Comment of Richard Morrison
Research Fellow, Competitive Enterprise Institute[1]

To the Securities and Exchange Commission

In the matter of the Proposed Rule Change to Adopt Listing Rules Related to Board Diversity
Release No. 34-90574; File No. SR-NASDAQ-2020-081

March 11, 2021

Summary

The board diversity rules proposed by Nasdaq are a misguided and inappropriate attempt at social engineering that will backfire and make gender, racial, and sexual identity issues more contentious and problematic in corporate America. The Securities and Exchange Commission (SEC) should decline to approve them.

Style of Regulation

The current rules, initially proposed in December 2020 and amended in March 2021, do have the virtue of being less onerous and prescriptive than many other regulations on public companies administered by agencies like the Securities and Exchange Commission or the Public Company Accounting Oversight Board. In its revised proposal, Nasdaq made several concessions based on feedback from potential regulated entities, including provisions for firms with small boards, grace periods created by unexpected vacancies, and a longer phase-in of rules for newly listed companies.[2]

Those changes, and the "comply-or-explain" enforcement mechanism, demonstrate a welcome willingness to compromise and avoid "hard" rules that would come with fines or other penalties for noncompliance. Elements of the current process could profitably inform future regulatory processes. However, the underlying substance of the proposal would still create more problems than it would solve.

Empirical Evidence Undermines Nasdaq's Case

In its Notice of Filing, Nasdaq states that it "reviewed a substantial body of third-party research" in order to "determine whether empirical evidence demonstrates an association between board diversity, shareholder value, investor protection and board decision-making."[3] Having decided that such

---

[1] Founded in 1984, the Competitive Enterprise Institute (CEI) is recognized as a leading and effective advocate for freedom on a wide range of critical economic and regulatory policy issues. CEI is a non-partisan educational and research institute operating under Section 501(c)(3) of the Internal Revenue Code. See also https://cei.org/about.
[2] Wallace Bao and Steven Khadavi, "Nasdaq Amends Proposed Rules on Board Diversity," JD Supra, March 3, 2021, https://www.jdsupra.com/legalnews/nasdaq-amends-proposed-rules-on-board-4282540.
[3] "Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity," Securities and Exchange Commission, Release No. 34-90574 (File No. SR-NASDAQ-2020-081), December 4, 2020, p. 6, https://www.sec.gov/rules/sro/nasdaq/2020/34-90574.pdf.

associations exist, it then proceeds to justify the proposal, in part, on such findings. But if these findings were as strong as Nasdaq suggests, they would provide a justification to allow market processes and incentives to proceed on their own, not a reason to regulate.

Profit-maximizing firms and public company boards have all the motivation they need to pursue greater shareholder value and better corporate governance. If board diversity—as measured by the demographic box-checking required by the current proposal—was as valuable as proffered, only legal intervention could *stop* companies from adopting it. Nasdaq itself acknowledges that "a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the Board," and that "listed companies are diligently working to add directors with other diverse attributes."[4]

Nasdaq's engagement with corporate stakeholders also discovered overwhelming support for its premises. It found "consensus across every constituency in the inherent value of board diversity."[5] So, even though most firms support the goals in mind, and have already responded or are currently responding to the ostensible rewards offered, their pace of adoption, though accelerating, doesn't quite meet Nasdaq's timeline. This is a weak argument for the intervention proposed.

Danger of Tokenism and Backlash

The emerging diversity and inclusion (D&I) movement in corporate America, while positively associated in the minds of many observers with proposals like the current one, also provides us with an important warning about its likely effects. Hiring or promoting people merely to achieve a diversity quota or fend off criticism is known as tokenism, and has received a large amount of negative attention from the business press, academic researchers, and the world of arts and humanities in recent years.

Forbes reported in 2019 that tokenism "can ignite a negative boomerang effect on the most well-intentioned organizations" and that people in underrepresented groups who are invited to join boards to fulfill numerical diversity goals may "abruptly leave oftentimes with more disgust and frustration than they had previously."[6] In the context of academia, Yolanda Flores Niemann of Utah State University has found that "tokenized contexts impose negative personal, psychological, and career-damaging effects on faculty of color."[7] Even the National Poetry Foundation, which had its own public crisis of diversity and inclusion in 2020, has published analysis on the damaging effects of tokenism on writers and artists.[8]

---

[4] Ibid., p. 7.
[5] Ibid., p. 10.
[6] Dana Brownlee, "The Dangers of Mistaking Diversity for Inclusion in the Workplace," *Forbes*, September 15, 2019, https://www.forbes.com/sites/danabrownlee/2019/09/15/the-dangers-of-mistaking-diversity-for-inclusion-in-the-workplace/?sh=4d4332e54d86.
[7] Yolanda Flores Niemann, "Diffusing the Impact of Tokenism on Faculty of Color," in *To Improve the Academy*, 30(1), pp. 216-229.
[8] Morgan Parker, "Tokenism May Cause the Following Side Effects," National Poetry Foundation, December 23, 2015, https://www.poetryfoundation.org/harriet/2015/12/tokenism-may-cause-the-following-side-effects. See also Andrew Limbong, "Poetry Foundation Leaders Resign After Criticism of their Response to Protests," National

These recent concerns build on decades of analysis that has found that token hiring and affirmative action policies can have negative impacts on precisely the individuals they are intended to help.[9] Prominent Black economists and social analysts, like Thomas Sowell[10] and Walter Williams,[11] for example, have also written at length about the counterproductive effects of race-based admittance, hiring, and promotion strategies.

Women Have Different Career Priorities than Men

The diversity proposal puts its greatest emphasis on gender diversity, tacitly endorsing the unstated assumption that anything less than 50 percent of board seats being held by women is a sign of sexist discrimination. But service on a corporate board is a very specific and specialized form of work, and there is no reason to think that men and women, as groups, have the exact same level of interest in—or commitment to—that professional experience. No one should be excluded from any job based on immutable characteristics like being male or female, but neither should the SEC or other federal agency base public policy on the false notion that men and women desire all professions equally.

Women, for example, express a preference for certain employment benefits at a greater rate than men, including work-life balance, flexible work arrangements, and shorter commutes, according to a 2018 survey by Glassdoor. Men tend to have stronger preferences for other values, like a potential employer's financial performance.[12] Men and women also have extremely lopsided representation in many fields and industries for reasons that have nothing to do with structural or legal barriers. Over 91 percent of registered nurses, 82 percent of elementary and middle school teachers, and 79 percent of meeting and convention planners are women.[13] Conversely, approximately 90 percent of construction workers, 82 percent of ordained clergy, and 75 percent of farmers are male.[14]

While these distributions are based on longstanding social norms and multiple historical factors, including past discrimination, the lack of structural barriers to current professionals means that

---

Public Radio, June 10, 2020, https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/10/874324678/poetry-foundation-leaders-resign-after-criticism-of-their-response-to-protests.

9 Hail Heriot, "The Sad Irony of Affirmative Action," *National Affairs*, Winter 2013, https://www.nationalaffairs.com/publications/detail/the-sad-irony-of-affirmative-action. See also Richard Sander and Stuart Taylor, Jr., "The Painful Truth About Affirmative Action," *The Atlantic*, October 2, 2012, https://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/.

10 Thomas Sowell, "Blacks hurt by being liberal mascots," *Orange County Register*, May 27, 2008, https://www.ocregister.com/2008/05/27/thomas-sowell-blacks-hurt-by-being-liberal-mascots.

11 Walter Williams, "How affirmative action is hurting black law students," *News & Record* (Greensboro, NC), July 3, 2018, https://greensboro.com/opinion/columns/walter-williams-how-affirmative-action-is-hurting-black-law-students/article_545177db-049c-5277-9e0f-c4648eb2faa9.html.

12 Ruth Umoh, "Survey: When considering a new job, men and women prioritize different things," CNBC, August 9, 2018, https://www.cnbc.com/2018/08/09/glassdoor-what-men-and-woman-look-for-in-a-new-job.html.

13 Kathleen Elkins, "20 jobs that are dominated by women," *Business Insider,* February 17, 2015, https://www.businessinsider.com/pink-collar-jobs-dominated-by-women-2015-2.

14 Denise Dayton, "Careers That Are Male Dominated," *Houston Chronicle*, June 28, 2018, https://work.chron.com/male-vs-female-statistics-workplace-america-23880.html.

Nasdaq's attempt to micromanage the board membership of every company under its jurisdiction is overreaching and inappropriate.

Impact on Potential LGBTQ+ Directors

While great strides have been made in recent years in the public acceptance of gay, lesbian, and trans people in the United States,[15] including recent U.S. Supreme Court decisions like *United States v. Windsor* (2013), *Obergefell v. Hodges* (2015), and *Bostock v. Clayton County* (2020), LGBTQ people in America still face widespread discrimination and harassment.[16] As of 2019, roughly half of non-straight Americans had chosen not to disclose their sexuality to their bosses and coworkers.[17] Even with the new employment law landscape provided by *Bostock*, many gay Americans will be hesitant to share the details of their sexual orientation and gender identity professionally, as information disclosed in the workplace can negatively affect other aspects of an individual's life for which there are no legal protections.

There is also no meaningful recourse available once previously confidential information becomes public knowledge. Thus, the proposed rule will place an undue burden on current or potential corporate directors to "out" themselves via Nasdaq's self-identification framework. In order for their companies to stay compliant, LGBTQ+ directors will suffer a disproportionately negative impact that will not apply to potential directors who choose to self-identify their sex, race, or ethnicity.

Sexual and gender identity issues are extremely personal and affected by cultural, religious, and familial concerns specific to each individual. Those concerns for privacy far exceed whatever value might accrue to society at large from an individual being counted in Nasdaq's statistics. Placing the presumption on LGBTQ+ people to open themselves to uncertainty and risk in order to boost their firm's diversity score (or, alternately, jeopardize their own careers) is inappropriate.

Cumulative Regulatory Burden

Agencies should consider the cumulative total burden that regulated entities are already working under, how any proposed rule would increase it, and the dynamic effects of that increased total. Every regulatory requirement incurs costs for a firm, in both time and money, that could be spent on an array of alternative priorities—including the benefit of diverse stakeholder groups. Nasdaq and the Securities and Exchange Commission should exercise caution about adding to existing compliance burdens. In any final rule, they should attempt to impose the least possible additional cost on regulated entities to achieve the rule's intended purpose.

---

[15] Dan Avery, "Support for gay marriage reaches all-time high, survey finds," NBC News, October 21, 2020, https://www.nbcnews.com/feature/nbc-out/support-gay-marriage-reaches-all-time-high-survey-finds-n1244143.

[16] "In the past year, 1 in 3 LGBTQ people reported experiencing discrimination." Sharita Gruberg, Lindsay Mahowald, and John Halpin, "The State of the LGBTQ Community in 2020: A National Public Opinion Study," Center for American Progress, 2020, https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020.

[17] Kari Paul, "Nearly 50% of LGBTQ Americans are in the closet at work," *MarketWatch*, October 11, 2019, https://www.marketwatch.com/story/half-of-lgbtq-americans-are-not-out-to-co-workers-2018-06-27.

Every U.S. public company is already operating within the context of a vast web of federal and state regulation, some directed at its particular industry and more at firms and employers in general. That accumulated, "vertical" burden has significant economic effects on individual firms, particular industries and sectors, and the U.S. economy as a whole, slowing innovation and economic growth.[18] The Competitive Enterprise Institute's study *10,000 Commandments: An Annual Snapshot of the Federal Regulatory State* estimates that the current total cost burden of U.S. federal regulation comes to around $1.9 trillion per year, or roughly $14,000 per household, a large burden by any measure.[19] With firms already facing such significant costs, even a seemingly small additional burden can have a disproportionate marginal impact.

[18] Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, "Regulatory Accumulation and Its Costs: An Overview," *Policy Brief*, Mercatus Center, November 2018, https://www.mercatus.org/publications/regulation/regulatory-accumulation-and-its-costs.

[19] Wayne Crews*, 10,000 Commandments 2020: An Annual Snapshot of the Federal Regulatory State, Competitive Enterprise Institute*, May 27, 2020, https://cei.org/sites/default/files/Ten_Thousand_Commandments_2020.pdf.