

Gerald Jaynes Testimony SB0301.pdf

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MARYLAND STATE LEGISLATURE BEFORE THE SENATE EDUCATION, HEALTH AND ENVIRONMENTAL AFFAIRS COMMITTEE: HEARING ON SENATE BILL 301, "Corporations-Board Members and Executive Officers Diversity-Procurement Preference and Reporting." FEBRUARY 3, 2021

Good morning ladies and gentlemen and Chairman Paul G. Pinsky, Vice Chair Cherly C. Kagan, the Senate Minority Leader Bryan W. Simonaire and Members of the Committee. I would also like to acknowledge Senator Charles Sydnor III the sponsor of SB 301. I am pleased to testify in support of SB 301.

I am Gerald D. Jaynes, PhD, and the A. Whitney Griswold Professor of Economics, African American Studies, and Urban Studies at Yale University. I have written extensively on race relations and the economic conditions of African Americans, women, and people of color. I have more than 30 years of experience researching and analyzing race-based preference programs in contracting, employment, education, and housing. I am currently conducting research for a study of health disparities for the State of Connecticut.

My testimony supports SB 301 proposed legislation that is consistent with current trends related to Federal regulations and state government initiatives to address underrepresentation of minorities of color, women, and ethnic minorities on corporate boards. Efforts to promote diversity and inclusion are particularly relevant today given the Biden Administration's initiatives to address racial and gender equality at all levels of American society. This work is a continuing project and SB 301 is a step in the right direction. In a nation where non-Hispanic Whites represent 61 percent of the population, about 84 percent of corporate board seats are held by non-Hispanic Whites. According to a study by The Alliance for Board Diversity in collaboration with Deloitte examining representation of minorities and women on the boards of Fortune 500 Companies, underrepresented minorities on such boards are 8.6 percent African American, 8.8 percent Latinix, and 3.7 percent Asian American and Pacific Islanders ("Missing Pieces Report," 2018).

Diversity and inclusion efforts are not new. Perhaps, the most notable efforts in this direction concern policies related to government contracting and procurement at all levels of government. The origin and evolution of such efforts may be discerned in case law and discrimination studies conducted by the Federal Government and many state and local governments, as well as quasi-governmental entities across the country. As early as 1977, the US Congress enacted legislation mandating a "10 percent set-aside" of contracting activities related to federal public works projects (See Public Law 95-507). Many lawsuits followed, alleging discrimination based on race and violations of the 14th Amendment's Equal Protection Clause in the US Constitution.

The most famous cases establishing the parameters for developing Constitutional remedies for past discrimination were Fullilove v. Klutznick 488 U.S. 448 (1980), and City of Richmond v. J.A. Croson Co. 488 U.S. 46 (1989). The first case held the US Congress could constitutionally use its spending power to remedy past discrimination, and the second set out Constitutional strictures that must be met by state and local government jurisdictions setting up such programs. By the late 1990s, private consultant's analyses of various contracting programs became a cottage industry as many governmental entities sought to install new or to rejuvenate existing M/WBE diversity standards and requirements that would pass Constitutional muster. These "disparity studies" were designed to determine whether there was actual statistical and other historical evidence of discrimination to support a compelling governmental

interest in legislating M/WBE goals in contracting and procurement. In addition to serving a compelling governmental interest, such M/WBE programs must be “narrowly tailored” to address the discrimination.

Therefore, it is clear a government can use its resources to remedy past and/or ongoing discrimination as long as there is a compelling reason to do so. The courts have found government actions to promote racial/ethnic diversity a compelling governmental interest in a variety of settings analogous to promoting diversity of corporate boards. As with diversity policies such as those utilized by educational institutions and law enforcement agencies, a remedial measure such as SB 301 could in the future face a court challenge. However, a diversity and inclusion effort related to corporate boards is likely to be found acceptable to the courts if it meets the well-established standards set by the courts. The MD State Legislature should be confident SB 301 is well crafted to withstand scrutiny by the courts.

To summarize, current trends at the federal level and among the states related to efforts to increase diversity and inclusion on corporate boards range in scope from actual mandates requiring minimum representation minorities and women to legislation requiring corporations doing business in the state merely report the representation of minorities and women on their boards. The US Securities Exchange Commission (SEC) recently approved a rule change directed at corporate diversity on NASDAQ listed companies. Under the proposed rule change, NASDAQ filed a proposal with the SEC to “adopt listing rules related to board diversity.” 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, Latino, Asian, Native American or Alaska Native or Pacific Islander, two or more races or ethnicities, or as LBGTQ+, or (C) explain why the company does not have at least two directors on its board who self-identify in the categories listed above.” In addition, the new Rule 5606 (Board Diversity Disclosure), would require NASDAQ listed companies to provide statistical information related to these rule changes. The NASDAQ report cited the “social justice movement as a reason for encouraging greater commitment to diversity and inclusion by public companies. While the NASDAQ is not the focus of this hearing, it clearly is a barometer of the future as it relates to public companies and the broader issue of corporate diversity and inclusion.

The states led by California are in the forefront of this issue and have undertaken their own initiatives to address corporate diversity and inclusion. Twelve States, including California, Illinois, New York, Washington, Massachusetts, Michigan, Ohio, Hawaii, Pennsylvania, Colorado and Maryland have either enacted legislation or have legislation pending that requires large corporations report their efforts to promote diversity on their boards (See “State Gender Diversity Legislation Status Update, Cogency Global, Joan Helwis, November 6, 2020.) Unconvinced that simply requiring corporations to report their board diversity will improve the situation, Governor Newsome of the State of California recently signed Assembly Bill 979 that mandates publicly held corporations in California “to have at least one director from an under-represented community by 2021. Moreover, by 2022 boards with 4-9 members must have 2 people and boards with more than nine members must have 3 people (See “Newsome signs mandatory diversity in California corporate boardrooms”, *Los Angeles Times*, by Patrick Mc Greevy, September 30, 2020). Newsome said, “the mandate under the bill is necessary to promote diversity in corporate board rooms.” Of course, the State of California and other states will need to collect data to determine the extent to which such measures promote corporate board diversity and inclusion.

In contrast to the California mandate and similar legislation by other states, SB 301 proposes to use the State of Maryland’s massive procurement system to incentivize corporations doing business with the

State to diversify their boards and executive officers. The incentive provision of SB 301 is based on giving corporate bidders whose boards meet designated diversity thresholds a price preference in the bidding process. Maryland Procurement officials must apply a corporate diversity percentage to a responsive bid, if the responsible bidder meets the diversity threshold. The percentage price preference cannot exceed 5 percent. The price preference given bidders whose corporate boards meet certain thresholds is similar to the many existing bid price preference systems used by state and local procurement systems across the nation to incentivize businesses to diversify their subcontractors. As in those bid price preference policies, the goal of SB 301 is to use government tax funded procurement to address a compelling state interest, the redressing of centuries of discrimination in employment and business practices that underly the underrepresentation of minorities and women on corporate boards.

SB 301 represents a proactive approach to achieving greater corporate board diversity and inclusion on the boards of corporations doing business with the State of Maryland. To the extent such businesses are based in Maryland and/or employ Maryland residents, the promotion of corporate board diversity will serve another compelling state interest related to altered corporate employment policies likely to better reflect the diversity of Maryland's population. SB 301 represents the shifting paradigm in social attitudes towards corporate board diversity and inclusion and in the evolving standards related to corporate governance, accountability, and transparency. Thank you.

Gerald D. Jaynes

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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony Regarding SB 301 – Corporations – Board Members
And Executive Officers Diversity – Procurement Preference and Reporting
Before Education, Health and Environmental Affairs Committee
February 3, 2021**

Good afternoon Chairman Pinsky and Committee,

I do not believe that it would be surprising to this body that diversity has traditionally been lacking in the boardrooms of U.S. corporations. A company's board of directors is central to the functioning of the company: making decisions regarding strategies, management, and protecting investors. Research has shown that this lack of diversity on corporate boards has often been to the detriment of the corporation's stakeholders. Diverse candidates are frequently unsuccessful in being included on these boards. Numerous factors like unconscious bias and closed social networks prevent individuals from diverse backgrounds from being appointed.¹ Two years ago this body passed legislation seeking information about board gender diversity. I recall at the time mentioning to the advocate for the bill that I thought that we should also include racial diversity at some point in the near future. SB 301 is my effort to do so.

The purpose of SB 301 is to encourage diversity on corporate boards and front offices so they better represent the diversity of our state's population. Corporations with assets exceeding \$100,000,000 will be required to file an annual report detailing the number of board members who identify as a racial minority, the corporation's process used to identify nominees for its board of directors, and the policies it uses to promote diversity and equity.

By passing SB 301, Maryland will be joining the growing momentum across the country to improve the diversity of corporate boards. For example, last December Nasdaq Stock Market LLC submitted a proposal to the SEC to adopt listing rules related to board diversity. The proposed a new rule that would require NASDAQ listed companies to have at least one board director who identifies as a woman and at least one director who identifies as a racial minority.² California has also passed a law regarding board diversity requiring a minimum number of underrepresented people to serve on corporate boards.³ The distinction between this bill and California's is that this is not a quota nor mandate; instead this is an incentive for these corporations to do right.

¹ Nasdaq Stock Market LLC SEC Filing, 34-35.

² Nasdaq Stock Market LLC SEC Filing, 3.

³ Elana Lyn Gross, "California Lawmakers Approve New Diversity Quotas for Corporate Boards," *Forbes*, Aug. 31, 2020.

Under SB 301, the incentive would be the creation of a diversity percentage price preference for those companies that have diverse boards and officers. SB 301 would require the Board of Public Works to adopt regulations that establish a threshold of demographics for board members and executive officers of a corporation to reflect the racial demographics of the state.

Data shows that diversity on corporate boards creates benefits for companies. Investor confidence increases when boardrooms are comprised of more than one demographic group.⁴ One study showed that companies with the most diverse boards increased their returns on invested capital by 3.3% compared to companies with the least diverse boards.⁵ Another study showed that companies in the highest quartile for racial diversity were 35% more likely to have financial returns above their national industry median.⁶ SB 301 incentivizes corporate boards to do the right thing and reflect the rich diversity of Maryland's citizenry. With that, I ask that this body provide SB301 a favorable report.

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⁴ Nasdaq Stock Market LLC SEC Filing, 5.

⁵ Nasdaq Stock Market LLC SEC Filing, 17.

⁶ Ibid.

OMB APPROVAL

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Page 1 of * 271	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2020 - * 081 Amendment No. (req. for Amendments *)
Filing by The Nasdaq Stock Market LLC Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934		
Initial * <input checked="" type="checkbox"/> Amendment * <input type="checkbox"/> Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/> Section 19(b)(3)(A) * <input type="checkbox"/> Section 19(b)(3)(B) * <input type="checkbox"/>	Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)
Pilot <input type="checkbox"/> Extension of Time Period for Commission Action * <input type="checkbox"/> Date Expires *	Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 Section 806(e)(1) * <input type="checkbox"/> Section 806(e)(2) * <input type="checkbox"/> Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 Section 3C(b)(2) * <input type="checkbox"/>	
Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>	
Description Provide a brief description of the action (limit 250 characters, required when Initial is checked *). <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> A proposal to advance board diversity and enhance transparency of diversity statistics through new proposed listing requirements </div>		
Contact Information Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action. First Name * Jeffrey S. Last Name * Davis Title * Senior Vice President, Senior Deputy General Counsel E-mail * jeffrey.davis@nasdaq.com Telephone * (301) 978-8484 Fax		
Signature Pursuant to the requirements of the Securities Exchange Act of 1934, has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized. <div style="text-align: right;">(Title *)</div> <div style="display: flex; justify-content: space-between; align-items: flex-start;"> <div style="width: 30%;"> Date 12/01/2020 By John Zecca (Name *) </div> <div style="width: 60%; border: 1px solid black; padding: 5px;"> EVP and Chief Legal Counsel <div style="text-align: center; margin-top: 10px;"> </div> </div> </div>		
NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.		

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Form 19b-4 Information *

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (“Act”),¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to adopt listing rules related to board diversity, as described in more detail below:

(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;

(ii) to adopt Rule 5606 (Board Diversity Disclosure), which would require Nasdaq-listed companies, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company’s board of directors related to a director’s self-identified gender, race, and self-identification as LGBTQ+; and

(iii) to update Rule 5615 and IM-5615-3 (Foreign Private Issuers) and Rule 5810(c) (Types of Deficiencies and Notifications) to incorporate references to proposed Rule 5605(f) and Rule 5606; and

(iv) to make certain other non-substantive conforming changes.

¹ 15 U.S.C. § 78s(b)(1).

² 17 C.F.R. § 240.19b-4.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. A proposed Board Diversity Matrix form is attached as Exhibit 3 and the text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on November 5, 2020. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Jeffrey S. Davis
Senior Vice President, Senior Deputy General Counsel
Nasdaq, Inc.
(301) 978-8484

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

I. The Diversity Imperative for Corporate Boards

Over the past year, the social justice movement has brought heightened attention to the commitment of public companies to diversity and inclusion.

Controversies arising from corporate culture and human capital management challenges, as well as technology-driven changes to the business landscape, already underscored the need for enhanced board diversity—diversity in the boardroom is good corporate governance. The benefits to stakeholders of increased diversity are becoming more apparent and include an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls. Nasdaq believes that the

heightened focus on corporate board diversity by companies,³ investors,⁴ corporate governance organizations,⁵ and legislators⁶ demonstrates that investor confidence is enhanced when boardrooms are comprised of more than one demographic group. Nasdaq has also observed recent calls from SEC commissioners⁷ and investors⁸ for companies to provide more transparency regarding board diversity.

³ See Deloitte and the Society for Corporate Governance, *Board Practices Quarterly: Diversity, equity, and inclusion* (Sept. 2020), available at: <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/diversity-equity-and-inclusion.html> (finding, in a survey of over 200 companies, that “most companies and/or their boards have taken, or intend to take, actions in response to recent events surrounding racial inequality and inequity; 71% of public companies and 65% of private companies answered this question affirmatively”).

⁴ See ISS Governance, *2020 Global Benchmark Policy Survey, Summary of Results 6* (Sept. 24, 2020), available at: <https://www.issgovernance.com/wp-content/uploads/publications/2020-iss-policy-survey-results-report-1.pdf> (finding that “a significant majority of investors (61 percent) indicated that boards should aim to reflect the company’s customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups”).

⁵ See International Corporate Governance Network, *ICGN Guidance on Diversity on Boards 5* (2016), available at: <https://www.icgn.org/sites/default/files/ICGN%20Guidance%20on%20Diversity%20on%20Board%20-%20Final.pdf> (“The ICGN believes that diversity is a core attribute of a well-functioning board which supports greater long-term value for shareholders and companies.”).

⁶ See, e.g., John J. Cannon et al., Sherman & Sterling LLP, *Washington State Becomes Next to Mandate Gender Diversity on Boards* (May 28, 2020), available at: <https://www.shearman.com/perspectives/2020/05/washington-state-becomes-next-to-mandate-gender-diversity-on-boards>; Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020) (California legislation requiring companies headquartered in the state to have at least one director who self-identifies as a Female and one from an Underrepresented Community).

⁷ See Commissioner Allison Herren Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), available at: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26#_ftnref15 (“There is ever-growing recognition of the importance of diversity from all types of investors . . . [a]nd large numbers of commenters on this [SEC] rule proposal emphasized the need for specific diversity disclosure requirements.”); see also Commissioner Caroline Crenshaw, *Statement on the “Modernization” of Regulation S-K Items 101, 103, and 105* (August 26, 2020), available at: <https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k> (“As Commissioner Lee noted in her statement, the final [SEC] rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation. The failure to grapple with these issues is, quite simply, a failure to modernize.”); Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), available at: <https://www.sec.gov/news/speech/chair-white-icgn-speech.html> (“Companies’ disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted... Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.”).

Nasdaq conducted an internal study of the current state of board diversity among Nasdaq-listed companies based on public disclosures, and found that while some companies already have made laudable progress in diversifying their boardrooms, the national market system and the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards. It also found that current reporting of board diversity data was not provided in a consistent manner or on a sufficiently widespread basis. As such, investors are not able to readily compare board diversity statistics across companies.

Accordingly, Nasdaq is proposing to require each of its listed companies, subject to certain exceptions, to: (i) provide statistical information regarding diversity among the members of the company’s board of directors under proposed Rule 5606; and (ii) have, or explain why it does not have, at least two “Diverse” directors on its board under proposed rule 5605(f)(2). “Diverse” means a director who self-identifies as: (i) Female, (ii) an Underrepresented Minority, or (iii) LGBTQ+. Each listed company must have, or explain why it does not have, at least one Female director and at least one director who is either an Underrepresented Minority or LGBTQ+. Foreign Issuers (including Foreign Private Issuers) and Smaller Reporting

⁸ See Vanguard, *Investment Stewardship 2019 Annual Report* (2019), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf (“We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis.”); see also State Street Global Advisors, *Diversity Strategy, Goals & Disclosure: Our Expectations for Public Companies* (Aug. 27, 2020) <https://www.ssga.com/us/en/individual/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies> (announcing expectation that State Street’s portfolio companies (including US companies “and, to the greatest extent possible, non-US companies”) provide board level “[d]iversity characteristics, including racial and ethnic makeup, of the board of directors”).

Companies, by contrast, have more flexibility and may satisfy the requirement by having two Female directors. “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth. “Underrepresented Minority” means, consistent with the categories reported to the Equal Employment Opportunity Commission (“EEOC”) through the Employer Information Report EEO-1 Form (“EEO-1 Report”), an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities. “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

Under proposed Rule 5606, Nasdaq proposes to provide each company with one calendar year from the date that the Commission approves this proposal (the “Approval Date”) to comply with the requirement for statistical information regarding diversity. Under proposed Rule 5605(f)(2), no later than two calendar years after the Approval Date, each company must have, or explain why it does not have, one Diverse director. Further, each company must have, or explain why it does not have, two Diverse directors no later than: (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select or Global Market tiers; or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market tier.

Nasdaq undertook extensive research and analysis and has concluded that the proposal will fulfill the objectives of the Act in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to

protect investors and the public interest. In addition to conducting its own internal analysis as described above, Nasdaq reviewed a substantial body of third-party research and interviewed leaders representing a broad spectrum of market participants and other stakeholders to:

- determine whether empirical evidence demonstrates an association between board diversity, shareholder value, investor protection and board decision-making;
- understand investors' interest in, and impediments to obtaining, information regarding the state of board diversity at public companies;
- review the current state of board diversity and disclosure, both among Nasdaq-listed companies and more broadly within the U.S.;
- gain a better understanding of the causes of underrepresentation on boards;
- obtain the views of leaders representing public companies, investment banks, corporate governance organizations, investors, regulators and civil rights groups on the value of more diverse corporate boards, and on various approaches to encouraging more diversity on corporate boards; and
- evaluate the success of approaches taken by exchanges, regulators, and governments in both the U.S. and foreign jurisdictions to remedy underrepresentation on boards.

While gender diversity has improved among U.S. company boards in recent years, the pace of change has been gradual, and the U.S. still lags behind other jurisdictions that have imposed requirements related to board diversity. Moreover, progress toward bringing underrepresented racial and ethnic groups into the boardroom has been even slower. Nasdaq is unable to provide definitive estimates regarding the number of listed companies that will be affected by the proposal due to the inconsistent disclosures and definitions of diversity across companies and the extremely limited disclosure of race and ethnicity information – an information gap the proposed rule addresses. Based on the limited information that is available, Nasdaq believes 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. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. While studies suggest that current candidate selection processes may result in diverse candidates being overlooked, Nasdaq also believes that the lack of reliable and consistent data creates a barrier to measuring and improving diversity in the boardroom.

Nasdaq reviewed dozens of empirical studies and found that an extensive body of academic research demonstrates that diverse boards are positively associated with improved corporate governance and financial performance. For example, as discussed in detail below in *Section II, Academic Research: The Relationship between Diversity and Shareholder Value, Investor Protection and Decision Making*, studies have found that companies with gender-diverse boards or audit committees are associated with: more transparent public disclosures and less information asymmetry; better reporting discipline by management; a lower likelihood of manipulated earnings through earnings management; an increased likelihood of voluntarily disclosing forward-looking information; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a lower likelihood of securities fraud. In addition, studies found that having at least one woman on the board is associated with a lower likelihood of material weaknesses in internal control over financial reporting and a lower likelihood of material financial restatements. Studies also identified positive relationships between board diversity and commonly used financial metrics, including

higher returns on invested capital, returns on equity, earnings per share, earnings before interest and taxation margin, asset valuation multiples and credit ratings.

Nasdaq believes there are additional compelling reasons to support the diversification of company boards beyond a link to improved corporate governance and financial performance:

- Investors are calling in greater numbers for diversification of boardrooms.

Vanguard, State Street Advisors, BlackRock, and the NYC Comptroller's Office include board diversity expectations in their engagement and proxy voting guidelines.⁹ The heightened investor focus on corporate diversity and inclusion efforts demonstrates that investor confidence is undermined when a company's boardroom is homogenous and when transparency about such efforts is lacking. Investors frequently lack access to information about corporate board diversity that could be material to their decision making, and they might divest from companies that fail to take into consideration the demographics of their corporate stakeholders when they refresh their boards. Nasdaq explores these investor

⁹ Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors. See Vanguard, *Investment Stewardship 2020 Annual Report* (2020), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2020_investment_stewardship_annual_report.pdf. Starting in 2020, State Street Global Advisors will vote against the entire nominating committee of companies that do not have at least one woman on their boards and have not addressed questions on gender diversity within the last three years. See State Street Global Advisors, *Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines* (2020), available at: <https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf>. Beginning in 2018, BlackRock stated in proxy voting guidelines they "would normally expect to see at least 2 women directors on every board." See BlackRock Investment Stewardship, *Corporate governance and proxy voting guidelines for U.S. securities* (Jan. 2020), available at: <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>. The NYC Comptroller's Office in 2019 asked companies to adopt policies to ensure women and people of color are on the initial list for every open board seat. See Scott M. Stringer, *Remarks at the Bureau of Asset Management 'Emerging Managers and MWBE Managers Conference* (Oct. 11, 2019), available at: https://comptroller.nyc.gov/wp-content/uploads/2019/10/10.11.19-SMS-BAM-remarks_distro.pdf.

sentiments in *Section III, Current State of Board Diversity and Causes of Underrepresentation on Boards*.

- Nasdaq believes, consistent with SEC disclosure requirements in other contexts,¹⁰ that management’s vision on key issues impacting the company should be communicated with investors in a clear and straightforward manner. Indeed, transparency is the bedrock of federal securities laws regarding disclosure, and this sentiment is reflected in the broad-based support for uniform disclosure requirements regarding board diversity that Nasdaq observed during the course of its outreach to the industry. In addition, organizational leaders representing every category of corporate stakeholders Nasdaq spoke with (including business, investor, governance, regulatory and civil rights communities) were overwhelmingly in favor of diversifying boardrooms. Nasdaq summarizes the findings of its stakeholder outreach in *Section IV, Stakeholder Perspectives*.
- Legislators at the federal and state level increasingly are taking action to encourage or mandate corporations to diversify their boards and improve diversity disclosures. Congress currently is considering legislation requiring each SEC-registered company to provide board diversity statistics and disclose whether it has a board diversity policy. To date, eleven states have passed or proposed

¹⁰ See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056 (Dec. 29, 2003) (“We believe that management’s most important responsibilities include communicating with investors in a clear and straightforward manner. MD&A is a critical component of that communication. The Commission has long sought through its rules, enforcement actions and interpretive processes to elicit MD&A that not only meets technical disclosure requirements but generally is informative and transparent.”); see also Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890 (Nov. 19, 2020) (citing the 2003 MD&A Interpretative Release and stating that the purpose of the MD&A section is to enable investors to see a company “through the eyes of management”).

legislation related to board diversity.¹¹ SEC regulations require companies to disclose whether diversity is considered when identifying director nominees and, if so, how. Nasdaq explores various state and federal initiatives in *Section V, U.S. Regulatory Framework and Section VI, Nasdaq Proposal*.

In considering the merits and shaping the substance of the proposed listing rule, Nasdaq also sought and received valuable input from corporate stakeholders. During those discussions, Nasdaq found consensus across every constituency in the inherent value of board diversity. Business leaders also expressed concern that companies – and particularly smaller companies – would prefer an approach that allows flexibility to comply in a manner that fits their unique circumstances and stakeholders. Nasdaq recognizes that the operations, size, and current board composition of each Nasdaq-listed company are unique, and Nasdaq therefore endeavored to provide a regulatory impetus to enhance board diversity that balances the need for flexibility with each company’s particular circumstances.

The Exchange also considered the experience of its parent company, Nasdaq, Inc., as a public company.¹² In 2002, Nasdaq, Inc. met the milestone of welcoming its first woman, Mary Jo White, who later served as SEC Chair, to its board of directors. In her own words, “I was the first and only woman to serve on the board when I started, but,

¹¹ See Michael Hatcher and Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!*, Harv. L. Sch. Forum on Corp. Governance (May 12, 2020), available at: <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/>.

¹² While the Exchange recognizes that it is only one part of an ecosystem in which multiple stakeholders are advocating for board diversity, that part is meaningful: the United Nations Sustainable Stock Exchanges Initiative, of which Nasdaq, Inc., is an official supporter, recognized that “[s]tock exchanges are uniquely positioned to influence their market in a way few other actors can.” See United Nations Sustainable Stock Exchanges Initiative, *How Stock Exchanges Can Advance Gender Equality 2* (2017), available at: <https://sseinitiative.org/wp-content/uploads/2019/12/How-stock-exchanges-can-advance-gender-equality.pdf>.

happily, I was joined by another woman during my tenure...And then there were two. Not enough, but better than one.”¹³ In 2019, Nasdaq, Inc. also welcomed its first Black director. As a Charter Pledge Partner of The Board Challenge, Nasdaq supports The Board Challenge’s goal of “true and full representation on all boards of directors.”¹⁴

As a self-regulatory organization, Nasdaq also is cognizant of its role in advancing diversity within the financial industry, as outlined in the Commission’s diversity standards issued pursuant to Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Standards”).¹⁵ Authored jointly by the Commission and five other financial regulators, the Standards seek to provide a framework for exchanges and financial services organizations “to create and strengthen [their] diversity policies and practices.” Through these voluntary Standards, the Commission and other regulators “encourage each entity to use the[] Standards in a manner appropriate to its unique characteristics.”¹⁶ To that end, the proposed rule leverages the Exchange’s unique ability to influence corporate governance in furtherance of the goal of Section 342, which is to address the lack of diversity in the financial services industry.¹⁷ Finally, while the Exchange recognizes the importance of maximizing shareholder value, its role as a listing venue is to establish and enforce

¹³ See Mary Jo White, *Completing the Journey: Women as Directors of Public Companies* (Sept. 16, 2014), available at: <https://www.sec.gov/news/speech/2014-spch091614-mjw#.VBiLMhaaXDo>.

¹⁴ See The Board Challenge, <https://theboardchallenge.org/>. See also Nasdaq, Inc., *Notice of 2020 Annual Meeting of Shareholders and Proxy Statement* 52 (Mar. 31, 2020), available at: <https://ir.nasdaq.com/static-files/ce5519d4-3a0b-48ac-8441-5376ccbad4e5> (Nasdaq, Inc. believes that “[d]iverse backgrounds lead to diverse perspectives. We are committed to ensuring diverse backgrounds are represented on our board and throughout our organization to further the success of our business and best serve the diverse communities in which we operate.”).

¹⁵ See Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016 (June 10, 2015).

¹⁶ *Id.* at 33,023.

¹⁷ 156 Cong. Rec. H5233-61 (June 30, 2010).

substantive standards that promote investor protection. As a self-regulatory organization, the Exchange must demonstrate to the Commission that any proposed rule is consistent with Section 6(b) of the Act because, among other things, it is designed to protect investors, promote the public interest, prevent fraudulent and manipulative acts and practices, and remove impediments to the mechanism of a free and open market. The Exchange must also balance promoting capital formation, efficiency, and competition, among other things, alongside enhancing investor confidence.

With these objectives in mind, Nasdaq believes that a listing rule designed to enhance transparency related to board diversity will increase consistency and comparability of information across Nasdaq-listed companies, thereby increasing transparency and decreasing information collection costs. Nasdaq further believes that a listing rule designed to encourage listed companies to increase diverse representation on their boards will result in improved corporate governance, thus strengthening the integrity of the market, enhancing capital formation, efficiency, and competition, and building investor confidence. To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional transparency through disclosure explaining the company's reasons for not doing so. For example, the company may choose to disclose that it does not meet the diversity objectives of Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to meet that standard instead, or has a board philosophy regarding diversity that differs from the diversity objectives set forth in Rule 5605(f)(2). Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make

informed investment and voting decisions, thereby promoting capital formation and efficiency.

Nasdaq observed that studies suggest that certain groups may be underrepresented on boards because the traditional director nomination process is limited by directors looking within their own social networks for candidates with previous C-suite experience.¹⁸ Leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand. In order to assist companies that strive to meet the diversity objectives of Rule 5605(f)(2), Nasdaq is proposing to provide listed companies that have not yet met its diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment. Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of such services. Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

II. Academic Research: The Relationship between Diversity and Shareholder Value, Investor Protection and Decision Making

A company's board of directors plays a critical role in formulating company strategy; appointing, advising and overseeing management; and protecting investors.

¹⁸ See infra Section III.

Nasdaq has recognized the importance of varied perspectives on boards since 2003, when the Exchange adopted a listing rule intended to enhance investor confidence by requiring listed companies, subject to certain exceptions and cure periods, to have a majority independent board.¹⁹ Accompanying the rule are interpretive materials recognizing that independent directors “play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to *maximize shareholder value* in the Companies they oversee and guard against conflicts of interest.”²⁰

a. Diversity and Shareholder Value

There is a significant body of research suggesting a positive association between diversity and shareholder value.²¹ In the words of SEC Commissioner Allison Herren Lee: “to the extent one seeks economic support for diversity and inclusion (instead of requiring economic support for the lack of diversity and exclusion), the evidence is in.”²²

The Carlyle Group (2020) found that its portfolio companies with two or more diverse directors had average earnings growth of 12.3% over the previous three years, compared to 0.5% among portfolio companies with no diverse directors, where diverse

¹⁹ See Nasdaq Stock Market Rulebook, Rules 5605(b), 5615(a), and 5605(b)(1)(A).

²⁰ Id., IM-5605-1 (emphasis added).

²¹ Some companies recently have expressed the belief that a company must consider the impact of its activities on a broader group of stakeholders beyond shareholders. See Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at: <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf>. Commentators articulated this view as early as 1932. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1153 (1932).

²² See Commissioner Allison Herren Lee, *Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference* (September 22, 2020), available at: <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922>.

directors were defined as female, Black, Hispanic or Asian.²³ “After controlling for industry, fund, and vintage year, companies with diverse boards generate earnings growth that’s five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth.”²⁴

Several other studies also found a positive association between diverse boards and company performance. FCLTGlobal (2019) found that “the most diverse boards (top 20 percent) added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers (bottom 20 percent).”²⁵ McKinsey (2015) found that “companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial returns above their national industry median.”²⁶ Carter, Simkins and Simpson (2003) found among Fortune 1000 companies “statistically significant positive relationships between the presence of women or minorities on the board and firm value.”²⁷ Bernile, Bhagwat and Yonker (2017) found that greater diversity on boards—including gender, ethnicity, educational background, age, financial expertise and board experience—is

²³ See Jason M. Thomas and Megan Starr, The Carlyle Group, *Global Insights: From Impact Investing to Investing for Impact 5* (Feb. 24, 2020), available at: https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf (analyzing Carlyle U.S. portfolio company data, February 2020).

²⁴ Id.

²⁵ See FCLTGlobal, *The Long-term Habits of a Highly Effective Corporate Board* 11 (March 2019), available at: <https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effective-corporate-boards.pdf> (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data).

²⁶ See Vivian Hunt et al., McKinsey & Company, *Diversity Matters* (February 2, 2015), available at: <https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/why%20diversity%20matters/diversity%20matters.pdf> (analyzing 366 public companies in the United Kingdom, Canada, the United States, and Latin America in industries for the years 2010 to 2013, using the ethnic and racial categories African ancestry, European ancestry, Near Eastern, East Asian, South Asian, Latino, Native American, and other).

²⁷ See David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*. 38(1) Fin. Rev. 33 (analyzing 638 Fortune 1000 firms in 1997, measuring firm value by Tobin’s Q, with board diversity defined as the percentage of women, African Americans, Asians and Hispanics on the board of directors).

associated with increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, increased dividend payouts to shareholders, higher investment in R&D and better innovation.²⁸ The authors observed that “[t]his is in line with the results in Carter, Simkins, and Simpson (2003), which show a positive association between local demographic diversity and firm value.”²⁹

Several studies have found a positive association between gender diversity and financial performance. Credit Suisse (2014) found companies with at least one woman on the board had an average sector-adjusted return on equity (“ROE”) of 12.2%, compared to 10.1% for companies with no female directors, and average sector-adjusted ROEs of 14.1% and 11.2%, respectively, for the previous nine years.³⁰ MSCI (2016) found that U.S. companies with at least three women on the board in 2011 experienced median gains in ROE of 10% and earnings per share (“EPS”) of 37% over a five year period, whereas companies that had no female directors in 2011 showed median changes of -1% in ROE and -8% in EPS over the same five-year period.³¹ Catalyst (2011) found that the ROE of Fortune 500 companies with at least three women on the board (in at least four of five years) was 46% higher than companies with no women on the board,

²⁸ See Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies* (March 6, 2017), available at: <https://ssrn.com/abstract=2733394> (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat and CRSP databases).

²⁹ *Id.* at 32.

³⁰ See Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), available at: <https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/the-cs-gender-3000-women-in-senior-management.pdf> (analyzing 3,000 companies across 40 countries from the period from 2005 to 2013).

³¹ See Meggin Thwing Eastman et al., MSCI, *The tipping point: Women on boards and financial performance* 3 (December 2016), available at: <https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb> (analyzing of U.S. companies that were constituents of the MSCI World Index for the entire period from July 1, 2011 to June 30, 2016).

and return on sales and return on invested capital was 84% and 60% higher, respectively.³²

Credit Suisse (2016) found an association between LGBTQ+ diversity and stock performance, finding that a basket of 270 companies “supporting and embracing LGBT employees” outperformed the MSCI ACWI index by an average of 3.0% per year over the past 6 years.³³ Further, “[a]gainst a custom basket of companies in North America, Europe and Australia, the LGBT 270 has outperformed by 140 bps annually.”³⁴ Nasdaq acknowledges that this study focused on LGBTQ+ employees as opposed to directors, and that there is a lack of published research on the issue of LGBTQ+ representation on boards. However, Out Leadership (2019) suggests that the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity:

While the precise reason for the positive correlation between gender diversity and better corporate performance is unknown, many of the reasons that gender diversity is considered beneficial are also applicable to LGBT+ diversity. LGBT+ diversity in the boardroom may create a dynamic that enables better decisionmaking, and it brings to the boardroom the perspective of a community that is a critical component of the company’s consumer population and organizational talent.³⁵

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- ³² See Harvey M. Wagner, Catalyst, *The Bottom Line: Corporate Performance and Women’s Representation on Boards (2004–2008)* (March 1, 2011), available at: <https://www.catalyst.org/research/the-bottom-line-corporate-performance-and-womens-representation-on-boards-2004-2008/> (analyzing gender diversity data from Catalyst’s annual Fortune 500 Census of Women Board Directors report series for the years 2005 to 2009, and corresponding financial data from S&P’s Compustat database for the years 2004 to 2008).
- ³³ See Credit Suisse ESG Research, *LGBT: the value of diversity 1* (April 15, 2016), available at: https://research-doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=807075590&extdocid=807075590_1_eng_pdf&serialid=evu4wNcHexx7kusNLazQphUkT9naxi1PvpzZQvPjr1k%3d.
- ³⁴ Id.
- ³⁵ See Quorum, *Out Leadership’s LGBT+ Board Diversity and Disclosure Guidelines 3* (2019), available at: <https://outleadership.com/content/uploads/2019/01/OL-LGBT-Board-Diversity-Guidelines.pdf>.

McKinsey (2020) found “a positive, statistically significant correlation between company financial outperformance and [board] diversity, on the dimensions of both gender and ethnicity,” with companies in the top quartile for board gender diversity “28 percent more likely than their peers to outperform financially,” and a statistically significant correlation between board gender diversity and outperformance on earnings before interest and taxation margin.³⁶ Moody’s (2019) found that greater board gender diversity is associated with higher credit ratings, with women accounting for an average of 28% of board seats at Aaa-rated companies but less than 5% of board seats at Ca-rated companies.³⁷

While the overwhelming majority of studies on the association between economic performance and board diversity, including gender diversity, present a compelling case that board diversity is positively associated with financial performance, the results of some other studies on gender diversity are mixed. For example, Pletzer et al. (2015) found that board gender diversity alone has a “small and non-significant” relationship with a company’s financial performance.³⁸ Post and Byron (2014) found a “near zero” relationship with a company’s market performance, but a positive relationship with a

³⁶ See McKinsey & Company, *Diversity wins: How inclusion matters* 13 (May 2020), available at: <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf> (analyzing 1,039 companies across 15 countries for the period from December 2018 to November 2019).

³⁷ See Moody’s Investors Service, *Gender diversity is correlated with higher ratings, but mandates pose short-term risk* 2 (Sept. 11, 2019), available at: https://www.moody.com/research/Moodys-Corporate-board-gender-diversity-associated-with-higher-credit-ratings--PBC_1193768 (analyzing 1,109 publicly traded North American companies rated by Moody’s).

³⁸ See Jan Luca Pletzer et al., *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance – A Meta-Analysis* 1, PLOS One (June 18, 2015); see also Alice H. Eagly (2016), *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. Social Issues 199 (2016), available at <https://doi.org/10.1111/josi.12163> (concluding that the “research findings are mixed, and repeated meta-analyses have yielded average correlational findings that are null or extremely small” with respect to board gender diversity and company performance).

company's accounting returns.³⁹ Carter, D'Souza, Simkins and Simpson (2010) found that "[w]hen Tobin's Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity, neither positive nor negative."⁴⁰ A study conducted by Campbell and Minguez-Vera (2007) "suggests, at a minimum, that increased gender diversity can be achieved without destroying shareholder value."⁴¹ Adams and Ferreira (2009) found that "gender diversity has beneficial effects in companies with weak shareholder rights, where additional board monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights."⁴² Carter et al. (2010)⁴³ and the U.S. Government Accountability Office ("GAO") (2015)⁴⁴ concluded that the mixed nature of various academic studies may be due to differences in methodologies, data samples and time periods.

³⁹ See Corinne Post and Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis* 1 (2014). In 2016, the same authors, based on a review of the results for 87 studies, "found that board gender diversity is weakly but significantly positively correlated with [corporate social responsibility]," although they noted that "a significant correlational relationship does not prove causality." See Corinne Post and Kris Byron, *Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis*, 24(4) Corp. Governance: An Int'l Rev. 428 (July 2016), available at <http://dx.doi.org/10.1111/corg.12165>.

⁴⁰ See David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18(5) Corp. Governance 396, 410 (2010) (analysis of 541 S&P 500 companies for the years 1998-2002).

⁴¹ See Kevin Campbell and Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83(3) J. Bus. Ethics 13 (Feb. 2008) (analyzing 68 non-financial companies listed on the continuous market in Madrid during the period from January 1995 to December 2000, measuring firm value by an approximation of Tobin's Q defined as the sum of the market value of stock and the book value of debt divided by the book value of total assets).

⁴² See Renee B. Adams and Daniel Ferreira, *Women in the boardroom and their impact on governance and performance*, 94 J. Fin. Econ. 291 (2009) (analyzing 1,939 S&P 500, S&P MidCaps, and S&P SmallCap companies for the period 1996 to 2003, measuring company performance by a proxy for Tobin's Q (the ratio of market value to book value) and return on assets).

⁴³ See Carter et al., *supra* note 40, at 400 (observing that the different "statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.").

⁴⁴ See United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements* 5 (Dec. 2015) (the "GAO

While there are studies drawing different conclusions, Nasdaq believes that there is a compelling body of credible research on the association between economic performance and board diversity. At a minimum, Nasdaq believes that the academic studies support the conclusion that board diversity does not have adverse effects on company financial performance. This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are a sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the varying findings of studies at the time regarding the relationship between company performance and board independence,⁴⁵ Nasdaq adopted listing rules requiring a majority independent board that were “intended to enhance investor confidence in the companies that list on Nasdaq.”⁴⁶ In its Approval Order, the SEC stated that “[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets.”⁴⁷

Report”), available at: <https://www.gao.gov/assets/680/674008.pdf> (“Some research has found that gender diverse boards may have a positive impact on a company’s financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used”).

⁴⁵ See, e.g., Benjamin E. Hermalin and Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance*, 20 Fin. Mgmt. 101, 111 (1991) (finding that “there appears to be no relation between board composition and performance”); Sanjai Bhagat and Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54(3) Bus. Law. 921, 950 (1999) (“At the very least, there is no convincing evidence that increasing board independence, relative to the norms that currently prevail among large American firms, will improve firm performance. And there is some evidence suggesting the opposite—that firms with supermajority-independent boards perform worse than other firms, and that firms with more inside than independent directors perform about as well as firms with majority- (but not supermajority-) independent boards.”).

⁴⁶ See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,161 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

⁴⁷ *Id.* at 64,176.

Along the same lines, even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards. Therefore, Nasdaq believes that the proposal will enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two Diverse directors on their boards or by explaining their rationale for not meeting that objective. Further, Nasdaq believes that the proposal is consistent with the Act because it will not negatively impact capital formation, competition or efficiency among its public companies, and will promote investor protection and the public interest.⁴⁸

b. Diversity and Investor Protection

There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures and management oversight. In reaching this conclusion, Nasdaq evaluated the results of more than a dozen studies spanning more than two decades that found a positive association between gender diversity and important investor protections, and the assertions by some academics that such findings may extend to other forms of diversity, including racial and ethnic diversity. The findings of the studies reviewed by Nasdaq are summarized below.

⁴⁸ See also Lee, supra note 22 (“I could never quite buy in to the view that some 40 percent of the population in our country (if we’re talking about minorities) or over half the country (if we’re talking about women) must rationalize their inclusion in corporate boardrooms and elsewhere in economic terms instead of the reverse. How can one possibly justify—in economic terms—the systematic exclusion of a major portion of our talent base from the corporate pool?”).

Adams and Ferreira (2009) found that women are “more likely to sit on” the audit committee,⁴⁹ and a subsequent study by Srinidhi, Gul and Tsui (2011) found that companies with women on the audit committee are associated with “higher earnings quality” and “better reporting discipline by managers,”⁵⁰ leading the authors to conclude that “including female directors on the board and the audit committee are plausible ways of improving the firm’s reporting discipline and increasing investor confidence in financial statements.”⁵¹

A study conducted in 2016 by Pucheta-Martínez et al. concluded that gender diversity on the audit committee “improves the quality of financial information.”⁵² They found that “the percentage of females on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,”⁵³ and found a positive association between gender diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender diverse audit committees “ensure that managers do not seek to pressure auditors into issuing a

⁴⁹ See Adams and Ferreira, *supra* note 42, at 292.

⁵⁰ See Bin Srinidhi et al., *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610, 1612-16 (Winter 2011) (analyzing 3,132 firm years during the period from 2001 to 2007 based on S&P COMPUSTAT, Corporate Library’s Board Analyst, and IRRC databases; “choos[ing] the accruals quality as the metric that best reflects the ability of current earnings to reflect future cash flows” (noting that it “best predicts the incidence and magnitude of fraud relative to other commonly used measures of earnings quality”) and analyzing surprise earnings results that exceeded previous earnings or analyst forecasts, because “managers of firms whose unmanaged earnings fall marginally below the benchmarks have [an] incentive to manage earnings upwards so as to meet or beat previous earnings”).

⁵¹ *Id.* at 1612.

⁵² See Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information*, 25(4) Bus. Ethics: A European Rev. 363, 378 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004-2011).

⁵³ *Id.* at 363.

clean opinion instead of a qualified opinion” when any uncertainties or scope limitations are identified.⁵⁴

More recently, a study by Gull in 2018 found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management,⁵⁵ and a study conducted in 2019 by Bravo and Alcaide-Ruiz found a positive association between women on the audit committee with financial or accounting expertise and the voluntary disclosure of forward-looking information.⁵⁶ Bravo and Alcaide-Ruiz concluded that “female [audit committee] members with financial expertise play an important role in influencing disclosure strategies that provide forward-looking information containing projections and financial data useful for investors.”⁵⁷

While the above studies demonstrate a positive association between gender diverse audit committees and the quality of a company’s earnings, financial information and public disclosures, other studies found a positive association between board gender diversity and important investor protections regardless of whether or not women are on the audit committee.

⁵⁴ Id. at 368.

⁵⁵ See Ammar Gull et al., *Beyond gender diversity: How specific attributes of female directors affect earnings management*, 50(3) British Acct. Rev. 255 (Sept. 2017), available at: <https://ideas.repec.org/a/eee/bracre/v50y2018i3p255-274.html> (analyzing 394 French companies belonging to the CAC All-Shares index listed on Euronext Paris from 2001 to 2010, prior to the implementation of France’s gender mandate law that required women to comprise 20% of a company’s board of directors by 2014 and 40% by 2016).

⁵⁶ See Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140, 142-44 (2019) (analyzing companies included in the S&P 100 Index in 2016, “focus[ing] on the disclosure of financial forward-looking information (which is likely to require financial expertise), such as earnings forecasts, expected revenues, anticipated cash flows or any other financial indicator”).

⁵⁷ Id. at 150.

Abbott, Parker & Persley (2012) found, within a sample of non-Fortune 1000 companies, “a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement.”⁵⁸ Their findings are consistent with a subsequent study by Wahid (2017), which concluded that “gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud.”⁵⁹ Specifically, companies with female directors have “fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation.”⁶⁰ Wahid suggested that the implications of her study extend beyond gender diversity:

If you’re going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds . . . [and] [i]f we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.⁶¹

Cumming, Leung and Rui (2015) also examined the relationship between gender diversity and fraud, and found that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found “strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud

⁵⁸ See Lawrence J. Abbott et al., *Female Board Presence and the Likelihood of Financial Restatement*, 26(4) Accounting Horizons 607, 626 (2012) (analyzing a sample of 278 pre-SOX annual financial restatements and 187 pre-SOX quarterly financial restatements of U.S. companies from January 1, 1997 through June 30, 2002 identified by the U.S. General Accounting Office restatement report 03-138 (which only included “material misstatements of financial results”), and 75 post-SOX annual financial restatements from July 1, 2002, to September 30, 2005 identified by U.S. General Accounting Office restatement report 06-678 (which only included “restatements that were being made to correct material misstatements of previously reported financial information”), consisting almost exclusively of non-Fortune 1000 companies).

⁵⁹ See Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, J. Bus. Ethics (forthcoming) (Dec. 2017) Rotman School of Management Working Paper No. 2930132 at 1, available at: <https://ssrn.com/abstract=2930132> (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations).

⁶⁰ *Id.* at 23.

⁶¹ See Barbara Shecter, *Diverse boards tied to fewer financial ‘irregularities,’ Canadian study finds*, Financial Post (Feb. 5, 2020), <https://business.financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds> (last accessed Nov. 27, 2020).

sample.”⁶² The authors suggested that “other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud.”⁶³

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced weaknesses in internal control over financial reporting, noting that “prior literature has established a negative relationship between internal control weaknesses and earnings quality.”⁶⁴ The authors found that having at least one woman on the board (regardless of whether or not she is on the audit committee) “may lead to [a] reduced likelihood of material weaknesses [in internal control over financial reporting].”⁶⁵

Board gender diversity also was found to be positively associated with more transparent public disclosures. Gul, Srinidhi & Ng (2011) concluded that “gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms.”⁶⁶ Abad et al. (2017) concluded that companies with gender diverse boards are

⁶² See Douglas J. Cumming et al., *Gender Diversity and Securities Fraud*, Academy of Management Journal 34 (forthcoming) (Feb. 2, 2015), available at <https://ssrn.com/abstract=2562399> (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud, and 742 non-fraudulent companies for a control group).

⁶³ *Id.* at 33.

⁶⁴ See Yu Chen et al., *Board Gender Diversity and Internal Control Weaknesses*, 33 Advances in Acct. 11 (2016) (analyzing a sample of 4267 firm-year observations during the period from 2004 to 2013, beginning “the first year internal control weaknesses were required to be disclosed under section 404 of SOX”).

⁶⁵ *Id.* at 18.

⁶⁶ See Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?*, 51(3) J. Acct. & Econ. 314 (April 2011) (analyzing 4,084 firm years during the period from 2002 to 2007, excluding companies in the utilities and financial industries, measuring public information disclosure using “voluntary continuous disclosure of ‘other’ events in 8K reports” and measuring stock price informativeness by “idiosyncratic volatility,” or volatility that cannot be explained to systematic factors and can be diversified away).

associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with “reducing the risk of informed trading and enhancing stock liquidity.”⁶⁷

Other studies have found that diverse boards are better at overseeing management. Adams and Ferreira (2009) found “direct evidence that more diverse boards are more likely to hold CEOs accountable for poor stock price performance; CEO turnover is more sensitive to stock return performance in firms with relatively more women on boards.”⁶⁸ Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,⁶⁹ which may be an effective mechanism to deter opportunistic behavior by management and align their interests with shareholders.⁷⁰ A lack of diversity has been found to have the opposite effect. Westphal and Zajac (1995) found that “increased demographic similarity between CEOs and the board is likely to result in more generous CEO compensation contracts.”⁷¹

c. Diversity and Decision Making

Wahid (2017) suggests that “at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards’ ability to monitor firm management.”⁷² Nasdaq reviewed studies suggesting that

⁶⁷ See David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192, 202 (July 2017) (analyzing 531 company-year observations from 2004 to 2009 of non-financial companies traded on the electronic trading platform of the Spanish Stock Exchange (SIBE)).

⁶⁸ See Adams and Ferreira, supra note 42, at 292.

⁶⁹ See Maria Encarnacion Lucas-Perez et al., *Women on the Board and Managers’ Pay: Evidence from Spain*, 129 J. Bus. Ethics 285 (April 2014).

⁷⁰ Id.

⁷¹ See James D. Westphal and Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40(1) Admin. Sci. Q. 60, 77 (March 1995).

⁷² See Wahid, supra note 59, at 5.

board diversity can indeed enhance a company's ability to monitor management by reducing "groupthink" and improving decision making.

In 2009, the Commission, in adopting rules requiring proxy disclosure describing whether a company considers diversity in identifying director nominees, recognized the impact of diversity on decision making and corporate governance:

A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board's decision making process by encouraging consideration of a broader range of views.⁷³

Nasdaq agrees with the Commission's suggestion that board diversity improves board quality, governance and decision making. Nasdaq is concerned that boards lacking diversity can inadvertently suffer from "groupthink," which is "a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members."⁷⁴ The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis, after which the IMF's Independent Evaluation Office concluded that "[t]he IMF's ability to correctly identify the mounting risks [as the crisis developed] was hindered by a high

⁷³ See Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009).

⁷⁴ See Daniel P. Forbes and Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24(3) Acad. Mgmt. Rev. 489, 496 (Jul. 1999).

degree of groupthink.”⁷⁵

Other studies suggest that increased diversity reduces groupthink and leads to robust dialogue and better decision making. Dallas (2002) observed that “heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.”⁷⁶ Bernile et al. (2017) found that “diversity in the board of directors reduces stock return volatility, which is consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with ‘groupthink.’”⁷⁷ Dhir (2015) concluded that gender diversity may “promote cognitive diversity and constructive conflict in the boardroom.”⁷⁸ After interviewing 23 directors about their experience with Norway’s board gender mandate, he observed:

First, many respondents contended that gender diversity promotes enhanced dialogue. Interviewees frequently spoke of their belief that heterogeneity has resulted in: (1) higher quality boardroom discussions; (2) broader discussions that consider a wide range of angles or viewpoints; (3) deeper or more thorough discussions; (4) more frequent and lengthier discussions; (5) better informed discussions; (6) discussions that are more frequently brought inside the boardroom (as opposed to being held in spaces outside the boardroom, either exclusively or in addition to inside the boardroom); or (7) discussions in which items that directors previously took for granted are drawn out and addressed—where the implicit becomes explicit. Second, and intimately related, many

⁷⁵ See International Monetary Fund, *IMF Performance in the Run-Up to the Financial and Economic Crisis* (August 2011), available at: <https://www.elibrary.imf.org/view/IMF017/11570-9781616350789/11570-9781616350789/ch04.xml?language=en&redirect=true> (“The evaluation found that incentives were not well aligned to foster the candid exchange of ideas that is needed for good surveillance—many staff reported concerns about the consequences of expressing views contrary to those of supervisors, [m]anagement, and country authorities.”).

⁷⁶ See Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1391 (June 2002).

⁷⁷ See Bernile et al., *supra* note 28, at 38.

⁷⁸ See Aaron A. Dhir, CHALLENGING BOARDROOM DIVERSITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 150 (2015) (emphasis removed) (sample included 23 directors of Norwegian corporate boards, representing an aggregate of 95 board appointments at more than 70 corporations).

interviewees indicated that diversification has led to (or has the potential to lead to) better decision making processes and/or final decisions.⁷⁹

Investors also have emphasized the importance of diversity in decision making.

A group of institutional investors charged with overseeing state investments and the retirement savings of public employees asserted that “board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity.”⁸⁰

Nasdaq believes that cognitive diversity is particularly important on boards because in their advisory role, especially related to corporate strategy, “the ‘output’ that boards produce is entirely cognitive in nature.”⁸¹ While in 1999, Forbes and Milliken characterized boards as “large, elite, and episodic decision making groups that face complex tasks pertaining to strategic-issue processing,”⁸² over the past two decades, their role has evolved; boards are now more active, frequent advisors on areas such as cybersecurity, social media, and environmental, social and governance (“ESG”) issues such as climate change and racial and gender inequality. Nasdaq believes that boards comprised of directors from diverse backgrounds enhance investor confidence by ensuring that board deliberations include the perspectives of more than one demographic group, leading to more robust dialogue and better decision making.

III. Current State of Board Diversity and Causes of Underrepresentation on Boards

⁷⁹ Id. at 124 (emphasis removed).

⁸⁰ See Petition for Amendment of Proxy Rule (March 31, 2015), available at: <https://www.sec.gov/rules/petitions/2015/petn4-682.pdf>.

⁸¹ See Forbes and Milliken, supra note 74, at 492.

⁸² Id.

While the above studies suggest a positive association between board diversity, company performance, investor protections, and decision making, there is a noticeable lack of diversity among U.S. public companies. Nasdaq is a global organization and operates in many countries around the world that already have implemented diversity-focused directives. In fact, Nasdaq-listed companies in Europe already are subject to diversity requirements.⁸³ This first-hand experience provides Nasdaq with a unique perspective to incorporate global best practices into its proposal to advance diversity on U.S. corporate boards. Given that the U.S. ranks 53rd in board gender diversity, according to the World Economic Forum in its 2020 Global Gender Gap Report, Nasdaq believes advancing board diversity in the U.S. is a critical business and market imperative. This same report also found that “American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women.”⁸⁴ As of 2019, women directors held 19% of Russell 3000 seats (up from 16% in 2018).⁸⁵ In comparison, women hold more than 30% of board seats in Norway,

⁸³ On Nasdaq’s Nordic and Baltic exchanges, large companies must comply with EU Directive 2014/95/EU (the “EU Directive”), as implemented by each member state, which requires companies to disclose a board diversity policy with measurable objectives (including gender), or explain why they do not have such a policy. On Nasdaq Vilnius, companies are also required to comply with the Nasdaq Corporate Governance Code for Listed Companies or explain why they do not, which requires companies to consider diversity and seek gender equality on the board. Similarly, on Nasdaq Copenhagen, companies are required to comply with the Danish Corporate Governance Recommendations or explain why they do not, which requires companies to adopt and disclose a diversity policy that considers gender, age and international experience. On Nasdaq Iceland, listed companies must have at least 40% women on their board (a government requirement) and comply with the EU Directive.

⁸⁴ See World Economic Forum, *Global Gender Gap Report 2020* 33 (2019), available at: http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

⁸⁵ See Kosmas Papadopoulos, ISS Analytics, *U.S. Board Diversity Trends in 2019* 4-5 (May 31, 2019), available at: https://www.issgovernance.com/file/publications/ISS_US-Board-Diversity-Trends-2019.pdf.

France, Sweden and Finland.⁸⁶ At the current pace, the U.S. GAO estimates that it could take up to 34 years for U.S. companies to achieve gender parity on their boards.⁸⁷

Progress toward greater racial and ethnic diversity in U.S. company boardrooms has been even slower. Over the past ten years, the percentage of African American/Black directors at Fortune 500 companies has remained between 7 and 9%, while the percentage of women directors has grown from 16 to 23%.⁸⁸ In 2019, only 10% of board seats at Russell 3000 companies were held by racial minorities, reflecting an incremental increase from 8% in 2008.⁸⁹ Among Fortune 500 companies in 2018, there were fewer than 20 directors who publicly self-identified as LGBT+, and only nine companies reported considering sexual orientation and/or gender identity when identifying director nominees.⁹⁰

Women and minority directors combined accounted for 34% of Fortune 500 board seats in 2018.⁹¹ While women of color represent 18% of the U.S. population, they held only 4.6% of Fortune 500 board seats in 2018.⁹² Male underrepresented minorities held 11.5% of board seats at Fortune 500 companies in 2018, compared to 66% of board seats held by Caucasian/White men. Overall in 2018, 83.9% of board seats among

⁸⁶ See Deloitte, *Women in the Boardroom: A global perspective* (6th ed. 2019), available at: <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-the-boardroom-sixth-edition.pdf>.

⁸⁷ See GAO Report, *supra* note 44.

⁸⁸ See Russell Reynolds, *Ethnic & Gender Diversity on US Public Company Boards* 6 (September 8, 2020).

⁸⁹ See Papadopoulos, *supra* note 85, at 5.

⁹⁰ See Out Leadership, *supra* note 35.

⁹¹ See Deloitte, *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards* 9 (2018), available at: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf>.

⁹² See Catalyst, *Too Few Women of Color on Boards: Statistics and Solutions* (Jan. 31, 2020), <https://www.catalyst.org/research/women-minorities-corporate-boards/>.

Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of the U.S. population), 3.8% by Hispanic/Latino(a) individuals (who represent 19% of the U.S. population) and 3.7% by Asian/Pacific Islander individuals (who represent 6% of the U.S. population).⁹³ In its analysis of Russell 3000 companies, 2020 Women on Boards concluded that “larger companies do better with their diversity efforts than smaller companies.”⁹⁴

Based on the limited information that is available, Nasdaq believes 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. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. Thus, and for the reasons discussed in this Section 3.a.III, Nasdaq has concluded that a regulatory approach to encouraging greater diversity and data transparency would be beneficial.

Nasdaq reviewed academic studies on the causes of underrepresentation on boards and the approaches taken by other jurisdictions to remedy underrepresentation. Those studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions. Dhir (2015) explains that “[t]he presence of unconscious bias in the board appointment process,

⁹³ See Deloitte, *Missing Pieces Report*, supra note 91; United States Census Bureau, *QuickFacts*, available at: <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

⁹⁴ See *2020 Women On Boards Gender Diversity Index 4* (2019), available at: https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf.

coupled with closed social networks, generates a complex set of barriers for diverse directors; these are the ‘phantoms’ that prevent entry.”⁹⁵ In 2011, the Davies Review found that “informal networks influential in board appointments” contribute to the underrepresentation of women in the boardrooms of U.K. listed companies.⁹⁶ In 2017, the Parker Review acknowledged that “as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom.”⁹⁷ In 2020, the United Kingdom Financial Reporting Council commissioned a report to analyze barriers to LGBTQ+ inclusion and promotion in the workplace. Leaders who self-identified as LGBTQ+ expressed concerns about the current board nomination process, which includes “relying on personal recommendations without transparent competition or due process [and] informal ‘interviewing’ outside the selection process.”⁹⁸

These concerns are not unique to the United Kingdom. The U.S. GAO (2015) found that women’s representation on corporate boards may be hindered by directors’ tendencies to “rely on their personal networks to identify new board candidates.”⁹⁹ Vell (2017) found that “92% of board seats [of public U.S. and Canadian technology companies] are filled through networking, and women have less access to these

⁹⁵ See Dhir, *supra* note 78, at 47.

⁹⁶ See *Women on Boards* 17 (Feb. 2011), available at: <https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf>.

⁹⁷ See Sir John Parker, *A Report into the Ethnic Diversity of UK Boards* 38 (Oct. 12, 2017), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf.

⁹⁸ See Catriona Hay et al., The Financial Reporting Council, *Building more open business* 25 (2020), available at: <https://www.frc.org.uk/getattachment/19f3b216-bd45-4d46-af2f-f191f5bf4a07/The-Good-Side-x-Financial-Reporting-Council-1811-AMENDED.pdf>.

⁹⁹ See GAO Report, *supra* note 44, at 15.

networks.”¹⁰⁰ Deloitte and the Society for Corporate Governance (2019) found that this is also common in other industries including media, communications, energy, consumer products, financial services and life sciences.¹⁰¹ They observed that although 94% of companies surveyed were looking to increase diversity among their boards, 77% of those boards looked to referrals from current directors when identifying diverse director candidates, suggesting that “networking is still key to board succession.”¹⁰² Dhir (2015), in a qualitative study of Norwegian directors, observed that “[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background.”¹⁰³

Another contributing factor may be the traditional experience sought in director nominees. Rhode & Packel (2014) observed that:

One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service. The primary route to board directorship has long been through experience as a CEO of a public corporation. . . . Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened.¹⁰⁴

¹⁰⁰ See Vell Executive Search, *Women Board Members in Tech Companies: Strategies for Building High Performing Diverse Boards* 6 (2017), available at: <https://www.vell.com/images/pdf/VELL%20Report%20Women%20Board%20Members%20on%20Tech%20Boards%202017%203%2029.pdf>.

¹⁰¹ See Deloitte and the Society of Corporate Governance, *Board Practices Report: Common threads across boardrooms* 5 (2019), available at: https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/1202241_2018_Board_Practices_Report_FINAL.pdf.

¹⁰² *Id.* at 6.

¹⁰³ See Dhir, *supra* note 78, at 52.

¹⁰⁴ See Deborah Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39(2) Del. J. Corp. L. 377, 402-403 (2014); see also Dhir, *supra* note 78, at 39 (“[T]here is an apparent preference for either CEOs (whether current or retired) or senior management who have experience at the helm of a particular business stream or unit.... The fact that far fewer women than men have been CEOs has a potentially devastating effect on access to the boardroom, which in turn can have an effect on the number of women who rise to the level of CEO and to the executive suite.”).

Hillman et al. (2002) found that while white male directors of public companies were more likely to have current or former experience as a CEO, senior manager or director, African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy.¹⁰⁵ Dhir (2015) suggests that “[c]onsidering persons from other, non-management pools, such as academia, legal and accounting practice, the not-for-profit sector and politics, may help create a broader pool of diverse candidates.”¹⁰⁶ Directors surveyed by the U.S. GAO also “suggested, for example, that boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and government sectors. . . . [I]f boards were to expand their director searches beyond CEOs more women might be included in the candidate pool.”¹⁰⁷

Investors have begun calling for greater transparency surrounding ethnic diversity on company boards, and in the past several months as the U.S. has seen an uprising in the racial justice movement, there has been an increase in the number of African Americans appointed to Russell 3000 corporate boards.¹⁰⁸ In a five-month span, 130 directors appointed were African American, in comparison to the 38 African American directors who were appointed in the preceding five months.¹⁰⁹ Although tracking the acceleration in board diversity is feasible for some Russell 3000 companies, many of the companies

¹⁰⁵ See Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28(6) J. Mgmt. 747, 749, 754 (2002).

¹⁰⁶ See Dhir, *supra* note 78, at 42.

¹⁰⁷ See GAO Report *supra* note 44, at 18.

¹⁰⁸ See Leslie P. Norton, *The Number of Black Board Members Surged After George Floyd's Death*, *Barron's*, Oct. 27, 2020, available at: <https://www.barrons.com/articles/after-george-floyds-death-the-number-of-black-board-members-surges-51603809011>.

¹⁰⁹ *Id.*

do not disclose the racial makeup of the board, making it impossible to more broadly assess the impact of recent events on board diversity.

IV. Stakeholder Perspectives

To gain a better understanding of the current state of board diversity, benefits of diversity, causes of underrepresentation on boards and potential remedies to address underrepresentation, Nasdaq spoke with leaders representing a broad spectrum of market participants and other stakeholders. Nasdaq sought their perspectives to inform its analysis of whether the proposed rule changes would promote the public interest and protection of investors without unduly burdening competition or conflicting with existing securities laws. The group included representatives from the investor, regulatory, investment banking, venture capital and legal communities. Nasdaq also spoke with leaders of civil rights and corporate governance organizations, and organizations representing the interests of private and public companies, including Nasdaq-listed companies. Specifically, Nasdaq obtained their views on:

- the current state of board diversity in the U.S.;
- the inherent value of board diversity;
- increasing pressure from legislators and investors to improve diverse representation on boards and board diversity disclosure;
- whether a listing rule related to board diversity is in the public interest;
- how to define a “diverse” director; and
- the benefits and challenges of various approaches to improving board diversity disclosures and increasing diverse representation on boards, including mandates and disclosure-based models.

The discussions revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics. The majority of organizations also

were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can accelerate the rate of change, they expressed that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Business leaders also expressed concern that smaller companies would require flexibility and support to comply with any time-sensitive requirements to add diverse directors. Some stakeholders highlighted additional challenges that smaller companies, and companies in certain industries, may face finding diverse board members. Leaders from across the spectrum of stakeholders that Nasdaq surveyed reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand. Leaders from the legal community emphasized that any proposed rule that imposed additional burdens beyond, or is inconsistent with, existing securities laws—by, for example, requiring companies to adopt a diversity policy or include disclosure solely in their proxy statements—would present an additional burden and potentially more legal liability for listed companies.

V. U.S. Regulatory Framework

As detailed above, diversity has been the topic of a growing number of studies over the past decade and, in recent years, some investors have been increasingly advocating for greater diversity among directors of public companies.¹¹⁰ Over the past

¹¹⁰ In 2009, when the Commission proposed enhancements to proxy disclosures, including addressing board diversity disclosures, the Commission received over 130 comment letters related to its proposal, including from corporations, pension funds, professional associations, trade unions, accounting firms, law firms, consultants, academics, individual investors and other interested

year, the social justice movement has underscored the importance of having diverse perspectives and representation at all levels of decision-making, including on public company boards. In recent years, diversity has become increasingly important to the public, including institutional investors, pension funds and other stakeholders who believe that board diversity enhances board performance and is an important factor in the voting decisions of some investors.¹¹¹ Legislators increasingly are taking action to encourage corporations to diversify their boards and improve diversity disclosures.¹¹²

a. SEC Diversity Disclosure Requirements – Background

In 2009, the Commission sought comment on whether to amend Item 407(c)(2)(vi) of Regulation S-K to require disclosure of whether a nominating committee considers diversity when selecting a director for a position on the board.¹¹³ The Commission received more than 130 comment letters on its proposal. According to a University of Dayton Law Review analysis of those comment letters, most were

parties. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,335; see also David A. Katz and Laura McIntosh, *Raising the Stakes for Board Diversity*, Law.com (July 22, 2020), available at: <https://www.law.com/newyorklawjournal/2020/07/22/raising-the-stakes-for-board-diversity/?slreturn=20201017021522>; Office of the Illinois State Treasurer, *The Investment Case For Board Diversity: A Review of the Academic and Practitioner Research on the Value of Gender and Racial/Ethnic Board Diversity for Investors* 7 (Oct. 2020), available at: [https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20\(oct%202020\).pdf](https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20(oct%202020).pdf).

¹¹¹ See Comments on Proposed Rule: Proxy Disclosure and Solicitation Enhancements, available at: <https://www.sec.gov/comments/s7-13-09/s71309.shtml>. See also CGLytics, *Diversity on the Board? Metrics Used by Fortune 100 Companies* (June 29, 2020), available at: <https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/>; Office of the Illinois State Treasurer, supra note 110.

¹¹² For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one director from an Underrepresented Community. See Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020). Washington requires companies headquartered in the state to have at least 25% women on the board by 2022 or provide certain disclosures. See Wash. Subst. S.B. 6037 (June 11, 2020). At least eleven states have proposed diversity-related requirements. See Hatcher and Latham, supra note 11.

¹¹³ See Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076, 35,084 (July 17, 2009) (proposed rule).

submitted by groups with a specific interest in diversity, or by institutional investors, including mutual funds, pension funds, and socially responsible investment funds.¹¹⁴ Further, the analysis showed that 56 commenters addressed the issue of diversity disclosures, and only 5 of those 56 commenters did not favor such disclosure.¹¹⁵ Twenty-seven of the 56 mentioned gender diversity, 18 mentioned racial diversity, and 13 mentioned ethnic diversity. However, neither the proposed rule nor the final rule defined diversity.¹¹⁶

Ten years after its adoption of board diversity disclosure rules, the Commission revisited the rules by establishing new Compliance and Disclosure Interpretations (“C&DI”). However, the Commission did not provide a definition of diversity, and therefore issuers currently are not required to disclose the race, ethnicity or gender of their directors or nominees.

Currently, Item 401(e)(1) of Regulation S-K requires a company to “briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director.”¹¹⁷ The C&DI clarifies that if a board considered a director’s self-identified diversity characteristics (*e.g.*, race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background) during the nomination process, and the individual consents to disclose those diverse characteristics, the Commission “would expect that the company’s discussion required by

¹¹⁴ See Thomas Lee Hazen and Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37:1 Univ. Dayton L. Review 41, 51, n. 82 (citing the comment letters).

¹¹⁵ In the five comments that opposed diversity disclosure, three stated that diversity was an important value. See Comments on Proposed Rule, *supra* note 111; see also Hazen and Broome, *supra* note 114, at 54 n.88 (citing the 56 comment letters).

¹¹⁶ See Hazen and Broome, *supra* note 114, at 53 n. 84-86.

¹¹⁷ See 17 C.F.R. § 229.401(e)(1).

Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered.”¹¹⁸

Rather than providing a specific definition of diversity, the C&DI provides a non-exhaustive list of examples of diverse characteristics that a company could consider for purposes of Item 401(e)(1), including “race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background.”¹¹⁹ Additionally, the Commission stated that any description of a company’s diversity policy would be expected to include “a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.”¹²⁰

Item 407(c)(2)(vi) of Regulation S-K requires proxy disclosure regarding whether diversity is considered when identifying director nominees and, if so, how. In addition, if the board or nominations committee has adopted a diversity policy, the company must describe how the policy is implemented and its effectiveness is assessed.¹²¹ When adopting Item 407(c)(2)(vi), the Commission explained:

We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they

¹¹⁸ See Securities and Exchange Commission, Regulation S-K Compliance & Disclosure Interpretations (Sept. 21, 2020), available at: <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ See 17 C.F.R. § 229.407(c)(2)(vi).

consider appropriate. As a result we have not defined diversity in the amendments.¹²²

Moreover, Item 407(c)(2)(vi) does not require companies to adopt a formal policy and does not require them to explain why they have not. It also does not require public disclosure of board-level diversity statistics.

b. Complaints Surrounding Current Diversity Disclosure Requirements

Given the broad latitude afforded to companies by the Commission's rules related to board diversity and proxy disclosure, current reporting of board-level diversity statistics has been significantly unreliable and unusable to investors. This has been due to myriad data collection challenges, including the scarcity of reported information, the lack of uniformity in the information that is disclosed and inconsistencies in the definitions of diversity characteristics across companies.¹²³ The heightened national discourse around diversity and mounting grievances from investors surrounding transparency on board diversity prompted Nasdaq to examine the state of board diversity among its listed companies. While conducting that research, Nasdaq identified a number of key challenges, such as: (1) inconsistent disclosure and definitions of diversity across companies; (2) limited data on diverse characteristics outside of gender; (3) inconsistent or no disclosure of a director's race, ethnicity, or other diversity attributes (*e.g.*, nationality); (4) difficult-to-extract data because statistics are often embedded in graphics; and (5) aggregation of information, making it difficult to separate gender from other categories of diversity. Investors and data analysts have raised similar criticisms.

¹²² See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,344.

¹²³ See Petition for Rulemaking (July 6, 2017), available at: <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf>.

As the Illinois Treasurer observed, the paucity of data on race and ethnicity creates barriers to investment analysis, due diligence and academic study.¹²⁴ For example, the scarcity of such data is an impediment to academics who want to study the performance impact of racially diverse boards.¹²⁵ Nasdaq is concerned that investors also face the many data collection challenges Nasdaq encountered, rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions. Commissioner Allison Herren Lee expressed similar concerns, stating that the current SEC disclosure requirements have “led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. . . . And the current state of disclosure reveals the shortcomings of a principles-based materiality regime in this area.”¹²⁶

Some stakeholders believe there is a correlation between companies that disclose the gender, racial and ethnic composition of their board and the number of diverse directors on those companies’ boards.¹²⁷ Currently, the lack of reliable and consistent data makes it difficult to measure diversity in the boardroom, and a common set of standards for diversity definitions and disclosure format is greatly needed. At present, U.S. companies must navigate a complex patchwork of federal and state regulations and disclosure requirements. The limited disclosure currently provided voluntarily, which is

¹²⁴ See Press Release, *Illinois State Treasurer Frerichs Calls on Russell 3000 Companies to Disclose Diversity Data* (Oct. 28, 2020), available at https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/october2020_russell3000.pdf.

¹²⁵ See Office of Illinois State Treasurer, supra note 110, at 3-4.

¹²⁶ See Lee, supra note 22.

¹²⁷ See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 (“Although the[se] amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition. A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity.”); see also Office of Illinois State Treasurer, supra note 110, at 3.

primarily focused on gender (due in part to that data being the most readily available), fails to provide the full scope of a board's diverse characteristics.¹²⁸ It is difficult to improve what one cannot accurately measure. This lack of transparency is impacting investors who are increasingly basing public advocacy, proxy voting and direct shareholder-company engagement decisions on board diversity considerations.¹²⁹

c. Support for Updating Diversity Disclosure Requirements

Nasdaq's surveys of investors and reviews of their disclosed policies and actions show that board diversity is a priority when assessing companies, and investors report, in some cases, relying on intuition when there is a lack of empirical, evidenced-based data. Furthermore, the continued growth of ESG investing raises the importance of quality data, given the data-driven nature of investment products such as diversity-specific indices and broader ESG funds.

Investors have a unique platform from which to engage and influence a company's position on important topics like diversity. Similarly, Nasdaq, like other self-regulatory organizations, is uniquely positioned to establish practices that will assist in carrying out Nasdaq's mandate to protect investors and remove impediments from the market. Various stakeholders, including Nasdaq, believe that clear and concise annual disclosure of board diversity information that disaggregates the data by race, ethnicity, gender identity and sexual orientation will provide the public, including key stakeholders, with a better sense of a company's approach to improving corporate diversity and the

¹²⁸ See, e.g., CGLytics, supra note 111, at <https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/>; Petition for Amendment of Proxy Rule, supra note 80; Office of Illinois State Treasurer, supra note 110.

¹²⁹ See Office of the Illinois State Treasurer, *Russell 3000 Board Diversity Disclosure Initiative*, https://www.illinoistreasurer.gov/Financial_Institutions/Equity_Diversity_Inclusion/Russell_3000_Board_Diversity_Disclosure_Initiative (last accessed Nov. 25, 2020).

support needed to effectuate any changes. Required disclosures also would eliminate the number of shareholder proposals asking for these key metrics and the need for companies to respond to multiple investor requests for information.¹³⁰ Moreover, companies manage issues more closely and demonstrate greater progress when data is available.¹³¹

In 2015, nine large public pension funds who collectively supervised \$1.12 trillion in assets at the time petitioned the Commission to require registrants to disclose information related to, among other things, the gender, racial, and ethnic diversity of the registrant's board nominees.¹³² In 2017, Human Capital Management Coalition, which described itself as a group of institutional investors with \$2.8 trillion in assets at the time, made a similar petition to the Commission.¹³³ More recently, in October 2020, the Illinois Treasurer spearheaded an initiative along with twenty other investor organizations, asking for all companies in the Russell 3000 Index to disclose the composition of their board, including each board member's gender, race and ethnicity.¹³⁴

The largest proxy advisory firms have aligned their voting policies to encourage increased board diversity disclosure. Institutional Shareholder Services ("ISS"), recently adopted a new voting policy under which it will identify boards of companies in the Russell 3000 or S&P 1500 that "lack racial and ethnic diversity (or lack disclosure of such)" in 2021 and, beginning in 2022, will recommend voting against the chair of the nominating committee of such companies. The stated goal of the policy is "helping

¹³⁰ See Petition for Rulemaking, supra note 123, at 2.

¹³¹ See, e.g., Gwen Le Berre, Parametric, *Investors Need Data to Make Diversity a Reality* (Aug. 24, 2020), <https://www.parametricportfolio.com/blog/investors-need-data-to-make-diversity-a-reality>.

¹³² See Petition for Amendment of Proxy Rule, supra note 80.

¹³³ See Petition for Rulemaking, supra note 123.

¹³⁴ See Press Release, supra note 124.

investors identify companies with which they may wish to engage and to foster dialogue between investors and companies on this topic.”¹³⁵ In 2017, proxy advisory firm Glass Lewis announced a policy regarding board gender diversity that took effect in 2019. Glass Lewis generally recommends voting against the nominating committee chair of a board that has no female members, and when making such a recommendation, the firm closely examines the company’s disclosure of its board diversity considerations and other relevant contextual factors.¹³⁶ On November 24, 2020, Glass Lewis announced the publication of its 2021 Proxy Voting Policy Guidelines, which expand its board gender diversity policy to vote against nominating chairs if there are fewer than two female directors, beginning in 2022.¹³⁷ Most notably, beginning with the 2021 proxy season, the company will include an assessment report of company proxy disclosures relating to board diversity, skills and the director nomination process for companies in the S&P 500 index. According to Glass Lewis, it “will reflect how a company’s proxy statement presents: (i) the board’s current percentage of racial/ethnic diversity; (ii) whether the board’s definition of diversity explicitly includes gender and/or race/ethnicity; (iii) whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (aka ‘Rooney Rule’); and (iv) board skills disclosure.”¹³⁸

¹³⁵ See ISS Governance, *ISS Announces 2021 Benchmark Policy Updates* (November 12, 2020), available at: <https://www.issgovernance.com/iss-announces-2021-benchmark-policy-updates/>.

¹³⁶ See Glass Lewis, *2019 Policy Guideline Updates* (Oct. 24, 2018), available at: <https://www.glasslewis.com/2019-policy-guideline-updates-united-states-canada-shareholder-initiatives-israel/>.

¹³⁷ See Glass Lewis, *2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice - United States* (2020), available at: <https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-flf4-47cb-8dc0-e919a9a5cf5b>.

¹³⁸ Id.

Congress and members of the Commission also have weighed in on the importance of improving board transparency. In 2017, Representative Carolyn Maloney introduced the “Gender Diversity in Corporate Leadership Act of 2017,” which proposed requiring public companies to provide proxy disclosure regarding the gender diversity of the board of directors and nominees.¹³⁹ In November 2019, the U.S. House of Representatives, with bipartisan support, passed the “Corporate Governance Through Diversity Act of 2019,” which requires certain registrants annually to disclose the racial, ethnic, and gender composition of their boards and executive officers, as well as the veteran status of any of those directors and officers, in their proxy statements.¹⁴⁰ The bill also requires the disclosure of any policy, plan or strategy to promote racial, ethnic, and gender diversity among these groups. Legislators have proposed a companion bill in the U.S. Senate.¹⁴¹

The Council of Institutional Investors (“CII”), U.S. Chamber of Commerce,¹⁴² National Urban League, Office of New York State Comptroller and the National Association for the Advancement of Colored People praised the House of Representatives’ for passing the 2019 legislation. According to the U.S. Chamber of Commerce’s members and associations, it has become increasingly important to see improvements in board diversity.¹⁴³ Additionally, CII’s General Counsel stated that the

¹³⁹ Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017).

¹⁴⁰ Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019).

¹⁴¹ Improving Corporate Governance Through Diversity Act of 2019, S. 360, 116th Cong. (2019).

¹⁴² See Letter from Various U.S. Chamber of Commerce Associations and Members to Chairman Mike Crapo and Ranking Member Sherrod Brown, U.S. House Committee on Banking, Housing, and Urban Affairs (July 27, 2020), available at: https://www.uschamber.com/sites/default/files/200727_coalition_h.r._5084_senatesmallbusiness.pdf.

¹⁴³ Id.

proxy statement disclosure requirement in the legislation “could contribute to enhancing U.S. public company board consideration of diversity.”¹⁴⁴

More recently, SEC Commissioners have called for greater transparency surrounding ethnic diversity on company boards. In a September 2020 speech titled “Diversity Matters, Disclosure Works, and the SEC Can Do More” given at the CII Fall Conference, Commissioner Lee advocated advancing corporate diversity and for various approaches by which the Commission could promote diversity, including among other things, strengthening the C&DI’s guidance related to disclosure of board candidate diversity characteristics.¹⁴⁵ Commissioner Lee stated:

[The SEC has] largely declined to require diversity-related disclosure. In 2009, we adopted a requirement for companies to disclose if and how diversity is considered as a factor in the process for considering candidates for board positions, including any policies related to the consideration of diversity. In 2018, we issued guidance encouraging the disclosure of self-identified characteristics of board candidates. While I appreciate these measures, given that women of color hold just 4.6% of Fortune 500 board seats and less than one percent of Fortune 500 CEOs are Black, it’s time to consider how to get investors the diversity information they need to allocate their capital wisely.¹⁴⁶

VI. Nasdaq Proposal

a. Overview of Disclosure Requirements

Disclosure of information material to an investor’s voting and investment decision is the bedrock of federal securities laws. The Exchange’s listing rules require companies to comply with federal securities laws, including the registration requirements under the Securities Act of 1933. Once listed, companies are obligated to solicit proxies and file all

¹⁴⁴ See Joe Mont, *SEC, Congress seek better diversity disclosures*, Compliance Week (Feb. 20, 2019), <https://www.complianceweek.com/sec-congress-seek-better-diversity-disclosures/24802.article>.

¹⁴⁵ See Lee, *supra* note 22.

¹⁴⁶ *Id.* Commissioner Crenshaw also expressed disappointment with the Commission’s silence on diversity. See Crenshaw, *supra* note 7.

annual and periodic reports with the Commission under the Act at the prescribed times.¹⁴⁷

In discharging its obligation to protect investors, Nasdaq monitors listed companies for compliance with those disclosure obligations, and the failure to do so results in a notice of deficiency or delisting.

Nasdaq believes it is well within the Exchange's delegated regulatory authority to propose listing rules designed to enhance transparency so long as they do not conflict with existing federal securities laws. For example, Nasdaq requires listed companies to publicly disclose compensation or other payments by third parties to a company's directors or nominees, notwithstanding that such disclosure is not required by federal securities laws. In approving that proposed rule, the Commission noted:

To the extent there are certain factual scenarios that would require disclosure not otherwise required under Commission rules, we believe that it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Act, that are designed to improve transparency and accountability into corporate decision making and promote investor confidence in the integrity of the securities markets.¹⁴⁸

Nasdaq is concerned that while investors have increasingly emphasized that they consider board diversity information to be material, the current lack of transparency and consistency makes it difficult for Nasdaq and investors to determine the state of diversity among listed companies as well as each board's philosophy regarding diversity. Investors also have voiced dissatisfaction about having to independently collect board-level data about race, ethnicity and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.¹⁴⁹ Moreover, in some

¹⁴⁷ See Nasdaq Stock Market Rulebook, Rules 5250(c) and (d).

¹⁴⁸ See Order Granting Accelerated Approval of a Proposed Rule Change, 81 Fed. Reg. 44,400, 44,403 (July 7, 2016).

¹⁴⁹ See Petition for Amendment of Proxy Rule, supra note 80, at 2.

instances, based on Nasdaq's own investigation, such information is either unavailable, or, if available, not comparable across companies. To the extent investors must obtain this information on their own through an imperfect process, Nasdaq is concerned that it increases information asymmetries between larger stakeholders, who are able to collect this data directly from companies, and smaller investors, who must rely on incomplete public disclosures. For all investors who take on the burden of independently obtaining the current information, there is a cost and time burden related to the data collection.

Nasdaq believes that additional disclosure regarding a board's composition and philosophy related to board diversity will improve transparency and accountability into corporate decision making. Nasdaq proposes to improve transparency regarding board diversity by requiring all listed companies to publicly disclose unbundled, consistent data utilizing a uniform, transparent framework on their website or in their proxy statement under Rule 5606. Similarly, Nasdaq proposes to promote accountability in corporate decision-making by requiring companies who do not have at least two Diverse directors on their board to provide investors with a public explanation of the board's reasons for not doing so under Rule 5605(f)(3). Nasdaq designed the proposal to avoid a conflict with existing disclosure requirements under Regulation S-K and to mitigate additional burdens for companies by providing them with flexibility to provide such disclosure on their website or in their proxy statement, and not requiring them to adopt a formal diversity policy.

Nasdaq proposes to foster consistency in board diversity data disclosure by defining "Diverse" under Rule 5605(f)(1) as "an individual who self-identifies in one or

more of the following categories: Female, Underrepresented Minority or LGBTQ+,” and by adopting the following definitions under Rule 5605(f)(1):

- “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.
- “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.
- “Underrepresented Minority” means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.

The terms in the proposed definition of “Underrepresented Minority” reflect the EEOC’s categories and are construed in accordance with the EEOC’s definitions.¹⁵⁰ The terms in the proposed definition of LGBTQ+ are similar to the identities defined in California’s A.B. 979, described below, but have been expanded to include the queer community based on Nasdaq’s consultation with stakeholders, including human rights organizations.¹⁵¹

In constructing its proposed definition of “Diverse,” Nasdaq considered various state and federal legislation, stakeholder sentiments and academic studies. For example, California requires public companies headquartered in the state to have at least one

¹⁵⁰ While the EEO-1 report refers to “Hispanic or Latino” rather than Latinx, Nasdaq proposes to use the term Latinx to apply broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.

¹⁵¹ Further, Nasdaq agrees with the United Kingdom Financial Reporting Council that the acronym LGBTQ+ “does not attempt to exclude other groups, nor does it imply that the experiences of people under its umbrella are the same.” See Hay et al., supra note 98, at 14.

individual who self-identifies as a female on the board by 2019 under S.B. 826¹⁵² and at least one director who is a member of an “underrepresented community” by 2021 under A.B. 979.¹⁵³ S.B. 826 defines “Female” as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth,” consistent with legislation proposed by New Jersey, Michigan and Hawaii related to board gender diversity.¹⁵⁴ A.B. 979 considers directors from underrepresented communities to be individuals who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender. Since S.B. 826 was passed, 669 women have joined public company boards in the state and the number of public companies with all male boards has declined from 30% in 2018 to 3% in 2020.¹⁵⁵

The state of Washington requires public companies whose boards are not comprised of at least 25% directors who self-identify as women by January 1, 2022 to provide public disclosures related to the board’s consideration of “diverse groups” during the director nomination process. The state considers “diverse groups” to include “women, racial minorities, and historically underrepresented groups.”¹⁵⁶

As discussed above, Congress has proposed legislation relating to disclosure of racial, ethnic, gender and veteran status among the company’s directors. Section 342 of

¹⁵² See Cal. S.B. 826, supra note 112.

¹⁵³ See Cal. A.B. 979, supra note 112.

¹⁵⁴ See Cal. S.B. 826, supra note 112. See also N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

¹⁵⁵ See California Partners Project, *Claim Your Seat: A Progress Report on Women’s Representation on California Corporate Boards* 4 (2020), available at: <https://www.calpartnersproject.org/claimyourseat>.

¹⁵⁶ See Wash. Subst. S.B. 6037, supra note 112. At least 11 states have proposed diversity-related requirements. See Hatcher and Latham, supra note 11.

the Dodd-Frank Act defines “minority” as “Black American, Native American, Hispanic American, and Asian American,”¹⁵⁷ and the Diversity Assessment Report for Entities Regulated by the SEC requires the Exchange to report workforce composition data to the SEC based on the EEOC’s categories.¹⁵⁸ Most companies are required by law to provide similar workforce data to the EEOC through the EEO-1 Report, which requires employers to report statistical data related to race, ethnicity and gender to the EEOC.¹⁵⁹

Nasdaq has designed the proposed rule to require all companies to provide consistent, comparable data under Rule 5606 by utilizing the existing EEO-1 reporting categories that companies are already familiar with, and by requiring companies to have, or publicly explain why they do not have, at least two directors who are diverse in terms of race, ethnicity, sexual orientation or gender identity under Rule 5605(f)(2). While the EEO-1 report does not currently include sexual orientation or gender identity, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status in recognition of the U.S. Supreme Court’s recent decision in *Bostock v. Clayton County* that sexual orientation and gender identity are “inextricably” intertwined with sex.¹⁶⁰

¹⁵⁷ See 12 U.S.C. § 5452(g)(3) and Pub. L. 101-73 § 1204(c)(3).

¹⁵⁸ See Securities and Exchange Commission, Diversity Assessment Report for Entities Regulated by the SEC, available at: <https://www.sec.gov/files/OMWI-DAR-FORM.pdf>.

¹⁵⁹ All companies with 100 or more employees are required to complete the EEO-1 Report. See U.S. Equal Employment Opportunity Commission, EEO-1: Who Must File, <https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-who-must-file> (last accessed Nov. 27, 2020).

¹⁶⁰ See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020) (“But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”).

The proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, the company would still have to provide the required disclosure under Rule 5605(f)(3) if the company does not also have at least two directors who are otherwise considered Diverse under Rule 5605(f)(1). Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

Overall, Nasdaq believes the proposal will enhance investor confidence that all listed companies are considering diversity of race, ethnicity, sexual orientation and gender identity in the context of selecting directors. Investors will be confident that board discussions at listed companies with at least two Diverse directors include the perspectives of more than one demographic group. They will also be confident that boardrooms without at least two Diverse directors are having a thoughtful discussion about their reasons for not doing so and publicly explaining those reasons. On balance, the proposal will advance the public interest and enhance investor confidence in the integrity of the securities markets by ensuring investors that Nasdaq is monitoring all listed companies to verify that they have at least two Diverse directors or explain why they do not, and by requiring all listed companies to provide consistent, comparable diversity disclosures.

b. Board Statistical Disclosure

Given the increased interest in, and advocacy for, improvements in board transparency related to diversity disclosure information, the Exchange is proposing to adopt new Rule 5606(a), which would require each company to publicly disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified gender and racial characteristics and LGBTQ+ status.

All Nasdaq-listed companies that are subject to proposed Rule 5605(f), whether they choose to meet the diversity objectives of proposed Rule 5605(f)(2) or to explain why they do not, would be required to make the proposed Rule 5606 disclosure. This proposed rule also will assist the Exchange in assessing whether companies meet the diversity objectives of proposed Rule 5605(f). Under Rule 5606(e), Nasdaq proposes to make proposed Rule 5606 operative for listed companies one year after the SEC Approval Date of this proposal.

Pursuant to proposed Rule 5606(a), each company would be instructed to annually provide its board-level diversity data in a format substantially similar to the Board Diversity Matrix in proposed Rule 5606(a) and attached as Exhibit 3. The company would be required to provide the total number of directors on its board. If a director voluntarily self-identifies, each company, other than a Foreign Issuer (as defined under Rule 5605(f)(1)), would include the following in a table titled "Board Diversity Matrix," in accordance with the instructions accompanying the proposed disclosure format: (1) the number of directors based on gender identity (male, female or non-

binary¹⁶¹); (2) the number of directors based on race and ethnicity (African American or Black, Alaskan Native or American Indian, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities); and (3) the number of directors who self-identify as LGBTQ+.

Any director who chooses not to disclose a gender would be included under “Gender Undisclosed” and any director who chooses not to identify as any race or not to identify as LGBTQ+ would be included in the “Undisclosed” category at the bottom of the table. The defined terms for the race and ethnicity categories in the instructions to the Board Diversity Matrix disclosure format are substantially similar to the terms and definitions used in the EEO-1 Report.¹⁶² LGBTQ+ is defined similarly to proposed Rule 5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

Below is an example of a Board Diversity Matrix that companies may use, which is also attached as Exhibit 3:

Board Diversity Matrix (As of [DATE])				
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed

¹⁶¹ Although non-binary is included as a category in the proposed Board Diversity Matrix, a company would not satisfy the diversity requirement proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

¹⁶² See supra note 159. Additionally, the EEOC does not categorize LGBTQ+ or any other sexual orientation identifier on its EEO-1 Report. The definitions of the EEO-1 race and ethnicity categories may be found in the appendix to the EEO-1 Report instructional booklet, available at <https://www.eeoc.gov/employers/eo-1-survey/eo-1-instruction-booklet>.

Board Diversity Matrix (As of [DATE])				
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Undisclosed	#			

Nasdaq recognizes that some Foreign Issuers, including Foreign Private Issuers as defined by the Act,¹⁶³ may have their principal executive offices located outside of the United States and in jurisdictions that may impose laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race, ethnicity or LGBTQ+ status. In such countries, a Foreign Issuer may be precluded by law from requesting diversity data from its directors. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Board Matrix data less relevant for such companies and not useful for investors.

¹⁶³ See 17 C.F.R. § 240.3b-4.

As a result of these limitations, Nasdaq is proposing the option of a separate Board Diversity Matrix for Foreign Issuers. Similar to other companies, a Foreign Issuer would be required to provide the total number of directors on its board. If a director voluntarily self-identifies, the company would include the following in a table titled “Board Diversity Matrix”: (1) the number of directors based on gender identity (male, female or non-binary¹⁶⁴); (2) the number of directors who are considered underrepresented in the company’s home country jurisdiction;¹⁶⁵ and (3) the number of directors who self-identify as LGBTQ+. An “Underrepresented Individual in Home Country Jurisdiction” is defined in the instructions to the Board Diversity Matrix as a person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in a Foreign Issuer’s home country jurisdiction. Rule 5605(f)(2)(B)(i) also proposes the same definition for Diverse directors of Foreign Issuers.

Nasdaq is also proposing new Rule 5606(b), which would require each company to provide the disclosure required under Rule 5606(a) in either the company’s proxy statement or information statement for its annual meeting for shareholders, or on the company’s website. If the company elects to disclose the information on its website, the company must also submit such disclosure along with a URL link to the information through the Nasdaq Listing Center within 15 calendar days of the company’s annual shareholder meeting. The proposed time period to submit the information to the Nasdaq

¹⁶⁴ Although non-binary is included as a category in the proposed Board Diversity Matrix, a company would not satisfy any aspect of the diversity requirement proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

¹⁶⁵ To clarify, although a Foreign Issuer may disclose directors that meet the requirement of Underrepresented Minority pursuant to new Rule 5605(f)(1), such disclosure may not meet the diversity objectives of new Rule 5605(f)(2)(B)(ii).

Listing Center is aligned with the time period provided in proposed Rule 5605(f)(3) for a company to submit its explanation for why it does not have at least two Diverse directors. Disclosure of the statistical data is not in lieu of any SEC requirements for a company to disclose any required information pursuant to Regulation S-K or any other federal, state or foreign laws or regulations. As described in the instructions to the Board Diversity Matrix and Rule 5606(a), each year following the first year that a company publishes its annual Board Diversity Matrix, the company would be required to publish its data for the current and immediately prior years.

Additionally, Nasdaq is proposing Rule 5606(c), which exempts the following types of companies from proposed Rule 5606(a): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. The exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition.

Nasdaq is also proposing Rule 5606(d) to allow for a company newly listing on Nasdaq, including a company listing in connection with a business combination under IM-5101-2, to satisfy the requirement of Rule 5606 within one year of listing on Nasdaq. The disclosure required by proposed Rule 5606(d) would be required to be included in the company's annual proxy statement or information statement for its annual meeting of

shareholders or on the company's website. If the company provides such disclosure on its website, the company must also submit the disclosure and a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholder meeting.

When a company does not timely provide the required disclosure, Nasdaq will notify the company that it is not in compliance with a listing requirement and allow the company to provide a plan to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,¹⁶⁶ Nasdaq proposes to allow companies deficient under proposed Rule 5606 45 calendar days to submit a plan in accordance with Rule 5810(c)(2) to regain compliance and, based on that plan, Nasdaq can provide the company with up to 180 days to regain compliance. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815. Although proposed Rule 5606 is not identical to the current Commission requirements, it is similar to, and does not deviate from, the Commission's CD&I related to Items 401(e)(1) and 407(c)(2)(vi) of Regulation S-K. Moreover, the proposed rule strengthens the Commission's requirements by providing clarity to the definition of diversity and streamlining investors' desire for clear, complete and consistent disclosures. Nasdaq believes that the format of the Board Diversity Matrix and the information that it will

¹⁶⁶ Pursuant to Nasdaq Rule 5810(c)(2)(A)(iii), a company is provided 45 days to submit a plan to regain compliance with Rules 5620(a) (Meetings of Shareholders), 5620(c) (Quorum), 5630 (Review of Related Party Transactions), 5635 (Shareholder Approval), 5250(c)(3) (Auditor Registration), 5255(a) (Direct Registration Program), 5610 (Code of Conduct), 5615(a)(4)(D) (Partner Meetings of Limited Partnerships), 5615(a)(4)(E) (Quorum of Limited Partnerships), 5615(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 5640 (Voting Rights). Pursuant to Nasdaq Rule 5810(c)(2)(A)(iv), a company is also provided 45 days to submit a plan to regain compliance with Rule 5250(b)(3) (Disclosure of Third Party Director and Nominee Compensation). A company is generally provided 60 days to submit a plan to regain compliance with the requirement to timely file periodic reports contained in Rule 5250(c)(1).

provide offers greater transparency into a company's board composition and will enable the data to be easily aggregated across issuers.¹⁶⁷ Nasdaq also believes that requiring annual disclosure of the data will ensure that the information remains current and easy for investors, data analysts and other parties to track.

c. Diverse Board Representation or Explanation

Nasdaq is proposing to adopt new Rule 5605(f)(2) to require each listed company to have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one who self-identifies as Female and one who self-identifies as an Underrepresented Minority or LGBTQ+. ¹⁶⁸ A company does not need to provide additional public disclosures if the company discloses under Rule 5606 that it has at least two Diverse directors satisfying this requirement. The terms in the proposed definition of "Underrepresented Minority" reflect the EEOC's categories and are construed in accordance with the EEOC's definitions. Nasdaq has provided additional flexibility for Smaller Reporting Companies and Foreign Issuers (including Foreign Private Issuers).

Under proposed Rule 5605(f)(3), if a company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not have two Diverse directors, the company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable (*e.g.*, the applicable subparagraph, the applicable diversity objectives, and the timeframe applicable to the company's market tier); and (ii) explain the reasons why it does not have two Diverse

¹⁶⁷ Various stakeholders have requested easier aggregation. See Petition for Amendment of Proxy Rule, supra note 80, at 1.

¹⁶⁸ Nasdaq plans to publish an FAQ on the Listing Center clarifying that "two members of its board of directors who are Diverse" would exclude emeritus directors, retired directors and members of an advisory board.

directors. Such disclosure must be provided: (i) in the company's proxy statement or information statement for its annual meeting of shareholders; or (ii) on the company's website. If the company provides such disclosure on its website, the company must also notify Nasdaq of the location where the information is available by submitting the URL link through the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholder meeting.

Nasdaq would not assess the substance of the company's explanation, but would verify that the company has provided one. If the company has not provided any explanation, or has provided an explanation that does not satisfy subparagraphs (i) and (ii) of Rule 5605(f)(3), the explanation will not satisfy the requirements of Rule 5605(f)(3). For example, it would not satisfy Rule 5605(f)(3) merely to state that "the Company does not comply with Nasdaq's diversity rule." As described above, the company must specify the requirements of Rule 5605(f)(2) that are applicable and explain the reasons why it does not have two Diverse directors. For example, a company could disclose the following to satisfy subparagraph (i) of Rule 5605(f)(3): "As a Smaller Reporting Company listed on the Nasdaq Capital Market tier, the Company is subject to Nasdaq Rule 5605(f)(2)(C), which requires the company to have, or explain why it does not have, at least two Diverse directors, including at least one director who self-identifies as Female. Under Rule 5605(f)(7), the Company is required to have at least one Diverse director by March 10, 2023, and a second Diverse director by March 10, 2026. The Company has chosen to satisfy Rule 5605(f)(2)(C) by explaining its reasons for not meeting the diversity objectives of Rule 5605(f)(2)(C), which the Company has set forth below."

i. Effective Dates and Phase-in Period

Proposed Rule 5605(f)(7) provides a transition period before companies must fully satisfy the requirement to have two Diverse directors or explain why they do not upon the initial implementation of the rule. Under this transition rule, each company must have, or explain why it does not have, one Diverse director no later than two calendar years after SEC approval of the proposed rule (the “Approval Date”), and two Diverse directors no later than (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select (“NGS”) or Global Market (“NGM”) tiers, or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market (“NCM”) tier. For example, if the Approval Date is March 10, 2021, all companies would be required to have, or explain why they do not have, one Diverse director by March 10, 2023 and two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies).

Under proposed Rule 5605(f)(5)(A), a newly listed company that was not previously subject to a substantially similar requirement of another national securities exchange will be allowed one year from the date of listing to satisfy the requirement described above. This “phase-in” period applies to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, or through a business combination with an acquisition company listed under IM-5101-2, such that the company is no longer subject to IM-5101-2 after the combination. This phase-in period will apply after the end of the transition period provided in Rule 5605(f)(7). As a result, companies listing after the expiration of the phase-in periods provided by Rule 5605(f)(7) would be provided with one year from the

date of listing to satisfy the applicable requirement of Rule 5605(f)(2) to have, or explain why they do not have, at least two Diverse directors. Companies listing after the Approval Date, but prior to the expiration of the phase-in periods provided by Rule 5605(f)(7), would be provided with the latter of the periods set forth in Rule 5605(f)(7) or one year from the date of listing.

Nasdaq believes this proposed period is consistent with the phase-in periods granted to companies for Nasdaq's other board composition requirements. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and with the majority independent board requirement of Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

ii. Foreign Issuers

Nasdaq recognizes that the EEOC categories of race and ethnicity may not extend to all countries globally because each country has its own unique demographic composition. However, Nasdaq observed that on average, women tend to be underrepresented in boardrooms across the globe, holding an estimated 16.9% of board seats in 2018.¹⁶⁹ As an official supporter of the United Nations Sustainable Stock

¹⁶⁹ See Deloitte, *Women in the Boardroom*, supra note 86.

Exchanges Initiative, Nasdaq recognizes that ensuring women have equal opportunities for leadership in economic decision making is one of the United Nations Sustainable Development Goals to be accomplished by 2030.¹⁷⁰ However, studies estimate that at current rates, it could take 18¹⁷¹ to 34 years¹⁷² for U.S. companies to achieve gender parity on their boards.

Accordingly, under proposed Rule 5605(f)(2)(B), each Foreign Issuer must have, or explain why it does not have, at least two Diverse directors on its board, including at least one Female. Nasdaq proposes to provide Foreign Issuers with additional flexibility in that Foreign Issuers may satisfy the diversity requirement by having two Female directors. In addition, Foreign Issuers may also satisfy the diversity requirement by having one Female director, and an individual who self identifies as (i) LGBTQ+ or (ii) an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Alternatively, a company could satisfy Rule 5605(f)(2)(B) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule.

Nasdaq proposes to define a Foreign Issuer under Rule 5605(f)(1) as (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that: (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act;¹⁷³ and (ii) has its principal executive

¹⁷⁰ See United Nations Sustainable Stock Exchanges Initiative, *Gender Equality*, <https://www.un.org/sustainabledevelopment/gender-equality/> (last accessed Nov. 24, 2020).

¹⁷¹ See McKinsey & Company, *supra* note 36, at 17.

¹⁷² See GAO Report, *supra* note 44, at 9 (estimating "it could take about 10 years from 2014 for women to comprise 30 percent of board directors and more than 40 years for the representation of women on boards to match that of men").

¹⁷³ See 17 C.F.R. § 240.3b-4(b) ("The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.").

offices located outside of the United States. This definition will include all Foreign Private Issuers (as defined in Rule 5005(a)(19)),¹⁷⁴ and any foreign issuers that are not foreign private issuers so long as they are also headquartered outside of the United States. This is designed to recognize that companies that are not Foreign Private Issuers but are headquartered outside of the United States are foreign companies notwithstanding the fact that they file domestic SEC reports. It is also designed to exclude companies that are domiciled in a foreign jurisdiction without having a physical presence in that country. Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be a Foreign Issuer one year from the date that the company no longer qualifies as a Foreign Issuer to satisfy the requirements of Rule 5605(f).

Nasdaq also proposes to revise Rule 5615 and IM-5615-3, which currently permit a Foreign Private Issuer to follow home country practices in lieu of the requirements set forth in the Rule 5600 Series, subject to several exclusions. Nasdaq proposes to revise Rule 5615 and IM-5615-3 to add Rules 5605(f) and 5606 to the list of excluded corporate governance rules. As a result, Foreign Private Issuers must satisfy the requirements of Rule 5605(f) and 5606 and may not follow home country practices in lieu of such requirements. However, Foreign Private Issuers that elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, may satisfy the requirements of Rule 5605(f) by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

¹⁷⁴ Under Nasdaq Rule 5005(a)(19), the term Foreign Private Issuer has “the same meaning as under Rule 3b-4 under the Act.”

iii. Smaller Reporting Companies

Nasdaq also recognizes that smaller companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources necessary to compensate an additional director or engage a search firm to search outside of directors' networks. In recognition of the resource constraints faced by smaller companies, Nasdaq proposes to provide each Smaller Reporting Company with additional flexibility. Specifically, these companies could satisfy the two Diverse directors objective under Rule 5605(f)(2)(C) by having two Female directors.

Like other companies, Smaller Reporting Companies could also satisfy the two Diverse directors by having one Female director and one director who self-identifies as either (i) an Underrepresented Minority, or (ii) a member of the LGBTQ+ community. Alternatively, a company could satisfy Rule 5605(f)(2)(C) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule. Under Rule 5605(f)(1), Nasdaq proposes to define a Smaller Reporting Company as set forth in Rule 12b-2 under the Act.¹⁷⁵ Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be a Smaller Reporting Company one year from the date that the company no longer qualifies as a Smaller Reporting Company to satisfy the requirements of Rule 5605(f).

iv. Cure Period

Nasdaq proposes to adopt Rule 5605(f)(6) and a new Rule 5810(c)(3)(F) to specify what happens if a company does not have at least two Diverse directors as set

¹⁷⁵ Under 12b-2 of the Act, a Smaller Reporting Company "means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than \$250 million; or (2) Had annual revenues of less than \$100 million and either: (i) No public float; or (ii) A public float of less than \$700 million." See 17 C.F.R. § 240.12b-2.

forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3).¹⁷⁶ Under those provisions, the Listing Qualifications Department will promptly notify the company that it has until the latter of its next annual shareholders meeting, or 180 days from the event that caused the deficiency, to cure the deficiency. The company can cure the deficiency either by nominating additional directors so that it satisfies the Diversity requirement of Rule 5605(f)(2) or by providing the disclosure required by Rule 5605(f)(3). If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter. A company that receives a Staff Delisting Determination can appeal the determination to the Hearings Panel through the process set forth in Rule 5815. Nasdaq also proposes revising Rule 5810(c)(2)(A)(iv) to make a non-substantive change clarifying that Rule 5250(b)(3) is related to “Disclosure of Third Party Director and Nominee Compensation.”

v. Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of Rule 5605(f) (“Exempt Companies”): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. Proposed Rule 5605(f)(5)(B) will allow any company that

¹⁷⁶ Nasdaq proposes that existing Rules 5810(c)(3)(F) and (G) be renumbered as Rules 5810(c)(3)(G) and (H) respectively.

ceases to be an Exempt Company one year from the date that the company no longer qualifies as an Exempt Company to satisfy the requirements of Rule 5605(f).

Nasdaq believes it is appropriate to exempt these types of companies from the proposed rule because such companies do not have boards, do not list equity securities, or are not operating companies. These companies are already exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615.

d. Alternatives Considered

Nasdaq considered whether requiring listed companies to have, or explain why they do not have, two Diverse directors would better promote the public interest than an alternative threshold or approach. Nasdaq's reasoned decision-making process included considering: (i) mandate and disclosure-based approaches; (ii) higher and lower diversity objectives; (iii) longer and shorter timeframes; and (iv) broader and narrower definitions of "Diverse."

i. Mandate vs. Disclosure Based Approach

Globally, gender mandates range from requiring at least one woman on the board,¹⁷⁷ requiring two or more women based on board size,¹⁷⁸ or requiring 30 to 50%

¹⁷⁷ For example, the Securities and Exchange Board of India requires public companies to have at least one woman on the board. See Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, Regulation 17(1)(a) (2015), available at: https://www.sebi.gov.in/legal/regulations/jan-2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-10-2020-_37269.html. Similarly, the Israeli Companies Law requires public companies to have at least one woman on the board. See Paul Hastings, *Breaking the Glass Ceiling: Women in the Boardroom* 139 (2018), available at: <https://www.paulhastings.com/genderparity/>. In the United States, California's S.B. 826 requires public companies headquartered in California to have at least one woman on the board. See Cal. S.B. 826, supra note 112, at § 301.3(b)(3).

¹⁷⁸ For example, California's S.B. 826 requires public companies headquartered in California to have at least two women on the board if their board is comprised of five directors, and at least three women on the board if their board is comprised of six or more directors. See Cal. S.B. 826, supra

women on the board.¹⁷⁹ Some mandates vary by board size—for example, Norway imposes different standards for boards of two to three directors, four to five directors, six to eight directors, nine directors and ten or more directors.¹⁸⁰ California imposes a higher standard for gender diversity that boards with five directors or six or more directors must satisfy by the end of 2021 under S.B. 826, and a higher standard for underrepresented communities that boards with five to eight directors and nine or more directors must satisfy by the end of 2022 under A.B. 979. Nasdaq did not observe a common denominator among the mandates applicable to varying board sizes. However, Nasdaq considered criticism that a model based on various board sizes could subject companies to a higher threshold by virtue of adding directors.¹⁸¹ Based on Nasdaq data, the average

note 112, at § 301.3(b)(1) and (2). Similar legislation has been proposed in New Jersey, Michigan and Hawaii. *See* N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

¹⁷⁹ For example, Norway imposes a gender quota ranging from 33%-50% depending on board size. *See* Paul Hastings, *supra* note 177, at 103. Portugal requires listed companies to have at least 33.3% women on boards by 2020. *See* Deloitte, *Women in the Boardroom*, *supra* note 86, at 143. Germany requires public companies with co-determined boards (at least 50% employee representation) to have at least 30% women, and all other listed companies to establish a company-defined target. *See* Ulrike Binder and Guido Zeppenfeld, Mayer Brown, *Germany Introduces Rules on Female Quota for Supervisory Boards and Leadership Positions* (March 13, 2015), available at <https://www.mayerbrown.com/en/perspectives-events/publications/2015/03/germany-introduces-rules-on-female-quota-for-super>. Belgium requires listed companies to have at least 33% women on the board. *See* Deloitte, *Women in the Boardroom*, *supra* note 86, at 85. Austria requires listed companies with more than 1,000 employees to have at least 30% women on the board. *See id.* at 81. Iceland requires public companies with more than 50 employees to have at least 40% women on the board. *See* Act respecting Public Limited Companies No. 2/199, Article 63, available at: <https://www.government.is/publications/legislation/lex/2018/02/06/TRANSLATION-OF-RECENT-AMENDMENTS-OF-ICELANDIC-PUBLIC-AND-PRIVATE-LIMITED-COMPANIES-LEGISLATION-2008-2010-including-Acts-13-2010-sex-ratios-and-68-2010-minority-protection-remuneration/>. France and Italy both require public companies to have at least 40% women on their boards. *See* Paul Hastings, *supra* note 177, at 91; White & Case, *Italy increases gender quotas in corporate boards of listed companies* (Jan. 29, 2020), available at: <https://www.whitecase.com/publications/alert/italy-increases-gender-quotas-corporate-boards-listed-companies>).

¹⁸⁰ *See* Paul Hastings, *supra* note 177, at 103.

¹⁸¹ *See* David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *Gender Diversity and Board Quotas*, New York Law Journal (July 25, 2018), available at: <https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26150.18.pdf> (“California

board size of its listed companies is eight directors.

Soft targets ranging from 25% to 40% women on boards have been suggested by various corporate governance codes and corporate governance organizations. For example, Rule 4.1 of the Swedish Corporate Governance Code (the “Code”) provides that listed companies are to “strive for gender balance on the board.”¹⁸² Each company’s nominations committee is to publish a statement on its website at the time it issues notice of its shareholders meeting “with regard to the requirement in rule 4.1, that the proposed composition of the board is appropriate according to the criteria set out in the Code and that the company is to strive for gender balance.”¹⁸³ Companies are not required to comply with the Code, “but are allowed the freedom to choose alternative solutions which they feel are better suited to their particular circumstances, as long as they openly report every deviation, describe the alternative solution they have chosen and explain their reasons for doing so.”¹⁸⁴ Signifying progress, in 2019, 7% of nominations committees did not issue a statement on board gender balance, compared to 58% in 2013.¹⁸⁵

legislators dispute that the bill requires men to be displaced by women, noting that boards can simply increase their size. This may be easier said than done, however: Because the required quota increases with board size, a company with a four-man board that did not wish to force out a current director would need to add three women to accommodate the requirements of the law by 2021.”).

¹⁸² See Swedish Corporate Governance Board, *The Swedish Corporate Governance Code* §4.1 17 (eff. Jan. 1, 2020), available at: http://www.bolagsstyrning.se/UserFiles/Koden/The_Swedish_Corporate_Governance_Code_1_January_2020.pdf.

¹⁸³ See Swedish Corporate Governance Board, *Annual Report 2020* 22 (August 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3930/kodkoll_arsrapport-2020_eng.pdf.

¹⁸⁴ See Swedish Corporate Governance Board, *Gender balance on boards of listed companies: The Swedish Corporate Governance Board assesses the situation ahead of this year’s AGMs* (February 3, 2015), available at: http://www.bolagsstyrning.se/userfiles/archive/3856/pressrelease_gender_2014-02-03.pdf.

¹⁸⁵ See Swedish Corporate Governance Board, *Annual Report 2020*, *supra* note 183, at 22.

In 2015, the Swedish Corporate Governance Board, which is responsible for administering the Code, established a goal to achieve representation of women on boards of small/mid cap (and Swedish companies listed on NGM Equity) and large cap companies of 30% and 35%, respectively, by 2017. Further, the Board aimed to achieve 40% representation of women on boards of all listed Swedish companies by 2020.¹⁸⁶ Based on data as of June 30, 2020, among listed companies, women accounted for 32.7% of board seats on small/mid cap companies and NGM Equity, 38.6% of large cap companies and 34.7% of all listed companies.¹⁸⁷

In the United Kingdom, the Financial Conduct Authority requires companies with a premium listing on the London Stock Exchange to publicly disclose whether or not they comply with the Financial Reporting Council's U.K. Corporate Governance Code (the "U.K. Code"), and if not, to explain their reasons for non-compliance.¹⁸⁸ Provision 23 of the U.K. Code requires each company to publicly describe "the work of the nomination committee, including . . . the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the

¹⁸⁶ See Swedish Corporate Governance Board, *Gender balance*, supra note 184.

¹⁸⁷ See Swedish Corporate Governance Board, *Statistics regarding gender balance* (July 15, 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3922/200715_gender_balance_on_boards.pdf; see also *Sammanfattning*, available at http://www.bolagsstyrning.se/userfiles/archive/3922/statistik_konsfordelning_2020.pdf.

¹⁸⁸ See Financial Conduct Authority, LR 9.8.6(6), available at: <https://www.handbook.fca.org.uk/handbook/LR/9/8.html>; see also Financial Reporting Council, *The UK Corporate Governance Code 3* (July 2018), available at <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF>. In addition, "[i]n 2016, the [UK] Government also implemented the relevant provision of the EU Non-Financial Reporting Directive with a new reporting requirement in the FCA's Disclosure and Transparency Rules. This requires issuers (excluding [small and medium-sized enterprises]) admitted to trading on an EU regulated market to disclose their diversity policy in the corporate governance statement." See Financial Reporting Council, *Board Diversity Reporting 5* (September 2018), available at: <https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf>.

objectives,”¹⁸⁹ and Principle J states that board appointments and succession planning should, among other things, “promote diversity of gender, social and ethnic backgrounds.”¹⁹⁰ In addition, the Companies Act requires companies to disclose gender diversity statistics among the board, management and employees.¹⁹¹ In 2018, the Financial Reporting Council reported that 83% of FTSE 100 and 74% of FTSE 250 companies had established a board diversity policy specifying gender, with approximately 1/3 specifying ethnicity.¹⁹² More recently, a report commissioned by the Financial Reporting Council concluded that there is a lack of public disclosure regarding the LGBTQ+ status among directors and executives of public companies. While the report did not recommend amending Principle J of the U.K. Code to consider sexual orientation or gender identity, it emphasized that the U.K. Code “seeks to promote diversity and inclusion of all minority groups within business”¹⁹³ and suggested that the government “update corporate reporting requirements to require companies to demonstrate how they intend to capture data on the sexual orientation and gender identity of staff.”¹⁹⁴

In 2011, the Davies Review called on FTSE 100 boards to achieve 25% women on boards by 2015.¹⁹⁵ After that milestone was achieved, the Hampton Alexander Review encouraged FTSE 350 boards to have 1/3 women by 2020, and it has been

¹⁸⁹ See Financial Reporting Council, *The UK Corporate Governance Code*, supra note 188, at 9.

¹⁹⁰ Id. at 8.

¹⁹¹ See UK Companies Act 2006, § 414C.

¹⁹² See Financial Reporting Council, Board Diversity Reporting, supra note 188, at 9.

¹⁹³ See Hay et al., supra note 98, at 37.

¹⁹⁴ Id.

¹⁹⁵ See *Women on boards*, supra note 96.

achieved by FTSE 100 companies.¹⁹⁶ In 2017, the Parker Review called on FTSE 100 and 250 companies to have at least one director of color by 2021 and 2024, respectively.¹⁹⁷ As of February 2020, approximately 37% of FTSE 100 companies surveyed and 59% of FTSE 350 companies surveyed did not have one director of color on their board.¹⁹⁸

Australian Securities Exchange (“ASX”)-listed companies must comply with the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations (the “ASX Recommendations”) or explain why they do not. The ASX Recommendations require companies to have and disclose a diversity policy with measurable objectives and report on progress towards meeting those objectives. If the company is in the ASX/S&P 300, its objective for achieving gender diversity should be at least 30%.¹⁹⁹ The Australian government also requires companies with 100 or more employees to provide an annual report about gender equality indicators, including the gender composition of the board and the rest of the workforce.²⁰⁰ In 2015, the ASX and KPMG found that 99% of S&P/ASX 200 companies and 88% of ASX 201-500 companies disclosed establishing a diversity policy rather than explaining why they do

¹⁹⁶ See *Hampton-Alexander Review: FTSE Women Leaders* (November 2016), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf.

¹⁹⁷ See Parker, *supra* note 97.

¹⁹⁸ See Sir John Parker, *Ethnic Diversity Enriching Business Leadership* 19 (Feb. 5, 2020), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2020-report-final.pdf.

¹⁹⁹ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* 9 (4th ed. Feb. 2019), available at: <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>.

²⁰⁰ Workplace Gender Equality Act 2012, Part IV § 13 (March 25, 2015), available at: <https://www.legislation.gov.au/Details/C2015C00088>.

not have one.²⁰¹ As of July 2020, women account for 28.4% and 31.8% of board seats among ASX 300 and ASX 100 companies, respectively.²⁰²

Nasdaq observed that women account for at least 30% of the boards of the largest companies in Australia, Sweden and the United Kingdom, and in three other countries that have implemented disclosure requirements or suggested milestones on a comply-or-explain basis: Finland, New Zealand, and Canada.²⁰³ Nasdaq considered that countries that have implemented mandates have also seen progress in women's representation on boards, including, for example, Austria, Iceland, Belgium, France, Germany, Italy and Portugal.²⁰⁴ On average, women account for 31% of board seats in countries with gender mandates.²⁰⁵

Nasdaq discussed the benefits and challenges of mandate and comply-or-explain models with over a dozen stakeholders, and while the majority of organizations were in

²⁰¹ See KPMG and ASX, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended 1 January 2015 and 31 December 2015* 4 (2016) available at: <https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf>.

²⁰² See KPMG and 30% Club, *Building Gender Diversity on ASX 300 Boards: Seven Learnings from the ASX 200* 4 (July 2020), available at: <https://assets.kpmg/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf>. The report also noted that diversity counteracts groupthink and that ASX 201-299 companies with at least 30% female directors “are more likely than not to [have seen] market capitalisation increases over the past 12 months.” *Id.* at 6.

²⁰³ See The Conference Board of Canada, *Data Dashboard* (Sept. 23, 2020), available at: <https://www.conferenceboard.ca/focus-areas/inclusion/2020/aob-comparisons-around-the-world-table?AspxAutoDetectCookieSupport=1>; Andrew MacDougall et al., Osler, *Diversity Disclosure Practices* 4 (2020), available at <https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf>. But see Heike Mensi-Klarbach et al., *The Carrot or the Stick: Self-Regulation for Gender-Diverse Boards via Codes of Good Governance*, J. Bus. Ethics 11 (2019), available at: <https://doi.org/10.1007/s10551-019-04336-z> (reviewing longitudinal data from 2006 to 2016 on listed and state-owned companies in Austria and concluding that “self-regulation of gender diversity on boards is ineffective if merely based on recommendations in codes of good governance”). Mensi-Klarbach recommends setting concrete targets and providing public monitoring to improve the effectiveness of comply-or-explain frameworks.

²⁰⁴ See Paul Hastings, *supra* note 177; see also Deloitte, *Women in the Boardroom*, *supra* note 86.

²⁰⁵ See Paul Hastings, *supra* note 177; The Conference Board of Canada, *supra* note 203.

agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, the majority also stated that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. Most organizations Nasdaq spoke with expressed general discomfort with mandates, although they acknowledged that opposition is lessening in the wake of California's S.B. 826²⁰⁶ and A.B. 979.²⁰⁷ While many recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. In contrast, a disclosure-based framework that provides companies with flexibility would empower companies to maintain decision-making authority over their board's composition while providing stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity. This approach would better inform the investment community and enable more informed analysis of, and conversations with, companies. Nasdaq believes that these goals will be achieved through the disclosure of consistent, comparable data across companies, as would be required by the Exchange's proposed definition of Diverse.

For example, if, under Israeli law regarding board diversity, an Israeli company is required only to have a minimum of one woman on the board and such Israeli company chooses to comply with Israeli home country law in lieu of meeting the diversity objectives of Rule 5605(f)(2)(B), it may choose to disclose that "the Company is

²⁰⁶ See Cal. S.B. 826, supra note 112.

²⁰⁷ See Cal. A.B. 979, supra note 112.

incorporated in Israel and required by Israeli law to have a minimum of one woman on the board, and satisfies home country requirements in lieu of Nasdaq Rule 5605(f)(2)(B), which requires each Foreign Issuer to have at least two Diverse directors.” If a U.S. company had two Diverse directors but one resigned due to unforeseen circumstances, it could disclose, for example: “Due to the unexpected resignation of Ms. Smith this year, the Company does not have at least one director who self-identifies as Female and one director who self-identifies as an Underrepresented Minority or LGBTQ+. We intend to undertake reasonable efforts to meet the diversity objectives of Rule 5605(f)(2)(A) prior to our next annual shareholder meeting and have engaged a search firm to identify qualified Diverse candidates. However, due to unforeseen circumstances, we may not achieve this goal.” Or a U.S. company may disclose that it chooses to define diversity more broadly than Nasdaq’s definition by considering national origin, veteran status or individuals with disabilities when identifying nominees for director because it believes such diversity brings a wide range of perspectives and experiences to the board. In each case, investors will have a better understanding of the company’s reasons for not having at least two Diverse directors and can use that information to make an informed investment or voting decision.

ii. Higher vs. Lower Diversity Objectives

Nasdaq observed that existing empirical research spanned companies across several countries, including the United States, Spain, China, Canada, France and Norway. Nasdaq considered that the studies related to company performance and board diversity found positive associations at various levels and measures of board diversity, including

having at least one woman on the board,²⁰⁸ two or more diverse directors (with diverse considered female, Black, Hispanic or Asian),²⁰⁹ at least three women on the board²¹⁰ and being in the top quartile for gender and ethnic diversity.²¹¹

Nasdaq considered that the academic studies related to investor protection and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board²¹² or up to 50% women on the board, and the assertions of certain academics that their findings may extend to other forms of diversity, including racial and ethnic diversity.²¹³ Nasdaq also reviewed academic research suggesting that “critical mass” is achieved by having three or more women on the board, and that having only one diverse director on the board risks “tokenism.”²¹⁴ Nasdaq considered that although the legislation enacted by Norway and California, and proposed by several other states, varies based on board size, the academic research considered companies across a spectrum of sizes and board sizes, including Fortune 100, S&P 500, Fortune 1000 and smaller (non-Fortune 1000) companies.

Nasdaq concluded that there is no “one-size fits all” approach to promoting board diversity and that the academic literature regarding the relationship between board diversity, company performance and investor protections is continuing to evolve.

²⁰⁸ See Credit Suisse, supra note 30, at 16.

²⁰⁹ See Thomas and Starr, supra note 23, at 5.

²¹⁰ See Eastman et al., supra note 31, at 3; Wagner, supra note 32.

²¹¹ See McKinsey, supra note 36.

²¹² See Abbott et al., supra note 58; Chen et al., supra note 64.

²¹³ See Wahid, supra note 59; Cumming et al., supra note 62, at 34.

²¹⁴ See Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37(2) Org. Dynamics 145 (April 2008); Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, 52(2) J. Fin. & Quant. Analysis 751 (April 2017); Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102(2) J. Bus. Ethics. 299 (Feb. 25, 2011), available at <https://ssrn.com/abstract=1858347>.

However, in Nasdaq's survey of academic studies described above—and of the targets or mandates promulgated by regulatory bodies and organizations worldwide—Nasdaq observed a common denominator of having at least one woman on the board. Similarly, Nasdaq observed a common denominator of having at least one director who is diverse in terms of race, ethnicity or sexual orientation among the requirements related to, and academic research considering, board diversity beyond gender identity. Nasdaq therefore believes that a diversity objective of at least two Diverse directors provides a reasonable baseline for comparison across companies. Companies are not precluded from meeting a higher or lower alternative measurable objective. For example, a company may choose to disclose that it does not meet the diversity objectives under Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in Nasdaq's proposed rule. Nasdaq believes that providing flexibility and clear disclosure when the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.

iii. Longer vs. Shorter Timeframes

Nasdaq considered whether an alternative timeframe for satisfying the diversity objectives of Rule 5605(f)(2) would better promote the public interest than the timeframe Nasdaq has proposed under Rule 5605(f)(7). While companies are not precluded from adding additional directors to their boards to satisfy Rule 5605(f)(2) by having two Diverse directors sooner than contemplated by the proposed rule, Nasdaq understands that some companies may need to obtain shareholder approval to amend their governing

documents to allow for board expansion. Other companies may choose to replace an existing director on the board with a Diverse director, and board turnover may be low.²¹⁵ Nasdaq recognizes that it also takes substantial lead time to identify, interview and select board nominees. To provide companies with sufficient time to satisfy Rule 5605(f) by having two Diverse directors, while recognizing that investors are calling for expedient change, Nasdaq has structured its proposal similarly to the approach taken by California, where companies must achieve one target by an earlier date and satisfy the entire diversity objective at a later date. Nasdaq also considered the approaches taken by foreign jurisdictions to implement diversity objectives. For example, Belgium and France implemented diversity objectives under a phased approach that provided companies with at least five years to fully satisfy the objectives,²¹⁶ whereas Iceland and Portugal provided companies with three years or less.²¹⁷

While companies may choose to satisfy Rule 5605(f)(2) on an alternative timeframe, a company that chooses a timeframe that is longer than the timeframes set forth in Rule 5605(f)(7) also must publicly explain its reasons for doing so. For example, an NGM-listed company that, while not technically a Smaller Reporting Company, views itself as similarly situated to a NCM-listed Smaller Reporting Company may disclose the following: “While the Company is listed on NGM and technically qualifies as a Smaller Reporting Company, it does not file its SEC reports utilizing the Smaller Reporting Company designation. However, the Company believes that it is similarly situated to

²¹⁵ See Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, Harv. L. Sch. Forum on Corp. Governance (Oct. 18, 2020), <https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/> (last accessed Nov. 24, 2020).

²¹⁶ See Paul Hastings, supra note 177, at 79 and 90; see also supra note 179.

²¹⁷ See Deloitte, *Women in the Boardroom*, supra note 86, at 115 and 143; see also supra note 179.

other Smaller Reporting Companies listed on NCM in terms of its annual revenues and public float, and therefore has chosen to satisfy Rule 5605(f)(2)(C) in lieu of Rule 5605(f)(2)(A) and has satisfied this requirement by having at least two Diverse directors on the board who self-identify as Female within the timeframe provided under Rule 5605(f)(7) applicable to NCM-listed companies.”

iv. Broader vs. Narrower Definition of Diverse

Nasdaq considered whether the definition of Diverse should include broader characteristics than those reported on the EEO-1 report, such as the examples provided by the Commission’s CD&I, including LGBTQ+, nationality, veteran status, and individuals with disabilities. During its stakeholder outreach, Nasdaq inquired whether a broad definition of Diversity would promote the public interest. While recognizing the diverse perspectives that different backgrounds can provide, most stakeholders supported a narrower definition of Diversity focused on gender, race and ethnicity, with several supporting broadening the definition to include the LGBTQ+ community.

As discussed above, companies currently are permitted to define diversity “in ways they consider appropriate” under federal securities laws. One of the challenges of this principles-based approach has been the disclosure of inconsistent and noncomparable data across companies. However, most companies are required by law to report data on race, ethnicity and gender to the EEOC through the EEO-1 Report. Nasdaq believes that adopting a broad definition of Diverse would maintain the status quo of inconsistent, noncomparable disclosures, whereas a narrower definition of Diverse focused on race, ethnicity, sexual orientation and gender identity will promote the public interest by improving transparency and comparability. 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.

Nasdaq also believes that a transparent, consistent definition of Diverse would provide stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity if it does not have two Diverse directors. This would enable the investment community to conduct more informed analysis of, and have more informed conversations with, companies. To the extent a company chooses to satisfy the requirement of Rule 5605(f)(2) by having at least two Diverse directors on its board, it will have the ancillary benefit of making meaningful progress in improving board diversity related to race, ethnicity, sexual orientation and gender identity.

Nasdaq's review of academic research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities.²¹⁸ Nasdaq acknowledges that there also is a lack of published research

²¹⁸ KPMG (2020) states that veterans are underrepresented in boardrooms, with retired General and Flag Officers ("GFOs") occupying less than 1% of Fortune 500 board seats. See KPMG, *The value of veterans in the boardroom* 1 (2020), available at: <https://boardleadership.kpmg.us/content/dam/boardleadership/en/pdf/2020/the-value-of-veterans->

on the issue of LGBTQ+ representation on boards.²¹⁹ This may be due to a lack of consistent, transparent data on broader diverse attributes, or because there is no voluntary self-disclosure workforce reporting requirements for LGBTQ+ status, such as the EEO-1 reporting framework for race, ethnicity, and gender. In any event, it is evident that while “[b]oardroom diversity is a topic that has gained significant traction . . . LGBTQ+ diversity, however, has largely been left out of the conversation.”²²⁰

Nonetheless, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ in recognition of the U.S. Supreme Court’s recent affirmation that sexual orientation and gender identity are “inextricably” intertwined with sex,²²¹ and based on studies demonstrating a positive association between board diversity and decision making, company performance and investor protections. Nasdaq also believes that the proposed rule would foster the development of data to conduct meaningful assessments of the association between LGBTQ+ board diversity, company performance and investor protections.

As noted above, the proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, company would still have to provide the required disclosure under Rule 5605(f)(3) if the company does not also have at least two directors who are

in-the-boardroom.pdf (noting that “[r]etired GFOs who have honed their leadership and critical decision-making skills in a high-threat environment can bring extensive risk oversight experience to the board, which may be especially valuable in the context of today’s risk landscape”). Accenture (2018) observed that companies that offered inclusive working environments for employees with disabilities achieved an average of 28% higher revenue, 30% higher economic profit margins, and 2x net income than their industry peers. *See* Accenture, *Getting to Equal: The Disability Inclusion Advantage* (2018), available at: https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf.

²¹⁹ *See* Credit Suisse ESG Research, *supra* note 33, at 1; *see also* Out Leadership, *supra* note 35.

²²⁰ *See* Out Leadership, *supra* note 35, at 3.

²²¹ *See Bostock v. Clayton Cnty.*, *supra* note 160.

Diverse. Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would help inform the evolving body of research on the relationship between broader diverse attributes, company performance and investor protection and provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²²² in general, and furthers the objectives of Section 6(b)(5) of the Act,²²³ in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest, for the reasons set forth below. Further, Nasdaq believes the proposal is not designed to permit unfair discrimination between issuers or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange, for the reasons set forth below.

I. Board Statistical Disclosure

Nasdaq has proposed what it believes to be a straightforward and clear approach for companies to publish their statistical data pursuant to proposed Rule 5606. The disclosure will assist investors in making more informed decisions by making meaningful, consistent, and reliable data readily available and in a clear and

²²² See 15 U.S.C. § 78f(b).

²²³ Id. § 78f(b)(5).

comprehensive format prescribed by the proposed rule. Nasdaq also believes that the disclosure format required by proposed Rule 5606 protects investors by eliminating data collection inaccuracies and decreasing costs, while enhancing investors' ability to utilize the information.

As a threshold matter, as discussed above, diversity has become an increasingly important subject and, in recent years, investors increasingly have been advocating for greater board diversity and for the disclosure of board diversity statistics. The current board diversity disclosure regime is lacking in several respects, and Nasdaq believes that its proposed Rule 5606 addresses many of the current concerns and responds to investors' demands for greater transparency into the diversity characteristics of a company's board composition by mandating disclosure and curing certain deficiencies that exist within the current SEC disclosure requirements.

Investors have expressed their dissatisfaction with having to independently collect board-level data about race, ethnicity and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.²²⁴ The lack of consistency and specificity in Regulation S-K has been a major impediment for many investors and data collectors. As a general matter, the Commission's requirements have not addressed the concerns expressed by commenters that "disclosure about board diversity was important information to investors."²²⁵ Nasdaq believes that its proposed Rule 5606 addresses many of the concerns that have been raised.

²²⁴ See Petition for Amendment of Proxy Rule, *supra* note 80, at 2.

²²⁵ See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,343-44 (amending Item 407(c)(2)(vi) of Regulation S-K, codified at 17 C.F.R. § 229.407(c)(2)(vi)).

Nasdaq believes that requiring the annual disclosure of a company's board diversity, as proposed in Rule 5606(a), will provide consistent information to the public and will enable investors to continually review the board composition of a company to track trends and simplify or eliminate the need for a company to respond to multiple investor requests for information about the diverse characteristics of the company's board. Requiring annual disclosures also would make information available to investors who otherwise would not be able to obtain individualized disclosures.²²⁶ Moreover, consistent disclosures may encourage boards to consider a wider range of board candidates in the nomination process, including candidates with fewer ties to the current board.²²⁷

The Commission's 2009 amendments to Regulation S-K provide no definition for diversity and do not explicitly require disclosures specifically related to details about the board's gender, racial, ethnic and LGBTQ+ composition. Additionally, the Commission's CD&I does not address the definition of diversity, and it requires a registrant to disclose diversity information only in certain limited circumstances. Investors have expressed that current regulations and accompanying interpretations impair their ability to obtain clear and consistent data.²²⁸ As a result, Nasdaq believes that proposed Rule 5606(a) protects investors and the public interest by making clear that a company's annual diversity data disclosure must include information related to gender

²²⁶ See Petition for Rulemaking, supra note 123.

²²⁷ See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 ("To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent."); Hazen and Broome, supra note 114, at 57-58.

²²⁸ See Petition for Amendment of Proxy Rule, supra note 80, at 2; Petition for Rulemaking, supra note 123, at 7.

identity, race, ethnicity and LGBTQ+ status, thereby leaving less discretion for companies to selectively disclose certain diversity information and enhancing the comparability of such data across companies. Moreover, it is in the public interest to provide clear requirements for diversity disclosure, and Nasdaq's proposed Board Diversity Matrix format provides such clarity.

Nasdaq does not intend to obligate directors to self-identify in any of the categories related to gender identity, race, ethnicity and LGBTQ+. Nasdaq believes that a director should have autonomy to decide whether to provide such information to their company. Therefore, Nasdaq believes that it is reasonable and in the public interest to allow directors to opt out of disclosing the information required by proposed Rule 5606(a) by permitting a company to identify such directors in the "Undisclosed" category.

Nasdaq believes that it is in the public interest to utilize the Board Diversity Matrix format for all companies as proposed in Rule 5606(a). Additionally, Nasdaq believes that the format removes any impediments to aggregating and analyzing data across all companies by requiring each company to disclose separately the number of male, female, and non-binary directors, the number of male, female, and non-binary directors that fall into certain racial and ethnic categories, and the number of directors that identify as LGBTQ+. The format allows investors to easily disaggregate the data and track directors with multiple diversity characteristics.

As discussed above, most listed companies are required by law to complete an EEOC Employer Information Report EEO-1 Form. Although outside directors generally

are not employees and therefore are not covered in the EEO-1,²²⁹ Nasdaq believes that collecting the information required by proposed Rule 5606(a) is familiar to most companies, and that it is reasonable to require disclosure of the additional board information.

Nasdaq also believes that requiring currently listed companies to comply with proposed Rule 5606 within one year from the date of Commission approval is a reasonable amount of time, given that most companies already collect similar information for certain employees. Moreover, most companies are required to prepare an annual proxy statement and update the Commission within four business days when a new director is appointed to the board.²³⁰

Further, Nasdaq believes that the disclosure required by proposed Rule 5606(a) will remove impediments to shareholders by making available information related to board-level diversity in a standardized manner, thereby enhancing the consistency and comparability of the information and helping to better protect investors. The proposed disclosure will also help protect investors and the public interest by enabling investors to determine the total number of diverse directors, which is information that is not consistently available in existing proxy disclosures in cases where a single director has multiple diverse characteristics. While companies can elect to make this information available either in a proxy statement or on the company's website, Nasdaq believes it is in the public interest to allow companies the option to provide the disclosure in a way they believe will be most meaningful to their shareholders.

²²⁹ The EEO-1 Form does not require a company to disclose data for outside directors because such directors are not company employees.

²³⁰ See SEC Form 8-K, available at: <https://www.sec.gov/files/form8-k.pdf>.

Nasdaq recognizes that the proposed definition of Underrepresented Minority in Rule 5605(f)(1) may not apply to companies outside of the United States because each country has its own unique demographic composition. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Board Matrix data less relevant for such companies and not useful for investors. Therefore, Nasdaq believes that offering Foreign Issuers the option of a separate template that requires different disclosure categories will provide investors with more accurate disclosures related to the diversity of directors among the board of a Foreign Issuer. Additionally, Nasdaq believes that providing an "Underrepresented Individual in Home Country Jurisdiction" category provides Foreign Issuers with more flexibility to identify and disclose diverse directors within their home countries.

The annual requirement in the proposed rule will guarantee that the information is available to the public on a continuous and consistent basis. As described in the instructions to the Board Diversity Matrix disclosure form and Rule 5606(a), each year following the first year that a company publishes the Board Diversity Matrix, the company will be required to publish its data for the current and immediately prior years. Nasdaq believes that disclosing at least two years of data allows the public to view any changes and track a board's diversity progress.

In addition to providing a means for shareholders to assess a company's board-level diversity and measure its progress in improving that diversity over time, Nasdaq believes that proposed Rule 5606 will provide a means for Nasdaq to assess whether companies meet the diversity objectives of proposed Rule 5605(f). The ability to

determine satisfaction of the proposed listing rule's diversity objectives will protect investors and the public interest.

Moreover, the proposed rule provides transparency into diversity based not only on race, ethnicity, and gender identity, but also on a director's self-identified sexual orientation. Nasdaq believes that expanding the diversity characteristics beyond those which are commonly reported by companies currently will broaden the way boards view diversity, and ensure that board diversity is occurring across all protected groups.

Finally, Nasdaq believes that the proposal is not unfairly discriminatory because proposed Rule 5606 will apply to all Nasdaq-listed companies, except for the following companies: acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series—which meet the definition of Exempt Companies as defined under proposed Rule 5605(f)(4). Nasdaq believes it is reasonable and not unfairly discriminatory to exempt these companies from the proposed rule because the exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition.

Nasdaq further believes it is reasonable to provide companies with a one-year phase-in period to comply with proposed Rule 5606. Nasdaq believes there is only a *de minimis* burden placed on companies to collect the board data and prepare the Board

Diversity Matrix. Moreover, as discussed above, companies already are required to gather similar information for certain employees. Therefore, Nasdaq believes that one year is sufficient time for companies to incorporate their directors into their data collection. Furthermore, newly listed companies have many obligations to meet under Nasdaq listing rules. Therefore, Nasdaq believes that it is reasonable under proposed Rule 5606(d) to provide newly listed Nasdaq companies, including companies listing in connection with a business combination under IM-5101-2, with one year from the time of listing to comply with the proposed rule.

II. Diverse Board Representation or Explanation

a. Removes Impediments to and Perfects the Mechanism of a Free and Open Market and a National Market System

As discussed above, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions by limiting the search for director nominees to existing directors' social networks and candidates with C-suite experience.²³¹ In analyzing Norway's experience in implementing a gender mandate, Dhir (2015) observed that "[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background."²³² Dhir concluded that broadening the search for directors outside of traditional networks "is unlikely to occur without some form of regulatory intervention, given the prevalence of homogenous social networks and in-

²³¹ See GAO Report, supra note 44; Vell, supra note 100; Rhode & Packel, supra note 104, at 39; Deloitte, *Women in the Boardroom*, supra note 86; see also Parker, supra note 97, at 38 (acknowledging that, "as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom").

²³² See Dhir, supra note 78, at 52.

group favoritism.”²³³ Regulatory action was effective in increasing the representation of women on boards in Norway by “democratiz[ing] access to a space previously unavailable to women.”²³⁴ The number of public company board seats held by women in Norway increased from 6% in 2002 to 42% in 2020.²³⁵ One Norwegian director “grudgingly accept[ed] that the free market principles she held so dearly had disappointed her—and that the [mandate] was a necessary correction of market failure.”²³⁶

In contrast, Nasdaq observed that other countries have made comparable progress using a disclosure-based model. Women account for at least 30% of the largest boards of companies in six countries using comply-or-explain models:²³⁷ Australia, Finland, Sweden, New Zealand, Canada and the United Kingdom.²³⁸ Nasdaq discussed the benefits and challenges of mandate and disclosure-based models with over a dozen stakeholders, and the majority of organizations were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that

²³³ Id. at 51. See also Albertine d’Hoop-Azar et al., *Gender Parity on Boards Around the World*, Harv. L. Sch. Forum on Corp. Governance (January 5, 2017), available at: <https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/> (comparing gender diversity on boards in countries with varying requirements and enforcement measures and concluding that external pressures—“progressive societal norms” and regulations—are needed to increase board diversity).

²³⁴ See Dhir, supra note 78, at 101.

²³⁵ See Marianne Bertrand et al., *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway*, Nat’l Bureau of Econ. Rsch. Working Paper 20256 (June 2017), available at <https://www.nber.org/papers/w20256>; Statistics Norway, *Board and management in limited companies* (Mar. 6, 2020), <https://www.ssb.no/en/styre> (last accessed Nov. 27, 2020).

²³⁶ See Dhir, supra note 78, at 116.

²³⁷ See Paul Hastings, supra note 177; Deloitte, *Women in the Boardroom*, supra note 86.

²³⁸ See Conference Board of Canada, supra note 201; Osler, supra note 203, at 4.

mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. However, leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand.

Nasdaq also considered Commissioner Lee's observation that disclosure "gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value. Importantly, it can also drive corporate behavior." Specifically, she observed that:

For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the "what gets measured, gets managed" phenomenon. Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company. The Commission has long-recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that "disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct" and that "[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws."²³⁹

Nasdaq believes that a disclosure-based framework may influence corporate conduct if a company chooses to meet the diversity objective of Rule 5605(f)(2) by having two Diverse directors on the board. A company may satisfy that objective by broadening the search for qualified candidates and considering candidates from other professional pathways that bring a wider range of skills and perspectives beyond

²³⁹ See Lee, supra note 22.

traditional C-suite experience.²⁴⁰ Nasdaq believes that this will help increase opportunities for Diverse candidates that otherwise may be overlooked due to the impediments of the traditional director recruitment process, which will thereby remove impediments to a free and open market and a national market system. Further, boards that choose to have at least two Diverse directors may experience other benefits from diversity that perfect the mechanism of a free and open market and national market system. As discussed above in Section 3.a.II.b (*Diversity and Investor Protection*), and further discussed below in Section 3.b.II.b (*Prevent Fraudulent and Manipulative Acts and Practices*), studies suggest that diversity is positively associated with reduced stock volatility,²⁴¹ more transparent public disclosures,²⁴² and less information asymmetry,²⁴³ leading to stock prices that better reflect public information, and further removing impediments to and perfecting a free and open market and a national market system. Importantly, Nasdaq believes that the disclosure-based framework proposed under Rule 5605(f) will not create additional impediments to a free and open market and a national market system because it will empower companies to maintain decision-making authority over the composition of their boards.

To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2) to have at least two Diverse directors, Nasdaq believes that proposed Rule 5605(f)(3) will provide analysts and investors with a better understanding about the company's reasons for not doing so and its philosophy regarding diversity. Rule 5605(f)

²⁴⁰ See, e.g., Hillman et al., *supra* note 105 (finding that African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy).

²⁴¹ See Bernile et al., *supra* note 28.

²⁴² See Gul et al., *supra* note 66; Bravo and Alcaide-Ruiz, *supra* note 56.

²⁴³ See Abad et al., *supra* note 67.

will thus remove impediments to a free and open market and a national market system by enabling the investment community to conduct more informed analyses of, and have more informed conversations with, companies. Nasdaq believes that such analyses and conversations will be better informed by consistent, comparable data across companies, which Nasdaq proposes to achieve by adopting a consistent definition of “Diverse” under Rule 5605(f)(1). Nasdaq further believes that providing such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency and perfecting the mechanism of a free and open market and a national market system.

b. Prevent Fraudulent and Manipulative Acts and Practices

Nasdaq’s analysis discussed above in Section 3.a.II raises the concern that the failure of homogenous boards to consider a broad range of viewpoints can result in suboptimal decisions that have adverse effects on company performance, board performance and stakeholders. Nasdaq believes that including diverse directors with a broader range of skills, perspectives and experiences may help detect and prevent fraudulent and manipulative acts and practices by mitigating “groupthink.” Increased board diversity also may reduce the likelihood of insider trading and other fraudulent and manipulative acts and practices.

Nasdaq reached this conclusion by reviewing public statements by investors and organizations regarding the impact of groupthink on decision making processes, as well as academic studies on the relationship between diversity, groupthink and fraud. Nasdaq

observed that groupthink can result in “self-censorship”²⁴⁴ and failure to voice dissenting viewpoints in pursuit of “consensus without critical evaluation and without considering different possibilities.”²⁴⁵ In contrast, “board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity.”²⁴⁶

Dhir (2015) concluded that gender diversity may “promote cognitive diversity and constructive conflict in the boardroom” and may be more effective at overseeing management.²⁴⁷ One respondent in Dhir’s survey of Norwegian directors observed that:

I’ve seen situations where the women were more willing to dig into the difficult questions and really go to the bottom even if it was extremely painful for the rest of the board, but mostly for the CEO . . . when it comes to the really difficult situations, [where] you think that the CEO has . . . done something criminal . . . [o]r you think that he has done something negligent, something that makes it such that you . . . are unsure whether he’s the suitable person to be in the driving seat.²⁴⁸

Another director observed that “[i]f you have different experiences and a more diversified board, you will have different questions asked.”²⁴⁹ Dhir concluded that “women directors may be particularly adept at critically questioning, guiding and advising management without disrupting the overall working relationship between the board and management.”²⁵⁰

²⁴⁴ See Forbes and Milliken, supra note 74, at 496.

²⁴⁵ See Dhir, supra note 78, at 124.

²⁴⁶ See Petition for Amendment of Proxy Rule, supra note 80, at 4.

²⁴⁷ See Dhir, supra note 78, at 150.

²⁴⁸ Id. at xiv.

²⁴⁹ Id. at 120.

²⁵⁰ Id. at 35.

Pucheta-Martínez et al. (2016) reasoned that questioning management is a critical part of the audit committee's oversight role, along with ensuring that management does not pressure the external auditor to issue a clean audit opinion notwithstanding the identification of any uncertainties or scope limitations.²⁵¹ Otherwise, “[a]uditors may accept the demands of management for a clean audit report when the firm deserves a scope limitation and an uncertainty qualification.”²⁵² The authors found that “the percentage of female [directors] on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,”²⁵³ and further found a positive association between gender-diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender-diverse audit committees better “ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion” when any uncertainties or scope limitations are identified.²⁵⁴

Nasdaq also reviewed other studies that found a positive association between board gender diversity and important investor protections regardless of whether women are on the audit committee, and considered the assessment of some academics that their findings may extend to other forms of diversity, including racial and ethnic diversity. Nasdaq therefore believes that such findings with respect to audit committees would be expected to be more broadly applicable to the quality of the broader board's decision-

²⁵¹ See Pucheta-Martínez et al., supra note 52, at 368.

²⁵² Id. at 364.

²⁵³ Id. at 363.

²⁵⁴ Id. at 368.

making process, and to other forms of diversity, including diversity of race, ethnicity and sexual orientation.

In examining the association between broader board gender diversity and fraud, Cumming, et al. observed that “[g]ender diversity in particular facilitates more effective monitoring by the board and protection of shareholder interests by broadening the board’s expertise, experience, interests, perspectives and creativity.”²⁵⁵ They observed that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found “strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample.”²⁵⁶ The authors suggested that “other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud.”²⁵⁷

Similarly, Wahid (2017) noted that board gender diversity may “lead to less biased and superior decision-making” because it “has a potential to alter group dynamics by affecting cognitive conflict and cohesion.”²⁵⁸ Wahid (2017) concluded that “gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud,”²⁵⁹ finding that companies with female directors have “fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation.”²⁶⁰ Wahid also suggested that other forms of diversity, including racial diversity, could introduce

²⁵⁵ See Cumming et al., supra note 62, at 34.

²⁵⁶ Id. at 12-14.

²⁵⁷ Id. at 33.

²⁵⁸ See Wahid, supra note 59, at 6.

²⁵⁹ Id. at 1.

²⁶⁰ Id. at 23.

additional perspectives to the boardroom,²⁶¹ which Nasdaq believes could further mitigate groupthink.

Abbott, Parker and Persley (2012) posited that “a female board presence contribut[es] to the board’s ability to maintain an attitude of mental independence, diminish[es] the extent of groupthink and enhance[es] the ability of the board to monitor financial reporting.”²⁶² They noted that “poorer [internal] controls and the lack of an independent and questioning board-level attitude toward accounting judgments can create an opportunity for fraud.”²⁶³ They observed a lower likelihood of a material financial restatements stemming from fraud or error in companies with at least one woman on the board.²⁶⁴

Nasdaq believes that these studies provide substantial evidence suggesting an association between gender diverse boards or audit committees and a lower likelihood of fraud; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a greater likelihood of disclosing audit reports with uncertainties and scope limitations. Moreover, academics have suggested that other forms of diversity, including racial and ethnic diversity, may reduce fraud and mitigate groupthink. Further, while homogenous boards may unwittingly fall into the trap of

²⁶¹ Id. at 24-25; see also Shecter, supra note 61 (quoting Wahid as saying that “[i]f you’re going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds.... If we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.”).

²⁶² See Abbott et al., supra note 58, at 607.

²⁶³ Id. at 610.

²⁶⁴ Id. at 613 (“The previously discussed lines of research lead us to form our hypothesis. In summary, restatements may stem from error or fraud. In either instance, the internal control system (to which the board of directors contributes by setting the overall tone at the top) has failed to detect or prevent a misstatement. Ineffective internal controls may stem from insufficient questioning of assumptions underlying financial reporting, inadequate attention to the internal control systems, or insufficient support for the audit committee’s activities.”).

groupthink due to a lack of diverse perspectives, “heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.”²⁶⁵ Nasdaq therefore believes that the proposed rule is designed to reduce groupthink, and otherwise to enhance the functioning of boards, and thereby to prevent fraudulent and manipulative acts and practices.

Further, the Commission has suggested that in seeking board diversity, “[t]o the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent.”²⁶⁶ Nasdaq believes that the benefits of the proposed rule are analogous to the benefits of Nasdaq’s rules governing and requiring director independence. In 2003, Nasdaq adopted listing rules requiring, among other things, that independent directors comprise a majority of listed companies’ boards, which were “intended to enhance investor confidence in the companies that list on Nasdaq.”²⁶⁷ The Commission observed that self-regulatory organizations “play an important role in assuring that their listed issuers establish good governance practices,” and concluded that the proposed rule changes would secure an “objective oversight role” for issuers’ boards of directors, and “foster greater transparency, accountability, and objectivity” in that role.”²⁶⁸ Along the same lines, in approving Nasdaq’s application for registration as a national securities exchange, the Commission found Nasdaq’s rules governing the

²⁶⁵ See Dallas, supra note 76, at 1391.

²⁶⁶ See Proxy Disclosure Enhancements, supra note 73, 74 Fed. Reg. at 68,355.

²⁶⁷ See Order Approving Proposed Rule Changes, 68 Fed. Reg. at 64,161.

²⁶⁸ Id. at 64, 175.

independence of members of boards and certain committees to be consistent with Section 6(b)(5) of the Act because they advanced the “interests of shareholders” in “greater transparency, accountability, and objectivity” in oversight and decision-making by corporate boards.²⁶⁹ Nasdaq proposes to promote accountability in corporate decision-making by requiring companies who do not have at least two Diverse directors on their board to provide investors with a public explanation of the board’s reasons for not doing so under Rule 5605(f)(3).

Nasdaq believes it is critical to the detection and prevention of fraudulent and manipulative acts and practices to have directors on the board who are willing to critically question management and air dissenting views. Nasdaq believes that boards comprised of directors from Diverse backgrounds enhance investor confidence by ensuring that board deliberations consider the perspectives of more than one demographic group, leading to robust dialogue and better decision making. However, Nasdaq recognizes that directors may bring diverse perspectives, skills and experiences to the board, notwithstanding that they have similar attributes. Nasdaq therefore believes it is in the public interest to permit a company that chooses not to meet the diversity objectives of Rule 5605(f)(2) to explain why it does not, in accordance with Rule 5605(f)(3)—for example, if it believes that defining diversity more broadly than Nasdaq, for example by considering national origin, veteran status and disabilities, brings a wide range of perspectives and experiences to the board. Nasdaq believes such disclosure will provide investors with a better understanding of the company’s philosophy regarding diversity.

²⁶⁹ See *In re Nasdaq Stock Market*, 71 Fed. Reg. 3550, 3565 (Jan. 23, 2006). See also 68 Fed. Reg. 18,788, 18,815 (April 16, 2003) (in adopting Rule 10A-3, setting standards for the independence of audit committee members, the Commission concluded that such standards would “enhance the quality and accountability of the financial reporting process and may help increase investor confidence, which implies increased efficiency and competitiveness of the U.S. capital markets”).

This would better inform the investment community and enable more informed analyses of, and conversations with, companies. Therefore, Nasdaq believes satisfying Rule 5605(f)(2) through disclosure pursuant to Rule 5605(f)(3) is consistent with Section 6(b)(5) of the Act because it advances the “interests of shareholders” in “greater transparency, accountability, and objectivity” of boards and their decision-making processes.²⁷⁰ In addition, as discussed further in Section 3.b.II.c (*Promotes Investor Protection and the Public Interest*) below, Nasdaq believes that the proposed diversity requirement could help to reduce information asymmetry, and thereby reduce the risk of insider trading or other opportunistic insider behavior.

c. Promotes Investor Protection and the Public Interest

Nasdaq has found substantial evidence that board diversity is positively associated with more transparent public disclosures and higher quality financial reporting, thereby promoting investor protection. Specifically, studies have concluded that companies with gender-diverse boards are associated with more transparent public disclosures and less information asymmetry, leading to stock prices that better reflect public information. Gul, Srinidhi & Ng (2011) found that “gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms.”²⁷¹ Bravo and Alcaide-Ruiz (2019) found a positive association between women on the audit committee with financial or accounting expertise and the voluntary disclosure of forward-looking information.²⁷² Abad et al. (2017) concluded that companies with gender-diverse boards

²⁷⁰ Id.

²⁷¹ See Gul et al., supra note 66, at 2.

²⁷² See Bravo and Alcaide-Ruiz, supra note 56, at 151.

are associated with lower levels of information asymmetry, suggesting that “the policies recently implemented in several European countries to increase the presence of female directors in company boards could have beneficial effects on stock markets by reducing the risk of informed trading and enhancing stock liquidity.”²⁷³

Nasdaq believes that one consequence of information asymmetry is that insiders may engage in opportunistic behavior prior to a public announcement of financial results and before the market incorporates the new information into the company’s stock price. This can result in unfair gains or an avoidance of losses at the expense of shareholders who did not have access to the same information. This may exacerbate the principal-agent problem, in which the interests of a company’s board and shareholders are not aligned. Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,²⁷⁴ which may be an effective mechanism to deter opportunistic behavior by management and better align their interests with those of their company’s shareholders.²⁷⁵

Another concern is that “[w]hen information asymmetry is high, stakeholders do not have sufficient resources, incentives, or access to relevant information to monitor managers’ actions, which gives rise to the practice of earnings management.”²⁷⁶ Earnings management “is generally defined as the practice of using discretionary accounting methods to attain desired levels of reported earnings.”²⁷⁷ Manipulating

²⁷³ See Abad et al., supra note 67, at 202.

²⁷⁴ See Lucas-Perez et al., supra note 69.

²⁷⁵ Id.

²⁷⁶ See Vernon J. Richardson, *Information Asymmetry and Earnings Management: Some Evidence*, 15 Rev. Quantitative Fin. and Acct. 325 (2000).

²⁷⁷ See Gull et al., supra note 55, at 2.

earnings is particularly concerning to investors because “[i]f users of financial data are ‘misled’ by the level of reported income, then investors’ allocation of resources may be inappropriate when based on the financial statements provided by management,”²⁷⁸ thereby undermining the efficacy of the capital formation process for investors who rely on such information to make informed investment and voting decisions.

Gull et al. (2018)²⁷⁹ observe that overseeing management is a crucial component of investor protection, particularly with regard to earnings management:

The role of the board of directors and board characteristics (*i.e.* board independence and gender diversity) is usually associated with the protection of shareholder interests.... This role is particularly crucial with regard to the issue of earnings management, in that one of the responsibilities of boards is to monitor management.²⁸⁰

The authors of that study found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management. Srinidhi, Gul and Tsui (2011) observed that better oversight of management combined with lower information asymmetry leads to better earnings quality. They noted that “[e]arnings quality is an important outcome of good governance demanded by investors and therefore its improvement constitutes an important objective of the board.”²⁸¹ They found that companies with women on the board, specifically on the audit committee, exhibit “higher earnings quality” and “better reporting discipline by managers.”²⁸² They concluded that “including female directors on the board and the

²⁷⁸ Id.

²⁷⁹ See generally id.

²⁸⁰ Id. at 6 (citations omitted).

²⁸¹ See Srinidhi et al., supra note 50, at 1638.

²⁸² Id. at 1612.

audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements.”²⁸³

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced internal control weaknesses, noting that “prior literature has established a negative relationship between internal control weaknesses and earnings quality.”²⁸⁴ Internal control over financial reporting are procedures designed “to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.”²⁸⁵ Weaknesses in internal controls can “lead to poor financial reporting quality” and “more severe insider trading”²⁸⁶ or failure to detect a material misstatement. According to the PCAOB:

A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.²⁸⁷

A material misstatement can occur “as a result of some type of inherent risk, whether fraud or error (*e.g.*, management's aggressive accounting practices, erroneous application of GAAP).”²⁸⁸ The failure to prevent or detect a material misstatement before financial statements are issued can require the company to reissue its financial statements and potentially face costly shareholder litigation. Chen et al. found that

²⁸³ Id.

²⁸⁴ See Chen et al., supra note 64, at 18.

²⁸⁵ See Public Company Accounting Oversight Board, *Auditing Standard No. 5: Appendix A*, A5 available at: https://pcaobus.org/oversight/standards/archived-standards/details/Auditing_Standard_5_Appendix_A.

²⁸⁶ See Chen et al., supra note 64, at 12.

²⁸⁷ See Public Company Accounting Oversight Board, supra note 285, at A7.

²⁸⁸ See Abbott et al., supra note 58, at 609-10.

having at least one woman on the board (regardless of whether or not she is on the audit committee) “may lead [a] to reduced likelihood of material weaknesses [in internal control over financial reporting],”²⁸⁹ and Abbott, Parker and Persley (2012) found “a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement.”²⁹⁰ Notably, while the Sarbanes-Oxley Act (“SOX”) implemented additional measures to ensure that a company has robust internal controls, the findings of Abbott et al. were consistent among a sample of pre- and post-SOX restatements, suggesting that “an additional, beneficial layer of independence in group decision-making is associated with gender diversity.”²⁹¹

Nasdaq believes that the proposal to require listed companies to have at least two Diverse directors under Rule 5605(f) could help to lower information asymmetry and reduce the risk of insider trading or other opportunistic insider behavior, which would help to increase stock price informativeness and enhance stock liquidity, thereby protecting investors and promoting capital formation and efficiency. Nasdaq believes that information asymmetry could also be reduced by permitting companies to satisfy Rule 5605(f)(2) by publicly disclosing their reasons for not meeting its diversity objectives in accordance with Rule 5605(f)(3), because the requirement will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, which will further protect investors and promote capital formation and efficiency.

²⁸⁹ See Chen et al., supra note 64, at 18.

²⁹⁰ See Abbott et al., supra note 58, at 607.

²⁹¹ Id. at 609.

Moreover, Nasdaq believes that proposed Rule 5605(f) could foster more transparent public disclosures, higher quality financial reporting, and stronger internal control over financial reporting and mechanisms to monitor management. This could be particularly beneficial for Smaller Reporting Companies that are not subject to the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting, thereby promoting investor protection.

Nasdaq believes that the body of research on the relationship between economic performance and board diversity summarized under Section 3.a.II.a above provides substantial evidence supporting the conclusion that board diversity does not have adverse effects on company financial performance, and therefore Nasdaq believes the proposal will not negatively impact capital formation, competition or efficiency among its public companies.²⁹² Nasdaq considered that some studies on gender diversity alone have had mixed results,²⁹³ and that the U.S. GAO (2015) and Carter et al. (2010) concluded that the mixed results are due to differences in methodologies, data samples and time periods.²⁹⁴ This is not the first time Nasdaq has considered whether, on balance, various

²⁹² See Alexandre Di Miceli and Angela Donaggio, *Women in Business Leadership Boost ESG Performance: Existing Body of Evidence Makes Compelling Case*, 42 International Finance Corporation World Bank Group, Private Sector Opinion at 11 n.15 (2018), available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/private+sector+opinion/women+in+business+leadership+boost+esg+performance (“The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)”). See also Wahid, *supra* note 59, at 6 (suggesting that “at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards’ ability to monitor firm management”).

²⁹³ See, e.g., Pletzer et al., *supra* note 38; Post and Byron, *supra* note 39; Adams and Ferreira, *supra* note 42.

²⁹⁴ See GAO Report, *supra* note 44, at 5 (“Some research has found that gender diverse boards may have a positive impact on a company’s financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what

studies finding mixed results related to board composition and company performance are sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the mixed results of studies regarding the relationship between company performance and board independence,²⁹⁵ Nasdaq adopted listing rules requiring a majority independent board that were “intended to enhance investor confidence in the companies that list on Nasdaq.”²⁹⁶ In its Approval Order, the SEC noted that “[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets;” the Commission concluded that the independence rules would secure an “objective oversight role” for issuers’ boards, and “foster greater transparency, accountability, and objectivity” in that role.²⁹⁷ Nasdaq believes this reasoning applies to the current proposed rule as well. Even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards.²⁹⁸ Legislators are increasingly taking action to encourage corporations to diversify their boards and improve diversity disclosures.²⁹⁹ Moreover, during its discussions with stakeholders, Nasdaq found

methodologies were used”); Carter (2010), supra note 40, at 400 (observing that the different “statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.”).

²⁹⁵ See supra note 45.

²⁹⁶ See Order Approving Proposed Rule Changes, 68 Fed. Reg. at 64,161.

²⁹⁷ Id. at 64,176.

²⁹⁸ See supra notes 4 and 8.

²⁹⁹ See supra note 112.

consensus across every constituency that there is inherent value in board diversity.

Lastly, it has been a longstanding principle that “Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process.”³⁰⁰

For all the foregoing reasons, Nasdaq believes that proposed Rule 5605(f) will promote investor protection and the public interest by enhancing investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two Diverse directors on their boards or by explaining their rationale for not meeting that objective. To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional disclosure about the company’s reasons for doing so under Rule 5605(f)(3). For example, the company may choose to disclose that it does not meet the diversity objectives of Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in our proposed rule. Nasdaq believes that providing such flexibility and clear disclosure where the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency, and further promoting the public interest.

³⁰⁰ See Nasdaq Rulebook, Rule 5101.

d. Not Designed to Permit Unfair Discrimination between Customers, Issuers, Brokers, or Dealers

Nasdaq believes that proposed Rule 5605(f) is not designed to permit unfair discrimination among companies because it requires all companies subject to the rule to have at least two Diverse directors or explain why they do not. Further, the proposal requires at least one of the two Diverse directors to be an individual who self-identifies as Female. While the proposal provides different requirements for the second Diverse director among Smaller Reporting Companies, Foreign Issuers and other companies, Nasdaq believes that the rule is not designed to permit unfair discrimination among companies. In all cases, a company can choose to meet the diversity objectives of the entire rule or to satisfy only certain elements of the rule. Further, the proposed rule does not limit board sizes—if a board chooses to nominate a Diverse individual to the board to meet the diversity objectives of the proposed rule, it is not precluded from also nominating a non-Diverse director for an additional board seat.

i. Rule 5605(f)(2)(B): Foreign Issuers

Similar to all other companies subject to Rule 5605(f), the proposal requires all Foreign Issuers to have, or explain why they do not have, at least two Diverse directors, including one director who self-identifies as Female. However, Nasdaq proposes to provide Foreign Issuers with additional flexibility with regard to the second Diverse director. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. While the proposal provides a different requirement for the second Diverse director for Foreign

Issuers, Nasdaq believes it is not designed to permit unfair discrimination between Foreign Issuers and other companies because it recognizes that the unique demographic composition of the United States, and its historical marginalization of Underrepresented Minorities and the LGBTQ+ community, may not extend to all countries outside of the United States. Further, Nasdaq believes that it is challenging to apply a consistent definition of minorities to all countries globally because “[t]here is no internationally agreed definition as to which groups constitute minorities.”³⁰¹ Similarly, “there is no universally accepted international definition of indigenous peoples.”³⁰² Rather, the United Nations *Declaration on the Rights of Indigenous Peoples* recognizes “that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.”³⁰³ Accordingly, Nasdaq believes that it is not unfairly discriminatory to allow an alternative mechanism for Foreign Issuers to satisfy Rule 5605(f)(2) in recognition that the U.S.-based EEOC definition of Underrepresented Minorities is not appropriate for every Foreign Issuer. In addition, Foreign Issuers have the ability to satisfy Rule 5605(f)(2)(B) by explaining that they do not satisfy this alternative definition. Similarly, any company that is not a

³⁰¹ See United Nations, *Minority Rights: International Standards and Guidance for Implementation 2* (2010), available at: https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf. See also G.A. Res. 47/135, art. 1.1 (Dec. 18, 1992) (“States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”). The preamble to the Declaration also “[r]eaffirm[s] that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion.”

³⁰² See United Nations, *Minority Rights*, *supra* note 301, at 3.

³⁰³ See G.A. Res. 61/295 (Sept. 13, 2007).

Foreign Issuer, but that prefers the alternative definition available for Foreign Issuers, could follow Rule 5605(f)(2)(B) and disclose its reasons for doing so.

Under the proposal, Foreign Issuer means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a “foreign issuer” under Rule 3b-4(b) under the Act, and (ii) has its principal executive offices located outside of the United States. For example, a company that is considered a “foreign issuer” under Rule 3b-4(b) under the Act and has its principal executive offices located in Ireland would qualify as a Foreign Issuer for purposes of Rule 5605(f)(2), even if it is not considered a Foreign Private Issuer under Nasdaq or SEC rules.

Nasdaq recognizes that Foreign Issuers may be located in jurisdictions that impose privacy laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race or ethnicity. In such countries, a company may not be able to determine each director’s self-identified Diverse attributes due to restrictions on the collection of personal information. The company may instead publicly disclose pursuant to Rule 5605(f)(3) that “Due to privacy laws in the company’s home country jurisdiction limiting its ability to collect information regarding a director’s self-identified Diverse attributes, the company is not able to determine that it has two Diverse directors as set forth under Rule 5605(f)(2)(B)(ii).”

ii. Rule 5605(f)(2)(C): Smaller Reporting Companies

While the proposal provides a different requirement for the second Diverse director for Smaller Reporting Companies, Nasdaq believes that this distinction is not designed to permit unfair discrimination among companies. Nasdaq has designed the proposed rule to ensure it does not have a disproportionate economic impact on Smaller

Reporting Companies by imposing undue costs or burdens. Nasdaq recognizes that Smaller Reporting Companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources to compensate an additional director or engage a search firm to find director candidates outside of the directors' traditional networks. Nasdaq believes that this is a reasonable basis to distinguish Smaller Reporting Companies from other companies subject to the rule.

Smaller Reporting Companies already are provided certain exemptions from Nasdaq's listing rules. For example, under Rule 5605(d)(3), Smaller Reporting Companies must have a compensation committee comprised of at least two independent directors and a formal written compensation committee charter or board resolution that specifies the committee's responsibilities and authority, but such companies are not required to grant authority to the committee to retain or compensate consultants or advisors or consider certain independence factors before selecting such advisors, consistent with Rule 10C-1 of the Act.³⁰⁴ In its approval order, the SEC concluded as follows:

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C-1 requirements, it makes sense for Nasdaq to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further . . . in view of the potential additional costs of an annual review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.³⁰⁵

³⁰⁴ See Nasdaq Rulebook, Rule 5605(d)(3).

³⁰⁵ See Order Granting Accelerated Approval of Proposed Rule Change, 78 Fed. Reg. 4,554, 4,567 (Jan. 22, 2013).

The Commission also makes accommodations for Smaller Reporting Companies based on their more limited resources, allowing them to comply with scaled disclosure requirements in certain SEC reports rather than the more rigorous disclosure requirements for larger companies. For example, Smaller Reporting Companies are not required to include a compensation discussion and analysis in their proxy or Form 10-K describing the material elements of the compensation of its named executive officers.³⁰⁶ Eligible Smaller Reporting Companies also are relieved from the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting.³⁰⁷ In each case, companies may choose to comply with the more rigorous requirements in lieu of relying on the exemptions.

Any company that is not a Smaller Reporting Company, but prefers the alternative rule available for Smaller Reporting Companies, could follow Rule 5605(f)(2)(C) and disclose their reasons for doing so. As such, Nasdaq believes that the proposed alternative rule for Smaller Reporting Companies is not designed to, and does not, unfairly discriminate among companies. Lastly, Nasdaq believes that Rule 5605(f)(2)(C) is not designed to permit unfair discrimination among companies because it requires Smaller Reporting Companies to have at least one director who self-identifies as Female, similar to other companies subject to Rule 5065(f).

³⁰⁶ See 17 C.F.R. § 229.402(l).

³⁰⁷ See Accelerated Filer and Large Accelerated Filer Definitions, 85 Fed. Reg. 17,178 (March 26, 2020).

iii. Rule 5605(f)(3): Public Disclosure of Non-Diverse Board

Under proposed Rule 5605(f)(3), if a company determines not to meet the diversity objectives of Rule 5605(f) in its entirety, it must specify the applicable requirements of the Rule and explain its reasons for not having at least two Diverse directors. Nasdaq designed the proposal to avoid unduly burdening competition or efficiency, or conflicting with existing securities laws, by providing all companies subject to Rule 5605(f) with the option to make the public disclosure required under Rule 5605(f)(3) in the company's proxy statement or information statement for its annual meeting of shareholders or, alternatively on the company's website, provided that the company submits a URL link to such disclosure to Nasdaq through the Listing Center no later than 15 calendar days after the company's annual shareholder meeting. Nasdaq believes Rule 5605(f)(3) is not designed to permit unfair discrimination among companies because the proposed rule provides all companies subject to Rule 5605(f) the option to disclose an explanation rather than meet the diversity objectives of Rule 5605(f)(2).

Certain federal securities laws similarly permit companies to satisfy corporate governance requirements through disclosure of reasons for not meeting the applicable requirement. For example, under Regulation S-K, Item 407 requires a company to disclose whether or not its board of directors has determined that the company has at least one audit committee financial expert. If a company does not have a financial expert on the audit committee, it must provide an explanation.³⁰⁸ Item 406 requires a company to disclose whether it has adopted a written code of ethics that applies to the chief executive

³⁰⁸ See 17 C.F.R. § 229.407(d)(5).

officer and senior financial or accounting officers. If a company has not adopted such a code of ethics, it must disclose the reasons why not.³⁰⁹ Item 402 regarding pay ratio disclosure defines how total compensation for employees should be calculated, but permits companies to use a different measure as long as they explain their approach.³¹⁰

Furthermore, Nasdaq rules and SEC guidance already recognize that website disclosure can be a method of disseminating information to the public. For example, Nasdaq listing rules permit companies to provide website disclosures related to third party director compensation,³¹¹ foreign private issuer home country practices,³¹² and reliance on the exception relating to independent compensation committee members.³¹³ The SEC has recognized that “[a] company’s web site is an obvious place for investors to find information about the company”³¹⁴ and permits companies to make public disclosure of material information through website disclosures if, among other things, the company’s website is “a recognized channel of distribution of information.”³¹⁵

iv. Rule 5605(f)(4): Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of Rule 5605(f) (defined as “Exempt Companies”): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive

³⁰⁹ Id. § 229.406(a).

³¹⁰ Id. § 229.402.

³¹¹ See Nasdaq Rulebook, Rule 5250(b)(3)(A).

³¹² Id., Rule 5615(a)(3)(B) and IM-5615-3.

³¹³ Id., Rules 5605(d)(2)(B) (non-independent compensation committee member under exceptional and limited circumstances) and 5605(e)(3) (non-independent nominations committee member under exceptional and limited circumstances).

³¹⁴ See Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,864 (Aug. 7, 2008).

³¹⁵ Id. at 45,867.

issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. Each of the types of Exempt Companies either has no board of directors, lists only securities with no voting rights towards the election of directors, or is not an operating company, and the holders of the securities they issue do not expect to have a say in the composition of their boards. As such, Nasdaq believes the proposal is not designed to permit unfair discrimination by excluding Exempt Companies from the application of proposed Rule 5605(f). These companies already are exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615.

v. Rule 5605(f)(5): Phase-in Period

Proposed Rule 5605(f)(5)(A) will allow any newly listing company that was not previously subject to a substantially similar requirement of another national securities exchange one year from the date of listing to satisfy the requirements of Rule 5605(f). Proposed Rule 5605(f)(5)(B) also will allow any company that ceases to be a Foreign Issuer, a Smaller Reporting Company or an Exempt Company one year from the date that the company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively, to satisfy the requirements of Rule 5605(f). This phase-in period will apply after the end of the transition period provided in Rule 5605(f)(7).

Nasdaq believes this approach is not designed to permit unfair discrimination because it provides all companies that become newly subject to the rule the same time

period within which to comply. In addition, this approach is similar to other phase-in periods granted to companies listing on or transferring to Nasdaq. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

vi. Rule 5605(f)(7): Effective Dates/Transition

Under proposed Rule 5605(f)(7), each company must have, or explain why it does not have, one Diverse director no later than two calendar years after the Approval Date,³¹⁶ and two Diverse directors no later than (i) four calendar years after the Approval Date for companies listed on the NGS or NGM tiers, or (ii) five calendar years after the Approval Date for companies listed on the NCM tier.

Nasdaq believes this approach is not designed to permit unfair discrimination because it recognizes that companies listed on the Nasdaq Capital Market may not have the resources necessary to compensate an additional director or engage a search firm to search for director candidates outside of the directors' traditional networks. Therefore, Nasdaq believes it is in the public interest to provide such companies with one additional year to meet the diversity objectives of Rule 5605(f), should they choose to do so.

³¹⁶ The "Approval Date" is the date that the SEC approves the proposed rule.

Nasdaq notes that all companies may choose to follow a timeframe applicable to a different market tier, provided they publicly describe their explanation for doing so. They also may construct their own timeframe for meeting the diversity objectives of Rule 5605(f), provided they publicly disclose their reasons for not abiding by Nasdaq's timeframe.

e. Not Designed to Regulate by Virtue of any Authority Conferred by the Act Matters Not Related to the Purposes of the Act or the Administration of the Exchange

Nasdaq believes that the proposal is not designed to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.³¹⁷ The proposal relates to the Exchange's corporate governance standards for listed companies. As discussed above, "[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets."³¹⁸ And because "it is not always feasible to define . . . every practice which is inconsistent with the public interest or with the protection of investors," the Act leaves to SROs "the necessary work" of rulemaking pursuant to Section 6(b)(5).³¹⁹

Nasdaq recognizes that U.S. states are increasingly proposing and adopting board diversity requirements, and because corporations are creatures of state law, some market participants may believe that such regulation is best left to states. However, Nasdaq considered that certain of its listing rules related to corporate governance currently relate to areas that are also regulated by states. For example, states impose standards related to

³¹⁷ See 15 U.S.C. § 78f(b)(5).

³¹⁸ See Order Approving Proposed Rule Changes, 68 Fed. Reg. at 64,161.

³¹⁹ See Heath v. SEC, 586 F.3d 122, 132 (2d Cir. 2009) (citing Avery v. Moffat, 55 N.Y.S.2d 215, 228 (Sup. Ct. 1945)).

quorums³²⁰ and shareholder approval of certain transactions,³²¹ which also are regulated under Nasdaq's listing rules.³²² Nasdaq has adopted rules relating to such matters to ensure uniformity of such rules among its listed companies. Similarly, Nasdaq believes that the proposed rule will create uniformity among listed companies by helping to assure investors that all non-exempt companies have at least two Diverse directors on their board or publicly describe why they do not.

Further, Nasdaq believes the proposal will enhance investor confidence that listed companies that have two Diverse directors are considering the perspectives of more than one demographic group, leading to robust dialogue and better decision making, as well as the other corporate governance benefits of diverse boards discussed above in Section 3.a.II. To the extent companies choose to disclose their reasons for not meeting the diversity objectives of Rule 5605(f)(2) pursuant to Rule 5605(f)(3), Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make an informed voting decision, thereby promoting capital formation and efficiency. It has been the Exchange's longstanding principle that "Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process."³²³

³²⁰ See, e.g., 8 Del. Code § 216 (providing that a quorum at a shareholder's meeting shall consist of no less than 1/3 of the shares entitled to vote at such meeting).

³²¹ See, e.g., *id.* §§ 251, 271 (providing that shareholder approval by a majority of the outstanding voting shares entitled to vote is required for mergers and the sale of all or substantially all of a corporation's assets).

³²² See, e.g., Nasdaq Rulebook, Rules 5620(c) and 5635(a).

³²³ *Id.*, Rule 5101.

In addition, as discussed in Section 3.a.I, in passing Section 342 of the Dodd-Frank Act, Congress recognized the need to respond to the lack of diversity in the financial services industry, and the Standards designed by the Commission and other financial regulators provide a framework for addressing that industry challenge. The Standards themselves identify several focus areas, including the importance of “Organizational Commitment,” which speaks to the critical role of senior leadership—including boards of directors—in promoting diversity and inclusion across an organization. In addition, like the proposed rule, the Standards also consider “Practice to Promote Transparency,” and recognize that transparency is a key component of any diversity initiative. Specifically, the Standards provide that the “transparency of an entity’s diversity and inclusion program promotes the objectives of Section 342,” and also is important because it provides the public with necessary information to assess an entity’s diversity policies and practices.³²⁴

4. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Nasdaq reviewed requirements related to board diversity in two dozen foreign jurisdictions, and almost every jurisdiction imposes diversity-focused requirements on listed companies, either through a securities exchange, financial regulator or the government. Nasdaq competes for listings globally, including in countries that have implemented a more robust regulatory reporting framework for diversity and ESG disclosures. Currently in the U.S., the Long Term Stock Exchange (“LTSE”), which

³²⁴ Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016 (June 10, 2015).

includes a number of sponsors which have investment businesses, has communicated to institutional investors that it that it seeks to distinguish itself by focusing on corporate governance, including, for example, diversity and inclusion. Under Rule 14.425, companies listed on LTSE must adopt and publish a long-term stakeholder policy that explains, among other things, “the Company’s approach to diversity and inclusion.”³²⁵

I. Board Statistical Disclosure

The Exchange does not believe that proposed Rule 5606 will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the adoption of Rule 5606 will not impose any undue burden on competition among listed companies for the reasons set forth below.

With a few exceptions, all companies would be required to make the same disclosure of their board-level statistical information. The average board size of a company that is currently listed on the Exchange is eight directors. Although a company would be required to disclose its board-level statistical data, directors may choose to opt out rather than reveal their diversity characteristics to their company. A company would identify such directors in the “Undisclosed” category. For directors who voluntarily disclose their diversity characteristics, the company would collect their responses and disclose the information in either the company’s proxy statement, information statement of shareholder meeting or on the company’s website, using Nasdaq’s required format. While the time and economic burden may vary based on a company’s board size, Nasdaq does not believe there is any significant burden associated with gathering, preparing and

³²⁵ See Long-Term Stock Exchange Rule Book, Rule 14.425.

reporting this data. Therefore, Nasdaq believes that there will be a *de minimis* time and economic burden on listed companies to collect and disclose the diversity statistical data.

Some investors value demographic diversity, and list it as an important factor influencing their director voting decisions.³²⁶ Investors have stated that consistent data would make its collection and analysis easier and more equitable for investors that are not large enough to demand or otherwise access individualized disclosures.³²⁷ Therefore, Nasdaq believes that any burden placed on companies to gather and disclose their board-level diversity statistics is counterbalanced by the benefits that the information will provide to a company's investors.

Moreover, as discussed above, most listed companies are required to submit an annual EEO-1 Report, which provides statistical data related to race and gender data among employees similar to the data required under proposed Rule 5606(a). Because most companies are already collecting similar information annually to satisfy their EEOC requirement, Nasdaq does not believe that adding directors to the collection will place a significant burden on these companies. Additionally, the information requested from Foreign Issuers is limited in scope and therefore does not impose a significant burden on them.

Nasdaq faces competition in the market for listing services. Proposed Rule 5606 reflects that competition, but it does not impose any burden on competition with other exchanges. As discussed above, investors have made clear their desire for greater transparency into public companies' board-level diversity as it relates to gender identity, race, and ethnicity. Nasdaq believes that the proposed rule will enhance the competition

³²⁶ See Hunt et al., supra note 26.

³²⁷ See Petition for Rulemaking, supra note 123, at 2.

for listings. Other exchanges can set similar requirements for their listed companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

II. Diverse Board Representation or Explanation

Nasdaq believes that proposed Rule 5605(f) will not impose burdens on competition among listed companies because the Exchange has constructed a framework for similarly-situated companies to satisfy similar requirements (*i.e.*, Foreign Issuers, Smaller Reporting Companies and other companies), and has provided all companies with the choice of satisfying the requirements of Rule 5605(f)(2) by having at least two Diverse directors, or by explaining why they do not. Nasdaq believes that this will avoid imposing undue costs or burdens on companies that, for example, cannot afford to compensate an additional director or believe it is not appropriate, feasible or desirable to meet the diversity objectives of Rule 5605(f) based on the company's particular circumstances (for example, the company's size, operations or current board composition). Rather than requiring a company to divert resources to compensate an additional director, and place the company at a competitive disadvantage with its peers, the rule provides the flexibility for such company to explain why it does not meet the diversity objective.

The cost of identifying director candidates can range from nothing or a nominal fee (via personal, work or school-related networks, or board affinity organizations, as well as internal research by the corporate secretary's team) to amounts that can vary

widely depending on the specific search firm and the size of the company. Some industry observers estimate board searches for independent directors cost about one-third of a director's annual compensation, while others estimate it costs between \$75,000 and \$150,000. The underlying figures vary; for example, one search firm generally charges \$25,000 to \$50,000. Nasdaq observes that total annual director compensation can range widely; median director pay is estimated at \$134,000 for Russell 3000 companies and \$232,000 for S&P 500 companies. Moreover, there is a wider range of underlying compensation amounts. For example, Russell 3000 directors may receive approximately \$32,600 (10th percentile), or up to \$250,000 (90th percentile) or more. S&P 500 directors may receive approximately \$100,000 (10th percentile) or up to \$310,000 (90th percentile) or more.³²⁸ Most, if not all, of these costs would be borne in any event in the search for new directors regardless of the proposed rule. While the proposed rule might lead some companies to search for director candidates outside of already established networks, the incremental costs of doing so would be tied directly to the benefit of a broader search.

To reduce costs for companies that do not currently meet the diversity objectives of Rule 5605(f)(2), Nasdaq is proposing to provide listed companies that have not yet met their diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment. This offering is designed to ease the search for diverse nominees and reduce the costs on companies that choose to meet the diversity objectives of Rule 5605(f)(2). Nasdaq is contemporaneously

³²⁸ Total annual director compensation varies by compensation elements and structure as well as amount, which is generally based on the size, sector, maturity of the company, and company specific situation. See Mark Emanuel et al., Semler Brossy and the Conference Board, *Director Compensation Practices in the Russell 3000 and S&P 500* (2020 ed.), available at <https://conferenceboard.esgauge.org/directorcompensation/report>.

submitting a rule filing to the Commission regarding the provision of such services.

Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

Nasdaq also has structured the proposed rule to provide companies with at least four years from the Approval Date to satisfy Rule 5605(f)(2) so that companies do not incur immediate costs striving to meet the diversity objectives of Rule 5605(f)(2). Nasdaq also has reduced the compliance burden on Smaller Reporting Companies and Foreign Issuers by providing them with additional flexibility when satisfying the requirement related to the second Diverse director. Smaller Reporting Companies could satisfy the proposed diversity objective to have two Diverse directors under Rule 5605(f)(2)(C) with two Female directors. Like other companies, Smaller Reporting Companies also could satisfy the second director objective by including an individual who self-identifies as an Underrepresented Minority or a member of the LGBTQ+ community. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Nasdaq has further reduced the compliance burdens on companies listed on the Nasdaq Capital Market tier by providing them with five years from the Approval Date to satisfy Rule

5605(f)(2), recognizing that such companies may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For the foregoing reasons, Nasdaq does not believe that proposed Rule 5605(f) will impose any burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act. Further, Nasdaq does not believe the proposed rule will impose any burden on competition among listing exchanges. As described above, Nasdaq competes with other exchanges globally for listings, including exchanges based in jurisdictions that have implemented disclosure requirements related to diversity. Within the United States, LTSE requires listed companies to adopt and publish a long-term stakeholder policy that explains, among other things, “the Company’s approach to diversity and inclusion.”³²⁹ Other listing venues within the United States may propose to adopt rules similar to LTSE’s requirements or the Exchange’s proposal if they believe companies would prefer to list on an exchange with diversity-related listing standards.

5. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

³²⁹ See Long-Term Stock Exchange Rule Book, Rule 14.425.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.
3. Disclosure Template - Instructions.
5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____; File No. SR-NASDAQ-2020-081)

December __, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of
Proposed Rule Change to Adopt Listing Rules Related to Board Diversity

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on December 1, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt listing rules related to board diversity, as described in more detail below:

(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

¹ 15 U.S.C. § 78s(b)(1).

² 17 C.F.R. § 240.19b-4.

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;

(ii) to adopt Rule 5606 (Board Diversity Disclosure), which would require Nasdaq-listed companies, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+; and

(iii) to update Rule 5615 and IM-5615-3 (Foreign Private Issuers) and Rule 5810(c) (Types of Deficiencies and Notifications) to incorporate references to proposed Rule 5605(f) and Rule 5606; and

(iv) to make certain other non-substantive conforming changes.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

I. The Diversity Imperative for Corporate Boards

Over the past year, the social justice movement has brought heightened attention to the commitment of public companies to diversity and inclusion.

Controversies arising from corporate culture and human capital management challenges, as well as technology-driven changes to the business landscape, already underscored the need for enhanced board diversity—diversity in the boardroom is good corporate governance. The benefits to stakeholders of increased diversity are becoming more apparent and include an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls. Nasdaq believes that the heightened focus on corporate board diversity by companies,³ investors,⁴ corporate governance organizations,⁵ and legislators⁶ demonstrates that investor confidence is

³ See Deloitte and the Society for Corporate Governance, *Board Practices Quarterly: Diversity, equity, and inclusion* (Sept. 2020), available at: <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/diversity-equity-and-inclusion.html> (finding, in a survey of over 200 companies, that “most companies and/or their boards have taken, or intend to take, actions in response to recent events surrounding racial inequality and inequity; 71% of public companies and 65% of private companies answered this question affirmatively”).

⁴ See ISS Governance, *2020 Global Benchmark Policy Survey, Summary of Results 6* (Sept. 24, 2020), available at: <https://www.issgovernance.com/wp-content/uploads/publications/2020-iss-policy-survey-results-report-1.pdf> (finding that “a significant majority of investors (61 percent) indicated that boards should aim to reflect the company’s customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups”).

⁵ See International Corporate Governance Network, *ICGN Guidance on Diversity on Boards 5* (2016), available at: <https://www.icgn.org/sites/default/files/ICGN%20Guidance%20on%20Diversity%20on%20Board%20-%20Final.pdf> (“The ICGN believes that diversity is a core attribute of a well-functioning board which supports greater long-term value for shareholders and companies.”).

⁶ See, e.g., John J. Cannon et al., Sherman & Sterling LLP, *Washington State Becomes Next to Mandate Gender Diversity on Boards* (May 28, 2020), available at: <https://www.shearman.com/perspectives/2020/05/washington-state-becomes-next-to-mandate-gender-diversity-on-boards>; Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020)

enhanced when boardrooms are comprised of more than one demographic group. Nasdaq has also observed recent calls from SEC commissioners⁷ and investors⁸ for companies to provide more transparency regarding board diversity.

Nasdaq conducted an internal study of the current state of board diversity among Nasdaq-listed companies based on public disclosures, and found that while some companies already have made laudable progress in diversifying their boardrooms, the national market system and the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards. It also found that current reporting of board diversity data was not provided in a consistent manner or on a

(California legislation requiring companies headquartered in the state to have at least one director who self-identifies as a Female and one from an Underrepresented Community).

⁷ See Commissioner Allison Herren Lee, *Regulation S-K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), available at: https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26#_ftnref15 (“There is ever-growing recognition of the importance of diversity from all types of investors . . . [a]nd large numbers of commenters on this [SEC] rule proposal emphasized the need for specific diversity disclosure requirements.”); see also Commissioner Caroline Crenshaw, *Statement on the “Modernization” of Regulation S-K Items 101, 103, and 105* (August 26, 2020), available at: <https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k> (“As Commissioner Lee noted in her statement, the final [SEC] rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation. The failure to grapple with these issues is, quite simply, a failure to modernize.”); Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), available at: <https://www.sec.gov/news/speech/chair-white-icgn-speech.html> (“Companies’ disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted. . . . Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.”).

⁸ See Vanguard, *Investment Stewardship 2019 Annual Report* (2019), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf (“We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis.”); see also State Street Global Advisors, *Diversity Strategy, Goals & Disclosure: Our Expectations for Public Companies* (Aug. 27, 2020) <https://www.ssga.com/us/en/individual/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies> (announcing expectation that State Street’s portfolio companies (including US companies “and, to the greatest extent possible, non-US companies”) provide board level “[d]iversity characteristics, including racial and ethnic makeup, of the board of directors”).

sufficiently widespread basis. As such, investors are not able to readily compare board diversity statistics across companies.

Accordingly, Nasdaq is proposing to require each of its listed companies, subject to certain exceptions, to: (i) provide statistical information regarding diversity among the members of the company’s board of directors under proposed Rule 5606; and (ii) have, or explain why it does not have, at least two “Diverse” directors on its board under proposed rule 5605(f)(2). “Diverse” means a director who self-identifies as: (i) Female, (ii) an Underrepresented Minority, or (iii) LGBTQ+. Each listed company must have, or explain why it does not have, at least one Female director and at least one director who is either an Underrepresented Minority or LGBTQ+. Foreign Issuers (including Foreign Private Issuers) and Smaller Reporting Companies, by contrast, have more flexibility and may satisfy the requirement by having two Female directors. “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth. “Underrepresented Minority” means, consistent with the categories reported to the Equal Employment Opportunity Commission (“EEOC”) through the Employer Information Report EEO-1 Form (“EEO-1 Report”), an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities. “LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

Under proposed Rule 5606, Nasdaq proposes to provide each company with one calendar year from the date that the Commission approves this proposal (the

“Approval Date”) to comply with the requirement for statistical information regarding diversity. Under proposed Rule 5605(f)(2), no later than two calendar years after the Approval Date, each company must have, or explain why it does not have, one Diverse director. Further, each company must have, or explain why it does not have, two Diverse directors no later than: (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select or Global Market tiers; or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market tier.

Nasdaq undertook extensive research and analysis and has concluded that the proposal will fulfill the objectives of the Act in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. In addition to conducting its own internal analysis as described above, Nasdaq reviewed a substantial body of third-party research and interviewed leaders representing a broad spectrum of market participants and other stakeholders to:

- determine whether empirical evidence demonstrates an association between board diversity, shareholder value, investor protection and board decision-making;
- understand investors’ interest in, and impediments to obtaining, information regarding the state of board diversity at public companies;
- review the current state of board diversity and disclosure, both among Nasdaq-listed companies and more broadly within the U.S.;
- gain a better understanding of the causes of underrepresentation on boards;
- obtain the views of leaders representing public companies, investment banks, corporate governance organizations, investors, regulators and civil rights groups on the value of more diverse corporate boards, and on various approaches to encouraging more diversity on corporate boards; and

- evaluate the success of approaches taken by exchanges, regulators, and governments in both the U.S. and foreign jurisdictions to remedy underrepresentation on boards.

While gender diversity has improved among U.S. company boards in recent years, the pace of change has been gradual, and the U.S. still lags behind other jurisdictions that have imposed requirements related to board diversity. Moreover, progress toward bringing underrepresented racial and ethnic groups into the boardroom has been even slower. Nasdaq is unable to provide definitive estimates regarding the number of listed companies that will be affected by the proposal due to the inconsistent disclosures and definitions of diversity across companies and the extremely limited disclosure of race and ethnicity information – an information gap the proposed rule addresses. Based on the limited information that is available, Nasdaq believes 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. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. While studies suggest that current candidate selection processes may result in diverse candidates being overlooked, Nasdaq also believes that the lack of reliable and consistent data creates a barrier to measuring and improving diversity in the boardroom.

Nasdaq reviewed dozens of empirical studies and found that an extensive body of academic research demonstrates that diverse boards are positively associated with improved corporate governance and financial performance. For example, as discussed in detail below in *Section II, Academic Research: The Relationship between Diversity and Shareholder Value, Investor Protection and Decision Making*,

studies have found that companies with gender-diverse boards or audit committees are associated with: more transparent public disclosures and less information asymmetry; better reporting discipline by management; a lower likelihood of manipulated earnings through earnings management; an increased likelihood of voluntarily disclosing forward-looking information; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a lower likelihood of securities fraud. In addition, studies found that having at least one woman on the board is associated with a lower likelihood of material weaknesses in internal control over financial reporting and a lower likelihood of material financial restatements. Studies also identified positive relationships between board diversity and commonly used financial metrics, including higher returns on invested capital, returns on equity, earnings per share, earnings before interest and taxation margin, asset valuation multiples and credit ratings.

Nasdaq believes there are additional compelling reasons to support the diversification of company boards beyond a link to improved corporate governance and financial performance:

- Investors are calling in greater numbers for diversification of boardrooms.

Vanguard, State Street Advisors, BlackRock, and the NYC Comptroller's Office include board diversity expectations in their engagement and proxy voting guidelines.⁹ The heightened investor focus on corporate diversity and inclusion

⁹ Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors. See Vanguard, *Investment Stewardship 2020 Annual Report* (2020), available at: https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2020_investment_stewardship_annual_report.pdf. Starting in 2020, State Street Global Advisors will vote against the entire nominating committee of companies that do not have at least one woman on their boards and have not addressed questions on gender diversity within the last three years. See State Street Global Advisors, *Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines* (2020), available at: <https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf>.

efforts demonstrates that investor confidence is undermined when a company's boardroom is homogenous and when transparency about such efforts is lacking. Investors frequently lack access to information about corporate board diversity that could be material to their decision making, and they might divest from companies that fail to take into consideration the demographics of their corporate stakeholders when they refresh their boards. Nasdaq explores these investor sentiments in *Section III, Current State of Board Diversity and Causes of Underrepresentation on Boards*.

- Nasdaq believes, consistent with SEC disclosure requirements in other contexts,¹⁰ that management's vision on key issues impacting the company should be communicated with investors in a clear and straightforward manner. Indeed, transparency is the bedrock of federal securities laws regarding disclosure, and this sentiment is reflected in the broad-based support for uniform disclosure requirements regarding board diversity that Nasdaq observed during the course of its outreach to the industry. In addition, organizational leaders representing every

Beginning in 2018, BlackRock stated in proxy voting guidelines they "would normally expect to see at least 2 women directors on every board." See BlackRock Investment Stewardship, *Corporate governance and proxy voting guidelines for U.S. securities* (Jan. 2020), available at: <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>. The NYC Comptroller's Office in 2019 asked companies to adopt policies to ensure women and people of color are on the initial list for every open board seat. See Scott M. Stringer, *Remarks at the Bureau of Asset Management 'Emerging Managers and MWBE Managers Conference* (Oct. 11, 2019), available at: https://comptroller.nyc.gov/wp-content/uploads/2019/10/10.11.19-SMS-BAM-remarks_distro.pdf.

¹⁰ See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 Fed. Reg. 75,056 (Dec. 29, 2003) ("We believe that management's most important responsibilities include communicating with investors in a clear and straightforward manner. MD&A is a critical component of that communication. The Commission has long sought through its rules, enforcement actions and interpretive processes to elicit MD&A that not only meets technical disclosure requirements but generally is informative and transparent."); see also Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890 (Nov. 19, 2020) (citing the 2003 MD&A Interpretative Release and stating that the purpose of the MD&A section is to enable investors to see a company "through the eyes of management").

- category of corporate stakeholders Nasdaq spoke with (including business, investor, governance, regulatory and civil rights communities) were overwhelmingly in favor of diversifying boardrooms. Nasdaq summarizes the findings of its stakeholder outreach in *Section IV, Stakeholder Perspectives*.
- Legislators at the federal and state level increasingly are taking action to encourage or mandate corporations to diversify their boards and improve diversity disclosures. Congress currently is considering legislation requiring each SEC-registered company to provide board diversity statistics and disclose whether it has a board diversity policy. To date, eleven states have passed or proposed legislation related to board diversity.¹¹ SEC regulations require companies to disclose whether diversity is considered when identifying director nominees and, if so, how. Nasdaq explores various state and federal initiatives in *Section V, U.S. Regulatory Framework* and *Section VI, Nasdaq Proposal*.

In considering the merits and shaping the substance of the proposed listing rule, Nasdaq also sought and received valuable input from corporate stakeholders. During those discussions, Nasdaq found consensus across every constituency in the inherent value of board diversity. Business leaders also expressed concern that companies – and particularly smaller companies – would prefer an approach that allows flexibility to comply in a manner that fits their unique circumstances and stakeholders. Nasdaq recognizes that the operations, size, and current board composition of each Nasdaq-listed company are unique, and Nasdaq therefore endeavored to provide a

¹¹ See Michael Hatcher and Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!*, Harv. L. Sch. Forum on Corp. Governance (May 12, 2020), available at: <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/>.

regulatory impetus to enhance board diversity that balances the need for flexibility with each company's particular circumstances.

The Exchange also considered the experience of its parent company, Nasdaq, Inc., as a public company.¹² In 2002, Nasdaq, Inc. met the milestone of welcoming its first woman, Mary Jo White, who later served as SEC Chair, to its board of directors. In her own words, “I was the first and only woman to serve on the board when I started, but, happily, I was joined by another woman during my tenure...And then there were two. Not enough, but better than one.”¹³ In 2019, Nasdaq, Inc. also welcomed its first Black director. As a Charter Pledge Partner of The Board Challenge, Nasdaq supports The Board Challenge's goal of “true and full representation on all boards of directors.”¹⁴

As a self-regulatory organization, Nasdaq also is cognizant of its role in advancing diversity within the financial industry, as outlined in the Commission's diversity standards issued pursuant to Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Standards”).¹⁵ Authored jointly by the Commission and five other financial regulators, the Standards seek to provide a

¹² While the Exchange recognizes that it is only one part of an ecosystem in which multiple stakeholders are advocating for board diversity, that part is meaningful: the United Nations Sustainable Stock Exchanges Initiative, of which Nasdaq, Inc., is an official supporter, recognized that “[s]tock exchanges are uniquely positioned to influence their market in a way few other actors can.” See United Nations Sustainable Stock Exchanges Initiative, *How Stock Exchanges Can Advance Gender Equality 2* (2017), available at: <https://sseinitiative.org/wp-content/uploads/2019/12/How-stock-exchanges-can-advance-gender-equality.pdf>.

¹³ See Mary Jo White, *Completing the Journey: Women as Directors of Public Companies* (Sept. 16, 2014), available at: <https://www.sec.gov/news/speech/2014-spch091614-mjw#.VBiLMhaaXDo>.

¹⁴ See The Board Challenge, <https://theboardchallenge.org/>. See also Nasdaq, Inc., *Notice of 2020 Annual Meeting of Shareholders and Proxy Statement* 52 (Mar. 31, 2020), available at: <https://ir.nasdaq.com/static-files/ce5519d4-3a0b-48ac-8441-5376ccbad4e5> (Nasdaq, Inc. believes that “[d]iverse backgrounds lead to diverse perspectives. We are committed to ensuring diverse backgrounds are represented on our board and throughout our organization to further the success of our business and best serve the diverse communities in which we operate.”).

¹⁵ See Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016 (June 10, 2015).

framework for exchanges and financial services organizations “to create and strengthen [their] diversity policies and practices.” Through these voluntary Standards, the Commission and other regulators “encourage each entity to use the[] Standards in a manner appropriate to its unique characteristics.”¹⁶ To that end, the proposed rule leverages the Exchange’s unique ability to influence corporate governance in furtherance of the goal of Section 342, which is to address the lack of diversity in the financial services industry.¹⁷ Finally, while the Exchange recognizes the importance of maximizing shareholder value, its role as a listing venue is to establish and enforce substantive standards that promote investor protection. As a self-regulatory organization, the Exchange must demonstrate to the Commission that any proposed rule is consistent with Section 6(b) of the Act because, among other things, it is designed to protect investors, promote the public interest, prevent fraudulent and manipulative acts and practices, and remove impediments to the mechanism of a free and open market. The Exchange must also balance promoting capital formation, efficiency, and competition, among other things, alongside enhancing investor confidence.

With these objectives in mind, Nasdaq believes that a listing rule designed to enhance transparency related to board diversity will increase consistency and comparability of information across Nasdaq-listed companies, thereby increasing transparency and decreasing information collection costs. Nasdaq further believes that a listing rule designed to encourage listed companies to increase diverse representation on their boards will result in improved corporate governance, thus strengthening the integrity of the market, enhancing capital formation, efficiency, and

¹⁶ Id. at 33,023.

¹⁷ 156 Cong. Rec. H5233-61 (June 30, 2010).

competition, and building investor confidence. To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional transparency through disclosure explaining the company's reasons for not doing so. For example, the company may choose to disclose that it does not meet the diversity objectives of Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to meet that standard instead, or has a board philosophy regarding diversity that differs from the diversity objectives set forth in Rule 5605(f)(2). Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency.

Nasdaq observed that studies suggest that certain groups may be underrepresented on boards because the traditional director nomination process is limited by directors looking within their own social networks for candidates with previous C-suite experience.¹⁸ Leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand. In order to assist companies that strive to meet the diversity objectives of Rule 5605(f)(2), Nasdaq is proposing to provide listed companies that have not yet met its diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment. Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of

¹⁸ See infra Section III.

such services. Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

II. Academic Research: The Relationship between Diversity and Shareholder Value, Investor Protection and Decision Making

A company's board of directors plays a critical role in formulating company strategy; appointing, advising and overseeing management; and protecting investors. Nasdaq has recognized the importance of varied perspectives on boards since 2003, when the Exchange adopted a listing rule intended to enhance investor confidence by requiring listed companies, subject to certain exceptions and cure periods, to have a majority independent board.¹⁹ Accompanying the rule are interpretive materials recognizing that independent directors "play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to *maximize shareholder value* in the Companies they oversee and guard against conflicts of interest."²⁰

a. Diversity and Shareholder Value

There is a significant body of research suggesting a positive association between diversity and shareholder value.²¹ In the words of SEC Commissioner Allison Herren

¹⁹ See Nasdaq Stock Market Rulebook, Rules 5605(b), 5615(a), and 5605(b)(1)(A).

²⁰ Id., IM-5605-1 (emphasis added).

²¹ Some companies recently have expressed the belief that a company must consider the impact of its activities on a broader group of stakeholders beyond shareholders. See Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at:

Lee: “to the extent one seeks economic support for diversity and inclusion (instead of requiring economic support for the lack of diversity and exclusion), the evidence is in.”²²

The Carlyle Group (2020) found that its portfolio companies with two or more diverse directors had average earnings growth of 12.3% over the previous three years, compared to 0.5% among portfolio companies with no diverse directors, where diverse directors were defined as female, Black, Hispanic or Asian.²³ “After controlling for industry, fund, and vintage year, companies with diverse boards generate earnings growth that’s five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth.”²⁴

Several other studies also found a positive association between diverse boards and company performance. FCLTGlobal (2019) found that “the most diverse boards (top 20 percent) added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers (bottom 20 percent).”²⁵ McKinsey (2015) found that “companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial

<https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf>. Commentators articulated this view as early as 1932. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1153 (1932).

²² *See* Commissioner Allison Herren Lee, *Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference* (September 22, 2020), available at: <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922>.

²³ *See* Jason M. Thomas and Megan Starr, The Carlyle Group, *Global Insights: From Impact Investing to Investing for Impact* 5 (Feb. 24, 2020), available at: https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf (analyzing Carlyle U.S. portfolio company data, February 2020).

²⁴ *Id.*

²⁵ *See* FCLTGlobal, *The Long-term Habits of a Highly Effective Corporate Board* 11 (March 2019), available at: <https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effective-corporate-boards.pdf> (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data).

returns above their national industry median.”²⁶ Carter, Simkins and Simpson (2003) found among Fortune 1000 companies “statistically significant positive relationships between the presence of women or minorities on the board and firm value.”²⁷ Bernile, Bhagwat and Yonker (2017) found that greater diversity on boards—including gender, ethnicity, educational background, age, financial expertise and board experience—is associated with increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, increased dividend payouts to shareholders, higher investment in R&D and better innovation.²⁸ The authors observed that “[t]his is in line with the results in Carter, Simkins, and Simpson (2003), which show a positive association between local demographic diversity and firm value.”²⁹

Several studies have found a positive association between gender diversity and financial performance. Credit Suisse (2014) found companies with at least one woman on the board had an average sector-adjusted return on equity (“ROE”) of 12.2%, compared to 10.1% for companies with no female directors, and average sector-adjusted ROEs of 14.1% and 11.2%, respectively, for the previous nine years.³⁰ MSCI (2016)

²⁶ See Vivian Hunt et al., McKinsey & Company, *Diversity Matters* (February 2, 2015), available at: <https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/why%20diversity%20matters/diversity%20matters.pdf> (analyzing 366 public companies in the United Kingdom, Canada, the United States, and Latin America in industries for the years 2010 to 2013, using the ethnic and racial categories African ancestry, European ancestry, Near Eastern, East Asian, South Asian, Latino, Native American, and other).

²⁷ See David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38(1) Fin. Rev. 33 (analyzing 638 Fortune 1000 firms in 1997, measuring firm value by Tobin’s Q, with board diversity defined as the percentage of women, African Americans, Asians and Hispanics on the board of directors).

²⁸ See Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies* (March 6, 2017), available at: <https://ssrn.com/abstract=2733394> (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat and CRSP databases).

²⁹ *Id.* at 32.

³⁰ See Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), available at: <https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/the->

found that U.S. companies with at least three women on the board in 2011 experienced median gains in ROE of 10% and earnings per share (“EPS”) of 37% over a five year period, whereas companies that had no female directors in 2011 showed median changes of -1% in ROE and -8% in EPS over the same five-year period.³¹ Catalyst (2011) found that the ROE of Fortune 500 companies with at least three women on the board (in at least four of five years) was 46% higher than companies with no women on the board, and return on sales and return on invested capital was 84% and 60% higher, respectively.³²

Credit Suisse (2016) found an association between LGBTQ+ diversity and stock performance, finding that a basket of 270 companies “supporting and embracing LGBT employees” outperformed the MSCI ACWI index by an average of 3.0% per year over the past 6 years.³³ Further, “[a]gainst a custom basket of companies in North America, Europe and Australia, the LGBT 270 has outperformed by 140 bps annually.”³⁴ Nasdaq acknowledges that this study focused on LGBTQ+ employees as opposed to directors,

[cs-gender-3000-women-in-senior-management.pdf \(analyzing 3,000 companies across 40 countries from the period from 2005 to 2013\).](#)

³¹ See Meggin Thwing Eastman et al., MSCI, *The tipping point: Women on boards and financial performance* 3 (December 2016), available at: <https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb> (analyzing of U.S. companies that were constituents of the MSCI World Index for the entire period from July 1, 2011 to June 30, 2016).

³² See Harvey M. Wagner, Catalyst, *The Bottom Line: Corporate Performance and Women’s Representation on Boards (2004–2008)* (March 1, 2011), available at: <https://www.catalyst.org/research/the-bottom-line-corporate-performance-and-womens-representation-on-boards-2004-2008/> (analyzing gender diversity data from Catalyst’s annual Fortune 500 Census of Women Board Directors report series for the years 2005 to 2009, and corresponding financial data from S&P’s Compustat database for the years 2004 to 2008).

³³ See Credit Suisse ESG Research, *LGBT: the value of diversity* 1 (April 15, 2016), available at: https://research-doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=807075590&extdocid=807075590_1_eng_pdf&serialid=evu4wNcHexx7kusNLazQphUkT9naxi1Pvp tZQvPjr1k%3d.

³⁴ Id.

and that there is a lack of published research on the issue of LGBTQ+ representation on boards. However, Out Leadership (2019) suggests that the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity:

While the precise reason for the positive correlation between gender diversity and better corporate performance is unknown, many of the reasons that gender diversity is considered beneficial are also applicable to LGBT+ diversity. LGBT+ diversity in the boardroom may create a dynamic that enables better decisionmaking, and it brings to the boardroom the perspective of a community that is a critical component of the company's consumer population and organizational talent.³⁵

McKinsey (2020) found “a positive, statistically significant correlation between company financial outperformance and [board] diversity, on the dimensions of both gender and ethnicity,” with companies in the top quartile for board gender diversity “28 percent more likely than their peers to outperform financially,” and a statistically significant correlation between board gender diversity and outperformance on earnings before interest and taxation margin.³⁶ Moody's (2019) found that greater board gender diversity is associated with higher credit ratings, with women accounting for an average of 28% of board seats at Aaa-rated companies but less than 5% of board seats at Ca-rated companies.³⁷

³⁵ See Quorum, *Out Leadership's LGBT+ Board Diversity and Disclosure Guidelines* 3 (2019), available at: <https://outleadership.com/content/uploads/2019/01/OL-LGBT-Board-Diversity-Guidelines.pdf>.

³⁶ See McKinsey & Company, *Diversity wins: How inclusion matters* 13 (May 2020), available at: <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf> (analyzing 1,039 companies across 15 countries for the period from December 2018 to November 2019).

³⁷ See Moody's Investors Service, *Gender diversity is correlated with higher ratings, but mandates pose short-term risk* 2 (Sept. 11, 2019), available at: https://www.moody's.com/research/Moodys-Corporate-board-gender-diversity-associated-with-higher-credit-ratings--PBC_1193768 (analyzing 1,109 publicly traded North American companies rated by Moody's).

While the overwhelming majority of studies on the association between economic performance and board diversity, including gender diversity, present a compelling case that board diversity is positively associated with financial performance, the results of some other studies on gender diversity are mixed. For example, Pletzer et al. (2015) found that board gender diversity alone has a “small and non-significant” relationship with a company’s financial performance.³⁸ Post and Byron (2014) found a “near zero” relationship with a company’s market performance, but a positive relationship with a company’s accounting returns.³⁹ Carter, D’Souza, Simkins and Simpson (2010) found that “[w]hen Tobin’s Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity, neither positive nor negative.”⁴⁰ A study conducted by Campbell and Minguez-Vera (2007) “suggests, at a minimum, that increased gender diversity can be achieved without destroying shareholder value.”⁴¹ Adams and Ferreira (2009) found that “gender diversity has beneficial effects

³⁸ See Jan Luca Pletzer et al., *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance – A Meta-Analysis* 1, PLOS One (June 18, 2015); see also Alice H. Eagly (2016), *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. Social Issues 199 (2016), available at <https://doi.org/10.1111/josi.12163> (concluding that the “research findings are mixed, and repeated meta-analyses have yielded average correlational findings that are null or extremely small” with respect to board gender diversity and company performance).

³⁹ See Corinne Post and Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis* 1 (2014). In 2016, the same authors, based on a review of the results for 87 studies, “found that board gender diversity is weakly but significantly positively correlated with [corporate social responsibility],” although they noted that “a significant correlational relationship does not prove causality.” See Corinne Post and Kris Byron, *Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis*, 24(4) Corp. Governance: An Int’l Rev. 428 (July 2016), available at <http://dx.doi.org/10.1111/corg.12165>.

⁴⁰ See David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18(5) Corp. Governance 396, 410 (2010) (analysis of 541 S&P 500 companies for the years 1998-2002).

⁴¹ See Kevin Campbell and Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83(3) J. Bus. Ethics 13 (Feb. 2008) (analyzing 68 non-financial companies listed on the continuous market in Madrid during the period from January 1995 to December 2000, measuring firm value by an approximation of Tobin’s Q defined as the sum of the market value of stock and the book value of debt divided by the book value of total assets).

in companies with weak shareholder rights, where additional board monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights.”⁴² Carter et al. (2010)⁴³ and the U.S. Government Accountability Office (“GAO”) (2015)⁴⁴ concluded that the mixed nature of various academic studies may be due to differences in methodologies, data samples and time periods.

While there are studies drawing different conclusions, Nasdaq believes that there is a compelling body of credible research on the association between economic performance and board diversity. At a minimum, Nasdaq believes that the academic studies support the conclusion that board diversity does not have adverse effects on company financial performance. This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are a sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the varying findings of studies at the time regarding the relationship between company performance and board independence,⁴⁵ Nasdaq

⁴² See Renee B. Adams and Daniel Ferreira, *Women in the boardroom and their impact on governance and performance*, 94 J. Fin. Econ. 291 (2009) (analyzing 1,939 S&P 500, S&P MidCaps, and S&P SmallCap companies for the period 1996 to 2003, measuring company performance by a proxy for Tobin’s Q (the ratio of market value to book value) and return on assets).

⁴³ See Carter et al., *supra* note 40, at 400 (observing that the different “statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.”).

⁴⁴ See United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements* 5 (Dec. 2015) (the “GAO Report”), available at: <https://www.gao.gov/assets/680/674008.pdf> (“Some research has found that gender diverse boards may have a positive impact on a company’s financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used”).

⁴⁵ See, e.g., Benjamin E. Hermalin and Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance*, 20 Fin. Mgmt. 101, 111 (1991) (finding that “there appears to be no relation between board composition and performance”); Sanjai Bhagat and Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*,

adopted listing rules requiring a majority independent board that were “intended to enhance investor confidence in the companies that list on Nasdaq.”⁴⁶ In its Approval Order, the SEC stated that “[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets.”⁴⁷

Along the same lines, even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards. Therefore, Nasdaq believes that the proposal will enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two Diverse directors on their boards or by explaining their rationale for not meeting that objective. Further, Nasdaq believes that the proposal is consistent with the Act because it will not negatively impact capital formation, competition or efficiency among its public companies, and will promote investor protection and the public interest.⁴⁸

54(3) Bus. Law. 921, 950 (1999) (“At the very least, there is no convincing evidence that increasing board independence, relative to the norms that currently prevail among large American firms, will improve firm performance. And there is some evidence suggesting the opposite—that firms with supermajority-independent boards perform worse than other firms, and that firms with more inside than independent directors perform about as well as firms with majority- (but not supermajority-) independent boards.”).

⁴⁶ See Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,161 (Nov. 12, 2003) (approving SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141).

⁴⁷ Id. at 64,176.

⁴⁸ See also Lee, supra note 22 (“I could never quite buy in to the view that some 40 percent of the population in our country (if we’re talking about minorities) or over half the country (if we’re talking about women) must rationalize their inclusion in corporate boardrooms and elsewhere in economic terms instead of the reverse. How can one possibly justify—in economic terms—the systematic exclusion of a major portion of our talent base from the corporate pool?”).

b. Diversity and Investor Protection

There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures and management oversight. In reaching this conclusion, Nasdaq evaluated the results of more than a dozen studies spanning more than two decades that found a positive association between gender diversity and important investor protections, and the assertions by some academics that such findings may extend to other forms of diversity, including racial and ethnic diversity. The findings of the studies reviewed by Nasdaq are summarized below.

Adams and Ferreira (2009) found that women are “more likely to sit on” the audit committee,⁴⁹ and a subsequent study by Srinidhi, Gul and Tsui (2011) found that companies with women on the audit committee are associated with “higher earnings quality” and “better reporting discipline by managers,”⁵⁰ leading the authors to conclude that “including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements.”⁵¹

⁴⁹ See Adams and Ferreira, supra note 42, at 292.

⁵⁰ See Bin Srinidhi et al., *Female Directors and Earnings Quality*, 28(5) Contemporary Accounting Research 1610, 1612-16 (Winter 2011) (analyzing 3,132 firm years during the period from 2001 to 2007 based on S&P COMPUSTAT, Corporate Library's Board Analyst, and IRRIC databases; “choos[ing] the accruals quality as the metric that best reflects the ability of current earnings to reflect future cash flows” (noting that it “best predicts the incidence and magnitude of fraud relative to other commonly used measures of earnings quality”) and analyzing surprise earnings results that exceeded previous earnings or analyst forecasts, because “managers of firms whose unmanaged earnings fall marginally below the benchmarks have [an] incentive to manage earnings upwards so as to meet or beat previous earnings”).

⁵¹ Id. at 1612.

A study conducted in 2016 by Pucheta-Martínez et al. concluded that gender diversity on the audit committee “improves the quality of financial information.”⁵² They found that “the percentage of females on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,”⁵³ and found a positive association between gender diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender diverse audit committees “ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion” when any uncertainties or scope limitations are identified.⁵⁴

More recently, a study by Gull in 2018 found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management,⁵⁵ and a study conducted in 2019 by Bravo and Alcaide-Ruiz found a positive association between women on the audit committee with financial or accounting expertise and the voluntary disclosure of forward-looking information.⁵⁶ Bravo and Alcaide-Ruiz concluded that “female [audit committee] members with

⁵² See Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information*, 25(4) Bus. Ethics: A European Rev. 363, 378 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004-2011).

⁵³ *Id.* at 363.

⁵⁴ *Id.* at 368.

⁵⁵ See Ammar Gull et al., *Beyond gender diversity: How specific attributes of female directors affect earnings management*, 50(3) British Acct. Rev. 255 (Sept. 2017), available at: <https://ideas.repec.org/a/eee/bracre/v50y2018i3p255-274.html> (analyzing 394 French companies belonging to the CAC All-Shares index listed on Euronext Paris from 2001 to 2010, prior to the implementation of France’s gender mandate law that required women to comprise 20% of a company’s board of directors by 2014 and 40% by 2016).

⁵⁶ See Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information*, 34(2) Gender in Mgmt. 140, 142-44 (2019) (analyzing companies included in the S&P 100 Index in 2016, “focus[ing] on the disclosure of financial forward-looking information (which is likely to require financial expertise), such as earnings forecasts, expected revenues, anticipated cash flows or any other financial indicator”).

financial expertise play an important role in influencing disclosure strategies that provide forward-looking information containing projections and financial data useful for investors.”⁵⁷

While the above studies demonstrate a positive association between gender diverse audit committees and the quality of a company’s earnings, financial information and public disclosures, other studies found a positive association between board gender diversity and important investor protections regardless of whether or not women are on the audit committee.

Abbott, Parker & Persley (2012) found, within a sample of non-Fortune 1000 companies, “a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement.”⁵⁸ Their findings are consistent with a subsequent study by Wahid (2017), which concluded that “gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud.”⁵⁹ Specifically, companies with female directors have “fewer irregularity-type [financial]

⁵⁷ Id. at 150.

⁵⁸ See Lawrence J. Abbott et al., *Female Board Presence and the Likelihood of Financial Restatement*, 26(4) Accounting Horizons 607, 626 (2012) (analyzing a sample of 278 pre-SOX annual financial restatements and 187 pre-SOX quarterly financial restatements of U.S. companies from January 1, 1997 through June 30, 2002 identified by the U.S. General Accounting Office restatement report 03-138 (which only included “material misstatements of financial results”), and 75 post-SOX annual financial restatements from July 1, 2002, to September 30, 2005 identified by U.S. General Accounting Office restatement report 06-678 (which only included “restatements that were being made to correct material misstatements of previously reported financial information”), consisting almost exclusively of non-Fortune 1000 companies).

⁵⁹ See Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, J. Bus. Ethics (forthcoming) (Dec. 2017) Rotman School of Management Working Paper No. 2930132 at 1, available at: <https://ssrn.com/abstract=2930132> (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations).

restatements, which tend to be indicative of financial manipulation.”⁶⁰ Wahid suggested that the implications of her study extend beyond gender diversity:

If you’re going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds . . . [and] [i]f we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.⁶¹

Cumming, Leung and Rui (2015) also examined the relationship between gender diversity and fraud, and found that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found “strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample.”⁶² The authors suggested that “other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud.”⁶³

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced weaknesses in internal control over financial reporting, noting that “prior literature has established a negative relationship between internal control weaknesses and earnings quality.”⁶⁴ The authors found that having at least one

⁶⁰ Id. at 23.

⁶¹ See Barbara Shecter, *Diverse boards tied to fewer financial ‘irregularities,’ Canadian study finds*, Financial Post (Feb. 5, 2020), <https://business.financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds> (last accessed Nov. 27, 2020).

⁶² See Douglas J. Cumming et al., *Gender Diversity and Securities Fraud*, Academy of Management Journal 34 (forthcoming) (Feb. 2, 2015), available at <https://ssrn.com/abstract=2562399> (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud, and 742 non-fraudulent companies for a control group).

⁶³ Id. at 33.

⁶⁴ See Yu Chen et al., *Board Gender Diversity and Internal Control Weaknesses*, 33 Advances in Acct. 11 (2016) (analyzing a sample of 4267 firm-year observations during the period from 2004 to 2013, beginning “the first year internal control weaknesses were required to be disclosed under section 404 of SOX”).

woman on the board (regardless of whether or not she is on the audit committee) “may lead to [a] reduced likelihood of material weaknesses [in internal control over financial reporting].”⁶⁵

Board gender diversity also was found to be positively associated with more transparent public disclosures. Gul, Srinidhi & Ng (2011) concluded that “gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms.”⁶⁶ Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with “reducing the risk of informed trading and enhancing stock liquidity.”⁶⁷

Other studies have found that diverse boards are better at overseeing management. Adams and Ferreira (2009) found “direct evidence that more diverse boards are more likely to hold CEOs accountable for poor stock price performance; CEO turnover is more sensitive to stock return performance in firms with relatively more women on boards.”⁶⁸ Lucas-Perez et al. (2014) found that board gender diversity is positively associated with

⁶⁵ Id. at 18.

⁶⁶ See Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?*, 51(3) J. Acct. & Econ. 314 (April 2011) (analyzing 4,084 firm years during the period from 2002 to 2007, excluding companies in the utilities and financial industries, measuring public information disclosure using “voluntary continuous disclosure of ‘other’ events in 8K reports” and measuring stock price informativeness by “idiosyncratic volatility,” or volatility that cannot be explained to systematic factors and can be diversified away).

⁶⁷ See David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192, 202 (July 2017) (analyzing 531 company-year observations from 2004 to 2009 of non-financial companies traded on the electronic trading platform of the Spanish Stock Exchange (SIBE)).

⁶⁸ See Adams and Ferreira, supra note 42, at 292.

linking executive compensation plans to company performance,⁶⁹ which may be an effective mechanism to deter opportunistic behavior by management and align their interests with shareholders.⁷⁰ A lack of diversity has been found to have the opposite effect. Westphal and Zajac (1995) found that “increased demographic similarity between CEOs and the board is likely to result in more generous CEO compensation contracts.”⁷¹

c. Diversity and Decision Making

Wahid (2017) suggests that “at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards’ ability to monitor firm management.”⁷² Nasdaq reviewed studies suggesting that board diversity can indeed enhance a company’s ability to monitor management by reducing “groupthink” and improving decision making.

In 2009, the Commission, in adopting rules requiring proxy disclosure describing whether a company considers diversity in identifying director nominees, recognized the impact of diversity on decision making and corporate governance:

A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board’s decision making process by encouraging consideration of a broader range of

⁶⁹ See Maria Encarnacion Lucas-Perez et al., *Women on the Board and Managers’ Pay: Evidence from Spain*, 129 J. Bus. Ethics 285 (April 2014).

⁷⁰ Id.

⁷¹ See James D. Westphal and Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40(1) Admin. Sci. Q. 60, 77 (March 1995).

⁷² See Wahid, supra note 59, at 5.

views.⁷³

Nasdaq agrees with the Commission's suggestion that board diversity improves board quality, governance and decision making. Nasdaq is concerned that boards lacking diversity can inadvertently suffer from "groupthink," which is "a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members."⁷⁴ The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis, after which the IMF's Independent Evaluation Office concluded that "[t]he IMF's ability to correctly identify the mounting risks [as the crisis developed] was hindered by a high degree of groupthink."⁷⁵

Other studies suggest that increased diversity reduces groupthink and leads to robust dialogue and better decision making. Dallas (2002) observed that "heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences."⁷⁶ Bernile et al. (2017) found that "diversity in the board of directors reduces stock return volatility, which is consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with

⁷³ See Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009).

⁷⁴ See Daniel P. Forbes and Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24(3) Acad. Mgmt. Rev. 489, 496 (Jul. 1999).

⁷⁵ See International Monetary Fund, *IMF Performance in the Run-Up to the Financial and Economic Crisis* (August 2011), available at: <https://www.elibrary.imf.org/view/IMF017/11570-9781616350789/11570-9781616350789/ch04.xml?language=en&redirect=true> ("The evaluation found that incentives were not well aligned to foster the candid exchange of ideas that is needed for good surveillance—many staff reported concerns about the consequences of expressing views contrary to those of supervisors, [m]anagement, and country authorities.").

⁷⁶ See Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1391 (June 2002).

‘groupthink.’”⁷⁷ Dhir (2015) concluded that gender diversity may “promote cognitive diversity and constructive conflict in the boardroom.”⁷⁸ After interviewing 23 directors about their experience with Norway’s board gender mandate, he observed:

First, many respondents contended that gender diversity promotes enhanced dialogue. Interviewees frequently spoke of their belief that heterogeneity has resulted in: (1) higher quality boardroom discussions; (2) broader discussions that consider a wide range of angles or viewpoints; (3) deeper or more thorough discussions; (4) more frequent and lengthier discussions; (5) better informed discussions; (6) discussions that are more frequently brought inside the boardroom (as opposed to being held in spaces outside the boardroom, either exclusively or in addition to inside the boardroom); or (7) discussions in which items that directors previously took for granted are drawn out and addressed—where the implicit becomes explicit. Second, and intimately related, many interviewees indicated that diversification has led to (or has the potential to lead to) better decision making processes and/or final decisions.⁷⁹

Investors also have emphasized the importance of diversity in decision making. A group of institutional investors charged with overseeing state investments and the retirement savings of public employees asserted that “board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity.”⁸⁰

Nasdaq believes that cognitive diversity is particularly important on boards because in their advisory role, especially related to corporate strategy, “the ‘output’ that

⁷⁷ See Bernile et al., *supra* note 28, at 38.

⁷⁸ See Aaron A. Dhir, CHALLENGING BOARDROOM DIVERSITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 150 (2015) (emphasis removed) (sample included 23 directors of Norwegian corporate boards, representing an aggregate of 95 board appointments at more than 70 corporations).

⁷⁹ *Id.* at 124 (emphasis removed).

⁸⁰ See Petition for Amendment of Proxy Rule (March 31, 2015), available at: <https://www.sec.gov/rules/petitions/2015/petn4-682.pdf>.

boards produce is entirely cognitive in nature.”⁸¹ While in 1999, Forbes and Milliken characterized boards as “large, elite, and episodic decision making groups that face complex tasks pertaining to strategic-issue processing,”⁸² over the past two decades, their role has evolved; boards are now more active, frequent advisors on areas such as cybersecurity, social media, and environmental, social and governance (“ESG”) issues such as climate change and racial and gender inequality. Nasdaq believes that boards comprised of directors from diverse backgrounds enhance investor confidence by ensuring that board deliberations include the perspectives of more than one demographic group, leading to more robust dialogue and better decision making.

III. Current State of Board Diversity and Causes of Underrepresentation on Boards

While the above studies suggest a positive association between board diversity, company performance, investor protections, and decision making, there is a noticeable lack of diversity among U.S. public companies. Nasdaq is a global organization and operates in many countries around the world that already have implemented diversity-focused directives. In fact, Nasdaq-listed companies in Europe already are subject to diversity requirements.⁸³ This first-hand experience provides Nasdaq with a unique perspective to incorporate global best practices into its proposal to advance diversity on

⁸¹ See Forbes and Milliken, supra note 74, at 492.

⁸² Id.

⁸³ On Nasdaq’s Nordic and Baltic exchanges, large companies must comply with EU Directive 2014/95/EU (the “EU Directive”), as implemented by each member state, which requires companies to disclose a board diversity policy with measurable objectives (including gender), or explain why they do not have such a policy. On Nasdaq Vilnius, companies are also required to comply with the Nasdaq Corporate Governance Code for Listed Companies or explain why they do not, which requires companies to consider diversity and seek gender equality on the board. Similarly, on Nasdaq Copenhagen, companies are required to comply with the Danish Corporate Governance Recommendations or explain why they do not, which requires companies to adopt and disclose a diversity policy that considers gender, age and international experience. On Nasdaq Iceland, listed companies must have at least 40% women on their board (a government requirement) and comply with the EU Directive.

U.S. corporate boards. Given that the U.S. ranks 53rd in board gender diversity, according to the World Economic Forum in its 2020 Global Gender Gap Report, Nasdaq believes advancing board diversity in the U.S. is a critical business and market imperative. This same report also found that “American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women.”⁸⁴ As of 2019, women directors held 19% of Russell 3000 seats (up from 16% in 2018).⁸⁵ In comparison, women hold more than 30% of board seats in Norway, France, Sweden and Finland.⁸⁶ At the current pace, the U.S. GAO estimates that it could take up to 34 years for U.S. companies to achieve gender parity on their boards.⁸⁷

Progress toward greater racial and ethnic diversity in U.S. company boardrooms has been even slower. Over the past ten years, the percentage of African American/Black directors at Fortune 500 companies has remained between 7 and 9%, while the percentage of women directors has grown from 16 to 23%.⁸⁸ In 2019, only 10% of board seats at Russell 3000 companies were held by racial minorities, reflecting an incremental increase from 8% in 2008.⁸⁹ Among Fortune 500 companies in 2018, there were fewer than 20 directors who publicly self-identified as LGBT+, and only nine companies

⁸⁴ See World Economic Forum, *Global Gender Gap Report 2020* 33 (2019), available at: http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

⁸⁵ See Kosmas Papadopoulos, ISS Analytics, *U.S. Board Diversity Trends in 2019* 4-5 (May 31, 2019), available at: https://www.issgovernance.com/file/publications/ISS_US-Board-Diversity-Trends-2019.pdf.

⁸⁶ See Deloitte, *Women in the Boardroom: A global perspective* (6th ed. 2019), available at: <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-the-boardroom-sixth-edition.pdf>.

⁸⁷ See GAO Report, *supra* note 44.

⁸⁸ See Russell Reynolds, *Ethnic & Gender Diversity on US Public Company Boards* 6 (September 8, 2020).

⁸⁹ See Papadopoulos, *supra* note 85, at 5.

reported considering sexual orientation and/or gender identity when identifying director nominees.⁹⁰

Women and minority directors combined accounted for 34% of Fortune 500 board seats in 2018.⁹¹ While women of color represent 18% of the U.S. population, they held only 4.6% of Fortune 500 board seats in 2018.⁹² Male underrepresented minorities held 11.5% of board seats at Fortune 500 companies in 2018, compared to 66% of board seats held by Caucasian/White men. Overall in 2018, 83.9% of board seats among Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of the U.S. population), 3.8% by Hispanic/Latino(a) individuals (who represent 19% of the U.S. population) and 3.7% by Asian/Pacific Islander individuals (who represent 6% of the U.S. population).⁹³ In its analysis of Russell 3000 companies, 2020 Women on Boards concluded that “larger companies do better with their diversity efforts than smaller companies.”⁹⁴

Based on the limited information that is available, Nasdaq believes 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. Nasdaq also believes that

⁹⁰ See Out Leadership, supra note 35.

⁹¹ See Deloitte, *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards* 9 (2018), available at: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf>.

⁹² See Catalyst, *Too Few Women of Color on Boards: Statistics and Solutions* (Jan. 31, 2020), <https://www.catalyst.org/research/women-minorities-corporate-boards/>.

⁹³ See Deloitte, *Missing Pieces Report*, supra note 91; United States Census Bureau, *QuickFacts*, available at: <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

⁹⁴ See 2020 Women On Boards Gender Diversity Index 4 (2019), available at: https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf.

listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. Thus, and for the reasons discussed in this Section II.A.1.III, Nasdaq has concluded that a regulatory approach to encouraging greater diversity and data transparency would be beneficial.

Nasdaq reviewed academic studies on the causes of underrepresentation on boards and the approaches taken by other jurisdictions to remedy underrepresentation. Those studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions. Dhir (2015) explains that “[t]he presence of unconscious bias in the board appointment process, coupled with closed social networks, generates a complex set of barriers for diverse directors; these are the ‘phantoms’ that prevent entry.”⁹⁵ In 2011, the Davies Review found that “informal networks influential in board appointments” contribute to the underrepresentation of women in the boardrooms of U.K. listed companies.⁹⁶ In 2017, the Parker Review acknowledged that “as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom.”⁹⁷ In 2020, the United Kingdom Financial Reporting Council commissioned a report to analyze barriers to LGBTQ+ inclusion and promotion in the workplace.

Leaders who self-identified as LGBTQ+ expressed concerns about the current board

⁹⁵ See Dhir, *supra* note 78, at 47.

⁹⁶ See *Women on Boards* 17 (Feb. 2011), available at: <https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf>.

⁹⁷ See Sir John Parker, *A Report into the Ethnic Diversity of UK Boards* 38 (Oct. 12, 2017), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf.

nomination process, which includes “relying on personal recommendations without transparent competition or due process [and] informal ‘interviewing’ outside the selection process.”⁹⁸

These concerns are not unique to the United Kingdom. The U.S. GAO (2015) found that women’s representation on corporate boards may be hindered by directors’ tendencies to “rely on their personal networks to identify new board candidates.”⁹⁹ Vell (2017) found that “92% of board seats [of public U.S. and Canadian technology companies] are filled through networking, and women have less access to these networks.”¹⁰⁰ Deloitte and the Society for Corporate Governance (2019) found that this is also common in other industries including media, communications, energy, consumer products, financial services and life sciences.¹⁰¹ They observed that although 94% of companies surveyed were looking to increase diversity among their boards, 77% of those boards looked to referrals from current directors when identifying diverse director candidates, suggesting that “networking is still key to board succession.”¹⁰² Dhir (2015), in a qualitative study of Norwegian directors, observed that “[b]oard seats tend to be

⁹⁸ See Catriona Hay et al., The Financial Reporting Council, *Building more open business* 25 (2020), available at: <https://www.frc.org.uk/getattachment/19f3b216-bd45-4d46-af2f-f191f5bf4a07/The-Good-Side-x-Financial-Reporting-Council-1811-AMENDED.pdf>.

⁹⁹ See GAO Report, *supra* note 44, at 15.

¹⁰⁰ See Vell Executive Search, *Women Board Members in Tech Companies: Strategies for Building High Performing Diverse Boards* 6 (2017), available at: <https://www.vell.com/images/pdf/VELL%20Report%20Women%20Board%20Members%20on%20Tech%20Boards%202017%203%2029.pdf>.

¹⁰¹ See Deloitte and the Society of Corporate Governance, *Board Practices Report: Common threads across boardrooms* 5 (2019), available at: https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/1202241_2018_Board_Practices_Report_FINAL.pdf.

¹⁰² *Id.* at 6.

filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background.”¹⁰³

Another contributing factor may be the traditional experience sought in director nominees. Rhode & Packel (2014) observed that:

One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service. The primary route to board directorship has long been through experience as a CEO of a public corporation. . . . Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened.¹⁰⁴

Hillman et al. (2002) found that while white male directors of public companies were more likely to have current or former experience as a CEO, senior manager or director, African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy.¹⁰⁵ Dhir (2015) suggests that “[c]onsidering persons from other, non-management pools, such as academia, legal and accounting practice, the not-for-profit sector and politics, may help create a broader pool of diverse candidates.”¹⁰⁶ Directors surveyed by the U.S. GAO also “suggested, for example, that boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the

¹⁰³ See Dhir, supra note 78, at 52.

¹⁰⁴ See Deborah Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39(2) Del. J. Corp. L. 377, 402-403 (2014); see also Dhir, supra note 78, at 39 (“[T]here is an apparent preference for either CEOs (whether current or retired) or senior management who have experience at the helm of a particular business stream or unit.... The fact that far fewer women than men have been CEOs has a potentially devastating effect on access to the boardroom, which in turn can have an effect on the number of women who rise to the level of CEO and to the executive suite.”).

¹⁰⁵ See Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28(6) J. Mgmt. 747, 749, 754 (2002).

¹⁰⁶ See Dhir, supra note 78, at 42.

nonprofit and government sectors. . . . [I]f boards were to expand their director searches beyond CEOs more women might be included in the candidate pool.”¹⁰⁷

Investors have begun calling for greater transparency surrounding ethnic diversity on company boards, and in the past several months as the U.S. has seen an uprising in the racial justice movement, there has been an increase in the number of African Americans appointed to Russell 3000 corporate boards.¹⁰⁸ In a five-month span, 130 directors appointed were African American, in comparison to the 38 African American directors who were appointed in the preceding five months.¹⁰⁹ Although tracking the acceleration in board diversity is feasible for some Russell 3000 companies, many of the companies do not disclose the racial makeup of the board, making it impossible to more broadly assess the impact of recent events on board diversity.

IV. Stakeholder Perspectives

To gain a better understanding of the current state of board diversity, benefits of diversity, causes of underrepresentation on boards and potential remedies to address underrepresentation, Nasdaq spoke with leaders representing a broad spectrum of market participants and other stakeholders. Nasdaq sought their perspectives to inform its analysis of whether the proposed rule changes would promote the public interest and protection of investors without unduly burdening competition or conflicting with existing securities laws. The group included representatives from the investor, regulatory, investment banking, venture capital and legal communities. Nasdaq also spoke with

¹⁰⁷ See GAO Report supra note 44, at 18.

¹⁰⁸ See Leslie P. Norton, *The Number of Black Board Members Surged After George Floyd's Death*, Barron's, Oct. 27, 2020, available at: <https://www.barrons.com/articles/after-george-floyds-death-the-number-of-black-board-members-surges-51603809011>.

¹⁰⁹ Id.

leaders of civil rights and corporate governance organizations, and organizations representing the interests of private and public companies, including Nasdaq-listed companies. Specifically, Nasdaq obtained their views on:

- the current state of board diversity in the U.S.;
- the inherent value of board diversity;
- increasing pressure from legislators and investors to improve diverse representation on boards and board diversity disclosure;
- whether a listing rule related to board diversity is in the public interest;
- how to define a “diverse” director; and
- the benefits and challenges of various approaches to improving board diversity disclosures and increasing diverse representation on boards, including mandates and disclosure-based models.

The discussions revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics. The majority of organizations also were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can accelerate the rate of change, they expressed that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Business leaders also expressed concern that smaller companies would require flexibility and support to comply with any time-sensitive requirements to add diverse directors. Some stakeholders highlighted additional challenges that smaller companies, and companies in certain industries, may face finding diverse board members. Leaders from across the spectrum of stakeholders that Nasdaq surveyed reinforced the notion that if companies recruit by skill set and expertise rather

than title, then they will find there is more than enough diverse talent to satisfy demand. Leaders from the legal community emphasized that any proposed rule that imposed additional burdens beyond, or is inconsistent with, existing securities laws—by, for example, requiring companies to adopt a diversity policy or include disclosure solely in their proxy statements—would present an additional burden and potentially more legal liability for listed companies.

V. U.S. Regulatory Framework

As detailed above, diversity has been the topic of a growing number of studies over the past decade and, in recent years, some investors have been increasingly advocating for greater diversity among directors of public companies.¹¹⁰ Over the past year, the social justice movement has underscored the importance of having diverse perspectives and representation at all levels of decision-making, including on public company boards. In recent years, diversity has become increasingly important to the public, including institutional investors, pension funds and other stakeholders who believe that board diversity enhances board performance and is an important factor in the

¹¹⁰ In 2009, when the Commission proposed enhancements to proxy disclosures, including addressing board diversity disclosures, the Commission received over 130 comment letters related to its proposal, including from corporations, pension funds, professional associations, trade unions, accounting firms, law firms, consultants, academics, individual investors and other interested parties. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,335; see also David A. Katz and Laura McIntosh, *Raising the Stakes for Board Diversity*, Law.com (July 22, 2020), available at: <https://www.law.com/newyorklawjournal/2020/07/22/raising-the-stakes-for-board-diversity/?slreturn=20201017021522>; Office of the Illinois State Treasurer, *The Investment Case For Board Diversity: A Review of the Academic and Practitioner Research on the Value of Gender and Racial/Ethnic Board Diversity for Investors* 7 (Oct. 2020), available at: [https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20\(oct%202020\).pdf](https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20(oct%202020).pdf).

voting decisions of some investors.¹¹¹ Legislators increasingly are taking action to encourage corporations to diversify their boards and improve diversity disclosures.¹¹²

a. SEC Diversity Disclosure Requirements – Background

In 2009, the Commission sought comment on whether to amend Item 407(c)(2)(vi) of Regulation S-K to require disclosure of whether a nominating committee considers diversity when selecting a director for a position on the board.¹¹³ The Commission received more than 130 comment letters on its proposal. According to a University of Dayton Law Review analysis of those comment letters, most were submitted by groups with a specific interest in diversity, or by institutional investors, including mutual funds, pension funds, and socially responsible investment funds.¹¹⁴ Further, the analysis showed that 56 commenters addressed the issue of diversity disclosures, and only 5 of those 56 commenters did not favor such disclosure.¹¹⁵ Twenty-seven of the 56 mentioned gender diversity, 18 mentioned racial diversity, and 13 mentioned ethnic diversity. However, neither the proposed rule nor the final rule defined

¹¹¹ See Comments on Proposed Rule: Proxy Disclosure and Solicitation Enhancements, available at: <https://www.sec.gov/comments/s7-13-09/s71309.shtml>. See also CGLytics, *Diversity on the Board? Metrics Used by Fortune 100 Companies* (June 29, 2020), available at: <https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/>; Office of the Illinois State Treasurer, *supra* note 110.

¹¹² For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one director from an Underrepresented Community. See Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020). Washington requires companies headquartered in the state to have at least 25% women on the board by 2022 or provide certain disclosures. See Wash. Subst. S.B. 6037 (June 11, 2020). At least eleven states have proposed diversity-related requirements. See Hatcher and Latham, *supra* note 11.

¹¹³ See Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076, 35,084 (July 17, 2009) (proposed rule).

¹¹⁴ See Thomas Lee Hazen and Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37:1 Univ. Dayton L. Review 41, 51, n. 82 (citing the comment letters).

¹¹⁵ In the five comments that opposed diversity disclosure, three stated that diversity was an important value. See Comments on Proposed Rule, *supra* note 111; see also Hazen and Broome, *supra* note 114, at 54 n.88 (citing the 56 comment letters).

diversity.¹¹⁶

Ten years after its adoption of board diversity disclosure rules, the Commission revisited the rules by establishing new Compliance and Disclosure Interpretations (“C&DI”). However, the Commission did not provide a definition of diversity, and therefore issuers currently are not required to disclose the race, ethnicity or gender of their directors or nominees.

Currently, Item 401(e)(1) of Regulation S-K requires a company to “briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director.”¹¹⁷ The C&DI clarifies that if a board considered a director’s self-identified diversity characteristics (*e.g.*, race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background) during the nomination process, and the individual consents to disclose those diverse characteristics, the Commission “would expect that the company’s discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered.”¹¹⁸

Rather than providing a specific definition of diversity, the C&DI provides a non-exhaustive list of examples of diverse characteristics that a company could consider for purposes of Item 401(e)(1), including “race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background.”¹¹⁹ Additionally, the Commission stated that any description of a company’s diversity policy would be expected to include

¹¹⁶ See Hazen and Broome, *supra* note 114, at 53 n. 84-86.

¹¹⁷ See 17 C.F.R. § 229.401(e)(1).

¹¹⁸ See Securities and Exchange Commission, Regulation S-K Compliance & Disclosure Interpretations (Sept. 21, 2020), available at: <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

¹¹⁹ *Id.*

“a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.”¹²⁰

Item 407(c)(2)(vi) of Regulation S-K requires proxy disclosure regarding whether diversity is considered when identifying director nominees and, if so, how. In addition, if the board or nominations committee has adopted a diversity policy, the company must describe how the policy is implemented and its effectiveness is assessed.¹²¹ When adopting Item 407(c)(2)(vi), the Commission explained:

We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.¹²²

Moreover, Item 407(c)(2)(vi) does not require companies to adopt a formal policy and does not require them to explain why they have not. It also does not require public disclosure of board-level diversity statistics.

b. Complaints Surrounding Current Diversity Disclosure Requirements

Given the broad latitude afforded to companies by the Commission’s rules related to board diversity and proxy disclosure, current reporting of board-level diversity statistics has been significantly unreliable and unusable to investors. This has been due

¹²⁰ Id.

¹²¹ See 17 C.F.R. § 229.407(c)(2)(vi).

¹²² See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,344.

to myriad data collection challenges, including the scarcity of reported information, the lack of uniformity in the information that is disclosed and inconsistencies in the definitions of diversity characteristics across companies.¹²³ The heightened national discourse around diversity and mounting grievances from investors surrounding transparency on board diversity prompted Nasdaq to examine the state of board diversity among its listed companies. While conducting that research, Nasdaq identified a number of key challenges, such as: (1) inconsistent disclosure and definitions of diversity across companies; (2) limited data on diverse characteristics outside of gender; (3) inconsistent or no disclosure of a director's race, ethnicity, or other diversity attributes (*e.g.*, nationality); (4) difficult-to-extract data because statistics are often embedded in graphics; and (5) aggregation of information, making it difficult to separate gender from other categories of diversity. Investors and data analysts have raised similar criticisms.

As the Illinois Treasurer observed, the paucity of data on race and ethnicity creates barriers to investment analysis, due diligence and academic study.¹²⁴ For example, the scarcity of such data is an impediment to academics who want to study the performance impact of racially diverse boards.¹²⁵ Nasdaq is concerned that investors also face the many data collection challenges Nasdaq encountered, rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions. Commissioner Allison Herren Lee expressed similar concerns, stating that the

¹²³ See Petition for Rulemaking (July 6, 2017), available at: <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf>.

¹²⁴ See Press Release, *Illinois State Treasurer Frerichs Calls on Russell 3000 Companies to Disclose Diversity Data* (Oct. 28, 2020), available at https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/october2020_russell3000.pdf.

¹²⁵ See Office of Illinois State Treasurer, *supra* note 110, at 3-4.

current SEC disclosure requirements have “led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. . . . And the current state of disclosure reveals the shortcomings of a principles-based materiality regime in this area.”¹²⁶

Some stakeholders believe there is a correlation between companies that disclose the gender, racial and ethnic composition of their board and the number of diverse directors on those companies’ boards.¹²⁷ Currently, the lack of reliable and consistent data makes it difficult to measure diversity in the boardroom, and a common set of standards for diversity definitions and disclosure format is greatly needed. At present, U.S. companies must navigate a complex patchwork of federal and state regulations and disclosure requirements. The limited disclosure currently provided voluntarily, which is primarily focused on gender (due in part to that data being the most readily available), fails to provide the full scope of a board’s diverse characteristics.¹²⁸ It is difficult to improve what one cannot accurately measure. This lack of transparency is impacting investors who are increasingly basing public advocacy, proxy voting and direct shareholder-company engagement decisions on board diversity considerations.¹²⁹

c. Support for Updating Diversity Disclosure Requirements

¹²⁶ See Lee, supra note 22.

¹²⁷ See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 (“Although the[se] amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition. A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity.”); see also Office of Illinois State Treasurer, supra note 110, at 3.

¹²⁸ See, e.g., CGLytics, supra note 111, at <https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/>; Petition for Amendment of Proxy Rule, supra note 80; Office of Illinois State Treasurer, supra note 110.

¹²⁹ See Office of the Illinois State Treasurer, *Russell 3000 Board Diversity Disclosure Initiative*, https://www.illinoistreasurer.gov/Financial_Institutions/Equity_Diversity_Inclusion/Russell_3000_Board_Diversity_Disclosure_Initiative (last accessed Nov. 25, 2020).

Nasdaq's surveys of investors and reviews of their disclosed policies and actions show that board diversity is a priority when assessing companies, and investors report, in some cases, relying on intuition when there is a lack of empirical, evidenced-based data. Furthermore, the continued growth of ESG investing raises the importance of quality data, given the data-driven nature of investment products such as diversity-specific indices and broader ESG funds.

Investors have a unique platform from which to engage and influence a company's position on important topics like diversity. Similarly, Nasdaq, like other self-regulatory organizations, is uniquely positioned to establish practices that will assist in carrying out Nasdaq's mandate to protect investors and remove impediments from the market. Various stakeholders, including Nasdaq, believe that clear and concise annual disclosure of board diversity information that disaggregates the data by race, ethnicity, gender identity and sexual orientation will provide the public, including key stakeholders, with a better sense of a company's approach to improving corporate diversity and the support needed to effectuate any changes. Required disclosures also would eliminate the number of shareholder proposals asking for these key metrics and the need for companies to respond to multiple investor requests for information.¹³⁰ Moreover, companies manage issues more closely and demonstrate greater progress when data is available.¹³¹

In 2015, nine large public pension funds who collectively supervised \$1.12 trillion in assets at the time petitioned the Commission to require registrants to disclose information related to, among other things, the gender, racial, and ethnic diversity of the

¹³⁰ See Petition for Rulemaking, *supra* note 123, at 2.

¹³¹ See, e.g., Gwen Le Berre, Parametric, *Investors Need Data to Make Diversity a Reality* (Aug. 24, 2020), <https://www.parametricportfolio.com/blog/investors-need-data-to-make-diversity-a-reality>.

registrant's board nominees.¹³² In 2017, Human Capital Management Coalition, which described itself as a group of institutional investors with \$2.8 trillion in assets at the time, made a similar petition to the Commission.¹³³ More recently, in October 2020, the Illinois Treasurer spearheaded an initiative along with twenty other investor organizations, asking for all companies in the Russell 3000 Index to disclose the composition of their board, including each board member's gender, race and ethnicity.¹³⁴

The largest proxy advisory firms have aligned their voting policies to encourage increased board diversity disclosure. Institutional Shareholder Services ("ISS"), recently adopted a new voting policy under which it will identify boards of companies in the Russell 3000 or S&P 1500 that "lack racial and ethnic diversity (or lack disclosure of such)" in 2021 and, beginning in 2022, will recommend voting against the chair of the nominating committee of such companies. The stated goal of the policy is "helping investors identify companies with which they may wish to engage and to foster dialogue between investors and companies on this topic."¹³⁵ In 2017, proxy advisory firm Glass Lewis announced a policy regarding board gender diversity that took effect in 2019. Glass Lewis generally recommends voting against the nominating committee chair of a board that has no female members, and when making such a recommendation, the firm closely examines the company's disclosure of its board diversity considerations and other

¹³² See Petition for Amendment of Proxy Rule, *supra* note 80.

¹³³ See Petition for Rulemaking, *supra* note 123.

¹³⁴ See Press Release, *supra* note 124.

¹³⁵ See ISS Governance, *ISS Announces 2021 Benchmark Policy Updates* (November 12, 2020), available at: <https://www.issgovernance.com/iss-announces-2021-benchmark-policy-updates/>.

relevant contextual factors.¹³⁶ On November 24, 2020, Glass Lewis announced the publication of its 2021 Proxy Voting Policy Guidelines, which expand its board gender diversity policy to vote against nominating chairs if there are fewer than two female directors, beginning in 2022.¹³⁷ Most notably, beginning with the 2021 proxy season, the company will include an assessment report of company proxy disclosures relating to board diversity, skills and the director nomination process for companies in the S&P 500 index. According to Glass Lewis, it “will reflect how a company’s proxy statement presents: (i) the board’s current percentage of racial/ethnic diversity; (ii) whether the board’s definition of diversity explicitly includes gender and/or race/ethnicity; (iii) whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (aka ‘Rooney Rule’); and (iv) board skills disclosure.”¹³⁸

Congress and members of the Commission also have weighed in on the importance of improving board transparency. In 2017, Representative Carolyn Maloney introduced the “Gender Diversity in Corporate Leadership Act of 2017,” which proposed requiring public companies to provide proxy disclosure regarding the gender diversity of the board of directors and nominees.¹³⁹ In November 2019, the U.S. House of Representatives, with bipartisan support, passed the “Corporate Governance Through

¹³⁶ See Glass Lewis, *2019 Policy Guideline Updates* (Oct. 24, 2018), available at: <https://www.glasslewis.com/2019-policy-guideline-updates-united-states-canada-shareholder-initiatives-israel/>.

¹³⁷ See Glass Lewis, *2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice - United States* (2020), available at: <https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b>.

¹³⁸ Id.

¹³⁹ Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017).

Diversity Act of 2019,” which requires certain registrants annually to disclose the racial, ethnic, and gender composition of their boards and executive officers, as well as the veteran status of any of those directors and officers, in their proxy statements.¹⁴⁰ The bill also requires the disclosure of any policy, plan or strategy to promote racial, ethnic, and gender diversity among these groups. Legislators have proposed a companion bill in the U.S. Senate.¹⁴¹

The Council of Institutional Investors (“CII”), U.S. Chamber of Commerce,¹⁴² National Urban League, Office of New York State Comptroller and the National Association for the Advancement of Colored People praised the House of Representatives’ for passing the 2019 legislation. According to the U.S. Chamber of Commerce’s members and associations, it has become increasingly important to see improvements in board diversity.¹⁴³ Additionally, CII’s General Counsel stated that the proxy statement disclosure requirement in the legislation “could contribute to enhancing U.S. public company board consideration of diversity.”¹⁴⁴

More recently, SEC Commissioners have called for greater transparency surrounding ethnic diversity on company boards. In a September 2020 speech titled “Diversity Matters, Disclosure Works, and the SEC Can Do More” given at the CII Fall Conference, Commissioner Lee advocated advancing corporate diversity and for various

¹⁴⁰ Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019).

¹⁴¹ Improving Corporate Governance Through Diversity Act of 2019, S. 360, 116th Cong. (2019).

¹⁴² See Letter from Various U.S. Chamber of Commerce Associations and Members to Chairman Mike Crapo and Ranking Member Sherrod Brown, U.S. House Committee on Banking, Housing, and Urban Affairs (July 27, 2020), available at: https://www.uschamber.com/sites/default/files/200727_coalition_h.r._5084_senatesmallbusiness.pdf.

¹⁴³ Id.

¹⁴⁴ See Joe Mont, *SEC, Congress seek better diversity disclosures*, Compliance Week (Feb. 20, 2019), <https://www.complianceweek.com/sec-congress-seek-better-diversity-disclosures/24802.article>.

approaches by which the Commission could promote diversity, including among other things, strengthening the C&DI's guidance related to disclosure of board candidate diversity characteristics.¹⁴⁵ Commissioner Lee stated:

[The SEC has] largely declined to require diversity-related disclosure. In 2009, we adopted a requirement for companies to disclose if and how diversity is considered as a factor in the process for considering candidates for board positions, including any policies related to the consideration of diversity. In 2018, we issued guidance encouraging the disclosure of self-identified characteristics of board candidates. While I appreciate these measures, given that women of color hold just 4.6% of Fortune 500 board seats and less than one percent of Fortune 500 CEOs are Black, it's time to consider how to get investors the diversity information they need to allocate their capital wisely.¹⁴⁶

VI. Nasdaq Proposal

a. Overview of Disclosure Requirements

Disclosure of information material to an investor's voting and investment decision is the bedrock of federal securities laws. The Exchange's listing rules require companies to comply with federal securities laws, including the registration requirements under the Securities Act of 1933. Once listed, companies are obligated to solicit proxies and file all annual and periodic reports with the Commission under the Act at the prescribed times.¹⁴⁷ In discharging its obligation to protect investors, Nasdaq monitors listed companies for compliance with those disclosure obligations, and the failure to do so results in a notice of deficiency or delisting.

Nasdaq believes it is well within the Exchange's delegated regulatory authority to propose listing rules designed to enhance transparency so long as they do not conflict with existing federal securities laws. For example, Nasdaq requires listed companies to

¹⁴⁵ See Lee, supra note 22.

¹⁴⁶ Id. Commissioner Crenshaw also expressed disappointment with the Commission's silence on diversity. See Crenshaw, supra note 7.

¹⁴⁷ See Nasdaq Stock Market Rulebook, Rules 5250(c) and (d).

publicly disclose compensation or other payments by third parties to a company's directors or nominees, notwithstanding that such disclosure is not required by federal securities laws. In approving that proposed rule, the Commission noted:

To the extent there are certain factual scenarios that would require disclosure not otherwise required under Commission rules, we believe that it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Act, that are designed to improve transparency and accountability into corporate decision making and promote investor confidence in the integrity of the securities markets.¹⁴⁸

Nasdaq is concerned that while investors have increasingly emphasized that they consider board diversity information to be material, the current lack of transparency and consistency makes it difficult for Nasdaq and investors to determine the state of diversity among listed companies as well as each board's philosophy regarding diversity. Investors also have voiced dissatisfaction about having to independently collect board-level data about race, ethnicity and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.¹⁴⁹ Moreover, in some instances, based on Nasdaq's own investigation, such information is either unavailable, or, if available, not comparable across companies. To the extent investors must obtain this information on their own through an imperfect process, Nasdaq is concerned that it increases information asymmetries between larger stakeholders, who are able to collect this data directly from companies, and smaller investors, who must rely on incomplete public disclosures. For all investors who take on the burden of independently obtaining the current information, there is a cost and time burden related to the data collection.

¹⁴⁸ See Order Granting Accelerated Approval of a Proposed Rule Change, 81 Fed. Reg. 44,400, 44,403 (July 7, 2016).

¹⁴⁹ See Petition for Amendment of Proxy Rule, supra note 80, at 2.

Nasdaq believes that additional disclosure regarding a board's composition and philosophy related to board diversity will improve transparency and accountability into corporate decision making. Nasdaq proposes to improve transparency regarding board diversity by requiring all listed companies to publicly disclose unbundled, consistent data utilizing a uniform, transparent framework on their website or in their proxy statement under Rule 5606. Similarly, Nasdaq proposes to promote accountability in corporate decision-making by requiring companies who do not have at least two Diverse directors on their board to provide investors with a public explanation of the board's reasons for not doing so under Rule 5605(f)(3). Nasdaq designed the proposal to avoid a conflict with existing disclosure requirements under Regulation S-K and to mitigate additional burdens for companies by providing them with flexibility to provide such disclosure on their website or in their proxy statement, and not requiring them to adopt a formal diversity policy.

Nasdaq proposes to foster consistency in board diversity data disclosure by defining "Diverse" under Rule 5605(f)(1) as "an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+," and by adopting the following definitions under Rule 5605(f)(1):

- "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.
- "LGBTQ+" means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.
- "Underrepresented Minority" means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian,

Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.

The terms in the proposed definition of “Underrepresented Minority” reflect the EEOC’s categories and are construed in accordance with the EEOC’s definitions.¹⁵⁰ The terms in the proposed definition of LGBTQ+ are similar to the identities defined in California’s A.B. 979, described below, but have been expanded to include the queer community based on Nasdaq’s consultation with stakeholders, including human rights organizations.¹⁵¹

In constructing its proposed definition of “Diverse,” Nasdaq considered various state and federal legislation, stakeholder sentiments and academic studies. For example, California requires public companies headquartered in the state to have at least one individual who self-identifies as a female on the board by 2019 under S.B. 826¹⁵² and at least one director who is a member of an “underrepresented community” by 2021 under A.B. 979.¹⁵³ S.B. 826 defines “Female” as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth,” consistent with legislation proposed by New Jersey, Michigan and Hawaii related to board gender diversity.¹⁵⁴ A.B. 979 considers directors from underrepresented communities to be individuals who self-identify as Black, African American, Hispanic, Latino, Asian,

¹⁵⁰ While the EEO-1 report refers to “Hispanic or Latino” rather than Latinx, Nasdaq proposes to use the term Latinx to apply broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.

¹⁵¹ Further, Nasdaq agrees with the United Kingdom Financial Reporting Council that the acronym LGBTQ+ “does not attempt to exclude other groups, nor does it imply that the experiences of people under its umbrella are the same.” See Hay et al., supra note 98, at 14.

¹⁵² See Cal. S.B. 826, supra note 112.

¹⁵³ See Cal. A.B. 979, supra note 112.

¹⁵⁴ See Cal. S.B. 826, supra note 112. See also N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender. Since S.B. 826 was passed, 669 women have joined public company boards in the state and the number of public companies with all male boards has declined from 30% in 2018 to 3% in 2020.¹⁵⁵

The state of Washington requires public companies whose boards are not comprised of at least 25% directors who self-identify as women by January 1, 2022 to provide public disclosures related to the board's consideration of "diverse groups" during the director nomination process. The state considers "diverse groups" to include "women, racial minorities, and historically underrepresented groups."¹⁵⁶

As discussed above, Congress has proposed legislation relating to disclosure of racial, ethnic, gender and veteran status among the company's directors. Section 342 of the Dodd-Frank Act defines "minority" as "Black American, Native American, Hispanic American, and Asian American,"¹⁵⁷ and the Diversity Assessment Report for Entities Regulated by the SEC requires the Exchange to report workforce composition data to the SEC based on the EEOC's categories.¹⁵⁸ Most companies are required by law to provide similar workforce data to the EEOC through the EEO-1 Report, which requires employers to report statistical data related to race, ethnicity and gender to the EEOC.¹⁵⁹

¹⁵⁵ See California Partners Project, *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards* 4 (2020), available at: <https://www.calpartnersproject.org/claimyourseat>.

¹⁵⁶ See Wash. Subst. S.B. 6037, *supra* note 112. At least 11 states have proposed diversity-related requirements. See Hatcher and Latham, *supra* note 11.

¹⁵⁷ See 12 U.S.C. § 5452(g)(3) and Pub. L. 101-73 § 1204(c)(3).

¹⁵⁸ See Securities and Exchange Commission, Diversity Assessment Report for Entities Regulated by the SEC, available at: <https://www.sec.gov/files/OMWI-DAR-FORM.pdf>.

¹⁵⁹ All companies with 100 or more employees are required to complete the EEO-1 Report. See U.S. Equal Employment Opportunity Commission, EEO-1: Who Must File, <https://www.eeoc.gov/employers/eo-1-survey/eo-1-who-must-file> (last accessed Nov. 27, 2020).

Nasdaq has designed the proposed rule to require all companies to provide consistent, comparable data under Rule 5606 by utilizing the existing EEO-1 reporting categories that companies are already familiar with, and by requiring companies to have, or publicly explain why they do not have, at least two directors who are diverse in terms of race, ethnicity, sexual orientation or gender identity under Rule 5605(f)(2). While the EEO-1 report does not currently include sexual orientation or gender identity, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status in recognition of the U.S. Supreme Court's recent decision in *Bostock v. Clayton County* that sexual orientation and gender identity are "inextricably" intertwined with sex.¹⁶⁰

The proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, the company would still have to provide the required disclosure under Rule 5605(f)(3) if the company does not also have at least two directors who are otherwise considered Diverse under Rule 5605(f)(1). Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

¹⁶⁰ See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020) ("But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

Overall, Nasdaq believes the proposal will enhance investor confidence that all listed companies are considering diversity of race, ethnicity, sexual orientation and gender identity in the context of selecting directors. Investors will be confident that board discussions at listed companies with at least two Diverse directors include the perspectives of more than one demographic group. They will also be confident that boardrooms without at least two Diverse directors are having a thoughtful discussion about their reasons for not doing so and publicly explaining those reasons. On balance, the proposal will advance the public interest and enhance investor confidence in the integrity of the securities markets by ensuring investors that Nasdaq is monitoring all listed companies to verify that they have at least two Diverse directors or explain why they do not, and by requiring all listed companies to provide consistent, comparable diversity disclosures.

b. Board Statistical Disclosure

Given the increased interest in, and advocacy for, improvements in board transparency related to diversity disclosure information, the Exchange is proposing to adopt new Rule 5606(a), which would require each company to publicly disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified gender and racial characteristics and LGBTQ+ status.

All Nasdaq-listed companies that are subject to proposed Rule 5605(f), whether they choose to meet the diversity objectives of proposed Rule 5605(f)(2) or to explain why they do not, would be required to make the proposed Rule 5606 disclosure. This proposed rule also will assist the Exchange in assessing whether companies meet the diversity objectives of proposed Rule 5605(f). Under Rule 5606(e), Nasdaq proposes to

make proposed Rule 5606 operative for listed companies one year after the SEC Approval Date of this proposal.

Pursuant to proposed Rule 5606(a), each company would be instructed to annually provide its board-level diversity data in a format substantially similar to the Board Diversity Matrix in proposed Rule 5606(a) and attached as Exhibit 3. The company would be required to provide the total number of directors on its board. If a director voluntarily self-identifies, each company, other than a Foreign Issuer (as defined under Rule 5605(f)(1)), would include the following in a table titled “Board Diversity Matrix,” in accordance with the instructions accompanying the proposed disclosure format: (1) the number of directors based on gender identity (male, female or non-binary¹⁶¹); (2) the number of directors based on race and ethnicity (African American or Black, Alaskan Native or American Indian, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities); and (3) the number of directors who self-identify as LGBTQ+.

Any director who chooses not to disclose a gender would be included under “Gender Undisclosed” and any director who chooses not to identify as any race or not to identify as LGBTQ+ would be included in the “Undisclosed” category at the bottom of the table. The defined terms for the race and ethnicity categories in the instructions to the Board Diversity Matrix disclosure format are substantially similar to the terms and definitions used in the EEO-1 Report.¹⁶² LGTBQ+ is defined similarly to proposed Rule

¹⁶¹ Although non-binary is included as a category in the proposed Board Diversity Matrix, a company would not satisfy the diversity requirement proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

¹⁶² See supra note 159. Additionally, the EEOC does not categorize LGBTQ+ or any other sexual orientation identifier on its EEO-1 Report. The definitions of the EEO-1 race and ethnicity

5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

Below is an example of a Board Diversity Matrix that companies may use, which is also attached as Exhibit 3:

Board Diversity Matrix (As of [DATE])				
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Undisclosed	#			

categories may be found in the appendix to the EEO-1 Report instructional booklet, available at <https://www.eeoc.gov/employers/eo-1-survey/eo-1-instruction-booklet>.

Nasdaq recognizes that some Foreign Issuers, including Foreign Private Issuers as defined by the Act,¹⁶³ may have their principal executive offices located outside of the United States and in jurisdictions that may impose laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race, ethnicity or LGBTQ+ status. In such countries, a Foreign Issuer may be precluded by law from requesting diversity data from its directors. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Board Matrix data less relevant for such companies and not useful for investors.

As a result of these limitations, Nasdaq is proposing the option of a separate Board Diversity Matrix for Foreign Issuers. Similar to other companies, a Foreign Issuer would be required to provide the total number of directors on its board. If a director voluntarily self-identifies, the company would include the following in a table titled "Board Diversity Matrix": (1) the number of directors based on gender identity (male, female or non-binary¹⁶⁴); (2) the number of directors who are considered underrepresented in the company's home country jurisdiction;¹⁶⁵ and (3) the number of directors who self-identify as LGBTQ+. An "Underrepresented Individual in Home Country Jurisdiction" is defined in the instructions to the Board Diversity Matrix as a person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in a Foreign Issuer's home

¹⁶³ See 17 C.F.R. § 240.3b-4.

¹⁶⁴ Although non-binary is included as a category in the proposed Board Diversity Matrix, a company would not satisfy any aspect of the diversity requirement proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

¹⁶⁵ To clarify, although a Foreign Issuer may disclose directors that meet the requirement of Underrepresented Minority pursuant to new Rule 5605(f)(1), such disclosure may not meet the diversity objectives of new Rule 5605(f)(2)(B)(ii).

country jurisdiction. Rule 5605(f)(2)(B)(i) also proposes the same definition for Diverse directors of Foreign Issuers.

Nasdaq is also proposing new Rule 5606(b), which would require each company to provide the disclosure required under Rule 5606(a) in either the company's proxy statement or information statement for its annual meeting for shareholders, or on the company's website. If the company elects to disclose the information on its website, the company must also submit such disclosure along with a URL link to the information through the Nasdaq Listing Center within 15 calendar days of the company's annual shareholder meeting. The proposed time period to submit the information to the Nasdaq Listing Center is aligned with the time period provided in proposed Rule 5605(f)(3) for a company to submit its explanation for why it does not have at least two Diverse directors. Disclosure of the statistical data is not in lieu of any SEC requirements for a company to disclose any required information pursuant to Regulation S-K or any other federal, state or foreign laws or regulations. As described in the instructions to the Board Diversity Matrix and Rule 5606(a), each year following the first year that a company publishes its annual Board Diversity Matrix, the company would be required to publish its data for the current and immediately prior years.

Additionally, Nasdaq is proposing Rule 5606(c), which exempts the following types of companies from proposed Rule 5606(a): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth

in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. The exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition.

Nasdaq is also proposing Rule 5606(d) to allow for a company newly listing on Nasdaq, including a company listing in connection with a business combination under IM-5101-2, to satisfy the requirement of Rule 5606 within one year of listing on Nasdaq. The disclosure required by proposed Rule 5606(d) would be required to be included in the company's annual proxy statement or information statement for its annual meeting of shareholders or on the company's website. If the company provides such disclosure on its website, the company must also submit the disclosure and a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholder meeting.

When a company does not timely provide the required disclosure, Nasdaq will notify the company that it is not in compliance with a listing requirement and allow the company to provide a plan to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,¹⁶⁶ Nasdaq proposes to allow companies deficient under proposed Rule 5606 45 calendar days to submit a plan in accordance with Rule 5810(c)(2) to regain compliance and, based on that

¹⁶⁶ Pursuant to Nasdaq Rule 5810(c)(2)(A)(iii), a company is provided 45 days to submit a plan to regain compliance with Rules 5620(a) (Meetings of Shareholders), 5620(c) (Quorum), 5630 (Review of Related Party Transactions), 5635 (Shareholder Approval), 5250(c)(3) (Auditor Registration), 5255(a) (Direct Registration Program), 5610 (Code of Conduct), 5615(a)(4)(D) (Partner Meetings of Limited Partnerships), 5615(a)(4)(E) (Quorum of Limited Partnerships), 5615(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 5640 (Voting Rights). Pursuant to Nasdaq Rule 5810(c)(2)(A)(iv), a company is also provided 45 days to submit a plan to regain compliance with Rule 5250(b)(3) (Disclosure of Third Party Director and Nominee Compensation). A company is generally provided 60 days to submit a plan to regain compliance with the requirement to timely file periodic reports contained in Rule 5250(c)(1).

plan, Nasdaq can provide the company with up to 180 days to regain compliance. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815. Although proposed Rule 5606 is not identical to the current Commission requirements, it is similar to, and does not deviate from, the Commission's CD&I related to Items 401(e)(1) and 407(c)(2)(vi) of Regulation S-K. Moreover, the proposed rule strengthens the Commission's requirements by providing clarity to the definition of diversity and streamlining investors' desire for clear, complete and consistent disclosures. Nasdaq believes that the format of the Board Diversity Matrix and the information that it will provide offers greater transparency into a company's board composition and will enable the data to be easily aggregated across issuers.¹⁶⁷ Nasdaq also believes that requiring annual disclosure of the data will ensure that the information remains current and easy for investors, data analysts and other parties to track.

c. Diverse Board Representation or Explanation

Nasdaq is proposing to adopt new Rule 5605(f)(2) to require each listed company to have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one who self-identifies as Female and one who self-identifies as an Underrepresented Minority or LGBTQ+. ¹⁶⁸ A company does not need to provide additional public disclosures if the company discloses under Rule 5606 that it has at least two Diverse directors satisfying this requirement. The terms in the proposed

¹⁶⁷ Various stakeholders have requested easier aggregation. See Petition for Amendment of Proxy Rule, supra note 80, at 1.

¹⁶⁸ Nasdaq plans to publish an FAQ on the Listing Center clarifying that "two members of its board of directors who are Diverse" would exclude emeritus directors, retired directors and members of an advisory board.

definition of “Underrepresented Minority” reflect the EEOC’s categories and are construed in accordance with the EEOC’s definitions. Nasdaq has provided additional flexibility for Smaller Reporting Companies and Foreign Issuers (including Foreign Private Issuers).

Under proposed Rule 5605(f)(3), if a company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not have two Diverse directors, the company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable (*e.g.*, the applicable subparagraph, the applicable diversity objectives, and the timeframe applicable to the company’s market tier); and (ii) explain the reasons why it does not have two Diverse directors. Such disclosure must be provided: (i) in the company’s proxy statement or information statement for its annual meeting of shareholders; or (ii) on the company’s website. If the company provides such disclosure on its website, the company must also notify Nasdaq of the location where the information is available by submitting the URL link through the Nasdaq Listing Center no later than 15 calendar days after the company’s annual shareholder meeting.

Nasdaq would not assess the substance of the company’s explanation, but would verify that the company has provided one. If the company has not provided any explanation, or has provided an explanation that does not satisfy subparagraphs (i) and (ii) of Rule 5605(f)(3), the explanation will not satisfy the requirements of Rule 5605(f)(3). For example, it would not satisfy Rule 5605(f)(3) merely to state that “the Company does not comply with Nasdaq’s diversity rule.” As described above, the company must specify the requirements of Rule 5605(f)(2) that are applicable and explain the reasons why it does not have two Diverse directors. For example, a company

could disclose the following to satisfy subparagraph (i) of Rule 5605(f)(3): “As a Smaller Reporting Company listed on the Nasdaq Capital Market tier, the Company is subject to Nasdaq Rule 5605(f)(2)(C), which requires the company to have, or explain why it does not have, at least two Diverse directors, including at least one director who self-identifies as Female. Under Rule 5605(f)(7), the Company is required to have at least one Diverse director by March 10, 2023, and a second Diverse director by March 10, 2026. The Company has chosen to satisfy Rule 5605(f)(2)(C) by explaining its reasons for not meeting the diversity objectives of Rule 5605(f)(2)(C), which the Company has set forth below.”

i. Effective Dates and Phase-in Period

Proposed Rule 5605(f)(7) provides a transition period before companies must fully satisfy the requirement to have two Diverse directors or explain why they do not upon the initial implementation of the rule. Under this transition rule, each company must have, or explain why it does not have, one Diverse director no later than two calendar years after SEC approval of the proposed rule (the “Approval Date”), and two Diverse directors no later than (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select (“NGS”) or Global Market (“NGM”) tiers, or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market (“NCM”) tier. For example, if the Approval Date is March 10, 2021, all companies would be required to have, or explain why they do not have, one Diverse director by March 10, 2023 and two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies).

Under proposed Rule 5605(f)(5)(A), a newly listed company that was not previously subject to a substantially similar requirement of another national securities exchange will be allowed one year from the date of listing to satisfy the requirement described above. This “phase-in” period applies to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, or through a business combination with an acquisition company listed under IM-5101-2, such that the company is no longer subject to IM-5101-2 after the combination. This phase-in period will apply after the end of the transition period provided in Rule 5605(f)(7). As a result, companies listing after the expiration of the phase-in periods provided by Rule 5605(f)(7) would be provided with one year from the date of listing to satisfy the applicable requirement of Rule 5605(f)(2) to have, or explain why they do not have, at least two Diverse directors. Companies listing after the Approval Date, but prior to the expiration of the phase-in periods provided by Rule 5605(f)(7), would be provided with the latter of the periods set forth in Rule 5605(f)(7) or one year from the date of listing.

Nasdaq believes this proposed period is consistent with the phase-in periods granted to companies for Nasdaq’s other board composition requirements. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and with the majority independent board requirement of Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year

timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

ii. Foreign Issuers

Nasdaq recognizes that the EEOC categories of race and ethnicity may not extend to all countries globally because each country has its own unique demographic composition. However, Nasdaq observed that on average, women tend to be underrepresented in boardrooms across the globe, holding an estimated 16.9% of board seats in 2018.¹⁶⁹ As an official supporter of the United Nations Sustainable Stock Exchanges Initiative, Nasdaq recognizes that ensuring women have equal opportunities for leadership in economic decision making is one of the United Nations Sustainable Development Goals to be accomplished by 2030.¹⁷⁰ However, studies estimate that at current rates, it could take 18¹⁷¹ to 34 years¹⁷² for U.S. companies to achieve gender parity on their boards.

Accordingly, under proposed Rule 5605(f)(2)(B), each Foreign Issuer must have, or explain why it does not have, at least two Diverse directors on its board, including at least one Female. Nasdaq proposes to provide Foreign Issuers with additional flexibility in that Foreign Issuers may satisfy the diversity requirement by having two Female directors. In addition, Foreign Issuers may also satisfy the diversity requirement by

¹⁶⁹ See Deloitte, *Women in the Boardroom*, supra note 86.

¹⁷⁰ See United Nations Sustainable Stock Exchanges Initiative, *Gender Equality*, <https://www.un.org/sustainabledevelopment/gender-equality/> (last accessed Nov. 24, 2020).

¹⁷¹ See McKinsey & Company, supra note 36, at 17.

¹⁷² See GAO Report, supra note 44, at 9 (estimating “it could take about 10 years from 2014 for women to comprise 30 percent of board directors and more than 40 years for the representation of women on boards to match that of men”).

having one Female director, and an individual who self identifies as (i) LGBTQ+ or (ii) an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Alternatively, a company could satisfy Rule 5605(f)(2)(B) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule.

Nasdaq proposes to define a Foreign Issuer under Rule 5605(f)(1) as (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that: (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act;¹⁷³ and (ii) has its principal executive offices located outside of the United States. This definition will include all Foreign Private Issuers (as defined in Rule 5005(a)(19)),¹⁷⁴ and any foreign issuers that are not foreign private issuers so long as they are also headquartered outside of the United States. This is designed to recognize that companies that are not Foreign Private Issuers but are headquartered outside of the United States are foreign companies notwithstanding the fact that they file domestic SEC reports. It is also designed to exclude companies that are domiciled in a foreign jurisdiction without having a physical presence in that country. Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be a Foreign Issuer one year from the date that the company no longer qualifies as a Foreign Issuer to satisfy the requirements of Rule 5605(f).

Nasdaq also proposes to revise Rule 5615 and IM-5615-3, which currently permit a Foreign Private Issuer to follow home country practices in lieu of the requirements set

¹⁷³ See 17 C.F.R. § 240.3b-4(b) ("The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.").

¹⁷⁴ Under Nasdaq Rule 5005(a)(19), the term Foreign Private Issuer has "the same meaning as under Rule 3b-4 under the Act."

forth in the Rule 5600 Series, subject to several exclusions. Nasdaq proposes to revise Rule 5615 and IM-5615-3 to add Rules 5605(f) and 5606 to the list of excluded corporate governance rules. As a result, Foreign Private Issuers must satisfy the requirements of Rule 5605(f) and 5606 and may not follow home country practices in lieu of such requirements. However, Foreign Private Issuers that elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, may satisfy the requirements of Rule 5605(f) by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

iii. Smaller Reporting Companies

Nasdaq also recognizes that smaller companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources necessary to compensate an additional director or engage a search firm to search outside of directors' networks. In recognition of the resource constraints faced by smaller companies, Nasdaq proposes to provide each Smaller Reporting Company with additional flexibility. Specifically, these companies could satisfy the two Diverse directors objective under Rule 5605(f)(2)(C) by having two Female directors.

Like other companies, Smaller Reporting Companies could also satisfy the two Diverse directors by having one Female director and one director who self-identifies as either (i) an Underrepresented Minority, or (ii) a member of the LGBTQ+ community. Alternatively, a company could satisfy Rule 5605(f)(2)(C) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule. Under Rule

5605(f)(1), Nasdaq proposes to define a Smaller Reporting Company as set forth in Rule 12b-2 under the Act.¹⁷⁵ Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be a Smaller Reporting Company one year from the date that the company no longer qualifies as a Smaller Reporting Company to satisfy the requirements of Rule 5605(f).

iv. Cure Period

Nasdaq proposes to adopt Rule 5605(f)(6) and a new Rule 5810(c)(3)(F) to specify what happens if a company does not have at least two Diverse directors as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3).¹⁷⁶ Under those provisions, the Listing Qualifications Department will promptly notify the company that it has until the latter of its next annual shareholders meeting, or 180 days from the event that caused the deficiency, to cure the deficiency. The company can cure the deficiency either by nominating additional directors so that it satisfies the Diversity requirement of Rule 5605(f)(2) or by providing the disclosure required by Rule 5605(f)(3). If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter. A company that receives a Staff Delisting Determination can appeal the determination to the Hearings Panel through the process set forth in Rule 5815. Nasdaq also proposes revising Rule 5810(c)(2)(A)(iv) to make a non-substantive change clarifying that Rule 5250(b)(3) is related to “Disclosure of Third Party Director and Nominee Compensation.”

¹⁷⁵ Under 12b-2 of the Act, a Smaller Reporting Company “means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than \$250 million; or (2) Had annual revenues of less than \$100 million and either: (i) No public float; or (ii) A public float of less than \$700 million.” See 17 C.F.R. § 240.12b-2.

¹⁷⁶ Nasdaq proposes that existing Rules 5810(c)(3)(F) and (G) be renumbered as Rules 5810(c)(3)(G) and (H) respectively.

v. Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of Rule 5605(f) (“Exempt Companies”): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be an Exempt Company one year from the date that the company no longer qualifies as an Exempt Company to satisfy the requirements of Rule 5605(f).

Nasdaq believes it is appropriate to exempt these types of companies from the proposed rule because such companies do not have boards, do not list equity securities, or are not operating companies. These companies are already exempt from certain of Nasdaq’s corporate governance standards related to board composition, as described in Rule 5615.

d. Alternatives Considered

Nasdaq considered whether requiring listed companies to have, or explain why they do not have, two Diverse directors would better promote the public interest than an alternative threshold or approach. Nasdaq’s reasoned decision-making process included considering: (i) mandate and disclosure-based approaches; (ii) higher and lower diversity objectives; (iii) longer and shorter timeframes; and (iv) broader and narrower definitions of “Diverse.”

i. Mandate vs. Disclosure Based Approach

Globally, gender mandates range from requiring at least one woman on the board,¹⁷⁷ requiring two or more women based on board size,¹⁷⁸ or requiring 30 to 50% women on the board.¹⁷⁹ Some mandates vary by board size—for example, Norway imposes different standards for boards of two to three directors, four to five directors, six to eight directors, nine directors and ten or more directors.¹⁸⁰ California imposes a higher

¹⁷⁷ For example, the Securities and Exchange Board of India requires public companies to have at least one woman on the board. See Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, Regulation 17(1)(a) (2015), available at: https://www.sebi.gov.in/legal/regulations/jan-2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-10-2020-_37269.html. Similarly, the Israeli Companies Law requires public companies to have at least one woman on the board. See Paul Hastings, *Breaking the Glass Ceiling: Women in the Boardroom* 139 (2018), available at: <https://www.paulhastings.com/genderparity/>. In the United States, California's S.B. 826 requires public companies headquartered in California to have at least one woman on the board. See Cal. S.B. 826, supra note 112, at § 301.3(b)(3).

¹⁷⁸ For example, California's S.B. 826 requires public companies headquartered in California to have at least two women on the board if their board is comprised of five directors, and at least three women on the board if their board is comprised of six or more directors. See Cal. S.B. 826, supra note 112, at § 301.3(b)(1) and (2). Similar legislation has been proposed in New Jersey, Michigan and Hawaii. See N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414-1(b)(2) (2020).

¹⁷⁹ For example, Norway imposes a gender quota ranging from 33%-50% depending on board size. See Paul Hastings, supra note 177, at 103. Portugal requires listed companies to have at least 33.3% women on boards by 2020. See Deloitte, *Women in the Boardroom*, supra note 86, at 143. Germany requires public companies with co-determined boards (at least 50% employee representation) to have at least 30% women, and all other listed companies to establish a company-defined target. See Ulrike Binder and Guido Zeppenfeld, Mayer Brown, *Germany Introduces Rules on Female Quota for Supervisory Boards and Leadership Positions* (March 13, 2015), available at <https://www.mayerbrown.com/en/perspectives-events/publications/2015/03/germany-introduces-rules-on-female-quota-for-super>. Belgium requires listed companies to have at least 33% women on the board. See Deloitte, *Women in the Boardroom*, supra note 86, at 85. Austria requires listed companies with more than 1,000 employees to have at least 30% women on the board. See *id.* at 81. Iceland requires public companies with more than 50 employees to have at least 40% women on the board. See Act respecting Public Limited Companies No. 2/199, Article 63, available at: <https://www.government.is/publications/legislation/lex/2018/02/06/TRANSLATION-OF-RECENT-AMENDMENTS-OF-ICELANDIC-PUBLIC-AND-PRIVATE-LIMITED-COMPANIES-LEGISLATION-2008-2010-including-Acts-13-2010-sex-ratios-and-68-2010-minority-protection-remuneration/>. France and Italy both require public companies to have at least 40% women on their boards. See Paul Hastings, supra note 177, at 91; White & Case, *Italy increases gender quotas in corporate boards of listed companies* (Jan. 29, 2020), available at: <https://www.whitecase.com/publications/alert/italy-increases-gender-quotas-corporate-boards-listed-companies>).

¹⁸⁰ See Paul Hastings, supra note 177, at 103.

standard for gender diversity that boards with five directors or six or more directors must satisfy by the end of 2021 under S.B. 826, and a higher standard for underrepresented communities that boards with five to eight directors and nine or more directors must satisfy by the end of 2022 under A.B. 979. Nasdaq did not observe a common denominator among the mandates applicable to varying board sizes. However, Nasdaq considered criticism that a model based on various board sizes could subject companies to a higher threshold by virtue of adding directors.¹⁸¹ Based on Nasdaq data, the average board size of its listed companies is eight directors.

Soft targets ranging from 25% to 40% women on boards have been suggested by various corporate governance codes and corporate governance organizations. For example, Rule 4.1 of the Swedish Corporate Governance Code (the “Code”) provides that listed companies are to “strive for gender balance on the board.”¹⁸² Each company’s nominations committee is to publish a statement on its website at the time it issues notice of its shareholders meeting “with regard to the requirement in rule 4.1, that the proposed composition of the board is appropriate according to the criteria set out in the Code and that the company is to strive for gender balance.”¹⁸³ Companies are not required to

¹⁸¹ See David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *Gender Diversity and Board Quotas*, New York Law Journal (July 25, 2018), available at: <https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26150.18.pdf> (“California legislators dispute that the bill requires men to be displaced by women, noting that boards can simply increase their size. This may be easier said than done, however: Because the required quota increases with board size, a company with a four-man board that did not wish to force out a current director would need to add three women to accommodate the requirements of the law by 2021.”).

¹⁸² See Swedish Corporate Governance Board, *The Swedish Corporate Governance Code* §4.1 17 (eff. Jan. 1, 2020), available at: http://www.bolagsstyrning.se/UserFiles/Koden/The_Swedish_Corporate_Governance_Code_1_January_2020.pdf.

¹⁸³ See Swedish Corporate Governance Board, *Annual Report 2020 22* (August 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3930/kodkoll_arsrapport-2020_eng.pdf.

comply with the Code, “but are allowed the freedom to choose alternative solutions which they feel are better suited to their particular circumstances, as long as they openly report every deviation, describe the alternative solution they have chosen and explain their reasons for doing so.”¹⁸⁴ Signifying progress, in 2019, 7% of nominations committees did not issue a statement on board gender balance, compared to 58% in 2013.¹⁸⁵

In 2015, the Swedish Corporate Governance Board, which is responsible for administering the Code, established a goal to achieve representation of women on boards of small/mid cap (and Swedish companies listed on NGM Equity) and large cap companies of 30% and 35%, respectively, by 2017. Further, the Board aimed to achieve 40% representation of women on boards of all listed Swedish companies by 2020.¹⁸⁶ Based on data as of June 30, 2020, among listed companies, women accounted for 32.7% of board seats on small/mid cap companies and NGM Equity, 38.6% of large cap companies and 34.7% of all listed companies.¹⁸⁷

In the United Kingdom, the Financial Conduct Authority requires companies with a premium listing on the London Stock Exchange to publicly disclose whether or not they comply with the Financial Reporting Council’s U.K. Corporate Governance Code (the

¹⁸⁴ See Swedish Corporate Governance Board, *Gender balance on boards of listed companies: The Swedish Corporate Governance Board assesses the situation ahead of this year’s AGMs* (February 3, 2015), available at: http://www.bolagsstyrning.se/userfiles/archive/3856/pressrelease_gender_2014-02-03.pdf.

¹⁸⁵ See Swedish Corporate Governance Board, *Annual Report 2020*, supra note 183, at 22.

¹⁸⁶ See Swedish Corporate Governance Board, *Gender balance*, supra note 184.

¹⁸⁷ See Swedish Corporate Governance Board, *Statistics regarding gender balance* (July 15, 2020), available at: http://www.bolagsstyrning.se/userfiles/archive/3922/200715_gender_balance_on_boards.pdf; see also *Sammanfattning*, available at http://www.bolagsstyrning.se/userfiles/archive/3922/statistik_konsfordelning_2020.pdf.

“U.K. Code”), and if not, to explain their reasons for non-compliance.¹⁸⁸ Provision 23 of the U.K. Code requires each company to publicly describe “the work of the nomination committee, including . . . the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives,”¹⁸⁹ and Principle J states that board appointments and succession planning should, among other things, “promote diversity of gender, social and ethnic backgrounds.”¹⁹⁰ In addition, the Companies Act requires companies to disclose gender diversity statistics among the board, management and employees.¹⁹¹ In 2018, the Financial Reporting Council reported that 83% of FTSE 100 and 74% of FTSE 250 companies had established a board diversity policy specifying gender, with approximately 1/3 specifying ethnicity.¹⁹² More recently, a report commissioned by the Financial Reporting Council concluded that there is a lack of public disclosure regarding the LGBTQ+ status among directors and executives of public companies. While the report did not recommend amending Principle J of the U.K. Code to consider sexual orientation or gender identity, it emphasized that the U.K. Code “seeks to promote

¹⁸⁸ See Financial Conduct Authority, LR 9.8.6(6), available at: <https://www.handbook.fca.org.uk/handbook/LR/9/8.html>; see also Financial Reporting Council, *The UK Corporate Governance Code* 3 (July 2018), available at <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF>. In addition, “[i]n 2016, the [UK] Government also implemented the relevant provision of the EU Non-Financial Reporting Directive with a new reporting requirement in the FCA’s Disclosure and Transparency Rules. This requires issuers (excluding [small and medium-sized enterprises]) admitted to trading on an EU regulated market to disclose their diversity policy in the corporate governance statement.” See Financial Reporting Council, *Board Diversity Reporting* 5 (September 2018), available at: <https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf>.

¹⁸⁹ See Financial Reporting Council, *The UK Corporate Governance Code*, *supra* note 188, at 9.

¹⁹⁰ *Id.* at 8.

¹⁹¹ See UK Companies Act 2006, § 414C.

¹⁹² See Financial Reporting Council, *Board Diversity Reporting*, *supra* note 188, at 9.

diversity and inclusion of all minority groups within business”¹⁹³ and suggested that the government “update corporate reporting requirements to require companies to demonstrate how they intend to capture data on the sexual orientation and gender identity of staff.”¹⁹⁴

In 2011, the Davies Review called on FTSE 100 boards to achieve 25% women on boards by 2015.¹⁹⁵ After that milestone was achieved, the Hampton Alexander Review encouraged FTSE 350 boards to have 1/3 women by 2020, and it has been achieved by FTSE 100 companies.¹⁹⁶ In 2017, the Parker Review called on FTSE 100 and 250 companies to have at least one director of color by 2021 and 2024, respectively.¹⁹⁷ As of February 2020, approximately 37% of FTSE 100 companies surveyed and 59% of FTSE 350 companies surveyed did not have one director of color on their board.¹⁹⁸

Australian Securities Exchange (“ASX”)-listed companies must comply with the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations (the “ASX Recommendations”) or explain why they do not. The ASX Recommendations require companies to have and disclose a diversity policy with measurable objectives and report on progress towards meeting those objectives. If the company is in the ASX/S&P 300, its objective for achieving gender diversity should be at

¹⁹³ See Hay et al., *supra* note 98, at 37.

¹⁹⁴ *Id.*

¹⁹⁵ See *Women on boards*, *supra* note 96.

¹⁹⁶ See *Hampton-Alexander Review: FTSE Women Leaders* (November 2016), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf.

¹⁹⁷ See Parker, *supra* note 97.

¹⁹⁸ See Sir John Parker, *Ethnic Diversity Enriching Business Leadership* 19 (Feb. 5, 2020), available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2020-report-final.pdf.

least 30%.¹⁹⁹ The Australian government also requires companies with 100 or more employees to provide an annual report about gender equality indicators, including the gender composition of the board and the rest of the workforce.²⁰⁰ In 2015, the ASX and KPMG found that 99% of S&P/ASX 200 companies and 88% of ASX 201-500 companies disclosed establishing a diversity policy rather than explaining why they do not have one.²⁰¹ As of July 2020, women account for 28.4% and 31.8% of board seats among ASX 300 and ASX 100 companies, respectively.²⁰²

Nasdaq observed that women account for at least 30% of the boards of the largest companies in Australia, Sweden and the United Kingdom, and in three other countries that have implemented disclosure requirements or suggested milestones on a comply-or-explain basis: Finland, New Zealand, and Canada.²⁰³ Nasdaq considered that countries

¹⁹⁹ See ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* 9 (4th ed. Feb. 2019), available at: <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>.

²⁰⁰ Workplace Gender Equality Act 2012, Part IV § 13 (March 25, 2015), available at: <https://www.legislation.gov.au/Details/C2015C00088>.

²⁰¹ See KPMG and ASX, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended 1 January 2015 and 31 December 2015* 4 (2016) available at: <https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf>.

²⁰² See KPMG and 30% Club, *Building Gender Diversity on ASX 300 Boards: Seven Learnings from the ASX 200* 4 (July 2020), available at: <https://assets.kpmg/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf>. The report also noted that diversity counteracts groupthink and that ASX 201-299 companies with at least 30% female directors “are more likely than not to [have seen] market capitalisation increases over the past 12 months.” *Id.* at 6.

²⁰³ See The Conference Board of Canada, *Data Dashboard* (Sept. 23, 2020), available at: <https://www.conferenceboard.ca/focus-areas/inclusion/2020/aob-comparisons-around-the-world-table?AspxAutoDetectCookieSupport=1>; Andrew MacDougall et al., Osler, *Diversity Disclosure Practices* 4 (2020), available at <https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf>. But see Heike Mensi-Klarbach et al., *The Carrot or the Stick: Self-Regulation for Gender-Diverse Boards via Codes of Good Governance*, J. Bus. Ethics 11 (2019), available at: <https://doi.org/10.1007/s10551-019-04336-z> (reviewing longitudinal data from 2006 to 2016 on listed and state-owned companies in Austria and concluding that “self-regulation of gender diversity on boards is ineffective if merely based on recommendations in codes of good governance”). Mensi-Klarbach recommends setting

that have implemented mandates have also seen progress in women's representation on boards, including, for example, Austria, Iceland, Belgium, France, Germany, Italy and Portugal.²⁰⁴ On average, women account for 31% of board seats in countries with gender mandates.²⁰⁵

Nasdaq discussed the benefits and challenges of mandate and comply-or-explain models with over a dozen stakeholders, and while the majority of organizations were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, the majority also stated that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. Most organizations Nasdaq spoke with expressed general discomfort with mandates, although they acknowledged that opposition is lessening in the wake of California's S.B. 826²⁰⁶ and A.B. 979.²⁰⁷ While many recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. In contrast, a disclosure-based framework that provides companies with flexibility would empower companies to maintain decision-making authority over their board's composition while providing stakeholders with a better understanding of the company's current board

concrete targets and providing public monitoring to improve the effectiveness of comply-or-explain frameworks.

²⁰⁴ See Paul Hastings, supra note 177; see also Deloitte, *Women in the Boardroom*, supra note 86.

²⁰⁵ See Paul Hastings, supra note 177; The Conference Board of Canada, supra note 203.

²⁰⁶ See Cal. S.B. 826, supra note 112.

²⁰⁷ See Cal. A.B. 979, supra note 112.

composition and its philosophy regarding diversity. This approach would better inform the investment community and enable more informed analysis of, and conversations with, companies. Nasdaq believes that these goals will be achieved through the disclosure of consistent, comparable data across companies, as would be required by the Exchange's proposed definition of Diverse.

For example, if, under Israeli law regarding board diversity, an Israeli company is required only to have a minimum of one woman on the board and such Israeli company chooses to comply with Israeli home country law in lieu of meeting the diversity objectives of Rule 5605(f)(2)(B), it may choose to disclose that "the Company is incorporated in Israel and required by Israeli law to have a minimum of one woman on the board, and satisfies home country requirements in lieu of Nasdaq Rule 5605(f)(2)(B), which requires each Foreign Issuer to have at least two Diverse directors." If a U.S. company had two Diverse directors but one resigned due to unforeseen circumstances, it could disclose, for example: "Due to the unexpected resignation of Ms. Smith this year, the Company does not have at least one director who self-identifies as Female and one director who self-identifies as an Underrepresented Minority or LGBTQ+. We intend to undertake reasonable efforts to meet the diversity objectives of Rule 5605(f)(2)(A) prior to our next annual shareholder meeting and have engaged a search firm to identify qualified Diverse candidates. However, due to unforeseen circumstances, we may not achieve this goal." Or a U.S. company may disclose that it chooses to define diversity more broadly than Nasdaq's definition by considering national origin, veteran status or individuals with disabilities when identifying nominees for director because it believes such diversity brings a wide range of perspectives and experiences to the board. In each

case, investors will have a better understanding of the company's reasons for not having at least two Diverse directors and can use that information to make an informed investment or voting decision.

ii. Higher vs. Lower Diversity Objectives

Nasdaq observed that existing empirical research spanned companies across several countries, including the United States, Spain, China, Canada, France and Norway. Nasdaq considered that the studies related to company performance and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board,²⁰⁸ two or more diverse directors (with diverse considered female, Black, Hispanic or Asian),²⁰⁹ at least three women on the board²¹⁰ and being in the top quartile for gender and ethnic diversity.²¹¹

Nasdaq considered that the academic studies related to investor protection and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board²¹² or up to 50% women on the board, and the assertions of certain academics that their findings may extend to other forms of diversity, including racial and ethnic diversity.²¹³ Nasdaq also reviewed academic research suggesting that "critical mass" is achieved by having three or more women on the board, and that having only one diverse director on the board risks

²⁰⁸ See Credit Suisse, supra note 30, at 16.

²⁰⁹ See Thomas and Starr, supra note 23, at 5.

²¹⁰ See Eastman et al., supra note 31, at 3; Wagner, supra note 32.

²¹¹ See McKinsey, supra note 36.

²¹² See Abbott et al., supra note 58; Chen et al., supra note 64.

²¹³ See Wahid, supra note 59; Cumming et al., supra note 62, at 34.

“tokenism.”²¹⁴ Nasdaq considered that although the legislation enacted by Norway and California, and proposed by several other states, varies based on board size, the academic research considered companies across a spectrum of sizes and board sizes, including Fortune 100, S&P 500, Fortune 1000 and smaller (non-Fortune 1000) companies.

Nasdaq concluded that there is no “one-size fits all” approach to promoting board diversity and that the academic literature regarding the relationship between board diversity, company performance and investor protections is continuing to evolve. However, in Nasdaq’s survey of academic studies described above—and of the targets or mandates promulgated by regulatory bodies and organizations worldwide—Nasdaq observed a common denominator of having at least one woman on the board. Similarly, Nasdaq observed a common denominator of having at least one director who is diverse in terms of race, ethnicity or sexual orientation among the requirements related to, and academic research considering, board diversity beyond gender identity. Nasdaq therefore believes that a diversity objective of at least two Diverse directors provides a reasonable baseline for comparison across companies. Companies are not precluded from meeting a higher or lower alternative measurable objective. For example, a company may choose to disclose that it does not meet the diversity objectives under Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in Nasdaq’s proposed rule. Nasdaq believes that providing flexibility and clear disclosure when the company determines to

²¹⁴ See Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37(2) Org. Dynamics 145 (April 2008); Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, 52(2) J. Fin. & Quant. Analysis 751 (April 2017); Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102(2) J. Bus. Ethics. 299 (Feb. 25, 2011), available at <https://ssrn.com/abstract=1858347>.

follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.

iii. Longer vs. Shorter Timeframes

Nasdaq considered whether an alternative timeframe for satisfying the diversity objectives of Rule 5605(f)(2) would better promote the public interest than the timeframe Nasdaq has proposed under Rule 5605(f)(7). While companies are not precluded from adding additional directors to their boards to satisfy Rule 5605(f)(2) by having two Diverse directors sooner than contemplated by the proposed rule, Nasdaq understands that some companies may need to obtain shareholder approval to amend their governing documents to allow for board expansion. Other companies may choose to replace an existing director on the board with a Diverse director, and board turnover may be low.²¹⁵ Nasdaq recognizes that it also takes substantial lead time to identify, interview and select board nominees. To provide companies with sufficient time to satisfy Rule 5605(f) by having two Diverse directors, while recognizing that investors are calling for expedient change, Nasdaq has structured its proposal similarly to the approach taken by California, where companies must achieve one target by an earlier date and satisfy the entire diversity objective at a later date. Nasdaq also considered the approaches taken by foreign jurisdictions to implement diversity objectives. For example, Belgium and France implemented diversity objectives under a phased approach that provided

²¹⁵ See Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, Harv. L. Sch. Forum on Corp. Governance (Oct. 18, 2020), <https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/> (last accessed Nov. 24, 2020).

companies with at least five years to fully satisfy the objectives,²¹⁶ whereas Iceland and Portugal provided companies with three years or less.²¹⁷

While companies may choose to satisfy Rule 5605(f)(2) on an alternative timeframe, a company that chooses a timeframe that is longer than the timeframes set forth in Rule 5605(f)(7) also must publicly explain its reasons for doing so. For example, an NGM-listed company that, while not technically a Smaller Reporting Company, views itself as similarly situated to a NCM-listed Smaller Reporting Company may disclose the following: “While the Company is listed on NGM and technically qualifies as a Smaller Reporting Company, it does not file its SEC reports utilizing the Smaller Reporting Company designation. However, the Company believes that it is similarly situated to other Smaller Reporting Companies listed on NCM in terms of its annual revenues and public float, and therefore has chosen to satisfy Rule 5605(f)(2)(C) in lieu of Rule 5605(f)(2)(A) and has satisfied this requirement by having at least two Diverse directors on the board who self-identify as Female within the timeframe provided under Rule 5605(f)(7) applicable to NCM-listed companies.”

iv. Broader vs. Narrower Definition of Diverse

Nasdaq considered whether the definition of Diverse should include broader characteristics than those reported on the EEO-1 report, such as the examples provided by the Commission’s CD&I, including LGBTQ+, nationality, veteran status, and individuals with disabilities. During its stakeholder outreach, Nasdaq inquired whether a broad definition of Diversity would promote the public interest. While recognizing the diverse perspectives that different backgrounds can provide, most stakeholders supported a

²¹⁶ See Paul Hastings, supra note 177, at 79 and 90; see also supra note 179.

²¹⁷ See Deloitte, Women in the Boardroom, supra note 86, at 115 and 143; see also supra note 179.

narrower definition of Diversity focused on gender, race and ethnicity, with several supporting broadening the definition to include the LGBTQ+ community.

As discussed above, companies currently are permitted to define diversity “in ways they consider appropriate” under federal securities laws. One of the challenges of this principles-based approach has been the disclosure of inconsistent and noncomparable data across companies. However, most companies are required by law to report data on race, ethnicity and gender to the EEOC through the EEO-1 Report. Nasdaq believes that adopting a broad definition of Diverse would maintain the status quo of inconsistent, noncomparable disclosures, whereas a narrower definition of Diverse focused on race, ethnicity, sexual orientation and gender identity will promote the public interest by improving transparency and comparability. 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.

Nasdaq also believes that a transparent, consistent definition of Diverse would provide stakeholders with a better understanding of the company’s current board composition and its philosophy regarding diversity if it does not have two Diverse directors. This would enable the investment community to conduct more informed

analysis of, and have more informed conversations with, companies. To the extent a company chooses to satisfy the requirement of Rule 5605(f)(2) by having at least two Diverse directors on its board, it will have the ancillary benefit of making meaningful progress in improving board diversity related to race, ethnicity, sexual orientation and gender identity.

Nasdaq’s review of academic research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities.²¹⁸ Nasdaq acknowledges that there also is a lack of published research on the issue of LGBTQ+ representation on boards.²¹⁹ This may be due to a lack of consistent, transparent data on broader diverse attributes, or because there is no voluntary self-disclosure workforce reporting requirements for LGBTQ+ status, such as the EEO-1 reporting framework for race, ethnicity, and gender. In any event, it is evident that while “[b]oardroom diversity is a topic that has gained significant traction . . . LGBTQ+ diversity, however, has largely been left out of the conversation.”²²⁰

²¹⁸ KPMG (2020) states that veterans are underrepresented in boardrooms, with retired General and Flag Officers (“GFOs”) occupying less than 1% of Fortune 500 board seats. See KPMG, *The value of veterans in the boardroom* 1 (2020), available at: <https://boardleadership.kpmg.us/content/dam/boardleadership/en/pdf/2020/the-value-of-veterans-in-the-boardroom.pdf> (noting that “[r]etired GFOs who have honed their leadership and critical decision-making skills in a high-threat environment can bring extensive risk oversight experience to the board, which may be especially valuable in the context of today’s risk landscape”). Accenture (2018) observed that companies that offered inclusive working environments for employees with disabilities achieved an average of 28% higher revenue, 30% higher economic profit margins, and 2x net income than their industry peers. See Accenture, *Getting to Equal: The Disability Inclusion Advantage* (2018), available at: https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf.

²¹⁹ See Credit Suisse ESG Research, supra note 33, at 1; see also Out Leadership, supra note 35.

²²⁰ See Out Leadership, supra note 35, at 3.

Nonetheless, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ in recognition of the U.S. Supreme Court's recent affirmation that sexual orientation and gender identity are "inextricably" intertwined with sex,²²¹ and based on studies demonstrating a positive association between board diversity and decision making, company performance and investor protections. Nasdaq also believes that the proposed rule would foster the development of data to conduct meaningful assessments of the association between LGBTQ+ board diversity, company performance and investor protections.

As noted above, the proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, company would still have to provide the required disclosure under Rule 5605(f)(3) if the company does not also have at least two directors who are Diverse. Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would help inform the evolving body of research on the relationship between broader diverse attributes, company performance and investor protection and provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

²²¹ See Bostock v. Clayton Cnty., *supra* note 160.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²²² in general, and furthers the objectives of Section 6(b)(5) of the Act,²²³ in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest, for the reasons set forth below. Further, Nasdaq believes the proposal is not designed to permit unfair discrimination between issuers or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange, for the reasons set forth below.

I. Board Statistical Disclosure

Nasdaq has proposed what it believes to be a straightforward and clear approach for companies to publish their statistical data pursuant to proposed Rule 5606. The disclosure will assist investors in making more informed decisions by making meaningful, consistent, and reliable data readily available and in a clear and comprehensive format prescribed by the proposed rule. Nasdaq also believes that the disclosure format required by proposed Rule 5606 protects investors by eliminating data collection inaccuracies and decreasing costs, while enhancing investors' ability to utilize the information.

As a threshold matter, as discussed above, diversity has become an increasingly important subject and, in recent years, investors increasingly have been advocating for greater board diversity and for the disclosure of board diversity statistics. The current

²²² See 15 U.S.C. § 78f(b).

²²³ Id. § 78f(b)(5).

board diversity disclosure regime is lacking in several respects, and Nasdaq believes that its proposed Rule 5606 addresses many of the current concerns and responds to investors' demands for greater transparency into the diversity characteristics of a company's board composition by mandating disclosure and curing certain deficiencies that exist within the current SEC disclosure requirements.

Investors have expressed their dissatisfaction with having to independently collect board-level data about race, ethnicity and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.²²⁴ The lack of consistency and specificity in Regulation S-K has been a major impediment for many investors and data collectors. As a general matter, the Commission's requirements have not addressed the concerns expressed by commenters that "disclosure about board diversity was important information to investors."²²⁵ Nasdaq believes that its proposed Rule 5606 addresses many of the concerns that have been raised.

Nasdaq believes that requiring the annual disclosure of a company's board diversity, as proposed in Rule 5606(a), will provide consistent information to the public and will enable investors to continually review the board composition of a company to track trends and simplify or eliminate the need for a company to respond to multiple investor requests for information about the diverse characteristics of the company's board. Requiring annual disclosures also would make information available to investors who otherwise would not be able to obtain individualized disclosures.²²⁶ Moreover, consistent disclosures may encourage boards to consider a wider range of board

²²⁴ See Petition for Amendment of Proxy Rule, supra note 80, at 2.

²²⁵ See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,343-44 (amending Item 407(c)(2)(vi) of Regulation S-K, codified at 17 C.F.R. § 229.407(c)(2)(vi)).

²²⁶ See Petition for Rulemaking, supra note 123.

candidates in the nomination process, including candidates with fewer ties to the current board.²²⁷

The Commission's 2009 amendments to Regulation S-K provide no definition for diversity and do not explicitly require disclosures specifically related to details about the board's gender, racial, ethnic and LGBTQ+ composition. Additionally, the Commission's CD&I does not address the definition of diversity, and it requires a registrant to disclose diversity information only in certain limited circumstances. Investors have expressed that current regulations and accompanying interpretations impair their ability to obtain clear and consistent data.²²⁸ As a result, Nasdaq believes that proposed Rule 5606(a) protects investors and the public interest by making clear that a company's annual diversity data disclosure must include information related to gender identity, race, ethnicity and LGBTQ+ status, thereby leaving less discretion for companies to selectively disclose certain diversity information and enhancing the comparability of such data across companies. Moreover, it is in the public interest to provide clear requirements for diversity disclosure, and Nasdaq's proposed Board Diversity Matrix format provides such clarity.

Nasdaq does not intend to obligate directors to self-identify in any of the categories related to gender identity, race, ethnicity and LGBTQ+. Nasdaq believes that a director should have autonomy to decide whether to provide such information to their company. Therefore, Nasdaq believes that it is reasonable and in the public interest to

²²⁷ See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355 ("To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent."); Hazen and Broome, supra note 114, at 57-58.

²²⁸ See Petition for Amendment of Proxy Rule, supra note 80, at 2; Petition for Rulemaking, supra note 123, at 7.

allow directors to opt out of disclosing the information required by proposed Rule 5606(a) by permitting a company to identify such directors in the “Undisclosed” category.

Nasdaq believes that it is in the public interest to utilize the Board Diversity Matrix format for all companies as proposed in Rule 5606(a). Additionally, Nasdaq believes that the format removes any impediments to aggregating and analyzing data across all companies by requiring each company to disclose separately the number of male, female, and non-binary directors, the number of male, female, and non-binary directors that fall into certain racial and ethnic categories, and the number of directors that identify as LGBTQ+. The format allows investors to easily disaggregate the data and track directors with multiple diversity characteristics.

As discussed above, most listed companies are required by law to complete an EEOC Employer Information Report EEO-1 Form. Although outside directors generally are not employees and therefore are not covered in the EEO-1,²²⁹ Nasdaq believes that collecting the information required by proposed Rule 5606(a) is familiar to most companies, and that it is reasonable to require disclosure of the additional board information.

Nasdaq also believes that requiring currently listed companies to comply with proposed Rule 5606 within one year from the date of Commission approval is a reasonable amount of time, given that most companies already collect similar information for certain employees. Moreover, most companies are required to prepare an annual

²²⁹ The EEO-1 Form does not require a company to disclose data for outside directors because such directors are not company employees.

proxy statement and update the Commission within four business days when a new director is appointed to the board.²³⁰

Further, Nasdaq believes that the disclosure required by proposed Rule 5606(a) will remove impediments to shareholders by making available information related to board-level diversity in a standardized manner, thereby enhancing the consistency and comparability of the information and helping to better protect investors. The proposed disclosure will also help protect investors and the public interest by enabling investors to determine the total number of diverse directors, which is information that is not consistently available in existing proxy disclosures in cases where a single director has multiple diverse characteristics. While companies can elect to make this information available either in a proxy statement or on the company's website, Nasdaq believes it is in the public interest to allow companies the option to provide the disclosure in a way they believe will be most meaningful to their shareholders.

Nasdaq recognizes that the proposed definition of Underrepresented Minority in Rule 5605(f)(1) may not apply to companies outside of the United States because each country has its own unique demographic composition. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Board Matrix data less relevant for such companies and not useful for investors. Therefore, Nasdaq believes that offering Foreign Issuers the option of a separate template that requires different disclosure categories will provide investors with more accurate disclosures related to the diversity of directors among the board of a Foreign Issuer. Additionally, Nasdaq believes that providing an "Underrepresented

²³⁰ See SEC Form 8-K, available at: <https://www.sec.gov/files/form8-k.pdf>.

Individual in Home Country Jurisdiction” category provides Foreign Issuers with more flexibility to identify and disclose diverse directors within their home countries.

The annual requirement in the proposed rule will guarantee that the information is available to the public on a continuous and consistent basis. As described in the instructions to the Board Diversity Matrix disclosure form and Rule 5606(a), each year following the first year that a company publishes the Board Diversity Matrix, the company will be required to publish its data for the current and immediately prior years. Nasdaq believes that disclosing at least two years of data allows the public to view any changes and track a board’s diversity progress.

In addition to providing a means for shareholders to assess a company’s board-level diversity and measure its progress in improving that diversity over time, Nasdaq believes that proposed Rule 5606 will provide a means for Nasdaq to assess whether companies meet the diversity objectives of proposed Rule 5605(f). The ability to determine satisfaction of the proposed listing rule’s diversity objectives will protect investors and the public interest.

Moreover, the proposed rule provides transparency into diversity based not only on race, ethnicity, and gender identity, but also on a director’s self-identified sexual orientation. Nasdaq believes that expanding the diversity characteristics beyond those which are commonly reported by companies currently will broaden the way boards view diversity, and ensure that board diversity is occurring across all protected groups.

Finally, Nasdaq believes that the proposal is not unfairly discriminatory because proposed Rule 5606 will apply to all Nasdaq-listed companies, except for the following companies: acquisition companies listed under IM-5101-2; asset-backed issuers and

other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series—which meet the definition of Exempt Companies as defined under proposed Rule 5605(f)(4). Nasdaq believes it is reasonable and not unfairly discriminatory to exempt these companies from the proposed rule because the exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition.

Nasdaq further believes it is reasonable to provide companies with a one-year phase-in period to comply with proposed Rule 5606. Nasdaq believes there is only a *de minimis* burden placed on companies to collect the board data and prepare the Board Diversity Matrix. Moreover, as discussed above, companies already are required to gather similar information for certain employees. Therefore, Nasdaq believes that one year is sufficient time for companies to incorporate their directors into their data collection. Furthermore, newly listed companies have many obligations to meet under Nasdaq listing rules. Therefore, Nasdaq believes that it is reasonable under proposed Rule 5606(d) to provide newly listed Nasdaq companies, including companies listing in connection with a business combination under IM-5101-2, with one year from the time of listing to comply with the proposed rule.

II. Diverse Board Representation or Explanation

a. Removes Impediments to and Perfects the Mechanism of a Free and Open Market and a National Market System

As discussed above, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions by limiting the search for director nominees to existing directors' social networks and candidates with C-suite experience.²³¹ In analyzing Norway's experience in implementing a gender mandate, Dhir (2015) observed that "[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background."²³² Dhir concluded that broadening the search for directors outside of traditional networks "is unlikely to occur without some form of regulatory intervention, given the prevalence of homogenous social networks and in-group favoritism."²³³ Regulatory action was effective in increasing the representation of women on boards in Norway by "democratiz[ing] access to a space previously unavailable to women."²³⁴ The number of public company board seats held by women in Norway increased from 6% in 2002 to 42% in 2020.²³⁵ One Norwegian director

²³¹ See GAO Report, supra note 44; Vell, supra note 100; Rhode & Packel, supra note 104, at 39; Deloitte, *Women in the Boardroom*, supra note 86; see also Parker, supra note 97, at 38 (acknowledging that, "as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom").

²³² See Dhir, supra note 78, at 52.

²³³ Id. at 51. See also Albertine d'Hoop-Azar et al., *Gender Parity on Boards Around the World*, Harv. L. Sch. Forum on Corp. Governance (January 5, 2017), available at: <https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/> (comparing gender diversity on boards in countries with varying requirements and enforcement measures and concluding that external pressures—"progressive societal norms" and regulations—are needed to increase board diversity).

²³⁴ See Dhir, supra note 78, at 101.

²³⁵ See Marianne Bertrand et al., *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway*, Nat'l Bureau of Econ. Rsch. Working Paper 20256 (June

“grudgingly accept[ed] that the free market principles she held so dearly had disappointed her—and that the [mandate] was a necessary correction of market failure.”²³⁶

In contrast, Nasdaq observed that other countries have made comparable progress using a disclosure-based model. Women account for at least 30% of the largest boards of companies in six countries using comply-or-explain models.²³⁷ Australia, Finland, Sweden, New Zealand, Canada and the United Kingdom.²³⁸ Nasdaq discussed the benefits and challenges of mandate and disclosure-based models with over a dozen stakeholders, and the majority of organizations were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. However, leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand.

2017), available at <https://www.nber.org/papers/w20256>; Statistics Norway, *Board and management in limited companies* (Mar. 6, 2020), <https://www.ssb.no/en/styre> (last accessed Nov. 27, 2020).

²³⁶ See Dhir, supra note 78, at 116.

²³⁷ See Paul Hastings, supra note 177; Deloitte, *Women in the Boardroom*, supra note 86.

²³⁸ See Conference Board of Canada, supra note 201; Osler, supra note 203, at 4.

Nasdaq also considered Commissioner Lee’s observation that disclosure “gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value. Importantly, it can also drive corporate behavior.” Specifically, she observed that:

For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the “what gets measured, gets managed” phenomenon. Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company. The Commission has long-recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that “disclosure may, depending on determinations made by a company’s management, directors and shareholders, influence corporate conduct” and that “[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws.”²³⁹

Nasdaq believes that a disclosure-based framework may influence corporate conduct if a company chooses to meet the diversity objective of Rule 5605(f)(2) by having two Diverse directors on the board. A company may satisfy that objective by broadening the search for qualified candidates and considering candidates from other professional pathways that bring a wider range of skills and perspectives beyond traditional C-suite experience.²⁴⁰ Nasdaq believes that this will help increase opportunities for Diverse candidates that otherwise may be overlooked due to the impediments of the traditional director recruitment process, which will thereby remove impediments to a free and open market and a national market system. Further, boards that choose to have at least two Diverse directors may experience other benefits from diversity that perfect the mechanism of a free and open market and national market

²³⁹ See Lee, supra note 22.

²⁴⁰ See, e.g., Hillman et al., supra note 105 (finding that African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy).

system. As discussed above in Section II.A.1.II.b (*Diversity and Investor Protection*), and further discussed below in Section II.A.2.II.b (*Prevent Fraudulent and Manipulative Acts and Practices*), studies suggest that diversity is positively associated with reduced stock volatility,²⁴¹ more transparent public disclosures,²⁴² and less information asymmetry,²⁴³ leading to stock prices that better reflect public information, and further removing impediments to and perfecting a free and open market and a national market system. Importantly, Nasdaq believes that the disclosure-based framework proposed under Rule 5605(f) will not create additional impediments to a free and open market and a national market system because it will empower companies to maintain decision-making authority over the composition of their boards.

To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2) to have at least two Diverse directors, Nasdaq believes that proposed Rule 5605(f)(3) will provide analysts and investors with a better understanding about the company's reasons for not doing so and its philosophy regarding diversity. Rule 5605(f) will thus remove impediments to a free and open market and a national market system by enabling the investment community to conduct more informed analyses of, and have more informed conversations with, companies. Nasdaq believes that such analyses and conversations will be better informed by consistent, comparable data across companies, which Nasdaq proposes to achieve by adopting a consistent definition of "Diverse" under Rule 5605(f)(1). Nasdaq further believes that providing such disclosure will improve the quality of information available to investors who rely on this information to make

²⁴¹ See Bernile et al., supra note 28.

²⁴² See Gul et al., supra note 66; Bravo and Alcaide-Ruiz, supra note 56.

²⁴³ See Abad et al., supra note 67.

informed investment and voting decisions, thereby promoting capital formation and efficiency and perfecting the mechanism of a free and open market and a national market system.

b. Prevent Fraudulent and Manipulative Acts and Practices

Nasdaq's analysis discussed above in Section II.A.1.II raises the concern that the failure of homogenous boards to consider a broad range of viewpoints can result in suboptimal decisions that have adverse effects on company performance, board performance and stakeholders. Nasdaq believes that including diverse directors with a broader range of skills, perspectives and experiences may help detect and prevent fraudulent and manipulative acts and practices by mitigating "groupthink." Increased board diversity also may reduce the likelihood of insider trading and other fraudulent and manipulative acts and practices.

Nasdaq reached this conclusion by reviewing public statements by investors and organizations regarding the impact of groupthink on decision making processes, as well as academic studies on the relationship between diversity, groupthink and fraud. Nasdaq observed that groupthink can result in "self-censorship"²⁴⁴ and failure to voice dissenting viewpoints in pursuit of "consensus without critical evaluation and without considering different possibilities."²⁴⁵ In contrast, "board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity."²⁴⁶

²⁴⁴ See Forbes and Milliken, supra note 74, at 496.

²⁴⁵ See Dhir, supra note 78, at 124.

²⁴⁶ See Petition for Amendment of Proxy Rule, supra note 80, at 4.

Dhir (2015) concluded that gender diversity may “promote cognitive diversity and constructive conflict in the boardroom” and may be more effective at overseeing management.²⁴⁷ One respondent in Dhir’s survey of Norwegian directors observed that:

I’ve seen situations where the women were more willing to dig into the difficult questions and really go to the bottom even if it was extremely painful for the rest of the board, but mostly for the CEO . . . when it comes to the really difficult situations, [where] you think that the CEO has . . . done something criminal . . . [o]r you think that he has done something negligent, something that makes it such that you . . . are unsure whether he’s the suitable person to be in the driving seat.²⁴⁸

Another director observed that “[i]f you have different experiences and a more diversified board, you will have different questions asked.”²⁴⁹ Dhir concluded that “women directors may be particularly adept at critically questioning, guiding and advising management without disrupting the overall working relationship between the board and management.”²⁵⁰

Pucheta-Martínez et al. (2016) reasoned that questioning management is a critical part of the audit committee’s oversight role, along with ensuring that management does not pressure the external auditor to issue a clean audit opinion notwithstanding the identification of any uncertainties or scope limitations.²⁵¹ Otherwise, “[a]uditors may accept the demands of management for a clean audit report when the firm deserves a scope limitation and an uncertainty qualification.”²⁵² The authors found that “the percentage of female [directors] on [audit committees] reduces the probability of [audit]

²⁴⁷ See Dhir, supra note 78, at 150.

²⁴⁸ Id. at xiv.

²⁴⁹ Id. at 120.

²⁵⁰ Id. at 35.

²⁵¹ See Pucheta-Martínez et al., supra note 52, at 368.

²⁵² Id. at 364.

qualifications due to errors, non-compliance or the omission of information,”²⁵³ and further found a positive association between gender-diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender-diverse audit committees better “ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion” when any uncertainties or scope limitations are identified.²⁵⁴

Nasdaq also reviewed other studies that found a positive association between board gender diversity and important investor protections regardless of whether women are on the audit committee, and considered the assessment of some academics that their findings may extend to other forms of diversity, including racial and ethnic diversity. Nasdaq therefore believes that such findings with respect to audit committees would be expected to be more broadly applicable to the quality of the broader board’s decision-making process, and to other forms of diversity, including diversity of race, ethnicity and sexual orientation.

In examining the association between broader board gender diversity and fraud, Cumming, et al. observed that “[g]ender diversity in particular facilitates more effective monitoring by the board and protection of shareholder interests by broadening the board’s expertise, experience, interests, perspectives and creativity.”²⁵⁵ They observed that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found “strong evidence of a negative and diminishing effect of women on

²⁵³ Id. at 363.

²⁵⁴ Id. at 368.

²⁵⁵ See Cumming et al., supra note 62, at 34.

boards and the probability of being in our fraud sample.”²⁵⁶ The authors suggested that “other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud.”²⁵⁷

Similarly, Wahid (2017) noted that board gender diversity may “lead to less biased and superior decision-making” because it “has a potential to alter group dynamics by affecting cognitive conflict and cohesion.”²⁵⁸ Wahid (2017) concluded that “gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud,”²⁵⁹ finding that companies with female directors have “fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation.”²⁶⁰ Wahid also suggested that other forms of diversity, including racial diversity, could introduce additional perspectives to the boardroom,²⁶¹ which Nasdaq believes could further mitigate groupthink.

Abbott, Parker and Persley (2012) posited that “a female board presence contribut[es] to the board’s ability to maintain an attitude of mental independence, diminish[es] the extent of groupthink and enhance[es] the ability of the board to monitor financial reporting.”²⁶² They noted that “poorer [internal] controls and the lack of an independent and questioning board-level attitude toward accounting judgments can create

²⁵⁶ Id. at 12-14.

²⁵⁷ Id. at 33.

²⁵⁸ See Wahid, supra note 59, at 6.

²⁵⁹ Id. at 1.

²⁶⁰ Id. at 23.

²⁶¹ Id. at 24-25; see also Shecter, supra note 61 (quoting Wahid as saying that “[i]f you’re going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds.... If we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.”).

²⁶² See Abbott et al., supra note 58, at 607.

an opportunity for fraud.”²⁶³ They observed a lower likelihood of a material financial restatements stemming from fraud or error in companies with at least one woman on the board.²⁶⁴

Nasdaq believes that these studies provide substantial evidence suggesting an association between gender diverse boards or audit committees and a lower likelihood of fraud; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a greater likelihood of disclosing audit reports with uncertainties and scope limitations. Moreover, academics have suggested that other forms of diversity, including racial and ethnic diversity, may reduce fraud and mitigate groupthink. Further, while homogenous boards may unwittingly fall into the trap of groupthink due to a lack of diverse perspectives, “heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.”²⁶⁵ Nasdaq therefore believes that the proposed rule is designed to reduce groupthink, and otherwise to enhance the functioning of boards, and thereby to prevent fraudulent and manipulative acts and practices.

Further, the Commission has suggested that in seeking board diversity, “[t]o the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management

²⁶³ Id. at 610.

²⁶⁴ Id. at 613 (“The previously discussed lines of research lead us to form our hypothesis. In summary, restatements may stem from error or fraud. In either instance, the internal control system (to which the board of directors contributes by setting the overall tone at the top) has failed to detect or prevent a misstatement. Ineffective internal controls may stem from insufficient questioning of assumptions underlying financial reporting, inadequate attention to the internal control systems, or insufficient support for the audit committee’s activities.”).

²⁶⁵ See Dallas, supra note 76, at 1391.

and are, consequently, more independent.”²⁶⁶ Nasdaq believes that the benefits of the proposed rule are analogous to the benefits of Nasdaq’s rules governing and requiring director independence. In 2003, Nasdaq adopted listing rules requiring, among other things, that independent directors comprise a majority of listed companies’ boards, which were “intended to enhance investor confidence in the companies that list on Nasdaq.”²⁶⁷

The Commission observed that self-regulatory organizations “play an important role in assuring that their listed issuers establish good governance practices,” and concluded that the proposed rule changes would secure an “objective oversight role” for issuers’ boards of directors, and “foster greater transparency, accountability, and objectivity” in that role.”²⁶⁸ Along the same lines, in approving Nasdaq’s application for registration as a national securities exchange, the Commission found Nasdaq’s rules governing the independence of members of boards and certain committees to be consistent with Section 6(b)(5) of the Act because they advanced the “interests of shareholders” in “greater transparency, accountability, and objectivity” in oversight and decision-making by corporate boards.²⁶⁹ Nasdaq proposes to promote accountability in corporate decision-making by requiring companies who do not have at least two Diverse directors on their board to provide investors with a public explanation of the board’s reasons for not doing so under Rule 5605(f)(3).

²⁶⁶ See Proxy Disclosure Enhancements, supra note 73, 74 Fed. Reg. at 68,355.

²⁶⁷ See Order Approving Proposed Rule Changes, 68 Fed. Reg. at 64,161.

²⁶⁸ Id. at 64, 175.

²⁶⁹ See In re Nasdaq Stock Market, 71 Fed. Reg. 3550, 3565 (Jan. 23, 2006). See also 68 Fed. Reg. 18,788, 18,815 (April 16, 2003) (in adopting Rule 10A-3, setting standards for the independence of audit committee members, the Commission concluded that such standards would “enhance the quality and accountability of the financial reporting process and may help increase investor confidence, which implies increased efficiency and competitiveness of the U.S. capital markets”).

Nasdaq believes it is critical to the detection and prevention of fraudulent and manipulative acts and practices to have directors on the board who are willing to critically question management and air dissenting views. Nasdaq believes that boards comprised of directors from Diverse backgrounds enhance investor confidence by ensuring that board deliberations consider the perspectives of more than one demographic group, leading to robust dialogue and better decision making. However, Nasdaq recognizes that directors may bring diverse perspectives, skills and experiences to the board, notwithstanding that they have similar attributes. Nasdaq therefore believes it is in the public interest to permit a company that chooses not to meet the diversity objectives of Rule 5605(f)(2) to explain why it does not, in accordance with Rule 5605(f)(3)—for example, if it believes that defining diversity more broadly than Nasdaq, for example by considering national origin, veteran status and disabilities, brings a wide range of perspectives and experiences to the board. Nasdaq believes such disclosure will provide investors with a better understanding of the company’s philosophy regarding diversity. This would better inform the investment community and enable more informed analyses of, and conversations with, companies. Therefore, Nasdaq believes satisfying Rule 5605(f)(2) through disclosure pursuant to Rule 5605(f)(3) is consistent with Section 6(b)(5) of the Act because it advances the “interests of shareholders” in “greater transparency, accountability, and objectivity” of boards and their decision-making processes.²⁷⁰ In addition, as discussed further in Section II.A.2.II.c (*Promotes Investor Protection and the Public Interest*) below, Nasdaq believes that the proposed diversity

²⁷⁰Id.

requirement could help to reduce information asymmetry, and thereby reduce the risk of insider trading or other opportunistic insider behavior.

c. Promotes Investor Protection and the Public Interest

Nasdaq has found substantial evidence that board diversity is positively associated with more transparent public disclosures and higher quality financial reporting, thereby promoting investor protection. Specifically, studies have concluded that companies with gender-diverse boards are associated with more transparent public disclosures and less information asymmetry, leading to stock prices that better reflect public information.

Gul, Srinidhi & Ng (2011) found that “gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms.”²⁷¹ Bravo and Alcaide-Ruiz (2019) found a positive association between women on the audit committee with financial or accounting expertise and the voluntary disclosure of forward-looking information.²⁷² Abad et al. (2017) concluded that companies with gender-diverse boards are associated with lower levels of information asymmetry, suggesting that “the policies recently implemented in several European countries to increase the presence of female directors in company boards could have beneficial effects on stock markets by reducing the risk of informed trading and enhancing stock liquidity.”²⁷³

Nasdaq believes that one consequence of information asymmetry is that insiders may engage in opportunistic behavior prior to a public announcement of financial results and before the market incorporates the new information into the company’s stock price.

²⁷¹ See Gul et al., supra note 66, at 2.

²⁷² See Bravo and Alcaide-Ruiz, supra note 56, at 151.

²⁷³ See Abad et al., supra note 67, at 202.

This can result in unfair gains or an avoidance of losses at the expense of shareholders who did not have access to the same information. This may exacerbate the principal-agent problem, in which the interests of a company's board and shareholders are not aligned. Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,²⁷⁴ which may be an effective mechanism to deter opportunistic behavior by management and better align their interests with those of their company's shareholders.²⁷⁵

Another concern is that “[w]hen information asymmetry is high, stakeholders do not have sufficient resources, incentives, or access to relevant information to monitor managers’ actions, which gives rise to the practice of earnings management.”²⁷⁶ Earnings management “is generally defined as the practice of using discretionary accounting methods to attain desired levels of reported earnings.”²⁷⁷ Manipulating earnings is particularly concerning to investors because “[i]f users of financial data are ‘misled’ by the level of reported income, then investors’ allocation of resources may be inappropriate when based on the financial statements provided by management,”²⁷⁸ thereby undermining the efficacy of the capital formation process for investors who rely on such information to make informed investment and voting decisions.

²⁷⁴ See Lucas-Perez et al., supra note 69.

²⁷⁵ Id.

²⁷⁶ See Vernon J. Richardson, *Information Asymmetry and Earnings Management: Some Evidence*, 15 Rev. Quantitative Fin. and Acct. 325 (2000).

²⁷⁷ See Gull et al., supra note 55, at 2.

²⁷⁸ Id.

Gull et al. (2018)²⁷⁹ observe that overseeing management is a crucial component of investor protection, particularly with regard to earnings management:

The role of the board of directors and board characteristics (*i.e.* board independence and gender diversity) is usually associated with the protection of shareholder interests.... This role is particularly crucial with regard to the issue of earnings management, in that one of the responsibilities of boards is to monitor management.²⁸⁰

The authors of that study found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management. Srinidhi, Gul and Tsui (2011) observed that better oversight of management combined with lower information asymmetry leads to better earnings quality. They noted that “[e]arnings quality is an important outcome of good governance demanded by investors and therefore its improvement constitutes an important objective of the board.”²⁸¹ They found that companies with women on the board, specifically on the audit committee, exhibit “higher earnings quality” and “better reporting discipline by managers.”²⁸² They concluded that “including female directors on the board and the audit committee are plausible ways of improving the firm’s reporting discipline and increasing investor confidence in financial statements.”²⁸³

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced internal control weaknesses, noting that “prior literature has established a negative relationship between internal control weaknesses and earnings

²⁷⁹ See generally id.

²⁸⁰ Id. at 6 (citations omitted).

²⁸¹ See Srinidhi et al., supra note 50, at 1638.

²⁸² Id. at 1612.

²⁸³ Id.

quality.”²⁸⁴ Internal control over financial reporting are procedures designed “to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.”²⁸⁵ Weaknesses in internal controls can “lead to poor financial reporting quality” and “more severe insider trading”²⁸⁶ or failure to detect a material misstatement. According to the PCAOB:

A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.²⁸⁷

A material misstatement can occur “as a result of some type of inherent risk, whether fraud or error (*e.g.*, management’s aggressive accounting practices, erroneous application of GAAP).”²⁸⁸ The failure to prevent or detect a material misstatement before financial statements are issued can require the company to reissue its financial statements and potentially face costly shareholder litigation. Chen et al. found that having at least one woman on the board (regardless of whether or not she is on the audit committee) “may lead [a] to reduced likelihood of material weaknesses [in internal control over financial reporting],”²⁸⁹ and Abbott, Parker and Persley (2012) found “a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement.”²⁹⁰ Notably, while the Sarbanes-

²⁸⁴ See Chen et al., *supra* note 64, at 18.

²⁸⁵ See Public Company Accounting Oversight Board, *Auditing Standard No. 5: Appendix A*, A5 available at: https://pcaobus.org/oversight/standards/archived-standards/details/Auditing_Standard_5_Appendix_A.

²⁸⁶ See Chen et al., *supra* note 64, at 12.

²⁸⁷ See Public Company Accounting Oversight Board, *supra* note 285, at A7.

²⁸⁸ See Abbott et al., *supra* note 58, at 609-10.

²⁸⁹ See Chen et al., *supra* note 64, at 18.

²⁹⁰ See Abbott et al., *supra* note 58, at 607.

Oxley Act (“SOX”) implemented additional measures to ensure that a company has robust internal controls, the findings of Abbott et al. were consistent among a sample of pre- and post-SOX restatements, suggesting that “an additional, beneficial layer of independence in group decision-making is associated with gender diversity.”²⁹¹

Nasdaq believes that the proposal to require listed companies to have at least two Diverse directors under Rule 5605(f) could help to lower information asymmetry and reduce the risk of insider trading or other opportunistic insider behavior, which would help to increase stock price informativeness and enhance stock liquidity, thereby protecting investors and promoting capital formation and efficiency. Nasdaq believes that information asymmetry could also be reduced by permitting companies to satisfy Rule 5605(f)(2) by publicly disclosing their reasons for not meeting its diversity objectives in accordance with Rule 5605(f)(3), because the requirement will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, which will further protect investors and promote capital formation and efficiency.

Moreover, Nasdaq believes that proposed Rule 5605(f) could foster more transparent public disclosures, higher quality financial reporting, and stronger internal control over financial reporting and mechanisms to monitor management. This could be particularly beneficial for Smaller Reporting Companies that are not subject to the SOX 404(b) requirement to obtain an independent auditor’s attestation of management’s assessment of the effectiveness of internal control over financial reporting, thereby promoting investor protection.

²⁹¹ Id. at 609.

Nasdaq believes that the body of research on the relationship between economic performance and board diversity summarized under Section II.A.1.II.a above provides substantial evidence supporting the conclusion that board diversity does not have adverse effects on company financial performance, and therefore Nasdaq believes the proposal will not negatively impact capital formation, competition or efficiency among its public companies.²⁹² Nasdaq considered that some studies on gender diversity alone have had mixed results,²⁹³ and that the U.S. GAO (2015) and Carter et al. (2010) concluded that the mixed results are due to differences in methodologies, data samples and time periods.²⁹⁴ This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the mixed results of studies regarding the relationship between company performance and board independence,²⁹⁵ Nasdaq adopted listing rules requiring a majority independent board that were “intended to enhance investor confidence in the companies that list on

²⁹² See Alexandre Di Miceli and Angela Donaggio, *Women in Business Leadership Boost ESG Performance: Existing Body of Evidence Makes Compelling Case*, 42 International Finance Corporation World Bank Group, Private Sector Opinion at 11 n.15 (2018), available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/private+sector+opinion/women+in+business+leadership+boost+esg+performance (“The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)”). See also Wahid, *supra* note 59, at 6 (suggesting that “at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards’ ability to monitor firm management”).

²⁹³ See, e.g., Pletzer et al., *supra* note 38; Post and Byron, *supra* note 39; Adams and Ferreira, *supra* note 42.

²⁹⁴ See GAO Report, *supra* note 44, at 5 (“Some research has found that gender diverse boards may have a positive impact on a company’s financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used”); Carter (2010), *supra* note 40, at 400 (observing that the different “statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.”).

²⁹⁵ See *supra* note 45.

Nasdaq.”²⁹⁶ In its Approval Order, the SEC noted that “[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets;” the Commission concluded that the independence rules would secure an “objective oversight role” for issuers’ boards, and “foster greater transparency, accountability, and objectivity” in that role.²⁹⁷ Nasdaq believes this reasoning applies to the current proposed rule as well. Even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards.²⁹⁸ Legislators are increasingly taking action to encourage corporations to diversify their boards and improve diversity disclosures.²⁹⁹ Moreover, during its discussions with stakeholders, Nasdaq found consensus across every constituency that there is inherent value in board diversity. Lastly, it has been a longstanding principle that “Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process.”³⁰⁰

For all the foregoing reasons, Nasdaq believes that proposed Rule 5605(f) will promote investor protection and the public interest by enhancing investor confidence that all listed companies are considering diversity in the context of selecting directors, either

²⁹⁶ See Order Approving Proposed Rule Changes, 68 Fed. Reg. at 64,161.

²⁹⁷ Id. at 64,176.

²⁹⁸ See *supra* notes 4 and 8.

²⁹⁹ See *supra* note 112.

³⁰⁰ See Nasdaq Rulebook, Rule 5101.

by including at least two Diverse directors on their boards or by explaining their rationale for not meeting that objective. To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional disclosure about the company's reasons for doing so under Rule 5605(f)(3). For example, the company may choose to disclose that it does not meet the diversity objectives of Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in our proposed rule. Nasdaq believes that providing such flexibility and clear disclosure where the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency, and further promoting the public interest.

d. Not Designed to Permit Unfair Discrimination between Customers, Issuers, Brokers, or Dealers

Nasdaq believes that proposed Rule 5605(f) is not designed to permit unfair discrimination among companies because it requires all companies subject to the rule to have at least two Diverse directors or explain why they do not. Further, the proposal requires at least one of the two Diverse directors to be an individual who self-identifies as Female. While the proposal provides different requirements for the second Diverse director among Smaller Reporting Companies, Foreign Issuers and other companies, Nasdaq believes that the rule is not designed to permit unfair discrimination among companies. In all cases, a company can choose to meet the diversity objectives of the entire rule or to satisfy only certain elements of the rule. Further, the proposed rule does

not limit board sizes—if a board chooses to nominate a Diverse individual to the board to meet the diversity objectives of the proposed rule, it is not precluded from also nominating a non-Diverse director for an additional board seat.

i. Rule 5605(f)(2)(B): Foreign Issuers

Similar to all other companies subject to Rule 5605(f), the proposal requires all Foreign Issuers to have, or explain why they do not have, at least two Diverse directors, including one director who self-identifies as Female. However, Nasdaq proposes to provide Foreign Issuers with additional flexibility with regard to the second Diverse director. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. While the proposal provides a different requirement for the second Diverse director for Foreign Issuers, Nasdaq believes it is not designed to permit unfair discrimination between Foreign Issuers and other companies because it recognizes that the unique demographic composition of the United States, and its historical marginalization of Underrepresented Minorities and the LGBTQ+ community, may not extend to all countries outside of the United States. Further, Nasdaq believes that it is challenging to apply a consistent definition of minorities to all countries globally because “[t]here is no internationally agreed definition as to which groups constitute minorities.”³⁰¹ Similarly, “there is no

³⁰¹ See United Nations, *Minority Rights: International Standards and Guidance for Implementation 2* (2010), available at: https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf. See also G.A. Res. 47/135, art. 1.1 (Dec. 18, 1992) (“States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”). The preamble to the Declaration also “[r]eaffirm[s] that one of the basic aims of the United Nations, as proclaimed in

universally accepted international definition of indigenous peoples.”³⁰² Rather, the United Nations *Declaration on the Rights of Indigenous Peoples* recognizes “that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.”³⁰³ Accordingly, Nasdaq believes that it is not unfairly discriminatory to allow an alternative mechanism for Foreign Issuers to satisfy Rule 5605(f)(2) in recognition that the U.S.-based EEOC definition of Underrepresented Minorities is not appropriate for every Foreign Issuer. In addition, Foreign Issuers have the ability to satisfy Rule 5605(f)(2)(B) by explaining that they do not satisfy this alternative definition. Similarly, any company that is not a Foreign Issuer, but that prefers the alternative definition available for Foreign Issuers, could follow Rule 5605(f)(2)(B) and disclose its reasons for doing so.

Under the proposal, Foreign Issuer means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a “foreign issuer” under Rule 3b-4(b) under the Act, and (ii) has its principal executive offices located outside of the United States. For example, a company that is considered a “foreign issuer” under Rule 3b-4(b) under the Act and has its principal executive offices located in Ireland would qualify as a Foreign Issuer for purposes of Rule 5605(f)(2), even if it is not considered a Foreign Private Issuer under Nasdaq or SEC rules.

Nasdaq recognizes that Foreign Issuers may be located in jurisdictions that impose privacy laws limiting or prohibiting self-identification questionnaires, particularly

the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion.”

³⁰² See United Nations, *Minority Rights*, supra note 301, at 3.

³⁰³ See G.A. Res. 61/295 (Sept. 13, 2007).

as they relate to race or ethnicity. In such countries, a company may not be able to determine each director's self-identified Diverse attributes due to restrictions on the collection of personal information. The company may instead publicly disclose pursuant to Rule 5605(f)(3) that "Due to privacy laws in the company's home country jurisdiction limiting its ability to collect information regarding a director's self-identified Diverse attributes, the company is not able to determine that it has two Diverse directors as set forth under Rule 5605(f)(2)(B)(ii)."

ii. Rule 5605(f)(2)(C): Smaller Reporting Companies

While the proposal provides a different requirement for the second Diverse director for Smaller Reporting Companies, Nasdaq believes that this distinction is not designed to permit unfair discrimination among companies. Nasdaq has designed the proposed rule to ensure it does not have a disproportionate economic impact on Smaller Reporting Companies by imposing undue costs or burdens. Nasdaq recognizes that Smaller Reporting Companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources to compensate an additional director or engage a search firm to find director candidates outside of the directors' traditional networks. Nasdaq believes that this is a reasonable basis to distinguish Smaller Reporting Companies from other companies subject to the rule.

Smaller Reporting Companies already are provided certain exemptions from Nasdaq's listing rules. For example, under Rule 5605(d)(3), Smaller Reporting Companies must have a compensation committee comprised of at least two independent directors and a formal written compensation committee charter or board resolution that

specifies the committee's responsibilities and authority, but such companies are not required to grant authority to the committee to retain or compensate consultants or advisors or consider certain independence factors before selecting such advisors, consistent with Rule 10C-1 of the Act.³⁰⁴ In its approval order, the SEC concluded as follows:

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C-1 requirements, it makes sense for Nasdaq to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further . . . in view of the potential additional costs of an annual review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.³⁰⁵

The Commission also makes accommodations for Smaller Reporting Companies based on their more limited resources, allowing them to comply with scaled disclosure requirements in certain SEC reports rather than the more rigorous disclosure requirements for larger companies. For example, Smaller Reporting Companies are not required to include a compensation discussion and analysis in their proxy or Form 10-K describing the material elements of the compensation of its named executive officers.³⁰⁶ Eligible Smaller Reporting Companies also are relieved from the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting.³⁰⁷ In each case,

³⁰⁴ See Nasdaq Rulebook, Rule 5605(d)(3).

³⁰⁵ See Order Granting Accelerated Approval of Proposed Rule Change, 78 Fed. Reg. 4,554, 4,567 (Jan. 22, 2013).

³⁰⁶ See 17 C.F.R. § 229.402(l).

³⁰⁷ See Accelerated Filer and Large Accelerated Filer Definitions, 85 Fed. Reg. 17,178 (March 26, 2020).

companies may choose to comply with the more rigorous requirements in lieu of relying on the exemptions.

Any company that is not a Smaller Reporting Company, but prefers the alternative rule available for Smaller Reporting Companies, could follow Rule 5605(f)(2)(C) and disclose their reasons for doing so. As such, Nasdaq believes that the proposed alternative rule for Smaller Reporting Companies is not designed to, and does not, unfairly discriminate among companies. Lastly, Nasdaq believes that Rule 5605(f)(2)(C) is not designed to permit unfair discrimination among companies because it requires Smaller Reporting Companies to have at least one director who self-identifies as Female, similar to other companies subject to Rule 5605(f).

iii. Rule 5605(f)(3): Public Disclosure of Non-Diverse Board

Under proposed Rule 5605(f)(3), if a company determines not to meet the diversity objectives of Rule 5605(f) in its entirety, it must specify the applicable requirements of the Rule and explain its reasons for not having at least two Diverse directors. Nasdaq designed the proposal to avoid unduly burdening competition or efficiency, or conflicting with existing securities laws, by providing all companies subject to Rule 5605(f) with the option to make the public disclosure required under Rule 5605(f)(3) in the company's proxy statement or information statement for its annual meeting of shareholders or, alternatively on the company's website, provided that the company submits a URL link to such disclosure to Nasdaq through the Listing Center no later than 15 calendar days after the company's annual shareholder meeting. Nasdaq believes Rule 5605(f)(3) is not designed to permit unfair discrimination among companies because the proposed rule provides all companies subject to Rule 5605(f) the

option to disclose an explanation rather than meet the diversity objectives of Rule 5605(f)(2).

Certain federal securities laws similarly permit companies to satisfy corporate governance requirements through disclosure of reasons for not meeting the applicable requirement. For example, under Regulation S-K, Item 407 requires a company to disclose whether or not its board of directors has determined that the company has at least one audit committee financial expert. If a company does not have a financial expert on the audit committee, it must provide an explanation.³⁰⁸ Item 406 requires a company to disclose whether it has adopted a written code of ethics that applies to the chief executive officer and senior financial or accounting officers. If a company has not adopted such a code of ethics, it must disclose the reasons why not.³⁰⁹ Item 402 regarding pay ratio disclosure defines how total compensation for employees should be calculated, but permits companies to use a different measure as long as they explain their approach.³¹⁰

Furthermore, Nasdaq rules and SEC guidance already recognize that website disclosure can be a method of disseminating information to the public. For example, Nasdaq listing rules permit companies to provide website disclosures related to third party director compensation,³¹¹ foreign private issuer home country practices,³¹² and reliance on the exception relating to independent compensation committee members.³¹³

³⁰⁸ See 17 C.F.R. § 229.407(d)(5).

³⁰⁹ Id. § 229.406(a).

³¹⁰ Id. § 229.402.

³¹¹ See Nasdaq Rulebook, Rule 5250(b)(3)(A).

³¹² Id., Rule 5615(a)(3)(B) and IM-5615-3.

³¹³ Id., Rules 5605(d)(2)(B) (non-independent compensation committee member under exceptional and limited circumstances) and 5605(e)(3) (non-independent nominations committee member under exceptional and limited circumstances).

The SEC has recognized that “[a] company’s web site is an obvious place for investors to find information about the company”³¹⁴ and permits companies to make public disclosure of material information through website disclosures if, among other things, the company’s website is “a recognized channel of distribution of information.”³¹⁵

iv. Rule 5605(f)(4): Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of Rule 5605(f) (defined as “Exempt Companies”): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. Each of the types of Exempt Companies either has no board of directors, lists only securities with no voting rights towards the election of directors, or is not an operating company, and the holders of the securities they issue do not expect to have a say in the composition of their boards. As such, Nasdaq believes the proposal is not designed to permit unfair discrimination by excluding Exempt Companies from the application of proposed Rule 5605(f). These companies already are exempt from certain of Nasdaq’s corporate governance standards related to board composition, as described in Rule 5615.

³¹⁴ See Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,864 (Aug. 7, 2008).

³¹⁵ Id. at 45,867.

v. Rule 5605(f)(5): Phase-in Period

Proposed Rule 5605(f)(5)(A) will allow any newly listing company that was not previously subject to a substantially similar requirement of another national securities exchange one year from the date of listing to satisfy the requirements of Rule 5605(f). Proposed Rule 5605(f)(5)(B) also will allow any company that ceases to be a Foreign Issuer, a Smaller Reporting Company or an Exempt Company one year from the date that the company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively, to satisfy the requirements of Rule 5605(f). This phase-in period will apply after the end of the transition period provided in Rule 5605(f)(7).

Nasdaq believes this approach is not designed to permit unfair discrimination because it provides all companies that become newly subject to the rule the same time period within which to comply. In addition, this approach is similar to other phase-in periods granted to companies listing on or transferring to Nasdaq. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of Rule 5605(b). Similarly, SEC Rule 10A-3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

vi. Rule 5605(f)(7): Effective Dates/Transition

Under proposed Rule 5605(f)(7), each company must have, or explain why it does not have, one Diverse director no later than two calendar years after the Approval Date,³¹⁶ and two Diverse directors no later than (i) four calendar years after the Approval Date for companies listed on the NGS or NGM tiers, or (ii) five calendar years after the Approval Date for companies listed on the NCM tier.

Nasdaq believes this approach is not designed to permit unfair discrimination because it recognizes that companies listed on the Nasdaq Capital Market may not have the resources necessary to compensate an additional director or engage a search firm to search for director candidates outside of the directors' traditional networks. Therefore, Nasdaq believes it is in the public interest to provide such companies with one additional year to meet the diversity objectives of Rule 5605(f), should they choose to do so. Nasdaq notes that all companies may choose to follow a timeframe applicable to a different market tier, provided they publicly describe their explanation for doing so. They also may construct their own timeframe for meeting the diversity objectives of Rule 5605(f), provided they publicly disclose their reasons for not abiding by Nasdaq's timeframe.

e. Not Designed to Regulate by Virtue of any Authority Conferred by the Act Matters Not Related to the Purposes of the Act or the Administration of the Exchange

Nasdaq believes that the proposal is not designed to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the

³¹⁶ The "Approval Date" is the date that the SEC approves the proposed rule.

administration of the Exchange.³¹⁷ The proposal relates to the Exchange’s corporate governance standards for listed companies. As discussed above, “[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets.”³¹⁸ And because “it is not always feasible to define . . . every practice which is inconsistent with the public interest or with the protection of investors,” the Act leaves to SROs “the necessary work” of rulemaking pursuant to Section 6(b)(5).³¹⁹

Nasdaq recognizes that U.S. states are increasingly proposing and adopting board diversity requirements, and because corporations are creatures of state law, some market participants may believe that such regulation is best left to states. However, Nasdaq considered that certain of its listing rules related to corporate governance currently relate to areas that are also regulated by states. For example, states impose standards related to quorums³²⁰ and shareholder approval of certain transactions,³²¹ which also are regulated under Nasdaq’s listing rules.³²² Nasdaq has adopted rules relating to such matters to ensure uniformity of such rules among its listed companies. Similarly, Nasdaq believes that the proposed rule will create uniformity among listed companies by helping to assure investors that all non-exempt companies have at least two Diverse directors on their board or publicly describe why they do not.

³¹⁷ See 15 U.S.C. § 78f(b)(5).

³¹⁸ See Order Approving Proposed Rule Changes, 68 Fed. Reg. at 64,161.

³¹⁹ See *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009) (citing *Avery v. Moffat*, 55 N.Y.S.2d 215, 228 (Sup. Ct. 1945)).

³²⁰ See, e.g., 8 Del. Code § 216 (providing that a quorum at a shareholder’s meeting shall consist of no less than 1/3 of the shares entitled to vote at such meeting).

³²¹ See, e.g., id. §§ 251, 271 (providing that shareholder approval by a majority of the outstanding voting shares entitled to vote is required for mergers and the sale of all or substantially all of a corporation’s assets).

³²² See, e.g., Nasdaq Rulebook, Rules 5620(c) and 5635(a).

Further, Nasdaq believes the proposal will enhance investor confidence that listed companies that have two Diverse directors are considering the perspectives of more than one demographic group, leading to robust dialogue and better decision making, as well as the other corporate governance benefits of diverse boards discussed above in Section II.A.1.II. To the extent companies choose to disclose their reasons for not meeting the diversity objectives of Rule 5605(f)(2) pursuant to Rule 5605(f)(3), Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make an informed voting decision, thereby promoting capital formation and efficiency. It has been the Exchange's longstanding principle that "Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process."³²³

In addition, as discussed in Section II.A.1.I, in passing Section 342 of the Dodd-Frank Act, Congress recognized the need to respond to the lack of diversity in the financial services industry, and the Standards designed by the Commission and other financial regulators provide a framework for addressing that industry challenge. The Standards themselves identify several focus areas, including the importance of "Organizational Commitment," which speaks to the critical role of senior leadership—including boards of directors—in promoting diversity and inclusion across an organization. In addition, like the proposed rule, the Standards also consider "Practice to Promote Transparency," and recognize that transparency is a key component of any diversity initiative. Specifically, the Standards provide that the "transparency of an

³²³ Id., Rule 5101.

entity's diversity and inclusion program promotes the objectives of Section 342," and also is important because it provides the public with necessary information to assess an entity's diversity policies and practices.³²⁴

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Nasdaq reviewed requirements related to board diversity in two dozen foreign jurisdictions, and almost every jurisdiction imposes diversity-focused requirements on listed companies, either through a securities exchange, financial regulator or the government. Nasdaq competes for listings globally, including in countries that have implemented a more robust regulatory reporting framework for diversity and ESG disclosures. Currently in the U.S., the Long Term Stock Exchange ("LTSE"), which includes a number of sponsors which have investment businesses, has communicated to institutional investors that it that it seeks to distinguish itself by focusing on corporate governance, including, for example, diversity and inclusion. Under Rule 14.425, companies listed on LTSE must adopt and publish a long-term stakeholder policy that explains, among other things, "the Company's approach to diversity and inclusion."³²⁵

I. Board Statistical Disclosure

The Exchange does not believe that proposed Rule 5606 will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

³²⁴ Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33,016 (June 10, 2015).

³²⁵ See Long-Term Stock Exchange Rule Book, Rule 14.425.

Specifically, the Exchange believes that the adoption of Rule 5606 will not impose any undue burden on competition among listed companies for the reasons set forth below.

With a few exceptions, all companies would be required to make the same disclosure of their board-level statistical information. The average board size of a company that is currently listed on the Exchange is eight directors. Although a company would be required to disclose its board-level statistical data, directors may choose to opt out rather than reveal their diversity characteristics to their company. A company would identify such directors in the “Undisclosed” category. For directors who voluntarily disclose their diversity characteristics, the company would collect their responses and disclose the information in either the company’s proxy statement, information statement of shareholder meeting or on the company’s website, using Nasdaq’s required format. While the time and economic burden may vary based on a company’s board size, Nasdaq does not believe there is any significant burden associated with gathering, preparing and reporting this data. Therefore, Nasdaq believes that there will be a *de minimis* time and economic burden on listed companies to collect and disclose the diversity statistical data.

Some investors value demographic diversity, and list it as an important factor influencing their director voting decisions.³²⁶ Investors have stated that consistent data would make its collection and analysis easier and more equitable for investors that are not large enough to demand or otherwise access individualized disclosures.³²⁷ Therefore, Nasdaq believes that any burden placed on companies to gather and disclose their board-level diversity statistics is counterbalanced by the benefits that the information will provide to a company’s investors.

³²⁶ See Hunt et al., supra note 26.

³²⁷ See Petition for Rulemaking, supra note 123, at 2.

Moreover, as discussed above, most listed companies are required to submit an annual EEO-1 Report, which provides statistical data related to race and gender data among employees similar to the data required under proposed Rule 5606(a). Because most companies are already collecting similar information annually to satisfy their EEOC requirement, Nasdaq does not believe that adding directors to the collection will place a significant burden on these companies. Additionally, the information requested from Foreign Issuers is limited in scope and therefore does not impose a significant burden on them.

Nasdaq faces competition in the market for listing services. Proposed Rule 5606 reflects that competition, but it does not impose any burden on competition with other exchanges. As discussed above, investors have made clear their desire for greater transparency into public companies' board-level diversity as it relates to gender identity, race, and ethnicity. Nasdaq believes that the proposed rule will enhance the competition for listings. Other exchanges can set similar requirements for their listed companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

II. Diverse Board Representation or Explanation

Nasdaq believes that proposed Rule 5605(f) will not impose burdens on competition among listed companies because the Exchange has constructed a framework for similarly-situated companies to satisfy similar requirements (*i.e.*, Foreign Issuers, Smaller Reporting Companies and other companies), and has provided all companies

with the choice of satisfying the requirements of Rule 5605(f)(2) by having at least two Diverse directors, or by explaining why they do not. Nasdaq believes that this will avoid imposing undue costs or burdens on companies that, for example, cannot afford to compensate an additional director or believe it is not appropriate, feasible or desirable to meet the diversity objectives of Rule 5605(f) based on the company's particular circumstances (for example, the company's size, operations or current board composition). Rather than requiring a company to divert resources to compensate an additional director, and place the company at a competitive disadvantage with its peers, the rule provides the flexibility for such company to explain why it does not meet the diversity objective.

The cost of identifying director candidates can range from nothing or a nominal fee (via personal, work or school-related networks, or board affinity organizations, as well as internal research by the corporate secretary's team) to amounts that can vary widely depending on the specific search firm and the size of the company. Some industry observers estimate board searches for independent directors cost about one-third of a director's annual compensation, while others estimate it costs between \$75,000 and \$150,000. The underlying figures vary; for example, one search firm generally charges \$25,000 to \$50,000. Nasdaq observes that total annual director compensation can range widely; median director pay is estimated at \$134,000 for Russell 3000 companies and \$232,000 for S&P 500 companies. Moreover, there is a wider range of underlying compensation amounts. For example, Russell 3000 directors may receive approximately \$32,600 (10th percentile), or up to \$250,000 (90th percentile) or more. S&P 500 directors may receive approximately \$100,000 (10th percentile) or up to \$310,000 (90th

percentile) or more.³²⁸ Most, if not all, of these costs would be borne in any event in the search for new directors regardless of the proposed rule. While the proposed rule might lead some companies to search for director candidates outside of already established networks, the incremental costs of doing so would be tied directly to the benefit of a broader search.

To reduce costs for companies that do not currently meet the diversity objectives of Rule 5605(f)(2), Nasdaq is proposing to provide listed companies that have not yet met their diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment. This offering is designed to ease the search for diverse nominees and reduce the costs on companies that choose to meet the diversity objectives of Rule 5605(f)(2). Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of such services.

Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

Nasdaq also has structured the proposed rule to provide companies with at least four years from the Approval Date to satisfy Rule 5605(f)(2) so that companies do not incur immediate costs striving to meet the diversity objectives of Rule 5605(f)(2).

³²⁸ Total annual director compensation varies by compensation elements and structure as well as amount, which is generally based on the size, sector, maturity of the company, and company specific situation. See Mark Emanuel et al., Semler Brossy and the Conference Board, *Director Compensation Practices in the Russell 3000 and S&P 500* (2020 ed.), available at <https://conferenceboard.esgauge.org/directorcompensation/report>.

Nasdaq also has reduced the compliance burden on Smaller Reporting Companies and Foreign Issuers by providing them with additional flexibility when satisfying the requirement related to the second Diverse director. Smaller Reporting Companies could satisfy the proposed diversity objective to have two Diverse directors under Rule 5605(f)(2)(C) with two Female directors. Like other companies, Smaller Reporting Companies also could satisfy the second director objective by including an individual who self-identifies as an Underrepresented Minority or a member of the LGBTQ+ community. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Nasdaq has further reduced the compliance burdens on companies listed on the Nasdaq Capital Market tier by providing them with five years from the Approval Date to satisfy Rule 5605(f)(2), recognizing that such companies may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For the foregoing reasons, Nasdaq does not believe that proposed Rule 5605(f) will impose any burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act. Further, Nasdaq does not believe the proposed rule will impose any burden on competition among listing exchanges. As described above, Nasdaq competes with other exchanges globally for listings, including exchanges based in jurisdictions that have implemented disclosure requirements related to diversity. Within the United States, LTSE requires listed companies to adopt and publish a long-term stakeholder policy that explains, among other things, "the Company's approach to

diversity and inclusion.”³²⁹ Other listing venues within the United States may propose to adopt rules similar to LTSE’s requirements or the Exchange’s proposal if they believe companies would prefer to list on an exchange with diversity-related listing standards.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2020-081 on the subject line.

³²⁹ See Long-Term Stock Exchange Rule Book, Rule 14.425.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2020-081. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2020-081 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³⁰

J. Matthew DeLesDernier
Assistant Secretary

³³⁰ 17 CFR 200.30-3(a)(12).

EXHIBIT 3**Instructions:**

1. All Nasdaq listed companies, except those that are exempt under Nasdaq Listing Rule 5605(f)(4) are required to disclose board level diversity statistics using the format below. The disclosure must be titled “Board Diversity Matrix.”
2. When completing the disclosures, enter the number of directors that self-identify in each category. If a director self-identifies in the “Two or More Races or Ethnicities” category, the director must also self-identify in each individual category, as appropriate. For more details on the categories, refer to the definitions below.
3. The information provided below must be based on the voluntary self-identification of each member of the company’s board of directors. For a U.S. incorporated company, any director who chooses not to disclose a gender should be included under “Gender Undisclosed” and any director who chooses not to identify as any race or not to identify as LGBTQ+ should be included in the “Undisclosed” category.
4. A company that qualifies as a Foreign Issuer (as defined under Rule 5605(f)(1)) may elect to use the format below for a Foreign Issuer. Any director who chooses not to disclose a gender should be included under “Gender Undisclosed” and any director who chooses not to identify as an “Underrepresented Individual in Home Country Jurisdiction” or LGBTQ+ should be included in the “Undisclosed” category.
5. A company may publish the information by using any of the following methods: (1) the company’s proxy statement; (2) the company's information statement for its annual shareholder meeting; or (3) the company's website. If a company chooses option (3), the company must also submit a URL link to the information through the Nasdaq Listing Center no later than 15 calendar days following the company's annual meeting.
6. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

Definitions:

- **Black or African American** (not of Hispanic or Latinx origin) – A person having origins in any of the Black racial groups of Africa.
- **Alaskan Native or American Indian** – A person having origins in any of the original peoples of North and South America (including Central America), and who maintain cultural identification through tribal affiliation or community recognition.
- **Asian** – A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- **Hispanic or Latinx** – A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race. The term Latinx applies broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.

- **Native Hawaiian or Pacific Islander** – A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
- **White** (not of Hispanic or Latinx origin) – A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.
- **Two or More Races or Ethnicities** – A person who identifies with more than one of the above categories.
- **Underrepresented Individual in Home Country Jurisdiction** – A person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in a Foreign Issuer’s home country jurisdiction.
- **LGBTQ+** – A person who identifies as any of the following: lesbian, gay, bisexual, transgender or as a member of the queer community.

Board Disclosure Format

Board Diversity Matrix (As of [DATE])				
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			

Undisclosed	#
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Board Diversity Matrix (As of [DATE])				
Foreign Issuer under Rule 5605(f)(1)				
Country of Incorporation:	[Insert Country Name]			
Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender Undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the category below:				
LGBTQ+	#			
Underrepresented Individual in Home Country Jurisdiction	#			
Undisclosed	#			

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market LLC Rules

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5605. Board of Directors and Committees

(a) – (e) No change.

(f) Diverse Board Representation**(1) Definitions**

For purposes of this Rule 5605(f):

“Diverse” means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+.

“Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

“Foreign Issuer” means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a “foreign issuer” under Rule 3b-4(b) under the Act and (ii) has its principal executive offices located outside of the United States.

“LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or as a member of the queer community.

“Approval Date” means the date that the Commission issues an order granting the approval of this proposed Rule 5605(f).

“Smaller Reporting Company” has the definition set forth in Rule 12b-2 under the Act.

“Underrepresented Minority” means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.

(2) Diversity Requirement**(A) General Requirement**

Each Company, except as described below in (B) or (C), must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.

(B) Foreign Issuers

(i) In the case of a Foreign Issuer, in lieu of the definition in Rule 5605(f)(1), Diverse means an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the Company's home country jurisdiction.

(ii) Each Foreign Issuer must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the Company's home country jurisdiction.

(C) Smaller Reporting Companies

Each Smaller Reporting Company must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Minority.

(3) Public Disclosure of Non-Diverse Board

If a Company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not have two Diverse directors, the Company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable; and (ii) explain the reasons why it does not have two Diverse directors. Such disclosure must be provided: (i) in the Company's proxy statement or information statement for its annual meeting of shareholders; or (ii) on the Company's website. If the Company provides such disclosure on its website, the Company must also notify Nasdaq of the location where the information is available by submitting the URL link through the Nasdaq Listing Center no later than 15 calendar days after the Company's annual shareholders meeting.

(4) Exempt Companies

The following types of companies are exempt from the requirements of this Rule 5605(f) ("Exempt Companies"): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series.

(5) Phase-in Period

(A) Any Company newly listing on Nasdaq that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted one year from the date of listing to satisfy the requirements of Rule 5605(f). This phase-in period will apply after the end of the transition periods provided in Rule 5605(f)(7).

(B) Any Company that ceases to be a Foreign Issuer, a Smaller Reporting Company or an Exempt Company shall be permitted one year from the date that the Company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively, to satisfy the requirements of Rule 5605(f).

(6) Cure Period

If a Company does not have at least two Diverse directors as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), the Listing Qualifications Department will promptly notify the Company and inform it that it has until the latter of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

(7) Effective Dates/Transition

Each Company listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least one Diverse director no later than two calendar years after the Approval Date and at least two Diverse directors no later than four calendar years after the Approval Date. Each Company listed on The Nasdaq Capital Market must have, or explain why it does not have, at least one Diverse director no later than two calendar years after the Approval Date and at least two Diverse directors no later than five calendar years after the Approval Date. Notwithstanding the foregoing, a Company is not required to comply with the requirements of this Rule 5605(f) prior to the end of the phase-in period described in Rule 5605(f)(5), if applicable. A company listing after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must satisfy the requirements of this Rule 5605(f) by the latter of the periods set forth in this subparagraph (7) or one year from the date of listing.

5606. Board Diversity Disclosure

(a) Each Company must annually disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified characteristics in substantially the format below. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

<u>Board Diversity Matrix (As of [DATE])</u>				
<u>Board Size:</u>				
<u>Total Number of Directors</u>	#			
<u>Gender:</u>	<u>Male</u>	<u>Female</u>	<u>Non-Binary</u>	<u>Undisclosed Gender</u>
<u>Number of directors based on gender identity</u>	#	#	#	#
<u>Number of directors who identify in any of the categories below:</u>				
<u>African American or Black</u>	#	#	#	#
<u>Alaskan Native or American Indian</u>	#	#	#	#
<u>Asian</u>	#	#	#	#
<u>Hispanic or Latinx</u>	#	#	#	#
<u>Native Hawaiian or Pacific Islander</u>	#	#	#	#
<u>White</u>	#	#	#	#
<u>Two or More Races or Ethnicities</u>	#	#	#	#
<u>LGBTQ+</u>	#			
<u>Undisclosed</u>	#			

However, a Company that qualifies as a Foreign Issuer under Rule 5605(f)(1) may elect to use the format below:

<u>Board Diversity Matrix (As of [DATE])</u>				
<u>Foreign Issuer under Rule 5605(f)(1)</u>				
<u>Country of Incorporation:</u>	<u>[Insert Country Name]</u>			
<u>Board Size:</u>				
<u>Total Number of Directors</u>	#			
<u>Gender:</u>	<u>Male</u>	<u>Female</u>	<u>Non-Binary</u>	<u>Gender Undisclosed</u>
<u>Number of directors based on gender identity</u>	#	#	#	#

<u>Number of directors who identify in any of the category below:</u>	
<u>LGBTQ+</u>	<u>#</u>
<u>Underrepresented Individual in Home Country Jurisdiction</u>	<u>#</u>
<u>Undisclosed</u>	<u>#</u>

(b) The disclosure required by this Rule 5606 must be provided (i) in the Company's proxy statement or information statement for its annual meeting of shareholders or (ii) on the Company's website. If the Company provides such disclosure on its website, the Company must also submit such disclosure and include a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the Company's annual shareholders meeting.

(c) This Rule 5606 shall not apply to Exempt Companies as defined in Rule 5605(f)(4).

(d) A Company newly listing on Nasdaq, including a company listing in connection with a business combination under IM-5101-2, must satisfy the requirement of this Rule 5606 within one year of listing.

(e) This Rule 5606 will be operative one year after the date that the Commission issues an order granting the approval of this proposed Rule 5606.

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5615. Exemptions from Certain Corporate Governance Requirements

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(a) Exemptions to the Corporate Governance Requirements

(1) – (2) No change.

(3) Foreign Private Issuers

(A) A Foreign Private Issuer may follow its home country practice in lieu of the requirements of the Rule 5600 Series, the requirement to disclose third party director and nominee compensation set forth in Rule 5250(b)(3), and the requirement to distribute annual and interim reports set forth in Rule 5250(d), provided, however, that such a Company shall: comply with the Notification of Noncompliance requirement (Rule 5625), the Voting Rights requirement (Rule 5640), the Diverse Board Representation Rule (Rule 5605(f)), the Board Diversity Disclosure Rule (Rule 5606), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii). Except as provided in this

paragraph, a Foreign Private Issuer must comply with the requirements of the Rule 5000 Series.

(B) No change.

IM-5615-3. Foreign Private Issuers

A Foreign Private Issuer (as defined in Rule 5005) listed on Nasdaq may follow the practice in such Company's home country (as defined in General Instruction F of Form 20-F) in lieu of the provisions of the Rule 5600 Series, Rule 5250(b)(3), and Rule 5250(d), subject to several important exceptions. First, such an issuer shall comply with Rule 5625 (Notification of Noncompliance). Second, such a Company shall have an audit committee that satisfies Rule 5605(c)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). Fourth, such an issuer shall comply with Rule 5605(f) (Diverse Board Representation) and Rule 5606 (Board Diversity Disclosure). Finally, a Foreign Private Issuer that elects to follow home country practice in lieu of a requirement of Rules 5600, 5250(b)(3), or 5250(d) shall submit to Nasdaq a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing Companies, the certification is required at the time the Company seeks to adopt its first noncompliant practice. In the interest of transparency, the rule requires a Foreign Private Issuer to make appropriate disclosures in the Company's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the Company's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, a Company that is not required to file an annual report on Form 20-F may provide these disclosures in English on its website in addition to, or instead of, providing these disclosures on its registration statement or annual report. The Company shall disclose each requirement that it does not follow and include a brief statement of the home country practice the Company follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the website, the annual report and registration statement should so state and provide the web address at which the information may be obtained. Companies that must file annual reports on Form 20-F are encouraged to provide these disclosures on their websites, in addition to the required Form 20-F disclosures, to provide maximum transparency about their practices.

(4) - (6) No change.

(b) – (c) No change.

* * * * *

5810. Notification of Deficiency by the Listing Qualifications Department

When the Listing Qualifications Department determines that a Company does not meet a listing standard set forth in the Rule 5000 Series, it will immediately notify the Company of the deficiency. As explained in more detail below, deficiency notifications are of four types:

(1) – (4) No change.

Notifications of deficiencies that allow for submission of a compliance plan or an automatic cure or compliance period may result, after review of the compliance plan or expiration of the cure or compliance period, in issuance of a Staff Delisting Determination or a Public Reprimand Letter.

(a) – (b) No change.

(c) Types of Deficiencies and Notifications

No change.

(1) No change.

(2) Deficiencies for which a Company may Submit a Plan of Compliance for Staff Review

(A) Unless the Company is currently under review by an Adjudicatory Body for a Staff Delisting Determination, the Listing Qualifications Department may accept and review a plan to regain compliance when a Company is deficient with respect to one of the standards listed in subsections (i) through (vi) below. In accordance with Rule 5810(c)(2)(C), plans provided pursuant to subsections (i) through (iv) and (vi) below must be provided generally within 45 calendar days, and in accordance with Rule 5810(c)(2)(F), plans provided pursuant to subsection (v) must be provided generally within 60 calendar days. If a Company's plan consists of transferring from the Nasdaq Global or Global Select Market to the Nasdaq Capital Market, the Company should submit its application and the applicable application fee at the same time as its plan to regain compliance.

(i) – (ii) No change.

(iii) deficiencies from the standards of Rules 5620(a) {Meetings of Shareholders}, 5620(c) {Quorum}, 5630 {Review of Related Party Transactions}, 5635 {Shareholder Approval}, 5250(c)(3) {Auditor Registration}, 5255(a) {Direct Registration Program}, 5610 {Code of Conduct}, 5615(a)(4)(D) {Partner Meetings of Limited Partnerships}, 5615(a)(4)(E) {Quorum of Limited Partnerships}, 5615(a)(4)(G) {Related Party Transactions of Limited Partnerships}, or 5640 {Voting Rights};[or]

(iv) failure to make the disclosure required by Rule 5250(b)(3)[.]
{Disclosure of Third Party Director and Nominee Compensation} or Rule
5606 {Board Diversity Disclosure};

(v) failure to file periodic reports as required by Rules 5250(c)(1) or (2)[.];
or

(vi) failure to meet a continued listing requirement contained in the Rule
5700 Series.

IM-5810-2. Staff Review of Deficiencies

No change.

(B) – (G) No change.

(3) Deficiencies for which the Rules Provide a Specified Cure or Compliance Period

With respect to deficiencies related to the standards listed in (A) – [(F)](G) below, Staff's notification will inform the Company of the applicable cure or compliance period provided by these Rules and discussed below. If the Company does not regain compliance within the specified cure or compliance period, the Listing Qualifications Department will immediately issue a Staff Delisting Determination letter.

(A) Bid Price

A failure to meet the continued listing requirement for minimum bid price shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during any compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(i) – (iv) No change.

(B) Market Makers

No change.

(C) Market Value of Listed Securities

A failure to meet the continued listing requirements for Market Value of Listed Securities shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day

compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(D) Market Value of Publicly Held Shares

A failure to meet the continued listing requirement for Market Value of Publicly Held Shares shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved by meeting the applicable standard for a minimum of 10 consecutive business days during the 180 day compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

(E) Independent Director and Audit Committee Rules

No change.

(F) Diverse Board Representation Rule

If a Company does not have at least two Diverse directors as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), the Company shall be notified promptly and shall have until the latter of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

[(F)](G) Market Value/Principal Amount Outstanding of Non-Convertible Bonds

A failure to meet the continued listing requirement for non-convertible bonds, as set forth in Rule 5702(b)(1) (requiring non-convertible bonds to have at least \$400,000 in market value or principal amount outstanding) shall be determined to exist only if the deficiency continues for a period of 30 consecutive business days. Upon such failure, the Company shall be notified promptly and shall have a period of 180 calendar days from such notification to achieve compliance. Compliance can be achieved during this 180 calendar day compliance period by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period, unless Staff exercises its discretion to extend this 10 day period as discussed in Rule 5810(c)(3)[(G)](H).

[(G)](H) Staff Discretion Relating to the Price-based Requirements

No change.

(4) Public Reprimand Letter

No change.

(d) Additional Deficiencies

No change.

* * * * *

Testimony_of_Harry_S Johnson Fav SB0301.pdf

Uploaded by: Clark, Eugene

Position: FAV

Testimony of Harry S. Johnson, Esquire in support of SB0301-Board Members and Executive Office Diversity

My name is Harry S. Johnson, and I have been a member of the Maryland Bar since 1979. I herein respectfully submit testimony in support of SB0301. While this testimony will refer to other entities with which I have been affiliated, these comments are solely my own. For my entire career I have worked on issues of equity and inclusion. When I became a partner at my law firm in 1986, I was the first African American lawyer who started as an associate at a firm to become an equity partner. One of my proudest accomplishments was being the co-founder of the Maryland State Bar Association Leadership Academy. The Academy was designed to provide each year's class of racially, ethnically and geographically diverse young lawyers access to the leaders of the Bar and to learn leadership skills. Prior members of the Leadership Academy now serve as elected officials, judges, and members of the Maryland State Legislature. I chaired the Human Relations Commission for Baltimore County during the Ruppertsberger Administration. In 2003-2004, I had the privilege of serving as the first African American President of the Maryland State Bar Association. Additionally, I was the first African American Board Chair at Greater Baltimore Healthcare, Inc. ("GBMC") from 2011-2014. I served on the Board of CenterStage for a decade. I am now an Honorary Director for the Baltimore Community Foundation, where I co-chaired the inaugural Race, Equity and Inclusion Committee for five years. I currently serve on the Executive Committee of the University System of Maryland Foundation, and chair the Governance Committee. Finally, I currently have the privilege to serve as Chair of the Executive Committee of the Maryland Hospital Association.

All of the organizations listed above have had different journeys in addressing issues of race, equity and inclusion. For most, the first challenge was getting away from the notion that to openly discuss issues of race, equity and inclusion cast a negative view toward any one individual. Issues of inclusion are not individual, but are systemic. Corporate boards are composed of people who look alike because that is the way that they have always operated. Even the best intentioned people cannot effect lasting change if the system in which they operate does not recognize, promote and nurture equity and inclusion.

With all of the extensive board experience listed above, including leadership positions, I have never been asked to consider serving on a corporate board. This experience is not atypical for my diverse fellow board members. We get asked to serve on civic or non-for-profit boards, but not on the paying boards of corporate America. Our experience is in line with other diverse board members. In the Harvard Law School Forum on Corporate Governance, in an article entitled "Addressing the Challenge of Board Racial Diversity"¹, the author cites **Bloomberg** with regard to the racial composition of boards, indicating:

¹ Posner, Cydney, "Addressing the Challenge of Board Racial Diversity", Harvard Law School Forum on Corporate Governance, September 8, 2020.

-a dozen of the largest companies by market value in the S&P 500 Index have no Black board members; and

-“although about 10% of directors at the 200 biggest S&P 500 companies are Black...the percentage of Black executives joining boards in 2020 fell to 11% from 13% the year before.”²

While many factors go into trying to achieve racial equity and inclusion, there are two factors that are essential for any program that is making headway on these issues. These two factors are “intentionality” and “accountability”. Efforts to promote equity and inclusion must be intentional; they cannot depend on the good will of well-intentioned people. Rather, people of good will must commit to a course where the goal is to reach equity and inclusion in a measurable way. After committing to the course, there must be measurements and reporting to assure that not only are goals being achieved, but they are being ingrained in the DNA of the organization so that it becomes an essential element of the corporate culture.

It is of interest that corporations have been slow to effect change at the director level. Many of these same corporations have diversity programs for their vendors. I know this first hand because I have had the privilege of representing several Fortune 500 companies over the years. Bradley Gayton is the former General Counsel of Ford Motor Company. As General Counsel, he held meetings with law firm managing partners advising them that he expected to see diverse lawyers working on Ford matters. Mr. Gayton is now the General Counsel of Coca Cola, and he has directed major law firms that represent that company to direct a substantial portion of Coke’s legal work to diverse lawyers at their firms. The economics of those firms will dictate their behavior. Mr. Gayton’s actions are both intentional and measurable, and the law firms will be accountable.

Not-for-profits in Maryland are already on this journey. The Baltimore Community Foundation, when it did its strategic plan several years ago, created the Race, Equity and Inclusion Committee to ensure that REI considerations impacted all of its work. The Maryland Hospital Association voted to approve a Racial Equity Commitment in June, 2020. In that Commitment, MHA’s Executive Committee asked MHA, hospitals and health systems “to change the make-up of governing boards and leadership staffs to reflect the diversity of the community.”

With the steps being taken by NASDAC to urge corporations to make more concrete steps to promote racial diversity. SB0301 seems a sober and reasonable effort to get Maryland corporations to act with “intentionality” and “accountability”. Reporting board composition will allow those corporations who have already made efforts to be recognized for their vision. Frankly, it would not be a bad thing if reporting shames other corporations to recognize the diverse community in which we live and work. More importantly, that which is not reported cannot be measured. The reporting outlined in the bill will allow the State to help those

² Id.

corporations yet to give serious attention to race, equity and inclusion issues to have an incentive to redirect some of their efforts.

A final point as to why I think this legislation is important: I have often heard that it is difficult to find racially diverse board candidates who have the experience necessary to serve on corporate boards. This excuse is insulting and self-serving. Not-for-profit boards in Maryland seem to be able to find racially diverse board members with backgrounds that bring different perspectives to their boards. This gets back to the “intentionality” point. Maryland has a wealth of talented, well educated people of color. Maryland has a vibrant higher education community, with visionary leaders, and has produced talented people of color from our universities, colleges and community colleges. The question is not whether there are people of color who can serve on these boards, but what are corporations doing to identify people of color who have earned the opportunity to serve on corporate boards.

Issues of racial equity reach to the highest levels of our government, including recent executive orders from President Biden. SB0301 is only a step toward accountability, but it is long overdue and deserves serious consideration. Thank you for your consideration of my comments.

Theлма Daleу TESTIMONY FOR SENATE BILL 301.pdf

Uploaded by: Clark, Eugene

Position: FAV

TESTIMONY FOR SENATE BILL 301

BY Thelma Thomas Daley

To the distinguished members of the Education, Health, and Environmental Affairs Committee, it is an honor to offer support for Senate Bill 301 to enhance board diversity sponsored by Senator Sydnor.

My name is Thelma Daley and as a woman of color I have been fortunate to serve on a few rather key non- profit and corporate boards. Each experience made a difference for the dynamics of the board, the cultural issues addressed, and the approaches taken. All, in the end, benefitted the customers served who could not be at the table.

It is my belief that publicly held companies and the related corporate boards within this state with a very diverse population, should reflect a fair representation of the state's gender, racial, and ethnic diversity. According to research, Board diversity strengthens the effectiveness of the company's decisions which also improve their financial performance and the quality and variety of goods and services offered. All of these factors benefit the state.

Studies also reveal that workplace diversity catalyzes the best in teams; stimulates creativity and consideration of alternatives; and provides new perspectives. It allows board members to hear and consider the values, beliefs, situations, and conditions that otherwise would not have been on the table. Diversity in priorities and viewpoints is critical. Additionally, diverse representatives are the ambassadors to under-represented populations, the consumers of company products and goods.

An article by Lena Eisenstein, posits that a diverse board can be amicable and still take part in robust discussions where active listening, multiple perspectives, challenging ideas and asking hard questions rule the day.

In defining diversity, many variables come to mind, such as: age, race, gender, religion, ethnicity, disabilities, philosophies, life experiences, and competencies. Racial diversity has not been addressed to the degree female representation has been progressed.

Diversity reflects the real world. Businesses have diverse clients, customers, and stakeholders. New and broader perspectives make companies open to the needs of a wider array of groups to reflect the “real world”.

It should be noted that NASDAQ proposed a rule that is requiring its thousands of listed companies to have at least two diverse members of its board of directors.

Goldman Sachs announced it would not take a company public unless it had at least one diverse board member.

Governor Newsom of California signed a law that would require at least one minority member on the boards of all publicly traded companies based in California.

As documented in the Harvard Law School Forum on Corporate Governance, at least eleven states are considering or have enacted some requirements to enhance diversity on boards. Maryland has addressed female directors however, the question is for greater inclusion, especially racial equity.

From my own experience on The College Board, the Education Testing Services Board of Directors, the Saint Agnes Hospital Board, the Carrollton Bank Board, as well as the Baltimore City Architectural and Engineering Commission, my voice made a big difference. I was a voice they were not accustomed to hearing and the

results were evident in several expanded ways. The cultural context of my offerings is just one example that stretched the thought processes of my fellow board members in these, to some degree, “smaller” arenas.

Different voices bring a new lens for recruitment practices; for increasing multiculturalism; expanding the pool of those considered; underscoring trust; and for sending a clear message to employees and consumers that the corporation is one whose underlying values, mission, practices, and cultural representation at the highest level are those tenets to which they can be proud.

Senate Bill 301 is plain timely, sensible legislation. It places Maryland in the forefront of the movement of states toward equitable and diverse representation on corporate boards. Data are not needed to articulate that the face of the TRUST it propels is immeasurable!!

To implement this legislation, companies do not even have to replace a current board member. Just add another chair.

As a proud native Marylander, I thank you for the opportunity to share my thoughts in support of SB301 to

continue this great state's moment for equitable corporate diversity.

Legislative Testimony 301.pdf

Uploaded by: Elliott, Richard DeShay

Position: FAV

Legislative Testimony:
SB301

I strongly support Senator Charles Sydnor's Senate Bill 33 to improve business participation and opportunities for Black owned businesses in Maryland.



By Authority: Rich Elliott For Maryland Keanu Smith-Brown, Campaign Chair Christian Hillian, Treasurer

SB0301- 02.03.21 Board Members and Executive Offic

Uploaded by: Fry, Donald

Position: FWA



**TESTIMONY PRESENTED TO THE SENATE EDUCATION, HEALTH, AND
ENVIRONMENTAL AFFAIRS COMMITTEE**

**SENATE BILL 301 - CORPORATIONS – BOARD MEMBERS AND EXECUTIVE OFFICERS
DIVERSITY – PROCUREMENT PREFERENCE AND REPORTING**

Sponsor: Senator Sydnor

February 3, 2021

**DONALD C. FRY
PRESIDENT & CEO
GREATER BALTIMORE COMMITTEE**

Position: Support with Amendments

The Greater Baltimore Committee (GBC) supports Senate Bill 301 with amendments. This bill requires the Board of Public Works to establish, by regulation, a threshold and process for determining the demographics of board members and executive officers of a corporation that are similar to those of the State; requires the Board to adopt certain regulations that require certain units of State government to establish a certain corporate diversity percentage price preference; and requires the Department to report by January 1 annually to the Board information on the racial and ethnic diversity of certain Boards of Directors; etc.

The lack of diversity among corporate executives has been a longstanding and underreported negative impact on the economy. According to the McKinsey and Company consulting firm:

“Companies in the top quartile of gender diversity on executive teams were 25 percent more likely to experience above-average profitability than peer companies in the fourth quartile... (and) for ethnic and cultural diversity, companies in the top 25% outperformed those in the bottom quarter by 36% in terms of profitability.”

While companies agree about the importance of diversity, corporate boards and executive demographics often show a lack of women and minorities. Also, a survey revealed that among support staff and operations employees, 64% of all employees are white while 36 % were nonwhite, but among executives, 85% were white while only 14% were nonwhite.

The Greater Baltimore Committee contends that addressing these disparities will have a positive impact on Maryland’s economic growth and vitality.

While the GBC does support the intent of Senate Bill 301, there are several amendments that should be included to ensure that the true intent of the legislation is followed:

- The reporting requirement should include a provision that would include a reporting of gender diversity as well as racial diversity among board members and corporate executive officers.
- As the purpose of the bill is to serve as a reporting and informational source of diversity on boards and executive roles, the mandate to describe the process and procedure for identifying and selecting board

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members and executive positions should be deleted. In its place, language should be added similar to the process required of corporations desired to be listed by Nasdaq. Specifically, if the reporting reveals that the diversity reported by the corporation does not meet the established guidelines, the company filing the report shall explain the justification for the lack of diversity. This requirement would serve as an acknowledgement of the deficiency in diversity and require justification, if any.

For these reasons, the Greater Baltimore Committee urges a favorable report of Senate Bill 301 following the adoption of the recommended changes contained in this testimony.

The Greater Baltimore Committee (GBC) is a non-partisan, independent, regional business advocacy organization comprised of hundreds of businesses -- large, medium and small -- educational institutions, nonprofit organizations and foundations located in Anne Arundel, Baltimore, Carroll, Harford, and Howard counties as well as Baltimore City. The GBC is a 66-year-old, private-sector membership organization with a rich legacy of working with government to find solutions to problems that negatively affect our competitiveness and viability.

SB 301 Corporations – Board Members and Executive

Uploaded by: McCulloch, Champe

Position: UNF

**SB 301****Corporations – Board Members and Executive Officer Diversity – Procurement Preference and Reporting****Education, Health, and Environmental Affairs Committees****Position: Unfavorable**

Maryland AGC, the Maryland Chapter of the Associated General Contractors of America, provides professional education, business development, and advocacy for commercial construction companies and vendors, regardless of labor policy. AGC of America is the nation's largest and oldest trade association for the construction industry. AGC of America represents more than 26,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms through a nationwide network of chapters. Maryland AGC opposes SB 301 and respectfully requests the bill be given an unfavorable report.

SB 301 would require the Board of Public Works ("BPW") to:

- 1) determine the racial and ethnic profile of the population of the State;
- 2) establish and define a threshold of "substantial similarity" between the State profile under item (1) and the race and ethnicity profile of a generic corporation; and
- 3) develop a process to determine the race and ethnicity of board members and executive officers of every corporation filing an annual Form 1 with the Department of Assessments and Taxation and bidding to provide goods or services to units of the State.

Based on items (2) and (3) above, each procuring unit would then have to develop a price preference of up to 5% for bidding corporations. The Department of Planning is empowered to determine the "official demographic percentages," presumably of the State's population, although that is not clear.

For corporations with assets exceeding \$100,000,000, the annual Form 1 must include information on the ethnic and racial profile of its Board members only, the practices for identifying and evaluating Board candidates, identifying and appointing executive officers, including in both cases whether "demographic diversity" (not defined) is considered, and a description of the corporation's practices to promote "diversity, equity, and inclusion" (also not defined) among its Board members and executive officers.

The proposal has numerous faults, both technical and substantive. As to substance, the object of the bill is to change the demographic profile of the boards and executive officers of corporations seeking to do business with the State, using the State's procurement expenditures and providing a price preference as a lever. The apparent goal is to have corporate boards and executive officers look like the Maryland census.¹ The core of the bill is the development of the undefined standard of "substantial similarity." Does that mean that the corporation's profile as to each racial and ethnic measure must be within +/- 1% of the state's profile, or +/- 20%, or something else? Can a threshold be a range of acceptability? Can different ethnic and racial categories have different thresholds or must they all be the same? If the bill were to pass, "substantial similarity" should be defined explicitly.

¹ As of 12/10/2020, White 58.5%, Black 31.1%, Latino 10.9%, Asian 6.7%, Native American 0.7%, Hawaiian & Pacific Island 0.1%, 2 races 2.9% (does not add to 100.0 because of overlap), U.S. Census Bureau, "Quick Facts" for Maryland, www.uscensus.gov, accessed 01/19/2021 at 10:53 a.m.

While diverse boards may very well enhance a corporation's profit-making or non-profit service ability (and thus be reason enough for corporations to seek out diverse board members and executive officers), the notion that a board or set of executive officers that looks like Maryland's overall population will be suitable for all corporations has no basis. If anything, corporations structure their boards and executive officer cadres to reflect their customer base or financial movers. SB 301 mandates a specific diversity profile unrelated to the market a particular corporation serves and should be rejected.

The bill penalizes family-owned corporations, whose board members and executive officers are likely not to be diverse ethnically. This is as true of black- or brown-owned corporations as it is of white-owned corporations. Family-owned corporations, especially subchapter S corporations, are common in the construction industry. It is egregiously intrusive and unfair for the State to penalize these corporations by awarding corporations that are not family-owned a price preference. If bids are equally responsive, a diversity price preference should not be available against a family-owned corporation.

From a different standpoint, why should a partnership or LLC be denied the diversity price preference? These entities may have owner or member profiles even closer to the desired threshold than corporate bidders. The form under which a business entity operates should not determine the availability of a price preference.

The burden placed on corporations with assets over \$100,000,000 is not significant from a reporting standpoint, and it is equally insignificant from the standpoint of providing valuable information. Every corporation of that size, and many smaller corporations, have thoroughly developed and implemented diversity practices, so that providing an iteration of that every year as part of a Form 1 and providing the EEO-1 will simply be boilerplate. Moreover, there is little value in tasking the Department of Assessments and Taxation with the onerous chore of compiling from the many corporate diversity and inclusion plans a recital of diversity promotion practices. There are many sources of such plans and they are widely available. Simply Google "corporate board diversity" for a sample.

Finally, the bill allows each procuring unit to set the level of preference as long as it does not exceed 5%. While allowing units flexibility to meet their particular situations may be desirable, the thrust of the bill is to change the demographic profile of corporations as a matter of general public policy. Under that rubric, a uniform diversity price preference would be a better course. There is no reason to suppose that diversity is a weightier matter for UMS construction than it is for MDOT or DGS construction.

Accordingly, for the reasons outlined above, Maryland AGC respectfully requests that SB 301 be given an unfavorable report.

Champe C. McCulloch
McCulloch Government Relations, Inc.
Lobbyist for Maryland AGC

SB0301.docx.pdf

Uploaded by: Glaser, Jonathan

Position: INFO



**DEPARTMENT OF
ASSESSMENTS AND TAXATION**

Larry Hogan, Governor · Boyd K. Rutherford, Lt. Governor · Michael L. Higgs, Jr., Director

DATE: February 3, 2021

BILL NUMBER: SB0301

COMMITTEE: Ways and Means

BILL TITLE: Education, Health, and Environmental Affairs

SDAT POSITION: Letter of Information

The State Department of Assessments and Taxation (SDAT) offers the following information for SB0301, a bill that would require SDAT to collect information from publicly held domestic and foreign corporations, and non-stock corporations with total assets exceeding \$100,000,000; and then report annually on strategies for promoting diversity and inclusion among boards of directors and corporate executive officers. As stated below, the Department advises that it does not monitor whether an entity is public or private nor a business' assets, and feels strongly that the reporting requirements are outside of the scope of the Department's mission and subject matter expertise.

§11-101(d)(1): This section could not be efficiently implemented as currently written, as the Department does not monitor whether an entity is publicly or privately held, nor the corporation's assets, and the Department would not be able to verify whether a business should, or should not, submit any additional information required by this legislation. Further, the Department feels that this would create a burden on corporations that is not equally applied to other business entities. SDAT would not be able to verify the accuracy of information regarding self identification.

§11-101(d)(1)(i): The Department would incur a one-time programming cost of \$228,240 to add the categories of race and ethnicity to SDAT's business database (the Maryland Business Entity System). The Department would also have to identify one or two other data points that are currently reported as part of the Annual Report and Personal Property Return, and remove them from the database and reporting requirements. Although SDAT is working diligently to modernize its systems, the current Maryland Business Entity System is a mainframe application running on COBOL programming, and has technological limitations that make changes time-consuming, difficult, and costly.

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Larry Hogan, Governor · Boyd K. Rutherford, Lt. Governor · Michael L. Higgs, Jr., Director

The Department would also have to determine what categories of races and ethnicities can be reported and assumes it will be able to rely on categories provided by another government entity.

§11-101(d)(1)(ii)-(iv) & (2): These sections require the Department to collect a significant amount of additional information, including a description of the corporation's process for identifying and evaluating nominees for the board of directors, including if demographic diversity is considered; a description of the corporation's process for identifying and appointing executive officers, including if demographic diversity is considered; a description of the corporation's policies and practices for promoting diversity, equity, and inclusion among its board of directors and executive officers; and the corporation's consolidated EEO-1 report.

The Department advises that it has never interacted with these types of documents, and would not be able to verify whether businesses are submitting the correct ones or if the ones submitted are sufficiently completed. The documents would be included as "attachments" to the Annual Report and Personal Property Tax Return, and therefore copies would not be available online, but could be requested through SDAT's Copies Division.

These reporting requirements would result in SDAT having to collect responses of an indeterminate length. The department is concerned that because this data won't be transcribed or stored in an easily searchable format, it will take a significant amount of time for two full-time staff to manually review the attachments when preparing to complete the Annual Report. SDAT has never had a requirement to *describe a respondent's process or policies* as part of a report, and doesn't presently require businesses to report bylaws, ownership structures, operating agreements, etc.

Although all documents would ultimately be digitized, businesses frequently have issues uploading large files if they are not familiar with how to lower the resolution on an image. If a business decides to mail their Annual Report in, the Department would incur costs of approximately \$1.10 per Annual Report mailed in, and \$0.07 per page for storage space and data validation efforts. For documents submitted online, the Department would incur approximately \$0.009 per page for storage space.

§11-101(e): The Department advises that it has no expertise with best practices related to boards of directors or corporate executive officers, nor promoting racial and ethnic diversity on those boards and in those positions; and feels as though those two efforts are not within the scope of the agency's mission. SDAT's Charter Division is essentially a repository of documents, and SDAT's database doesn't presently store board membership nor executive officer information. The limited amount of information required in §11-101(c) is the exception, and when that legislation was deliberated in 2019 the Department shared some similar concerns as those

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**DEPARTMENT OF
ASSESSMENTS AND TAXATION**

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included in this letter. However, §11-101(c) only requires the Department to include two numerical data fields, whereas SB301 would require the Department to collect significantly more data, and then report on the information obtained and strategies for racial and ethnic inclusion.

While the Department appreciates and understands the intent of the bill, the Department feels that SDAT is not the appropriate organization to make recommendations about strategies for promoting diversity and inclusion in businesses. Otherwise, the Department would need to hire two grade 18 employees to study and implement this report, the salary and operating expenses of which would cost \$123,933 in FY22, increasing to \$174,297 in FY25. Among the corporations that are registered with SDAT, the Department is unable to predict or estimate that number of entities that would be subject to this bill, therefore the implementation and staff costs may be significantly higher.

The Department does not offer advice or guidance to businesses.

For these reasons, SDAT respectfully requests the committee strongly consider the information presented as the committee deliberates SB0301.

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2021 SB 301 Corps-Board & Officers Diversity DGS L

Uploaded by: Robertson, Ellen

Position: INFO

Larry Hogan
Governor

Boyd K. Rutherford
Lt Governor



OFFICE OF THE SECRETARY

Ellington E. Churchill, Jr.
Secretary

Nelson E. Reichart
Deputy Secretary

BILL: **Senate Bill 301** – Corporations – Board Members and Executive Officers Diversity – Procurement Preference and Reporting

COMMITTEE: Senate Education, Health and Environmental Affairs

DATE: February 3, 2021

POSITION: Letter of Information

Upon review of Senate Bill 301 – Corporations – Board Members and Executive Officers Diversity – Procurement Preference and Reporting, the Department of General Services (DGS) provides these comments for your consideration.

Under Senate Bill 301, DGS's Office of State Procurement (OSP) would be required to establish, track, and maintain the demographics of a corporation's board members and executive officers. This would **require additional staff** to establish the program, create the process for tracking and maintaining the demographics and determining if the board members and executive officers of corporations are substantially similar to the demographics of the State. If so, a corporate diversity price preference, not in excess of 5%, may be applied. The awarded contracts may potentially cost Maryland taxpayers millions of dollars, for example, 5% on a billion-dollar contract equals \$50 million.

For additional information, contact Ellen Robertson at 410-260-2908.

