



american securities association

America's Voice for Main Street's Investors

December 31, 2020

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

Re: Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (Release No. 34-90574)

Dear Ms. Countryman:

Members of the American Securities Association (ASA)¹ have long recognized the benefits of having diversity in the workforce and have taken concrete steps to hire and help develop women and individuals from underrepresented communities. The boards and workforce of the ASA members reflect this view. We believe the best way to build a sustainable economy is to ensure *all* Americans have an opportunity to prosper, regardless of their race, creed, color, ethnicity, religion, gender, sexual orientation, or political views.

Nasdaq's proposed listing rule regarding board diversity (Nasdaq Proposal) would require Nasdaq-listed companies to have at least one female director and one director that self-identifies as an underrepresented minority or LGBTQ+, with certain exceptions. Companies failing to meet these standards would be required to explain why they do not have at least two directors that meet these criteria.

The observations in this letter do not reflect a disagreement with the underlying goals of the Nasdaq Proposal. They are solely intended to highlight another example of self-regulatory organization (SRO) "mission creep" that has serious long-term consequences for our markets and investors across America. If SROs can use the listing rule process to effectively dictate the composition of company boards without the express authorization of Congress, what *can't* they do? Our concern is not novel as both Republican and Democratic commissioners at the SEC have raised similar concerns.²

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

² See e.g. Commissioner Kara Stein Remarks Before the Trader Forum 2014 Equity Trading Summit, February 6th, 2014 ("the exchange-based SRO model warrants significant consideration."); Commissioner Dan Gallagher Remarks at SIFMA's 15th Annual Market Structure Conference, Market: 2012: Time for a Fresh Look at Equity market Structure and Self-Regulation, October 4th, 2012 ("should exchanges still be SROs?"; "if self-regulation is to continue to play a central role in securities



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SROs, such as Nasdaq, have no delegated authority to engage in policymaking and they were never intended to do so. SROs are charged with enforcing fair, ethical, and efficient practices over the markets they regulate. These authorities do not permit SROs to wade into national debates or make public policy that is best left to elected officials and officers appointed by the President and confirmed by the Senate.

It is one thing for Nasdaq as a company to issue a public statement or to lobby elected officials on policy matters; it is quite another for Nasdaq to use its SRO authority as a market regulator to become *the* policymaker. In short, Nasdaq's attempt to use the listing rule process in this instance goes far beyond its delegated authority.

Elected members of Congress and political appointees at the SEC tasked by Congress to carry out specific duties *are the appropriate individuals* to address policy issues, not SROs.

We believe that the best process to achieve lasting acceptable change is the democratic process, which, in terms of improving corporate diversity, is already well underway³. Accordingly, the SEC should table the Nasdaq Proposal and engage with elected members of Congress and the public directly to address the important issue of diversity in corporate leadership. The ASA would welcome the chance to publicly comment on a formal SEC proposal or a concept release that addresses the issue. If past is prologue, then for a decision on important national issues to become widely accepted by the American people, it must benefit from a fulsome and transparent public debate.

The ASA looks forward to working with Congress and the SEC on these matters.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

regulation, SROs must be committed to ensuring that the rules they send to the Commission for approval are the result of the same degree of rigorous analysis as the Commission applies to its own rules.”; Commissioner Robert Jackson, Unfair Exchange: The State of America’s Stock Markets, September 19th, 2018.

³ H.R. 5084, 116th Congress, *Improving Corporate Governance Through Diversity Act of 2019*; Questions and Answers of General Applicability for Regulation S-K, [SEC.gov | Regulation S-K which](https://www.sec.gov/regulation-s-k) encourages more robust disclosure of board diversity metrics from public companies.

