

NICHOLAS D. LAWSON, M.D.

May 1, 2021

**Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, DC 20549-1090**

Re: Proposed Rule Change SR-NASDAQ-2020-081

Dear Secretary Countryman,

I write today to follow up on my January 15¹ and March 7² letters inquiring into NASDAQ's exclusion of persons with disabilities from its board diversity rule. There seems to still be no reply from NASDAQ or the SEC in response to the comments from me and others voicing similar concerns. In addition, the disability community has recently received an outpouring of support from hundreds of organizations³ now supporting the inclusion of persons with disabilities in the NASDAQ rule. I would like to know what may be preventing NASDAQ and the SEC from finally including persons with disabilities and moving forward.

I also write to revisit what seem to be NASDAQ's underlying justifications for excluding persons with disabilities. In Part I, I reengage with NASDAQ's concern that "disability" is a confusing category and may lead to "inconsistent and noncomparable" disclosures. In Part II, I revisit the argument that the form of EEO-1 Reports justifies excluding persons with disabilities and including LGBTQ+ persons. In Part III, I provide the example of the American Bar Association's (ABA) diversity plan, which includes women, racial/ethnic minorities, persons with disabilities, and LGBTQ+ persons, to allay concerns that disability inclusion will hurt inclusion of other minorities. In Part IV, I conclude with observations and recommendations.

I. "DISABILITY" IS CONFUSING, AND INCLUDING PERSONS WITH DISABILITIES WILL MUDDY UP DIVERSITY DATA REPORTS

¹ Letter from author to Vanessa Countryman, Sec'y, Sec. & Exchan. Comm'n (Jan. 15, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8259889-227946.pdf>.

² Letter from author to Vanessa Countryman, Sec'y, Sec. & Exchan. Comm'n (Mar. 7, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8451680-229783.pdf>

³ Letter from Nat'l Chamber of Commerce, Nat'l Veteran-Owned Bus. Ass'n, Out & Equal Workplace Advocates, U.S. Black Chambers, Inc., U.S. Hispanic Chamber of Commerce, U.S. Pan Asian Am. Chamber of Commerce Educ. Found. & Women Impacting Pub. Policy, to Vanessa Countryman, Sec'y, Sec. & Exchan. Comm'n (Apr. 2, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8588673-230910.pdf>; Letter from Wade Henderson, Interim President & CEO, and LaShawn Warren, Exec. Vice President for Governmental Affairs, Leadership Conference on Civil & Human Rights, to Vanessa Countryman, Sec'y, Sec. & Exchan. Comm'n (Apr. 6, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8639223-230935.pdf>

NASDAQ’s Senior Vice President Jeffrey S. Davis⁴ provided the following explanation for excluding persons with disabilities on page 14 of his February 26 letter:

“One of the challenges of this principles based approach has been the disclosure of inconsistent and noncomparable data across companies.”^[5] Commenter Professor Lisa M. Fairfax agreed, noting that “when corporations can define boards as diverse using different definitions and criteria, diversity disclosures become inconsistent, confusing, and potentially misleading.”^[6]

A. THE CONCERNS WERE WITH CATEGORIES LIKE EXPERIENCE, EDUCATION, BOARD TENURE, AND POLITICAL VIEWS—NOT DISABILITY

On closer inspection, however, the email from Prof. Lisa M. Fairfax that Mr. Davis cited never even mentioned disability. Instead, Prof. Fairfax appears to have been principally concerned that “some corporations define their boards as diverse even when they do not include any diversity with respect to gender, race, or ethnicity.” There is nothing from the text of her email to suggest that she was concerned that including *persons with disabilities* would muck up corporate diversity reporting.

Mr. Davis also cited a portion of NASDAQ’s own proposal (“Proposal”) that NASDAQ filed with the Federal Register on December 11, 2020. Yet even there, NASDAQ only discusses concerns with including categories such as “age, education and board tenure” in its definition of diverse—not disability.⁷

B. NASDAQ CAN AVOID “INCONSISTENT AND NONCOMPARABLE” DISCLOSURES BY DEFINING ITS CATEGORIES

⁴ Letter from Jeffrey Davis, Snr. Vice Pres., NASDAQ, to Vanessa Countryman, Sec’y, Sec. & Exchan. Comm’n 14 (Feb. 26, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf> [hereinafter Davis Letter]

⁵ Citing Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, 85 Fed. Reg. 80,472, 80,493 (Dec. 11, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-11/pdf/2020-27091.pdf> [hereinafter NASDAQ Proposal]

⁶ Letter from Lisa M. Fairfax, Prof. of Business Law, George Washington Univ. Law Sch., to Vanessa Countryman, Sec’y, Sec. & Exchan. Comm’n 8 (Jan. 4, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8204302-227455.pdf>

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. 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. (citation omitted)

⁷ NASDAQ Proposal, *supra* note 5, at 80,493:

Nasdaq also is concerned that the broader definitions of diversity utilized by some companies may result in Diverse candidates being overlooked, and may be hindering meaningful progress on improving diversity related to race, ethnicity, sexual orientation and gender identity. For example, a company may consider diversity to include age, education and board tenure. While such characteristics may provide laudable cognitive diversity, this focus may result in a homogenous board with respect to race, ethnicity, sexual orientation and gender identity that, by extension, does not reflect the diversity of a company’s communities, employees, investors or other stakeholders.

Even if NASDAQ remains confused by the term “disability,” it may avoid “inconsistent and noncomparable” diversity data reporting *by defining “disability” for the purposes of its rule*. This would avoid the problem of “inconsistent and noncomparable” reporting to which NASDAQ refers.

Further, NASDAQ’s board diversity matrix (below) appears to anticipate separate reporting for each racial/minority category, gender, and LGBTQ+ status. Unless diversity categories were collapsed, I fail to see how including persons with disabilities would muck up the waters. And I am not familiar with any problems relating to inconsistent and noncomparable disclosures under disability affirmative action programs with federal contractors under Section 503 of the Rehabilitation Act, which have been in effect for years.

Board Diversity Matrix (As of [DATE])				
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
Part I: Gender Identity				
Directors	#	#	#	#
Part II: Demographic Background				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Did Not Disclose Demographic Background	#			

II. SOMETHING ABOUT EEO-1 REPORTS

NASDAQ cites EEO-1 Reports as justification for excluding persons with disabilities indirectly. The Proposal and Mr. Davis’ letter⁸ cite EEO-1 Reports explicitly as a justification for including LGBTQ+ status.

In constructing the Proposal, Nasdaq based its proposed definition of Underrepresented Minority on the categories reported to the Equal Employment Opportunity Commission (“EEOC”) through the EEO-1 report with which most companies are already familiar, and while **it is not included in the EEO-1 report**, Nasdaq “believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status....

⁸ Davis Letter, *supra* note 4, at 15 (bold added).

Are these the EEO-1 Reports to which NASDAQ refers?

CO= CW14861
 UI= CW14861

**EQUAL EMPLOYMENT OPPORTUNITY
 2018 EMPLOYER INFORMATION REPORT
 CONSOLIDATED REPORT - TYPE 2**

SECTION B - COMPANY IDENTIFICATION



SECTION C - TEST FOR FILING REQUIREMENT

1-Y 2-N 3-Y DUNS NO.:196337864 EIN :201665019

SECTION E - ESTABLISHMENT INFORMATION

NAICS: 519190 All Other Information Services

SECTION D - EMPLOYMENT DATA

JOB CATEGORIES	HISPANIC OR LATINO		NOT-HISPANIC OR LATINO												OVERALL TOTALS					
	*****MALE*****															*****FEMALE*****				
	MALE	FEMALE	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES						
EXECUTIVE/SR OFFICIALS & MGRS	28	9	479	23	2	157	1	24	222	9	1	89	0	9	1053					
FIRST/MID OFFICIALS & MGRS	148	103	1538	74	6	926	1	76	737	58	8	490	2	50	4217					
PROFESSIONALS	705	458	5724	398	21	6325	12	441	2510	345	25	3352	4	327	20647					
TECHNICIANS	24	5	230	9	0	57	2	9	26	2	0	12	0	3	379					
SALES WORKERS	28	28	176	20	0	35	0	7	208	16	1	43	0	12	574					
ADMINISTRATIVE SUPPORT	10	105	25	8	2	9	0	7	288	54	12	103	1	61	685					
CRAFT WORKERS	0	0	6	1	0	0	0	0	5	0	0	0	0	0	12					
OPERATIVES	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0					
SERVICE WORKERS	13	6	62	7	2	11	1	4	19	1	0	9	0	3	138					
TOTAL	956	714	8240	540	33	7520	17	568	4015	485	47	4098	7	465	27705					
PREVIOUS REPORT TOTAL	641	463	6311	334	24	5242	15	387	2940	278	37	2710	6	291	19679					

SECTION F - REMARKS

CO= GY19380
 U= GY19380

EQUAL EMPLOYMENT OPPORTUNITY
 2018 EMPLOYER INFORMATION REPORT
 CONSOLIDATED REPORT - TYPE 2

SECTION B - COMPANY IDENTIFICATION



SECTION C - TEST FOR FILING REQUIREMENT

1-Y 2-Y 3-Y DUNS NO.:079942718 EIN :611767919

SECTION E - ESTABLISHMENT INFORMATION

NAICS: 519130 Internet Publishing and
 Broadcasting and Web Search Portals

SECTION D - EMPLOYMENT DATA

JOB CATEGORIES	HISPANIC OR LATINO		NOT-HISPANIC OR LATINO												OVERALL TOTALS
	MALE	FEMALE	***** MALE *****						***** FEMALE *****						
			WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	
EXECUTIVE/SX OFFICIALS & MGRS	5	4	187	7	0	58	0	6	81	5	0	18	1	5	357
FIRST/MID OFFICIALS & MGRS	564	368	6036	261	23	2903	17	271	3425	220	18	2069	4	226	16425
PROFESSIONALS	1693	647	17135	659	41	13469	18	894	4706	389	29	5783	6	465	45932
TECHNICIANS	45	6	544	29	2	30	14	31	68	8	0	8	2	3	790
SALES WORKERS	110	116	808	58	2	157	3	48	797	53	0	171	3	34	2360
ADMINISTRATIVE SUPPORT	34	128	80	20	1	28	0	7	541	64	9	201	1	47	1161
CRAFT WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OPERATIVES	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SERVICE WORKERS	42	26	45	18	4	22	0	5	45	2	3	8	0	3	223
TOTAL	2493	1295	24835	1052	73	16667	50	1262	9643	741	59	8278	17	783	67248
PREVIOUS REPORT TOTAL	2009	945	21974	799	63	13408	42	834	7931	544	49	6422	16	510	55546

SECTION F - REMARKS

DATES OF PAYROLL PERIOD: 12/01/2018 THRU 12/15/2018

SECTION G - CERTIFICATION

CERTIFYING OFFICIAL: SCOTT WILLIAMSON TITLE: Integrity program manager
 EEO-1 REPORT CONTACT PERSON: SCOTT WILLIAMSON TITLE: Integrity PROGRAM MANAGER

CERTIFIED DATE[EST]: 03/29/2019 08:23 AM

OS- D140290
 OS- D140290

EQUAL EMPLOYMENT OPPORTUNITY
 2018 EMPLOYER INFORMATION REPORT
 CONSOLIDATED REPORT - TYPE 2

SECTION B - COMPANY IDENTIFICATION



SECTION C - TEST FOR FILING REQUIREMENT

1-Y-2-N 3-Y DUNS NO. 000704780 EIN :942404110

SECTION E - ESTABLISHMENT INFORMATION

NAICS: 334111 Electronic Computer Manufacturing

SECTION D - EMPLOYMENT DATA

JOB CATEGORIES	HISPANIC OR LATINO		NOT-HISPANIC OR LATINO											OVERALL TOTAL		
	*****MALE*****														*****FEMALE*****	
	MALE	FEMALE	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKA NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKA NATIVE		TWO OR MORE RACES	
EXECUTIVES/NO OFFICIALS & MANAGERS	2	0	80	0	0	16	0	0	19	1	0	5	0	0	123	
PROF. / MGT. OFFICIALS & MANAG.	478	202	4448	161	9	1992	12	79	1600	123	8	708	5	53	9878	
PROFESSIONALS	1134	515	10878	378	84	9908	39	330	3287	177	21	3837	17	165	30745	
TECHNICIANS	903	285	3535	522	35	541	20	140	870	172	12	233	7	45	7350	
SALES WORKERS	3526	2089	8503	2588	117	1370	68	657	3889	1518	49	750	46	458	25825	
ADMINISTRATIVE SUPPORT	1423	1143	4377	1057	47	571	48	234	3048	1415	22	638	32	287	14340	
CRAFT WORKERS	24	2	85	3	0	18	0	0	1	0	0	1	1	0	115	
OPERATIVES	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
SERVICE WORKERS	247	306	85	21	5	94	4	15	41	17	5	41	4	11	896	
TOTAL	7767	4542	31889	4728	277	14510	188	1455	12754	3423	117	6213	112	1017	88072	
PREVIOUS REPORT TOTAL	7207	3891	31889	4475	267	12589	184	1284	12487	3235	118	5355	114	864	83759	

SECTION F - REMARKS

DATES OF PAYROLL PERIOD: 12/18/2018 THRU 12/31/2018

SECTION G - CERTIFICATION

CERTIFYING OFFICIAL: MARTHA BURRAGE-SIMS
 EEO-1 REPORT CONTACT PERSON: MARTHA BURRAGE-SIMS

TITLE: Senior AA/EEO Compliance Manager
 TITLE: SENIOR AA/EEO COMPLIANCE MANAGER

CERTIFIED DATE(TIME): 05/31/2019 01:21 PM

If so, I agree with NASDAQ that LGBTQ+ does *not* appear in the EEO-1 Report.⁹ Yet NASDAQ seems to be invoking these EEO-1 Reports as reasons to *include* LGBTQ+ persons (and also to exclude persons with disabilities).

The EEO-1 Reports also look pretty *different* from NASDAQ's board diversity matrix. Yet NASDAQ seems to be arguing that its approach (as manifested in its board diversity matrix) is preferable because it is the *same* as the EEO-1 Reports, which companies have become accustomed to.¹⁰ I do not see how this helps NASDAQ justify its newly proposed diversity matrix.

III. DISABILITY INCLUSION HURTS INCLUSION FOR LGBTQ+ PERSONS AND RACIAL/ETHNIC MINORITIES REDUX

⁹ NASDAQ Proposal, *supra* note 5, at 80,486 n.162 (“the EEOC does not categorize LGBTQ+ or any other sexual orientation identifier on its EEO-1 Report.”)

¹⁰ See Davis Letter, *supra* note 4, at 16, explaining that, “Nasdaq [says it] has determined to maintain alignment with the EEO-1 definitions,” and at 15, explaining that it “believe[s] it is appropriate for Nasdaq to base its definition of diversity on the EEO-1 reporting categories [because companies] are already familiar with these categories.”

My March 7 letter responded to possible concerns from NASDAQ and other advocates that disability inclusion in the rule might hurt inclusion of LGBTQ+ persons and racial/ethnic minorities. In particular, NASDAQ had suggested that “broader definitions of diversity utilized by some companies may result in Diverse candidates being overlooked, and may be hindering meaningful progress on improving diversity related to race, ethnicity, sexual orientation and gender identity”¹¹—“the more inclusive you try to make your diversity policies, then frankly, sometimes they don’t have the same impact.”¹²

My previous letters should have made it clear that the state of disability inclusion in U.S. leadership is horrendous. I personally do not believe that many companies would choose a person with a disability over a racial/ethnic minority or a LGBTQ+ person.

In what follows, I add to the leadership summary I provided in my January 15 letter by summarizing diversity data from a single organization that includes four categories—women, racial/ethnic minorities, persons with disabilities, and LGBTQ+ persons—in its diversity plan: the ABA. This data strongly suggest that disability inclusion is not hurting inclusion of racial/ethnic minorities and LGBTQ+ persons. Rather, it appears that persons with disabilities are not being included. The data derive from multiple ABA Goal III Reports.¹³

Goal III of the ABA’s mission is to “Eliminate Bias and Enhance Diversity.” The ABA’s initial efforts on this goal focused on racial and ethnic minorities and women and were led by the Commission on Racial and Ethnic Diversity (formed in 1986) and the Commission on Women in the Profession (formed in 1987). The goal was amended in 1999 to include “persons with disabilities” and in 2007 to include “persons of differing sexual orientations and gender identities.” The data appear below.

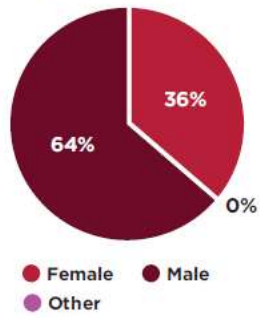
¹¹ NASDAQ Proposal, *supra* note 5, at 80,493.

¹² *Nasdaq Exec Jeff Thomas on New Diversity Rules for Listed Companies*, AXIOS (Dec. 1, 2020), <https://www.axios.com/nasdaq-jeff-thomas-diversity-rules-listed-companies-cbf245b3-2888-49bf-b8e9-7f3ea388cb0a.html>

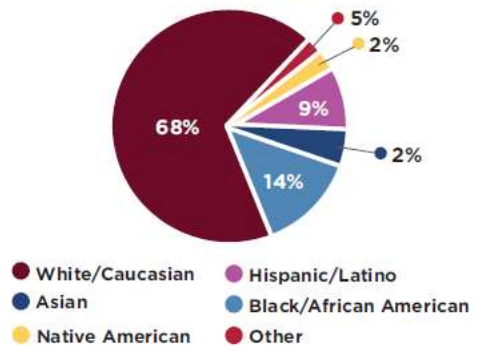
¹³ AM. BAR ASS’N, DIVERSITY & INCLUSION CTR., GOAL III REPORTS, <https://www.americanbar.org/groups/diversity/resources/goal3-reports/>

ABA Board of Governors Demographics 2019-2020

Gender Identification



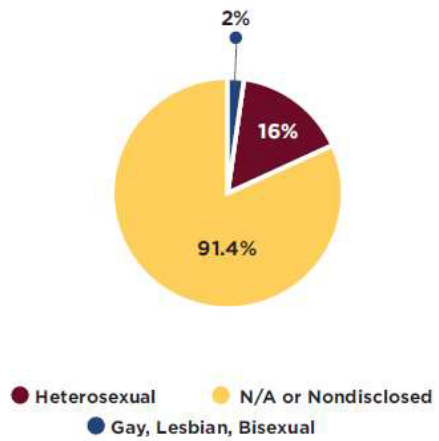
Race/Ethnicity



Disability Identification



Sexual Orientation Identification



ABA House of Delegates Demographics 2019-2020

Gender Identification

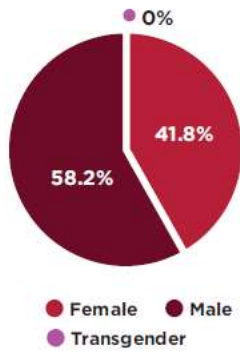


Figure represents the 100% of all House Members whose data was available.

Race/Ethnicity

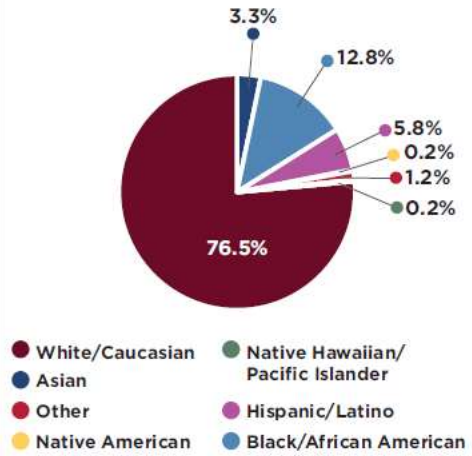


Figure represents the 78% of all House Members whose data was available.

LGBT Identification

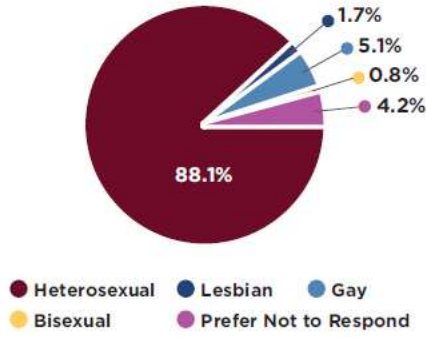


Figure represents the 21% of all House members whose data was available.

Disability Identification

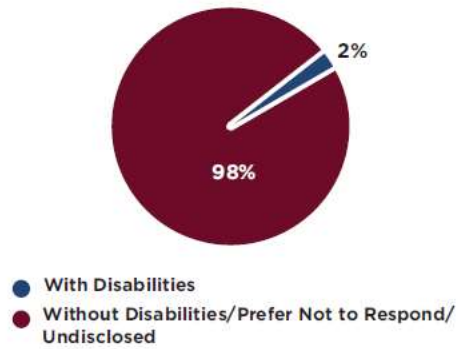
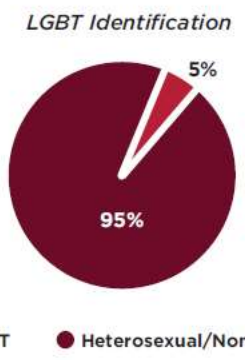
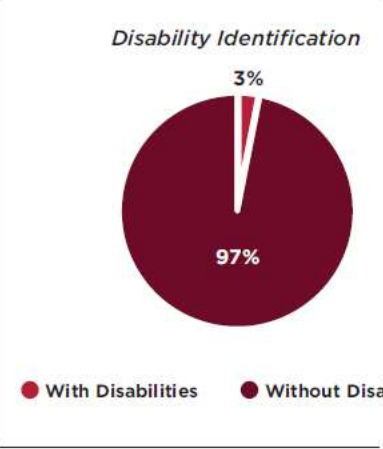
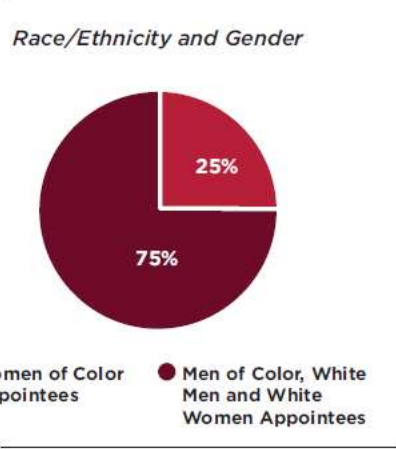
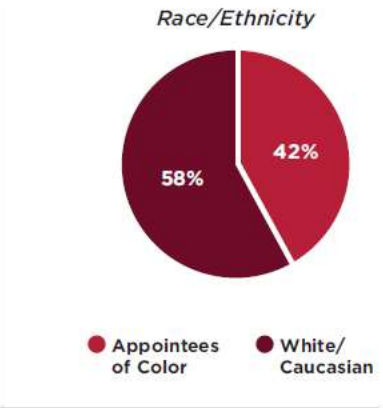
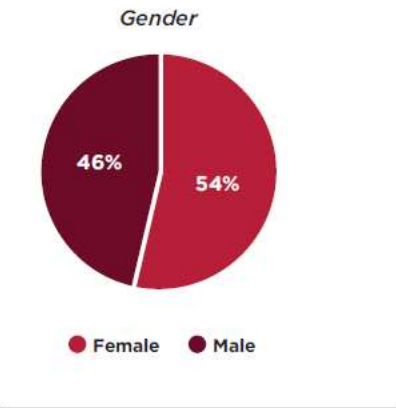


Figure represents the 100% of all House members whose data was available.

Presidential Appointments Under President Judy Perry Martinez 2019-2020



ABA Lawyer Member Demographics (As of August 31, 2019)

Gender Identification

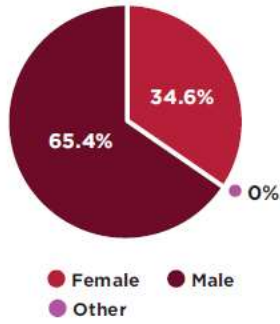


Figure represents the 96% of all lawyer members whose data was available.

Race/Ethnicity

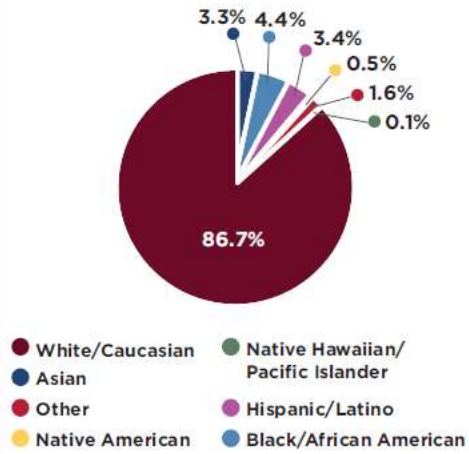


Figure represents the 33% of all lawyer members whose data was available.

Disability Identification

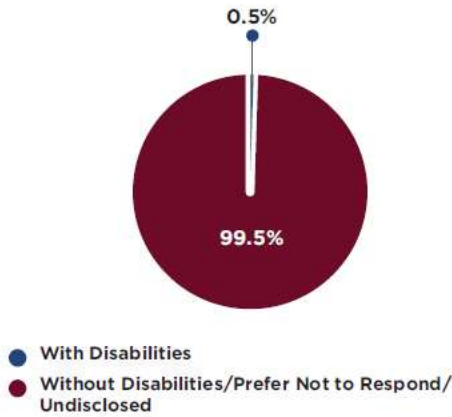


Figure represents the 100% of all lawyer members whose data was available.

LGBT Identification

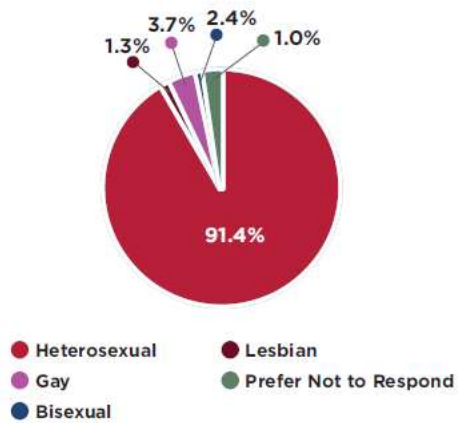


Figure represents the 9% of all active lawyer members.

Board of Governors

Category [% U.S. population]	Women [51%]	Racial/Ethnic [40%]	LGBT [4.5%]	Disability [26%]
2019-2020	36%	32% H 9%; B 14%; A 2%; N 2%	2%	0%
2018-2019	35%	23% H 2%; B 14%; A 5%; N 2%		2%
2016-2017	32%	23% H 4.5%; B 6.8%; A 9.1%; N 2.3%	2.3%	2.3%
2013-2014	25%	23% H 12.5%; B 10%; A 0%; N 0%		2.5%
2011-2012	37%	16% H 5.3%; B 7.9%; A 0%; N 2.6%	2.6%	0%
2010-2011	35%	23% H 5.3%; B 15.0%; A 0%; N 2.5%		0%
2009-2010	29%	18% H 5.3%; B 10.5%; A 0%; N 0%		0%
2000-2001	22%	8% H 0%; B 5.4%; A 2.7%; 0%		

House of Delegates

Category [% U.S. population]	Women [51%]	Racial/Ethnic [40%]	LGBT [4.5%]	Disability [26%]
2019-2020	42%	15% H 5.8%; B 12.8%; A 3.3%	7.6%	2%
2018-2019	41%	18% H 4%; B 10%		2%
2016-2017	32%	23% H 4.5%; B 6.8%; A 9.1%	2.3%	2.3%

Presidential Appointments

Category [% U.S. population]	Women [51%]	Racial/Ethnic [40%]	LGBT [4.5%]	Disability [26%]	Notes
2019-2020	42%	24% H 5.8%; B 12.8%; A 3.3%	7.6%	2%	Martinez W; H # = 682
2018-2019	47%	40%	4%	2%	Carlson # = 673
2017-2018	49%	42%		2%	Bass W # = 708
2016-2017	50%	43%	5.0%	1.8%	Klein W # = 794
2015-2016	55%	50% H 12.8%; B 25.8%; A 17.8%; N 1.7%	25.8% T 12.8%	1.2%	Brown W; B # = 733
2014-2015	51%	37% H 9.7%; B 17.6%; A 7.9%; N 1.3%	4.4% T 0.1%	1.4%	Hubbard # = 868
2013-2014	52%	37% H 8.4%; B 16.9%; A 9.5%; N 1.6%	2.9% T 0.1%	1.2%	Silkenat # = 818
2012-2013	54%	34% H 8.9%; B 16.4%; A 7.3%; N 1.4%	3.8% T 0.1%	1.8%	Bellows W # = 732
2011-2012	44%	35% H 10.5%; B 1.7%; A 6.4%; N 0.8%	2.8% T 0.1%	2.0%	Robinson # = 751
2010-2011	42%	34%	2.4% T 0.4%	2.3%	Zack # = 750
2009-2010	44%	27%	1.8% T 0.3%	2.4%	Lamm W # = 760
2008-2009	42%	19%	2.0% T 0.4%	6.6%	Wells # = 693

Presidential Appointments for Chairs of Standing and Special Committees, Task Forces and Commissions

Category [% U.S. population]	Women [51%]	Racial/Ethnic [40%]	LGBT [4.5%]	Disability [26%]	Notes
2019-2020	51%	38% H 5%; B 8%; A 2%; N 3%		1%	Martinez W; H # = 77
2018-2019	53%	40% H 3%; 9% B; A 15%; N 0%		3%	Carlson # = 81
2017-2018	48%	31% H 3%; B 6%; A 6%; N 0%		0%	Bass W # = 96
2016-2017	47%	42%	0%	0.126%	Klein W # = 93

Chairs of Member Practice Groups (aka Sections, Divisions, and Forums [SDFs])

Category [% U.S. population]	Women [51%]	Racial/Ethnic [40%]	LGBT [4.5%]	Disability [26%]	Notes
2019-2020	51%	11% H 5%; B 8%; A 2%; N 3%	0%	0%	Martinez W; H # = 39
2018-2019	38%	26% H 3%; B 9%; A 15%; N 0%	1%	0%	Carlson # = 34
2017-2018	38%	12% H 3%; B 3%; A 6%; N 0%	3%	0%	Bass W # = 34
2016-2017	50%	8.8% H 0%; B 5.9%; A 0%; N 2.9%	0%	17.6%	Klein W # = 34
2014-2015	29%		2.9%	0%	Hubbard # = 35
2013-2014	21%		5.9%	5.9%	Silkenat # = 34
2012-2013	26%		5.9%	0%	Bellows W # = 34
2011-2012	29%		8.8%	0%	Robinson # = 34

IV. GOING FORWARD

A. DISABILITY-LGBTQ+ RELATIONS

I first heard of the “disability-LGBTQ+ rivalry” shortly after reading the December 23, 2020 letter from the ACLU’s Executive Director and leading LGBTQ+ advocate supporting the NASDAQ rule’s exclusion of persons with disabilities. Like Samuel S. Guzik,¹⁴ I was very surprised, especially after learning so much about the organization from my Georgetown Law course on social movements other than the disability rights movement. I spoke to my professor about the NASDAQ rule, and that was when I first found out about the “conflict between the disability and LGBT communities. Sometimes the disputes devolve into quasi-ethnic rivalries, which is seldom good for anyone.”

That made me sad, and I began noticing a similar pattern. I noticed, for example, that my law school’s Office of Equity and Inclusion (OEI) was for “students of color; low-income students; first-generation students; Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, Two-Spirit + (LGBTQIA2S+) students; and allies.”¹⁵ I fully support the rights of students from all these marginalized backgrounds. But I wondered why the OEI Director could not at least include “disability” in addition to the many LGBTQ+ identities listed as falling within the purview of the school’s OEI.

I absolutely believe that the overwhelming majority of LGBTQ+ advocates do not want persons with disabilities to be excluded, and that the overwhelming majority of disability rights

¹⁴ Letter from Samuel S. Guzik, Guzik & Associates, to J. Matthew DeLesDernier, Assistant Sec’y, Sec. & Exchan. Comm’n 9 (Apr. 5, 2021), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8634789-230927.pdf> [hereinafter Guzik Letter]

¹⁵ GEORGETOWN LAW, OFF. OF DIVERSITY & INCLUSION, <https://www.law.georgetown.edu/your-life-career/diversity-inclusion/equity-inclusion-office/>

advocates similarly support the inclusion of LGBTQ+ persons. I think we are better than the current version of the NASDAQ rule. Though I do not know much about the rivalry, I know that we must take greater care to work together and avoid competing in the most marginalized minority Olympics.

I also hope that the current version of the NASDAQ rule reflects a simple misunderstanding. That said, I share some of the concerns expressed by Samuel S. Guzik about the motives underlying NASDAQ's leadership.¹⁶ I was very surprised on February 26 to find that NASDAQ—after hearing so many pointed entreaties that should have made clear that it would be a tactical and moral mistake to exclude persons with disabilities—seemed to try to steamroll the rule through without including persons with disabilities just the same. One of the first thoughts that came to my mind (and I think a reasonable one) was that some sort of a deal had been made.¹⁷

I sincerely hope that the current rule is not being advanced by persons who *really* do not want to include persons with disabilities and want them out of the way for LGBTQ+ persons. Though this may not have been the intentions of NASDAQ's leadership, their responses make me concerned that the current rule is at least partly being driven by animus. I very much hope that I am mistaken.

B. FUTURE DISABILITY DIVERSITY/INCLUSION AND AFFIRMATIVE ACTION IN LEADERSHIP

Diversity and the benefits that flow from an institutional body that includes marginalized individuals and their perspectives has long been one of the primary justifications for affirmative action and diversity/inclusion. But by cutting out persons with disabilities—a group with such poor representation in leadership—proponents of the affirmative action and the current NASDAQ rule make affirmative action look insincere. I fail to see how one can argue the importance of including marginalized individuals and their perspectives and not act to include persons with disabilities.

Persons with disabilities face profound challenges to inclusion in leadership. We have increasingly faced policies that equate disability with incompetence, lack of professionalism, misconduct, dangerousness, and dependence.¹⁸ We have increasingly been subjected to peer-to-

¹⁶ See Guzik Letter, *supra* note 14, at 5, 6, 10-11.

¹⁷ See *id.* at 1, 11 (arguing that the current rule is “not consistent with Section 6(b)(5) of the 1934 Act, as it appears designed to permit unfair discrimination between issuers,” later arguing that the rule has “undoubtedly placed the Exchange and its publicly held parent, Nasdaq, Inc., in good stead with its vast network of commercial and political relationships”)

¹⁸ See generally Nicholas D. Lawson, “*To Be a Good Lawyer, One Has to Be a Healthy Lawyer*”: *Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*. 34 GEO. J. LEGAL ETHICS 65 (2021); Letter from author to Scott Bales, Chair, Am. Bar Ass’n, Council on Legal Educ. and Admissions to Bar, regarding proposed changes to ABA Standards 508 and 303 (Mar. 31, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/3-21-comment-std303-508-lawson.pdf; Letter from author to U.S. Senators regarding Dr. Lorna Breen Health Care Provider Protection Act, S. 610, 117th Cong. (2021) (Mar. 17, 2021), https://www.linkedin.com/posts/nicholas-d-lawson-m-d-aa337968_letter-to-us-senators-opposing-wellbeing-ugcPost-6783952168257937408-hlZi

peer workplace surveillance, selective disciplinary attention and scrutiny, allegedly for our own safety, the safety of coworkers, and the public. Including persons with disabilities in the NASDAQ board diversity rule will be a necessary first step to inclusion in leadership and the business community. But I suspect it will not be sufficient to prompt significant numbers of potential board members to come out with their disabilities in these environments.

Thank you.

Respectfully submitted,

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