December 30, 2020

Via email (rule-comments@sec.gov)

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549–1090

Re: File Number SR– NASDAQ–2020–081

Ms. Countryman:

We at the Free Enterprise Project[1] of the National Center for Public Policy Research[2] appreciate the opportunity to submit this comment on the above-styled proposed rule that would, *inter alia*, "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,

[1] Launched in 2007, the National Center for Public Policy Research's Free Enterprise Project (FEP) focuses on shareholder activism and the confluence of big government and big business. FEP is the conservative movement's only full-service shareholder activism and education program: It files shareholder resolutions, engages corporate CEOs and board members at shareholder meetings, petitions the U.S. Securities and Exchange Commission (SEC) for interpretative guidance, and sponsors effective media campaigns to create the incentives for corporations to stay focused on their missions. More information is available here.

[2] The National Center for Public Policy Research is a communications and research foundation dedicated to providing free market solutions to today's public policy problems. We believe that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. More information is available here.

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."[3] Because we think that the proposed rule raises constitutional concerns, is impermissibly vague, and has been proposed without sufficient support to allow the Securities & Exchange Commission (SEC) to conclude that it is appropriately tailored to achieve its stated purpose, we oppose the proposed rule.

The central objection to the proposed rule is constitutional. Race and sex are suspect classifications, meaning that there is a high bar against making distinctions on the basis of race and sex. That bar is necessarily highest where the distinction is determinative, as it would be under the proposed rule: the fact of race and sex would preclude consideration for employment in the relevant positions by those of the disfavored race or sex. The proponent has not demonstrated that its proposed suspect classifications are narrowly tailored to achieve pressing needs; in fact, as explored below, the proponent has not demonstrated that its constitutionally suspect proposal is even reasonably suited to its stated purposes, while alternative and likely far more effective strategies that do not implicate suspect classifications are available to achieve the stated ends. Under all of these circumstances, the SEC cannot with constitutional fidelity approve the proposed rule.

Second, the proposed rule is impermissibly vague. Most notably in this regard, it would require that at least one member of the board of directors at Nasdaq-listed firms be, amongst other alternatives, a "member of the queer community." It fails, though, to define "queer community." We have been unable to determine a stable meaning for that term, while there appear to be any number of conflicting interpretations of it and sharp disagreement about its "true" meaning and relevance. A rule that requires one member of a board of directors to be part of something that the rule itself has not defined, and for which there is no settled, coherent meaning, is impermissibly vague, inviting confusion, challenge, litigation, unnecessary expense and other needless and unacceptable risks.

Third, the relationship between the proposed rule and its central and tertiary claimed benefits has not been established. The proponent asserts that it has "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"[4] as well as transparent communication by corporations and firm decision-making. Correlation, however, is very different from causation. As the Free Enterprise Project has established in significant detail,[5] while there is significant research demonstrating that *viewpoint* diversity increases financial, governance and other relevant performance, there appear to be no studies that establish that surface-characteristic diversity of the sort that would be mandated under this proposed rule causes, rather than is merely correlated with, such

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[3] U.S. Securities & Exchange Commission, SELF-REGULATORY ORGANIZATIONS; THE NASDAQ STOCK MARKET LLC; NOTICE OF FILING OF PROPOSED RULE CHANGE TO ADOPT LISTING RULES RELATED TO BOARD DIVERSITY 1 (2020) ("Notice") *available at* https://www.sec.gov/rules/sro/nasdaq/2020/34-90574.pdf.

[4] Notice, *supra* note 3, at p. 7.

[5] Free Enterprise Project, INVESTOR VALUE VOTER GUIDE 20-32 (2020), *available at* http://nationalcenter.org/IVVG/.

performance enhancement. Neither, crucially, are there any studies that separate out the two factors. For the proponent to demonstrate that its proposal would really achieve the purposes for which it is proposed, it would need to demonstrate that surface-characteristic diversity boosts performance and outcomes even when that surface-characteristic diversity adds no viewpoint diversity. (This, though, may prove hard to accomplish, as the proponent has proffered no reason, and we can think of none, why surface-characteristic diversity by itself would allow companies to "think out of the box" or otherwise make better decisions. These results naturally derive from an increase in *viewpoints* and *worldviews*, not skin color or generative equipment.) Until it does, its rule must be rejected as providing the wrong solution to the concerns that it addresses, and one fraught with constitutional objections. Meanwhile, we posit that a key to corporate success is true *viewpoint* diversity, requiring protection against discrimination on the basis of viewpoint which is now rife at so many American corporations.

Relatedly: as active shareholders in numerous companies listed on the Nasdaq, we are concerned that the proposed rule may cause companies to break state laws which require directors to serve as stewards for the benefit of shareholders. Selecting directors on the basis of arbitrary surface (and related) characteristics, rather than business acumen, industry knowledge, prior experience, viewpoint diversity and other factors genuinely relevant to firm performance, may cause Nasdaq-listed companies to violate their legal fiduciary obligations to their shareholders.

Thank you for your consideration of this comment. Please feel free to contact us if we can be of any further assistance in this matter.

Sincerely,

Justin Danhof

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