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The Honorable Allison Herren Lee

Acting Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 25049

April 7, 2020

Dear Acting Chair Lee:

I am writing regarding Amendment No. 1 to File No. S-2020-081 submitted by Nasdaq, Inc. ("Nasdaq") to the U.S. Securities and Exchange Commission ("SEC") for the adoption and implementation of new listing requirements that include diversity considerations for the board of directors of listed companies (the "Proposed Rule"). I write today on behalf of all Americans with a disability, and moreover those who truly seek diversity in the United States of America. The Proposed Rule is a magnificent step forward in this time of divisiveness in our country and is an important leap towards celebrating diversity in all of its forms.

However, the Proposed Rule serves to ignore the existence of civil rights laws identifying discrimination against the disabled, carefully constructing a self-serving narrative of why persons with a disability cannot be included as a minority group, all while using the same arguments in the alternative to include other minority groups. The time to end discrimination, for all, is now, and as a part of our government you are positioned to lead both policy and capital markets in the cessation of this abhorrent behavior.

As a self-regulating organization ("SRO") pursuant to the Securities and Exchange Act of 1934 ("Exchange Act") Nasdaq qualifies as a state actor. Thus, Nasdaq should fulfill their statutory duties and uphold all U.S. law rather than selectively applying fact and law in a manner that results in overt discrimination against the disabled. This letter requests that the Proposed Rule be denied as submitted until further amended to include persons with a disability, including service-disabled veterans, as is proposed hereinafter.

With 61 million persons with a disability living in the United States, the disabled represent the largest underrepresented community of all minorities. I appreciate and honor the sacrifice of our veterans, including service-disabled veterans who are indelibly included in the definition of disabled persons and represent an important pool of qualified directors for the board rooms of Corporate America. Without the changes proposed herein, service-disabled veterans will be locked out of corporate board rooms unless they self-identify with another underrepresented minority group respected by Nasdaq.

According to the Bureau of Labor Statistics, approximately 19% of people with disabilities were employed during the nine-year period between 2009 and 2018, as compared to more than 65% of people without disabilities. As has previously been reported to Congress by the National Council on Disability, persons with disabilities are vastly underrepresented in the fastest occupations in the economy and are overrepresented in the occupations with the fastest rates of decline. Nasdaq must not be permitted to use the Exchange Act to further discriminate against our most vulnerable citizens.

Deny Use of the Exchange Act to Discriminate Against the Disabled

Our culture is deeply fearful and stereotypical of the disabled as damaged or defective, and rules such as the Proposed Rule only perpetuate those myths. As a disabled person, I can attest to and support with data our nation's history of ostracization and institutionalization that has created the negative and inaccurate beliefs and attitudes about disability. Consequently, twice as many people with disabilities live in poverty and less than 30% of working age disabled persons in the U.S. are participating in the workforce. That is substantially less than the 78% participation rate for other Americans, and the percentage of persons with disabilities holding management positions is dismal at best.

Ironically, data does exist regarding contribution of the disabled to commercial enterprise, yet Nasdaq dismisses it as inadequate. Nonetheless, Nasdaq uses the same argument of a dearth of beneficial data and recent U.S. Supreme Court decisions as reasons to include the LGBTQ+ community. For the avoidance of doubt, I do support the inclusion of the LGBTQ+ community in the definition of an underrepresented community, but also request that we acknowledge the existence of many years of civil rights laws and U.S. Supreme Court decisions holding that the discrimination of the disabled is not to be tolerated.

Nasdaq should recognize that in addition to being a leader in our capital markets and a quasi-governmental entity (state actor) by virtue of it being a SRO, it is also a leader in the financial services industry. Financial inclusion is an overlooked component of the Proposed

Rule and developmental policy more generally, especially when it comes to people with disabilities. Globally, persons with disabilities represent a market exceeding \$1 trillion, hence Nasdaq as a leader in the financial-services sector, and the SEC have ample reason to lead on this issue. In some U.S. states, it has been found that 2 of 5 disabled households are unbanked, leaving those families to seek alternative financial services through pawnshops or currency exchanges. A move by Nasdaq to include the disabled on corporate boards would help Corporate America, and more specifically the financial services industry, understand the unique challenges faced by individuals with disabilities and drive inclusion of the disabled in the financial markets.

Selective Data Use Should Not Be Permitted to Justify Discrimination

In 2018, Accenture, LLP ("Accenture" NYSE:CAN) in partnership with the American Association of People with Disabilities ("AAPD") published a report of 45 companies concluding that companies embracing the employment and support of persons with disabilities because they outperform their peers. The report was included in the Proposed Rule filing, but summarily dismissed. Nasdaq dismissed the Accenture and AAPD findings that the 45 companies over the 4 year period of the study demonstrated 28 percent higher revenue, double the net income and 30 percent higher economic profit margins than the other companies in Disability:In and AAPD's Disability Equality Index ("DEI"). The Accenture/AAPD analysis also demonstrated that U.S. GDP could increase up to US\$25 billion if more persons with disabilities participated in our labor force. However, if we choose to exclude the disabled from the highest levels of corporate leadership, the gains of disability inclusion will be lost.

The Proposed Rule will perpetuate the biases that Accenture and AAPD found among corporations, including a lack of understanding of the:

- Scope of the [disabled] talent that exists;
- Potential benefits of employing the disabled in their organizations; and
- Erroneous views of the cost versus the return-on-investment (ROI) of disability inclusion.

More than 30 years have passed since the enactment of the Americans with Disabilities Act, and with the long-overdue national drive for inclusiveness and diversity, the SEC is presented with the opportunity to lead the democratization of our capital markets to include the disabled through the modernization of Nasdaq's and other exchanges' rules. If we truly desire diversity, we must stop pursuing half-way measures, and transform the outcomes of people with disabilities – this starts with the pinnacle of corporate leadership, the board of directors.

Nasdaq seeks to enforce transparency in the world of publicly traded companies, as if that is the goal of diversity. It is a clear that Nasdaq views diversity as a tool to improving corporate effectiveness, but that is insufficient. Diversity is a recognition of the collage of American living, recognizing the equality of our minorities. Hence, no rule should be

permitted to denigrate one minority at the expense of another, as Nasdaq and the Proposed Rule do.

Nasdaq Simply Ignores the Existence of Disability Laws to Serve its Purpose

In its Proposed Rule, Nasdaq cites the U.S. Equal Employment Opportunity Commission's EEO-1 data collection requirement as authority to exclude persons with disabilities. Nasdaq argues that the failure of EEO-1 reporting requirements to track the self-identification of disabled persons is authority to exclude the disabled from its definition of underrepresented minority. Our nation's history and law is replete with examples of government failures to include or protect minorities underscoring the vast discrimination that has been witnessed in our nation. The exclusion of "disability" in EEO-1 reporting is exactly the reason why Nasdaq should include disability in its definition of underrepresented community. Similar exclusions have led the U.S. Supreme Court to protect the LGBTQ+ community by extending laws, it is a recognition of the fallibility of our laws in protecting our minorities. Nasdaq cites those protections to include the LGBTQ+ as a minority group, but then ignores them as to the disabled.

In another incongruity, Nasdaq extends the definition of underrepresented community that it copied from California's law AB 979 to include the "Queer" populace, citing an oversight by the state. Nasdaq admonishes California's AB 979 for its failure to include the LGBTQ+ community, but then does exactly the same with the disabled populace. And, it fails to address the EEO-1 oversight on the part of disabled persons. It is exactly this type of behavior - the use of data and argument to include (or not) a minority population - that perpetuates discrimination of all groups.

Nasdaq, through omission, openly discriminates against the disabled, failing to even once mention Section 501 of the Rehabilitation Act of 1973 ("Rehab Act") or the Americans with Disabilities Act of 1990 as amended (the "ADA"), which prohibit employment discrimination against qualified persons on the basis of a disability. On what basis can the SEC and Nasdaq possibly ignore an entire area of Federal laws? To be clear, in its 274-page document addressing arguably the most important progressive initiative in Corporate America's history, Nasdaq fails to mention the Rehab Act, ADA, or any other prominent civil rights legislation affecting the disabled even once. The need for change has never been greater.

Rather than starting with EEO-1 as the basis for its definition of underrepresented minority, Nasdaq should have started with the Civil Rights Act of 1964 ("CRA"). The CRA states, "Title VII prohibits employment discrimination based on race, color, religion, sex and national origin." From there, the SEC and Nasdaq could in fact update the text to reflect U.S. Supreme Court decisions and the passage of other civil rights laws. In its present form, the Proposed Rule is a carefully woven apparatus to deliberately exclude the disabled.

Nasdaq should follow President Biden's Executive Order Supporting Underserved Communities

On January 20, 2021, President Biden issued the *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (the "Executive Order"). This order called for a comprehensive approach to advancing equity, combatting inequality and discrimination in this country. The Executive Order explicitly included the requirement for executive departments and agencies, of which the SEC is one, "to redress inequities in their policies and programs that serve as barriers to equal opportunity." It is critical to recognize to whom this order applies, which is "individuals who belong to underserved communities that have been denied treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender and queer (LGBTQ+) persons; **persons with disabilities** ... and persons otherwise affected by persistent poverty or inequality."

As an agency and state actor, the SEC and Nasdaq, respectively, should embrace the Executive Order that also calls for communicating with members of the underserved communities. It is abundantly clear that the Executive Order addresses those communities subject to discrimination in Federal policies and programs. The rule does not instruct the SEC to continue discrimination against the disabled, while protecting the other legitimately discriminated against minorities. Thus, the SEC and Nasdaq should either halt all implementation of the Proposed Rule or modify it to comport with President Biden's order.

The text of the Proposed Rule at issue is as follows:

"(i) to adopt Rule 5605(f) (Diverse Board Representation), which would require Nasdaq-listed companies, subject to certain exceptions, (A) to have at least one director who **self-identifies as a female**, and (B) to have 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+**, or (C) to explain why the company does not have at least two directors on its board who self-identify in the categories listed above;"

Proposed Change to Nasdaq's Definition of Underrepresented Minority

With respect, I would suggest a better formulation to be as follows:

"(i) to adopt Rule 5605(f) (Diverse Board Representation), which would require Nasdaq-listed companies, subject to certain exceptions, (A) to have at least one director who self-identifies as a female, and (B) to have 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+, (C) to have at least one director who is disabled, or (D) to explain why the company does not have at least three directors on its board who self-identify in the categories listed above;"

The participation of the disabled in the workforce is statistically similar to that of African-Americans and the LGBTQ+ community. I would encourage Nasdaq and the SEC to take this well-intentioned effort and improve it so that the disabled are not left behind. This simple change would honor the millions of Americans excluded from the economy, excluded by the financial services industry both as clients and employees, and the sacrifice of our service-disabled veterans who are also being excluded by Nasdaq and the Proposed Rule. Inasmuch as Nasdaq followed the State of California in deleting the disabled as a minority group, this dangerous fall down the slippery slope of discrimination must stop before the disabled are further forgotten.

The inclusion of the disabled on the boards of listed companies will reinforce the desire and need for employment of the disabled and their ability to excel at the highest levels of society. I would like to discuss these matters at greater length and depth with you and request a constructive meeting with the SEC and Nasdaq. Thank you for your consideration.

kindest regards,



Luka Erceg

/copy:

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