To: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Subject: File # SR-NASDAQ-2020-081

Date: [January 25, 2021 or earlier]

We are writing with respect to the Nasdaq rule on board room diversity, which can be found at 85 FR 80472 published on December 11, 2020. Our organizations are particularly interested in this rule because we work with a variety of corporations, both nonprofit and profit, to enable the 1-in-5 people with disabilities to have a better future themselves and to create a better future for others as well.

Further, we fully embrace the finding by Nasdaq in the proposed rulemaking that “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.” Our lengthy experience shows us that this is especially true regarding stakeholders with disabilities, and that therefore, a modification to the proposed rule to include people with disabilities would be beneficial both for our mission and for the stated aim of Nasdaq in making this rule.

In the proposed rulemaking, Nasdaq acknowledges that the primary categories of the rule are those covered by EEO-1, and justifies that decision in part by stating that “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.”

This academic review appears to have missed critical data, which we now bring to your attention in hopes of changing your decision.

In 2018 Accenture along with AAPD and Disability:IN, issued a report entitled, “Getting to Equal: The Disability Inclusion Advantage.” In that report, which can be found at <https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf>, they found that champions of the disability equality index perform above average financially when compared to other companies. In particular, champions on average scored 28% higher in revenue, double the net income, and had 30% higher economic profit margins over the four-year period analyzed. Disability inclusion champions were also on average two times more likely to outperform their peers in terms of total shareholder returns compared with the rest of the companies analyzed. Finally, the research showed that companies improving their disability equality index were four times more likely to have total shareholder returns outperforming their peers compared to those that did not improve. On average, those improving in disability inclusion showed returns outperforming industry peers by 53% while other companies outperformed their peers by only 4%.

In June of 2020, Westat issued a [report entitled](https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/EmployerSurveyFinalReport.pdf) “Survey of Employer Policy on the Employment of People with Disabilities.” This report was prepared for the Chief Evaluation Office and the Office of Disability Employment Policy of the U.S. Department of Labor’s Chief Evaluation Office and Office of Disability Employment Policy. It is a very comprehensive report with much relevant information to this rulemaking. A few in particular are worth noting. On pages 3-27 of the full report, Westat refers to an academic study finding that one of the practices that increase the likelihood of hiring people with disabilities is senior management commitment. On that same page, Westat refers to a different academic study saying that one of the retention practices associated with retention effectiveness of persons with disabilities is assuring employees know how their work and performance support the mission of the organization. Of course, senior management commitment and the mission of the organization begins with those on the corporate board.

Readily available studies which supplement that which Nasdaq erroneously referred to as a dearth of information. In fact, the academic evidence for the benefit to shareholders and stakeholders is very clear.

Further, the worldwide market of consumers with disabilities is massive and continues to grow, year after year. According to [Nielsen Research](https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/reaching-prevalent-diverse-consumers-with-disabilities.pdf), consumers with disabilities represent a $1 billion market segment themselves. When you include their families, friends and associates, that total expands to more than $1 trillion. Americans with disabilities represent the third largest market behind Baby Boomers and the mature market.

Nasdaq further states that this data does not exist for the LGBTQ+ community, but justifies the proposed expansion to the LGBTQ+ community, even though this community is not covered under the EEO–1 report, by stating, “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.”

The undersigned would first like to note that we join with the aforementioned stakeholders in celebrating and supporting the addition of the LGBTQ+ community to its definition of Diversity, but that the justifications provided by Nasdaq that the inclusion of one category beyond that of the EEO–1 report while continuing to exclude other protected classes, such as disability, requires a rational basis beyond the preference of Nasdaq stakeholders.

This is especially the case in the decision to exclude the disability community, given the long history of protection for the 1 in 5 Americans that Congress recognizes as having a disability. Indeed, nondiscrimination statutory provisions against persons with disabilities go as far back as the Rehabilitation Act of 1973 (29 U.S.C. §794), and in passing the Americans with Disabilities Act of 1990 (ADA), subsequently, Congress felt it necessary to make the following findings regarding systemic and societal discrimination against people with disabilities, to wit:

**Historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;** 42 U.S.C. §12101(a)(2)

**Census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;** 42 U.S.C. §12101(a)(6)

**The Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;** 42 U.S.C. §12101(a)(7)

**The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.** 42 U.S.C. §12101(a)(8)

This statutory history means that disability is a class tracked throughout the federal government. In fact, federal contractors are required to engage in affirmative action to hire and retain persons with disabilities. 29 U.S.C. §503. So, federal contractors, which would include many listed on the Nasdaq exchange, already are collecting information on how many employees they have with disabilities, which makes disability less burdensome to track than other categories additional to the EEO order.

Should stakeholders seeking board members seek further information in this regard, the following simple question is likely to yield the desired data:

*[Stakeholder] seeks to maximize shareholder return by fostering a diverse presence on its Board of Directors, including individuals with disabilities. A disability can be a physical, cognitive, sensory, mental health, chronic pain or another condition that is a barrier to everyday living. Do you have a disability?*

*Yes,*

*Don’t know*

*No*

The principal basis offered by Nasdaq, beyond the preference of its users, for excluding the protected classes not covered by the EEO–1 report is that it could result in boards lacking in diversity in race and gender. While this argument is facially plausible, it could first of all be remedied by structural changes to the rule. More importantly, there is no rational basis provided as to why this concern applies any differently to the LGBTQ+ community than those other protected classes not covered by the EEO–1 report.

The partially attempted differentiation, i.e., that the recent Supreme Court finding that LGBTQ+ discrimination was inextricably tied up with sex discrimination, and thus represents a facet of gender diversity, appears completely capricious in light of the structure of the proposed rule, which offers that including someone as a member of the LGBTQ+ community would be an alternative to the requirement of a member who was diverse in terms of race and national origin. If the proposed rule were in fact treating this as a subset of gender, the enumeration of LGBTQ+ would have been included by the drafters in the gender diversity requirement.

In conclusion, we encourage Nasdaq to add people with disabilities to the proposed rule because of the clearly identified benefits that this diversity presents for shareholders. We further note that Nasdaq has failed to articulate a rational basis to include one protected class beyond those articulated in the EEO–1 Report while excluding other protected classes.

Should this recommendation be accepted, we further recommend that Nasdaq use the definition of disability offered within the ADA and the Rehabilitation Act, to wit, a person who

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) is regarded as having such an impairment. 29 U.S.C. §794; 42 U.S.C. §12102(1).

We do hope that our comments here inform the SEC of the situation, and that the SEC will correct the unintentional and lacking in rational basis oversight of excluding persons with disabilities from the diversity rule.

Respectfully submitted on January 25, 2020 by:

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