasdaq Diversity Proposal is designed to promote just and equitable principles, to foster greater cooperation and coordination within the boardroom and to further the public interest. Moreover, we believe that the proposal, if authorized and approved by the SEC, will aid boards in the fulfillment of their fiduciary duties and will serve to benefit stockholders', as well as other stakeholders', interests. Accordingly, we broadly support Nasdaq's attempt to modernize and enhance the effectiveness of public company boards of directors by requiring the presence of opinions and experience of female and diverse candidates in the boardroom, while providing companies with the option of non-compliance, without adverse Exchange consequences, so long as the company publicly discloses why its board does not include a female and a diverse member.

Financial Performance and Diversity

There is, and for quite some time has been, a compelling and extensive body of credible research on the association between financial performance and board diversity. For example, in 2014, the Peterson Institute for International Economics ("PEII") released results of its survey of almost 22,000 companies in 91 different countries in its working paper series: "*Is Gender Diversity Profitable? Evidence from a Global Survey.*" PEII's survey found that nearly 60 percent of the firms surveyed had no female board members, just over half had no female C-suite executives, and fewer than 5 percent had a female chief executive officer despite also finding robust positive correlations between female executive representation and firm performance, echoing findings by Corinne Post and Kris Byron in late 2014, where they "found that female board representation is positively related to profitability and market performance in countries with stringent shareholder protections." In 2018, McKinsey & Company ("McKinsey") concluded: "Diverse companies are 33% more likely to have greater financial returns than their less-diverse industry peers." BCG also published a study in 2018 that found that, "In both developing and developed economies, companies with above-average diversity on their leadership teams report a greater payoff from innovation and higher EBIT margins. Even more persuasive, companies can start generating gains with relatively small changes in their leadership teams."

McKinsey issued updated research with substantially similar conclusions in 2020. In *Diversity Wins: How Inclusion Matters*" McKinsey reiterated "There is ample evidence that diverse and inclusive companies are likely to make better, bolder decisions." Notwithstanding, PEII noted in its 2020 policy brief entitled "*Women scaling the corporate ladder; progress steady but slow globally*" that "despite steady progress, women remain grossly underrepresented in corporate leadership worldwide" and that "at the current rate of change it would take more than a generation to reach generation parity."

Why the sluggish embrace to include women and diverse persons on boards? One possible explanation, similar to one offered by the undersigned in a 2016 article entitled "*How the SEC Should Tackle Board Diversity*": Shareholders can't vote on female and diverse board nominees if there aren't any female or diverse board nominees.

Investor Interests

The Nasdaq Diversity Proposal appears to have taken into account economic justifications, as well as diversity concerns publicly expressed by, and diversity information requested from, many significant institutional shareholders and shareholder advisors.

For example, State Street Global Advisors ("SSGA") announced in October 2018 and adopted in early 2020 a policy to vote against the entire nominating and governance committee of a company in its portfolio, if (a) that company does not have at least one woman on its board and (b) SSGA has had board diversity concerns for that company over four consecutive years. Additionally, since 2019, Institutional Shareholder Services has had a policy, subject to limited exceptions, to recommend against, or withhold votes from, the chair of the nominating committee of the board of directors of any public company with no female directors. Moreover, Glass Lewis announced that beginning in 2021 it will note as a concern boards consisting of fewer than two female directors. In 2022, Glass Lewis will recommend voting against the nominating chair of a board with fewer than two female directors for boards comprised of six or more directors.

Further, in addition to gender diversity, investors have also made clear their views on the import of ethnic diversity in the boardroom. Starting in 2021, SSGA will ask companies in its portfolio to articulate their risks, goals and strategies as related to racial and ethnic diversity noting that "[t]he ongoing issue of racial equity has caused us to focus more closely on the ways in which racial and ethnic diversity impacts us as investors." Similarly, BlackRock, which has had a focus on board diversity for several years and is a founding member of the US 30% Club, a group committed to increasing gender representation on boards and in senior management, included in its 2021 proxy voting guidelines for U.S. securities an expectation that boards "be comprised of a diverse selection of individuals who bring their personal and professional experiences to bear in order to create a constructive debate of a variety of views and opinions in the boardroom."

Other investors have been even more proactive in the approach to board diversity. In July 2020, New York City Comptroller's Office (the "NYC Comptroller's Office") sent letters to 56 Fortune 500 companies and successfully waged 17 campaigns as part of its Boardroom Accountability 3.0 campaign (the "3.0 Campaign"). As part of its 3.0 Campaign, which was based upon the "Rooney Rule," a rule borrowed from the NFL that requires teams to interview minority candidates for front office positions, the NYC Comptroller's Officer focused on the implementation of policies requiring the consideration of qualified women and racially/ethnically diverse candidates for director and external CEO searches. Further, the Midwest Investors Diversity Initiative recently announced that it had obtained commitments from 32 companies to adopt Rooney Rule policies for every open board seat through engagements over the past four years. In light of George Floyd's death in May 2020, coupled with the resulting broader societal awareness and focus on racial inequality and systemic racism, which for the most part occurred following the 2020 proxy season, it is logical to expect, absent the adoption of Nasdaq's accelerated rule-based approach for action, that 2021 will bring an increase in the number of shareholder proposals received by Nasdaq-listed companies relating to diversity, equity and inclusion.

Corporate Culture and Performance

A diverse board can greatly improve a company's ability to proactively address issues that impact corporate culture and reputation. A board unimpeded by being a gendered or otherwise homogenous group is more likely to investigate and/or take actions in the event of allegations of sexual harassment or assault or racial discrimination, including removal of officers or directors subject to these accusations. As we previously published in "Akin Gump's Top 10 Topics for Directors in 2020", we believe that confronting diversity issues at the board level can help to preserve and increase shareholder value by mitigating the reputational, legal and financial harm caused by such accusations and, perhaps, strengthen companies' ability to recruit and retain talent in the furtherance and fulfillment of strategic goals and objectives.

Similar Legal and Exchange Requirements

We note that the Nasdaq Diversity Proposal is not the first proposed regulation of its kind.

For example, in September 2018, California mandated all public companies with executive offices in the State to have at least one female board member by not later than December 2019. Other states have followed suit and adopted similar requirements. Further, on September 30, 2020, California's governor, Gavin Newsom, signed into law Senate Bill (SB) 979, a measure that will require California corporations to achieve diversity on their boards of directors by January 2023, thereby effectively banning all-white boards for more than 600 publicly held companies.

Countries around the globe, including Norway, Germany, France, Spain, Belgium, Netherlands and Iceland, have adopted diversity legislation similar to California's, but perhaps most similar to the Nasdaq Diversity Proposal is a rule adopted in 2014 and implemented in 2015 by the Ontario Securities Commission that requires that companies listed on the Toronto Stock Exchange ("TSX") detail the representation of women on their boards and in executive officer positions, as well as disclose any plans to boost their numbers or risk being delisted. Additionally, effective as of January 1, 2020, corporations governed by the Canada Business Corporations Act ("CBCA") with publicly traded securities have been required to provide shareholders with information on the corporation's policies and practices related to diversity on the board of directors and within senior management, including the number and percentage of members of the board and of senior management who are women, Aboriginal persons, members of visible minorities and persons with disabilities. To wit, Canada is the first jurisdiction in the world to mandate diversity disclosure with respect to specific personal characteristics in addition to gender. Like the Nasdaq Diversity Proposal, the approaches taken by TSX and CBCA are designed to increase leadership roles for underrepresented members of the population over time without requiring the forfeiture of leadership opportunities of male or non-diverse persons.

Compliance Ease

The Nasdaq Diversity Rule can be accurately described as a “comply or explain” or, even more accurately, as an “adopt or explain” approach. The proposed rule is driven by an overarching set of principles and goals for the nomination process and composition of corporate boards, who serve as fiduciaries elected by shareholders and are not employees nor protected by Title VII. Arguably, the proposed rule, at its core, primarily and predominantly serves to legislate common sense principles that have been articulated for many years, a discussion that has been both accelerated and voiced more loudly following the #metoo and Black Lives Matter movements.

We believe that the Nasdaq Diversity Rule – which includes a one-year phase-in approach – is neither burdensome to comply with or adopt and provides sufficient flexibility. Notably, the proposed rule is not quota based, and it provides a board with the option to simply expand its size so as to add new members and not replace existing directors. Further, the proposal provides Nasdaq-listed companies with the option of explaining why a minimum of two diverse directors is not achievable, recommended or necessary in lieu of adding new (or replacing existing) directors. Accordingly, should the SEC approve the Nasdaq Diversity Proposal, we do not believe boards of directors of Nasdaq-list companies will be confronted with any undue hardship, other than the ordinary course onboarding hurdles and/or drafting of requisite disclosure.

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In the realm of corporate governance and control, boards of directors are the ultimate internal controllers of corporate authority. We recognize that nominating and governance committees, when determining slates of directors for shareholder approval, take into account what they personally believe is in the best interest of shareholders. We appreciate that there is an argument that the Nasdaq Diversity Proposal may be seen by some as overreaching and unnecessary regulation. However, in light of economic evidence, investor interests, benefits to corporate culture, similar existing regulation and the ease of compliance, which, when taken together with Nasdaq’s own determination that more than three-quarters of its listed companies currently fall short of the proposed requirements, Akin Gump applauds the Exchange for its proactive efforts and believes that adoption the Nadsaq Diversity Rule is highly advisable.

We appreciate this opportunity to express our views to the SEC. At your convenience, we would be pleased to answer any questions the SEC or its staff might have about our comments. Please contact Kerry E. Berchem at [redacted] or via email at [redacted].

Sincerely yours,

Kerry E. Berchem