

Via Email

December 30, 2020

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number SR-NASDAQ-2020-081¹

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII) to express our general support for the Nasdaq Stock Market LLC (Nasdaq) “Notice of Filing of Proposed Rule Change To Adopt Listing Rules Related to Board Diversity” (Proposal).² We applaud Nasdaq’s efforts to enhance diversity through the Proposal’s expectations for listed companies.

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.³

Proposal Requirements

The Proposal has two requirements for each of Nasdaq’s listed companies, subject to certain exceptions: (1) Provide statistical information regarding diversity among the members of the company’s board of directors under proposed Rule 5606; and (2) have, or explain why it does not have, at least two ‘Diverse’ directors on its board under proposed [R]ule 5605(f)(2).⁴ The

¹ Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Adopt Listing Rules Related to Board Diversity, Exchange Act Release No. 90,574, 85 Fed. Reg. 80,472 (Dec. 11, 2020), <https://www.federalregister.gov/documents/2020/12/11/2020-27091/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

² 85 Fed. Reg. at 80,472.

³ For more information about the Council of Institutional Investors (CII), including its board and members, please visit CII’s website at <https://www.cii.org/about>.

⁴ See 85 Fed. Reg. at 80,473 (“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

Proposal defines “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 605(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.⁵

CII Policies

CII membership approved policies relevant to the subject matter of the Proposal include the following;

2.8b Board Diversity: The Council supports a diverse board. The Council believes a diverse board has benefits that can enhance corporate financial performance, particularly in today’s global market place. Nominating committee charters, or equivalent, ought to reflect that boards should be diverse, including such considerations as background, experience, age, race, gender, ethnicity, and culture.⁶

Statement on Company Disclosure

In evaluating proposals to expand company disclosure, CII considers the following factors:

- Materiality to investment and voting decisions
- Depth, consistency and reliability of empirical evidence supporting the connection between the disclosure and long-term shareowner value
- Anticipated benefit to investors, net of the cost of collection and reporting
- Prospect of substantially improving transparency, comparability, reliability and accuracy⁷

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).”).

⁵ *Id.* at 80,485.

⁶ Council of Institutional Investors, Corporate Governance Policies § 2.8b Board Diversity (updated Sept. 22, 2020), https://www.cii.org/files/policies/09_22_20_corp_gov_policies.pdf.

⁷ Council of Institutional, Policies on Other Issues, Statement on Company Disclosure (adopted Mar. 10, 2020), https://www.cii.org/policies_other_issues#Company_disclosure.

Application of Policies

Board Diversity

CII's policy on board diversity reflects the view that corporate governance best practices include the expectation that corporate boards will reflect the diversity of their communities, customers, and employees. And that diverse boards can have a significant positive effect on financial performance.⁸ We, however, believe diverse boards can be achieved without quotas which may result in "check-the-box" diversity.

We support the Proposal's comply-or-explain model that provides a transparent framework for listed companies to present their board composition, with the flexibility to explain why the Nasdaq proposed standards cannot be met.⁹ While Nasdaq's proposed definition of diversity is narrower than suggested by our policy, we believe that, as discussed below, the Proposal would improve transparency and comparability of disclosure across companies. And, we also believe investors can use the resulting transparency and comparability to make better-informed investment and voting decisions.

Company Disclosure

The following is an analysis of the application of the four factors contained in CII's company disclosure policy to the Proposal requirements. We conclude that the Proposal includes elements of all four factors.

Material to investment and voting decisions

CII believes the Proposal's requirements are material to investment and voting decisions. We agree with Nasdaq's observation that "diversity has become increasingly important to . . . institutional investors, pension funds and other stakeholders who believe that board diversity . . . is an important factor in the voting decisions of some investors."¹⁰

We also agree with Nasdaq's observation that "[i]nvestors frequently lack access to information about corporate board diversity that could be material to their decision making."¹¹ We share

⁸ See, e.g., Vivian Hunt et al., *Delivering through Diversity*, McKinsey & Co. 13 (Jan. 2018), https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20throug%20diversity/delivering-through-diversity_full-report.ashx ("We found that companies with the most ethnically/ culturally diverse boards worldwide are 43% more likely to experience higher profits.").

⁹ We note that CII has previously expressed general support for the stated goal of proposed federal legislation that would establish a comply-or-explain approach for cyber security risk management experience or expertise on reporting company boards. See Letter from Ken Bertsch, Executive Director, Council of Institutional Investors to the Honorable Jack Reed, United States Senate 1 (July 7, 2017), https://www.cii.org/files/07_07_17%20letter%20to%20Senator%20Reed.pdf ("CII strongly supports the stated goal of the [S.536, the Cybersecurity Disclosure Act of 2017] to "promote transparency in the oversight of cybersecurity risks at publicly traded companies").

¹⁰ 85 Fed. Reg. at 80,482.

¹¹ *Id.* at 80,475.

Nasdaq’s concern that “investors . . . face . . . many data collection challenges . . . rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions.”¹² We generally agree with Nasdaq that “[t]his lack of transparency is impacting investors who are increasingly basing public advocacy, proxy voting and direct shareholder company engagement decisions on board diversity considerations.”¹³

We agree with the remarks of Commissioner Allison Herren Lee at CII’s Fall conference that improving diversity disclosures:

[G]ets 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.¹⁴

More recently, in its Report on Activities, the Office of the Investor Advocate of the Securities and Exchange Commission (SEC) states:

To make fully informed investment decisions, investors generally would benefit from greater insight into the diversity characteristics of a company’s current board . . . Thus, to be listed on a national exchange, a company should be required to provide more fulsome disclosure regarding the composition of its board of directors . . . Voluntary disclosures in this regard have been useful, but listing standards could help ensure that more companies make this information publicly available on a basis that enables investors to draw comparisons.¹⁵

We agree with Nasdaq that the Proposal’s disclosures providing statistical information regarding diversity among the members of the company’s board of directors “will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions””¹⁶ More specifically, we agree that those disclosures “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.”¹⁷

With respect to the Proposal’s requirement to explain why a corporation does not have at least two ‘Diverse’ directors on its board, we agree with Nasdaq that that the disclosure would provide “investors . . . a better understanding of the company’s reasons for not having at least

¹² *Id.* at 80,483.

¹³ *Id.*

¹⁴ Commissioner Allison Herren Lee, Remarks at the Council of Institutional Investors Fall 2020 Conference: Diversity Matters, Disclosure Works, and the SEC Can Do More (Sept. 22, 2020), <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922>.

¹⁵ Office of the Investor Advocate, U.S. Securities and Exchange Commission, Report on Activities, Fiscal Year 2020 at 11 (Dec. 29, 2020), <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2020.pdf>.

¹⁶ 85 Fed. Reg. at 80,475.

¹⁷ *Id.* at 80,494.

two Diverse directors and can use that information to make an informed investment or voting decision.”¹⁸

Empirical evidence

CII agrees with Nasdaq’s finding that there is “an extensive body of academic research [that] demonstrates that diverse boards are positively associated with improved corporate governance and financial performance.”¹⁹

We note that Nasdaq’s finding was confirmed by FCLTGlobal, a 501(c)3 not-for-profit research organization. In its comment letter in response to the Proposal, FCLTGlobal states:

In a 2019 study by FCLTGlobal, “Predicting Long-term Success for Corporations and Investors Worldwide,” we found that having a diverse board—including a mix of genders and ages—is connected to strong long-term returns. The availability of data has been a barrier to robust studies in the past, and the effects of gender diversity are often easier to analyze than other types of diversity (e.g. race, ethnicity, other). Additionally, FCLTGlobal published an article in 2019 highlighting further evidence that diverse boards add long-term value.

In addition to our own analysis, there have been several academic studies to date that explore the connection between diversity and productivity, and the evidence is compelling. Using a multi-dimensional measure of diversity combining ethnicity, age, gender, education, financial expertise, and prior board experience, Bernile, Bhagwat and Yonker (2017) found that greater board diversity correlates with lower stock price volatility, more consistent investment in R&D projects over time, and better performance overall. In a separate study, Carter, Simkins and Simpson (2003) examined the relationship between board diversity and firm value for Fortune 1000 firms, and after controlling for size, industry, and other corporate governance measures they found significant positive relationships between a company’s value and the contingent of women or minorities on a company’s board. In an analysis of global corporate boards, Credit Suisse’s CS Gender 3000 report “reaffirms findings from previous iterations: that a material correlation exists between companies with a higher participation of women in decision-making roles and their stock market and corporate performance.”²⁰

In our view, the Proposal’s required disclosures would likely contribute to public company board consideration of diversity and such consideration can benefit long-term shareholder value.²¹

¹⁸ *Id.* at 80,492.

¹⁹ *Id.* at 80,473 (emphasis omitted).

²⁰ Letter from Sarah Keohane Williamson, CAIA, CFA, Chief Executive Officer, FCLTGlobal et al. (2020), <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8159463-226899.pdf>.

²¹ *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Maxine Watters, Chair, Committee on Financial Services, United States House of Representatives et al. 4 (July 10,

Anticipated benefit to investors, net of the cost

CII generally agrees with Nasdaq that the anticipated benefits of the Proposal to investors include that it “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”²² In addition, we agree that the “disclosure format required by proposed Rule 5606 [benefits] . . . investors by eliminating data collection inaccuracies and decreasing costs, while enhancing investors’ ability to utilize the information.”²³

We generally agree with Nasdaq that the comply-or-explain approach of the Proposal “will avoid 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).”²⁴ We note that “Nasdaq 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).”²⁵ We also note that “[t]o 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.”²⁶

With respect to the Proposal’s requirement for disclosure of board level diversity statistics, we agree with Nasdaq 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.”²⁷

Prospect of substantially improving transparency, comparability, reliability and accuracy

We agree with Nasdaq that “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”²⁸ We also agree that “[t]he heightened investor

2019),

[https://www.cii.org/Files/July%2010%202019%20%20Letter%20to%20Committee%20on%20Financial%20Services%20.docx%20\(finalI\)%20KB.pdf](https://www.cii.org/Files/July%2010%202019%20%20Letter%20to%20Committee%20on%20Financial%20Services%20.docx%20(finalI)%20KB.pdf) (“In our view, the disclosures . . . that would be required by H.R. 3279 or H.R. 1018 would likely contribute to enhancing public company board consideration of diversity consistent with CII’s policies [and] CII believes long-term investors, including our members, will benefit from the long-term shareowner value that can result, in part, from corporations embracing board diversity.”).

²² 85 Fed. Reg. at 80,503.

²³ *Id.* at 80,494.

²⁴ *Id.* at 80,504.

²⁵ *Id.* at 80,505.

²⁶ *Id.* at 80,504.

²⁷ *Id.*

²⁸ *Id.* at 80,474.

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."²⁹ We also agree that "a listing rule designed to enhance transparency related to board diversity will increase consistency and comparability of information . . . , thereby increasing transparency and decreasing information collection costs."³⁰

We share Nasdaq's view that "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."³¹

More specifically, we note that "[t]o the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), . . . the proposal will provide investors with additional transparency through disclosure explaining the company's reasons for not doing so."³² While we acknowledge that the diversity objectives of Rule 5605(f)(2) are much narrower than the objectives of CII's board diversity policy, we agree with Nasdaq that a narrower definition of "Diverse focused on race, ethnicity, sexual orientation and gender identity will promote the public interest by improving transparency and comparability."³³

In addition, we agree "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."³⁴ More specifically, "the format of the [Proposal's] 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."³⁵ Moreover, the Proposal would improve "transparency . . . by requiring all listed companies to . . . disclose [the required information] . . . on their website or in their proxy statement under Rule 5606."³⁶

²⁹ *Id.*

³⁰ *Id.* at 80,475 (emphasis omitted).

³¹ *Id.* at 80,494.

³² *Id.* at 80,475.

³³ *Id.* at 80,493.

³⁴ *Id.* at 80,495.

³⁵ *Id.* at 80,488.

³⁶ *Id.* at 80,485.

Thank you for allowing CII the opportunity to comment on the Proposal. We hope our letter is helpful to the SEC staff in their review of the Proposal. As always, we welcome the opportunity to discuss our perspectives on board diversity and other corporate governance issues at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style.

Jeffrey P. Mahoney
General Counsel