DIVERSIFYING THE CORPORATE WORLD

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I. INTRODUCTION

Throughout the last five years, there has been a push for diversity in every realm, industry, and profession.[1] The corporate world is no different. An influx of companies seek to diversify their ranks—primarily focusing on their board of directors—using Corporate Social Responsibility (CSR), known as Environmental, Social, and Governance (ESG) disclosures.[2] Despite companies' growing efforts, representation on corporate boards has not significantly increased.[3] White men dominate nearly 75 percent of corporate boards, while women occupy less than 17 percent of board seats.[4] Non-White directors, including men and women, make up about 25 percent of corporate boards in S&P 500 companies.[5] Women of color are almost nonexistent on corporate boards as "more than two thirds of the Fortune 500 have no women of color[,] [and] [o]nly 3.2% of directors are women of color."[6]

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1 Pamela Newkirk, *Diversity Has Become a Booming Business. So Where Are the Results?*, TIME: IDEAS (Oct. 10, 2019, 6:10 AM), https://time.com/5696943/diversity-business.

2 "A 2021 survey showed that diversity, equity, and inclusion was the top focus—95 [percent] for public companies and 63 [percent] for private companies—in ESG reports that companies are currently disclosing or plan to disclose in the future." Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307, 309 (2023).

3 Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379–80 (2014).

4 *Id.* at 379.

5 Andrew Ramonas, *Nasdaq Diversity Rule Challenge Puts Conservatives on Defense (1)*, BLOOMBERG L.: SEC. L. [hereinafter Ramonas, *Nasdaq Diversity Rule Challenge*], https://news.bloomberglaw.com/securities-law/nasdaq-diversity-rules-challenge-puts-conservatives-on-defense (Aug. 29, 2022, 2:49 PM).

6 Rhode & Packel, *supra* note 3, at 380.

The two leading stock exchanges in the United States—the New York Stock Exchange (NYSE) and Nasdaq—expressed a commitment to diversifying corporate boards.[7] Both stock exchanges are pivotal in making real world change in diversifying corporate boards because of their role in corporate governance for listed public companies. Despite being the two leading stock exchanges in the United States, the NYSE and Nasdaq choose to promote diversity in very different ways.

The NYSE sought to advance diversity within listed public companies without imposing a mandate for listed companies to adhere to.[8] Instead, the NYSE created the Board Advisory Council (BAC) to diversify corporate boards in listed companies.[9] The BAC is composed of twenty-seven executive officers from highly regarded companies.[10] The BAC purports to connect candidates with companies seeking new board members by using the BAC members' own networks.[11] The BAC's members must "nominate [at least] five candidates who [they] believe[] are ready to join a public-company board."[12] Through the BAC's live networking events, the executive officers on the BAC also advocate for and educate their nominees prior to introducing them to listed companies.[13] Additionally, the BAC not only hosts live events throughout the year but also two networking summits per year to

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7 *See* Elizabeth King, *The Importance of the NYSE's Market-Driven Approach to Board Diversity*, NYSE (June 16, 2022), https://www.nyse.com/boardadvisory/the-importance-of-the-nyse-s-market-driven-approach-to-board-diversity (stating that the NYSE is a proponent of diversity); *Exchange in Focus: NYSE Advancing Board Diversity*, SUSTAINABLE STOCK EXCHS. INITIATIVE (June 26, 2019), https://sseinitiative.org/all-news/exchange-in-focus-nyse-advancing-board-diversity (explaining the importance of diversity on corporate boards); *Diversity, Equity, and Culture*, NASDAQ, https://www.nasdaq.com/diversity-inclusion-belonging (last visited Oct. 4, 2023) (expressing Nasdaq's commitment to equality by diversifying corporate boards).

8 *See* King, *supra* note 7.

9 *The NYSE Board Diversity Initiative*, NYSE [hereinafter *Board Diversity Initiative*], https://www.nyse.com/boardadvisory/about-the-council (last visited Oct. 4, 2023).

10 *Id.*

11 *Id.*; *see also* King, *supra* note 7 (stating that the BAC's members are executive officers from well-known companies including Delta Air Lines, Goldman Sachs, HP, Procter & Gamble, and The New York Times Company, to name a few).

12 Betty Liu, *The Secret to Making Boards More Diverse: Better Networking*, BARRON'S: ECON. & POL'Y (Feb. 5, 2020, 1:30 PM), https://www.barrons.com/articles/diverse-boards-make-better-companies-so-the-nyse-is-taking-action-51580927401.

13 Stewart Landefeld, *Board Diversity: A Comparison Between the NYSE & Nasdaq Now*, PERKINS COIE: PUB. CHATTER (Nov. 1, 2021), https://www.publicchatter.com/2021/11/board-diversity-a-comparison-between-the-nyse-nasdaq-now; King, *supra* note 7.

introduce candidates through "speed-dating."[14] The BAC became the NYSE's primary tool in promoting diversity by actively attempting to diversify corporate boards since 2019.[15]

Nasdaq implemented various means to promote diversity within corporate boards through a mandate proposed in 2020, which the Securities and Exchange Commission (SEC) approved in August 2021 and is expected to become effective in December 2023.[16] Nasdaq's new mandate—the "Board Diversity Rule"[17]—is comprised of two parts. First, Nasdaq requires all listed companies to disclose diversity statistics including race, ethnicity, gender, and LGBTQ+ status.[18] In an effort to be transparent, Nasdaq is also disclosing its own statistics on race, ethnicity, and gender.[19] Second, the mandate requires listed companies to have, or explain why they do not have, two diverse directors: at least one individual who self-identifies as a woman and one individual who self-identifies as LGBTQ+ or a person from an

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[14] Ben Ashwell, *NYSE Targets Change in Board Diversity with Elite Networking Program*, IR MAG.: ESG (Jan. 9, 2020), https://www.irmagazine.com/esg/nyse-targets-change-board-diversity-elite-networking-program.

[15] *See Board Diversity Initiative*, *supra* note 9.

[16] Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Exchange Act Release No. 34-90574, 85 Fed. Reg. 80472 (Dec. 11, 2020) [hereinafter Adopt Board Diversity Rules]; Order Approving Listing Rules Related to Board Diversity, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44424 (Aug. 12, 2021) [hereinafter Approval Order]; NASDAQ, NASDAQ'S BOARD DIVERSITY RULE: WHAT COMPANIES SHOULD KNOW 1 (2023) [hereinafter NASDAQ, WHAT COMPANIES SHOULD KNOW], https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf; Jonathan D. Uslaner & Thomas Sperber, *Nasdaq's Board Diversity Rules: Inclusivity Is Good Business*, REUTERS: LEGAL (Feb. 15, 2022, 10:58 AM), https://www.reuters.com/legal (search "Nasdaq's Board Diversity Rules: Inclusivity Is Good Business" within the search bar); Press Release, Nasdaq, Nasdaq to Advance Diversity Through New Proposed Listing Requirements, (Dec. 1, 2020) [hereinafter Press Release, Nasdaq to Advance Diversity], https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01.

[17] This Comment uses "Board Diversity Rule," "mandate," and "diversity disclosure" interchangeably.

[18] Press Release, Nasdaq to Advance Diversity, *supra* note 16; NASDAQ, BOARD DIVERSITY MATRIX DISCLOSURE REQUIREMENTS AND EXAMPLES 1 (2023) [hereinafter NASDAQ, BOARD DIVERSITY MATRIX], https://listingcenter.nasdaq.com/assets/Board%20Matrix%20Examples_Website.pdf (showing Nasdaq's example of a sufficient disclosure of diversity statistics).

[19] *Diversity, Equity & Culture*, *supra* note 7.

underrepresented group.[20] Nasdaq defines an "underrepresented minority" as "self-identif[ying] in one or more of the following groups: 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."[21] Companies' explanations for why they do not have two diverse directors could include taking a different approach to diversify their corporate boards.[22]

This Comment examines the NYSE's and Nasdaq's approaches—NYSE's BAC and Nasdaq's Board Diversity Rule—to increase diversity on corporate boards. Part II of this Comment compares and contrasts the NYSE's and Nasdaq's efforts to promote diversity through several categories, including their approach, audience, and listed companies' initial reactions to both approaches. Part III analyzes the NYSE's BAC and Nasdaq's Board Diversity Rule and demonstrates that both are ineffective in the pursuit of enhancing diversity because of their low probability of success, their narrowness in approaches, and the claims against Nasdaq's mandate. Part IV of this Comment proposes a new disclosure mandate that both the NYSE and Nasdaq should implement that is effective, broad, and constitutional in promoting diversity. Ultimately, Part V concludes that the NYSE and Nasdaq's diversity approaches fall flat in successfully promoting diversity. Therefore, both stock exchanges should have listing conditions requiring companies to disclose diversity statistics and initiatives, including whether they have diversity, equity, and inclusion (DEI) initiatives and what those initiatives are.

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[20] NASDAQ, WHAT COMPANIES SHOULD KNOW, *supra* note 16, at 2. This Comment refers to this aspect of the Board Diversity Rule as the "explain" mandate or disclosure.

[21] For explanations on the timeframe listed companies must comply with to fulfill Nasdaq's Board Diversity Rule, see Press Release, Nasdaq to Advance Diversity, *supra* note 16. Analyzing Nasdaq's timeframe to comply with its mandate is beyond the scope of this Comment.

[22] *Enhancing Transparency on Diversity*, NASDAQ [hereinafter *Enhancing Transparency*], https://www.nasdaq.com/board-diversity (last visited Oct. 4, 2023); *see also* Jeff Green & Katherine Doherty, *Nasdaq Rule May Open Up Hundreds of New Diverse Board Slots*, BLOOMBERG L. (Aug. 6, 2021, 3:43 PM), https://www.bloomberglaw.com/bloomberglawnews (search "Nasdaq Rule May Open Up Hundreds of New Diverse Board Slots" within the search bar) (explaining that companies with less than six directors only need to have one diverse director to comply with Nasdaq's mandate).

II. COMPARING AND CONTRASTING THE NYSE'S AND NASDAQ'S DIVERSITY EFFORTS

In the last three years, the NYSE and Nasdaq have implemented new methods to diversify corporate boards. The NYSE's effort to promote diversity is centralized in its BAC—diversifying corporate boards by connecting diverse candidates with companies seeking new board members.[23] Meanwhile, Nasdaq mainly promotes diversity through its Board Diversity Rule—requiring companies to disclose whether they have two diverse directors, meaning a person who self-identifies as a woman and a person who self-identifies with an underrepresented group.[24] Both the NYSE's and Nasdaq's diversity efforts have similarities as well as key differences in their efforts to improve board diversity. Section A contrasts the different approaches the NYSE and Nasdaq use to enhance diversity in the corporate world. Section B compares the NYSE's and Nasdaq's diversity efforts in who their targeted audiences are. Section C examines listed companies' board composition after the announcements of both the NYSE's BAC and Nasdaq's Board Diversity Rule. Lastly, Section D recognizes that both the NYSE and Nasdaq must improve their board statistics.

A. *The NYSE's and Nasdaq's Approaches in Promoting Diversity*

Despite using different methods, both stock exchanges have a singular goal of diversifying corporate boards in listed public companies.[25] The NYSE has chosen to promote diversity with its BAC to avoid implementing a required mandate for listed companies to comply with.[26] The NYSE justified its avoidance of a mandate by looking at the effect on investors.[27] The NYSE's president, Stacey Cunningham, explained that using a diversity mandate would confine the "investable universe" by forcing a perspective on investors based on

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[23] King, *supra* note 7.

[24] Press Release, Nasdaq to Advance Diversity, *supra* note 16. A person from an underrepresented group is defined as "self-identif[ying] in one or more of the following groups: 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." *Id.*

[25] *See* King, *supra* note 7; *Diversity, Equity, and Culture*, *supra* note 7.

[26] Cydney Posner, *What Role Should the Exchanges Play in Encouraging Board Diversity?*, COOLEY: COOLEY PUBCO (Apr. 26, 2021), https://cooleypubco.com/2021/04/26/role-exchanges-board-diversity/#page=1.

[27] *Id.*

companies' board composition.[28] The NYSE reasoned that investors would then have a limited choice on what companies to invest in given their board demographics and exclude companies who do not meet this mandate.[29] Additionally, the NYSE contended that stock exchanges, which are self-regulatory organizations (SROs), do not possess the authority to intervene with social policy and pick sides by requiring a disclosure mandate.[30] The NYSE's BAC, instead, utilizes members' personal and professional networks to increase board representation by having members elect candidates to introduce them to companies seeking new directors.[31]

Conversely, Nasdaq decided to enact required disclosures of diversity statistics along with its Board Diversity Rule.[32] Nasdaq's president, Adena Friedman, offered a different framework concerning the diversity disclosure—transparency and urgency.[33] Friedman explained that the diversity mandate is not a quota but rather a "regulatory impetus" and an effort of transparency to show stakeholders the demographics of companies' board compositions.[34] Additionally, Nasdaq reasoned that, by implementing a disclosure requirement, the progress for diversifying corporate boards will be expedited because diversity demographics will be made public.[35] Nasdaq also mentioned that several countries outside of the United States have implemented mandatory quotas for diversifying board composition, which have been effective in increasing the number of women directors.[36] Ultimately, Nasdaq's Board Diversity Rule purports to promote diversity through transparency.

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[28] *Id.*

[29] *Id.*

[30] *Id.* Listed companies on the NYSE are also not required to disclose ESG issues, but are only encouraged to do so. *See ESG Resource Center*, NYSE, https://www.nyse.com/esg/resource-center (last visited Oct. 5, 2023). The question of whether stock exchanges, as self-regulatory organizations, have the authority to regulate social policy under administrative law is outside the scope of this Comment.

[31] *ESG Resource Center*, *supra* note 30; Landefeld, *supra* note 13.

[32] Press Release, Nasdaq to Advance Diversity, *supra* note 16.

[33] Posner, *supra* note 26.

[34] *Id.*

[35] *Id.*

[36] *Id.* (stating that countries including Austria, Belgium, France, Germany, Iceland, Italy, Norway, and Portugal have required diversity quotas).

B. *The NYSE's and Nasdaq's Diversity Efforts Only Target Board Composition*

While the NYSE's BAC and Nasdaq's Board Diversity Rule differ in approach, both efforts only target board composition, while ignoring the disparity of representation in executive, managerial, and employee positions.[37] The BAC solely uses members' networks to connect diverse candidates with board roles.[38] The BAC does not use members' own connections to directly diversify the composition of executives or employees, despite most, if not all, members being highly ranked executives in well-known companies.[39] Both aspects of Nasdaq's Board Diversity Rule only target companies' board of directors: Nasdaq's diversity statistics disclosure only references board positions, while omitting statistics concerning the composition of executives, managers, and employees.[40] Nasdaq's explain disclosure also only centers on directors,[41] despite its transparency ideology, which would be more meaningful if the mandate applied to all high-ranking positions.

The NYSE and Nasdaq have detailed their passion for diversifying corporate boards.[42] But both stock exchanges fall short in promoting diversity in the corporate realm as a whole by only targeting board positions. While board composition has substantial inequalities in representation, the vast majority of disparity is within executive positions. For example, in 2020, in Fortune 1000 companies, only 11.5 percent of general counsels identified as an individual from an underrepresented group.[43] While there may be a possible argument

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[37] *Board Diversity Initiative*, *supra* note 9; Press Release, Nasdaq to Advance Diversity, *supra* note 16; Adediran, *supra* note 2, at 348.

[38] King, *supra* note 7.

[39] *Board Diversity Initiative*, *supra* note 9.

[40] Press Release, Nasdaq to Advance Diversity, *supra* note 16.

[41] *Id.*

[42] *Exchange in Focus*, *supra* note 7; King, *supra* note 7.

[43] Jean Lee, *To Diversify Corporate America, We Need Standards, Not Statements*, BLOOMBERG L. (Aug. 9, 2021, 3:10 PM), https://www.bloomberglaw.com/bloomberglawnews (search "To Diversify Corporate America, We Need Standards, Not Statements" within the search bar). Compare the total population in the United States where Black individuals make up 13.6 percent of the population, American Indians make up 1.3 percent, Asian individuals make up 6.3 percent, Native Hawaiian make up 0.3 percent, White individuals make up 58.9 percent, and Hispanic or Latinx make up 19.1 percent. *QuickFacts*, U.S. CENSUS BUREAU [hereinafter *QuickFacts*],

that increasing board representation will translate to diverse executives, considering that most corporate boards elect officers and executives, diversity efforts must be targeted at the hierarchy of corporate positions, which also includes officers and executives. If both stock exchanges want to make a valiant effort to promote diversity in corporations, they must acknowledge that executives, officers, managers, and employees should also be diverse.

C. *Changes in Board Composition Following Announcements of Diversity Efforts*

To explore the vitality of each stock exchange's approach, a pivotal place to look concerns how the NYSE's and Nasdaq's listed companies reacted after learning of these diversity efforts. Were corporate boards composed of more individuals who self-identified as women, LGBTQ+, or an underrepresented group? The NYSE announced the creation of the BAC in 2019, over four years ago.[44] Nasdaq released its proposal for their Board Diversity Rule in late 2020, three years ago.[45] This Part first examines the NYSE's and Nasdaq's most well-known listed companies and whether those companies adjusted their board composition pursuant to diversity effort announcements. This Part then observes the current composition of all corporate boards across the United States, regardless of where these companies are listed.

1. NYSE-Listed Companies Make a Commendable Effort

The NYSE claims that the BAC has produced over five hundred meetings between companies seeking new directors and diverse candidates.[46] The NYSE also contends that *one* listed company, Dow, hired a diverse candidate, Debbie Dial, for a board position through the BAC's initiative.[47] The NYSE's BAC, however, does little to show whether listed companies diversifying their board composition can be attributed to their initiative.[48] Despite most of its efforts being

https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited Oct. 10, 2023).

[44] *Board Diversity Initiative*, *supra* note 9; *Exchange in Focus*, *supra* note 7.

[45] Press Release, Nasdaq to Advance Diversity, *supra* note 16.

[46] King, *supra* note 7.

[47] *Id.*

[48] The NYSE has given two specific examples of candidates in its BAC who have been hired since its inception in 2019, while also contending thirty candidates joined boards. *See* Liu, *supra* note 12; King, *supra* note 7; *see also Board Diversity Initiative*, *supra*

unattributable, by examining two of the NYSE's well-known companies, Walmart Inc. (Walmart) and CVS Health Corp. (CVS), there has been substantial growth in both diversity disclosures and board composition since 2019.

i. Walmart's Consistent Improvement in Diversifying Their Board

In 2019, Walmart's proxy statement identified twelve directors on its board.[49] Walmart also disclosed that there were four out of twelve directors who were women or part of a racial or ethnic group, around 33 percent, without differentiating between how many were women or how many were members of an underrepresented group.[50] Still, White men dominated 67 percent of its board.[51] The next year, Walmart continued to disclose the diverse makeup of its board without differentiating which board members belonged to gender diversity or racial or ethnic diversity.[52] In 2020, 36 percent of its board included individuals who identified as women or from an underrepresented group, leaving the majority, again, belonging to White men.[53] Walmart removed one board member from 2019 to 2020, which created a slightly higher percentage of diversity in its board composition simply by shrinking the size of the board.[54]

Two years after the BAC's diversity initiative announcement in 2019, and coincidentally the same year as Nasdaq's announcement, Walmart disclosed its gender diversity and its racial or ethnic diversity within its board separately.[55] Out of the twelve members on Walmart's board, three were women, constituting 25 percent of the board's makeup, and two identified as from an underrepresented group, accounting for only 16 percent.[56] Walmart did not disclose whether any women were also racially or ethnically diverse.[57] The following

note 9 (failing to contain information as to how many candidates have actually been hired).

[49] Walmart Inc., Definitive Proxy Statement (Schedule 14A) 7, 11 (Apr. 23, 2019).

[50] *Id.*

[51] *Id.*

[52] Walmart Inc., Definitive Proxy Statement (Schedule 14A) 5, 11 (Apr. 23, 2020).

[53] *Id.*

[54] *Id.*

[55] Walmart Inc., Definitive Proxy Statement (Schedule 14A) 4, 9 (Apr. 22, 2021).

[56] *Id.*

[57] *Id.*

year, Walmart continued to disclose its diversity statistics separately.[58] Walmart's eleven board members consisted of three women, roughly 27 percent of the board, and two racially or ethnically diverse individuals, around 18 percent of the board.[59] From 2021 to 2022, Walmart's board composition remained the same; however, the percentage of gender and racial or ethnic diversity slightly increased after Walmart reduced the size of their board.[60] After the BAC's diversity initiative announcement in 2019, Walmart's gender and racial or ethnic diversity on their board increased from 33 to 36 percent in the last four years.[61] Although this is a valiant effort in promoting diversity, this slight increase occurred only by Walmart shrinking the size of its board.

ii. The Board of CVS Can Improve Their Racial or Ethnic Diversity

Unlike Walmart, in 2019, CVS did not disclose racial or ethnic diversity statistics.[62] Instead, CVS disclosed that out of its sixteen directors, only four were women, exactly 25 percent, and even added a separate statistic of how many board members were born outside of the United States.[63] In the same and following year, CVS began disclosing ethnic diversity along with gender diversity.[64] Thirteen members sat on the board of directors of CVS; four were women, around 31 percent, and three were racially or ethnically diverse, around 23 percent.[65] CVS did not disclose whether any women also identified as racially or ethnically diverse.[66] From 2019 to 2020, the board composition of CVS remained the same, yet the percentage of

58 Walmart Inc., Definitive Proxy Statement (Schedule 14A) 4, 9 (Apr. 21, 2022).

59 *Id.*

60 *Id.*; Walmart Inc., Definitive Proxy Statement (Schedule 14A) 4, 9 (Apr. 22, 2021).

61 Walmart Inc., Definitive Proxy Statement (Schedule 14A) 4, 9 (Apr. 21, 2022); Walmart Inc., Definitive Proxy Statement (Schedule 14A) 7, 11 (Apr. 23, 2019); *see Board of Directors*, WALMART, https://corporate.walmart.com/about/board-of-directors (last visited Oct. 10, 2023).

62 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6 (Apr. 5, 2019).

63 *Id.* This added statistic is relevant because CVS, unlike any of the other three companies mentioned in this Part, is providing an additional category of diversity in its proxy statement—the company went above and beyond.

64 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 4 (Apr. 3, 2020).

65 *Id.*

66 *Id.*

gender diversity increased because the board downsized.[67] It is unclear whether racial or ethnic diversity within the board increased or decreased because CVS did not disclose this statistic in 2019.[68]

In 2021, CVS made a commendable change in disclosing its diversity statistics.[69] CVS began disclosing gender and racial or ethnic diversity within each director's biography, while still disclosing the total number of directors that are diverse.[70] Out of the thirteen directors serving on the board of CVS, five identified as women, 38 percent, and four identified as racially or ethnically diverse, 30 percent.[71] Two of the four racially or ethnically diverse directors were women.[72] The following year, CVS continued to disclose its diversity statistics broadly and within directors' biographies.[73] Five women sat on the 2022 board of CVS, 45 percent, and two individuals identified as racially or ethnically diverse, 18 percent, who were also both women.[74] The board also downsized from thirteen directors to eleven directors, which increased the percentage of gender diversity, despite the total number of women remaining the same.[75] Although CVS has made a worthy effort of disclosing diversity per director, racial or ethnic diversity declined by almost half, from 30 percent in 2021 to 18 percent in 2022.[76]

Ultimately, both NYSE-listed companies examined for the purposes of this Comment, Walmart and CVS, increased their gender diversity—only slightly—by adding one woman board member after the BAC announced its diversity initiative.[77] Both companies also

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67 *Id.*; CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6 (Apr. 5, 2019).

68 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 1, 6 (Apr. 5, 2019).

69 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6, 13–19 (Apr. 2, 2021).

70 *Id.*

71 *Id.*

72 *Id.*

73 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6, 13–18 (Apr. 1, 2022).

74 *Id.*

75 *Id.*

76 *Id.;* CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6, 13–20 (Apr. 2, 2021).

77 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6, 13–18 (Apr. 1, 2022); CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 1, 6 (Apr. 5, 2019); Walmart Inc., Definitive Proxy Statement (Schedule 14A) 1, 4, 9 (Apr. 21,

began disclosing both gender and racial or ethnic diversity as two distinct measurements.[78] CVS also approached its diversity disclosures admirably by disclosing the directors that identified as women *and* racially or ethnically diverse.[79] Unfortunately, neither company disclosed whether any director identified as LGBTQ+.[80] Despite both companies' disclosures, these actions are more attributable to Nasdaq's mandate for diversity disclosures, notwithstanding being listed on the NYSE.[81] These disclosures are more akin to Nasdaq's diversity efforts because Nasdaq requires companies to disclose diversity statistics,[82] not the NYSE. Meanwhile, the NYSE only connects candidates with listed companies seeking new directors, but it has not shared much information as to how many of its candidates have actually been hired.[83] Without knowing whether the NYSE's BAC aided in the process of placing these diverse directors in their positions, it is difficult to ascertain whether these companies instituted this progress because of the BAC's initiative.

2. Nasdaq-Listed Companies Show Promise

Nasdaq announced its Board Diversity Rule on December 1, 2020, eventually garnering approval from the SEC the following year.[84] Although this mandate will not be effective until December 2023,[85] Nasdaq-listed companies have made an effort to diversify their

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2022); Walmart Inc., Definitive Proxy Statement (Schedule 14A) 1, 7, 11 (Apr. 23, 2019).

78 Walmart Inc., Definitive Proxy Statement (Schedule 14A) 4, 9 (Apr. 21, 2022); CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 6, 13–18 (Apr. 1, 2022).

79 CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 1, 6, 13–18 (Apr. 1, 2022).

80 *See* Walmart Inc., Definitive Proxy Statement (Schedule 14A) 1, 4, 9 (Apr. 21, 2022); CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 1, 6, 13–18 (Apr. 1, 2022).

81 *See Board Diversity Initiative*, *supra* note 9 (omitting any information as to whether any candidates have been hired); *see, e.g.*, Press Release, Nasdaq to Advance Diversity, *supra* note 16 (requiring Nasdaq-listed companies to disclose diversity statistics).

82 Press Release, Nasdaq to Advance Diversity, *supra* note 16.

83 *See Board Diversity Initiative*, *supra* note 9. The NYSE has given only two examples of candidates in its BAC who have been hired since its inception in 2019. *See* Liu, *supra* note 12; King, *supra* note 7.

84 Press Release, Nasdaq to Advance Diversity, *supra* note 16.

85 NASDAQ, WHAT COMPANIES SHOULD KNOW, *supra* note 16, at 1; Uslaner & Sperber, *supra* note 16.

corporate boards and are already disclosing their diversity statistics.[86] When the SEC approved of Nasdaq's new mandate, more than a third, or 37 percent, of listed companies did not have a single director who was racially or ethnically diverse, and "more than one in [ten] ha[d] no female directors," 12 percent.[87] While these statistics may be outdated, two of Nasdaq's largest companies, Amazon.com, Inc. (Amazon) and Apple Inc. (Apple), have shown significant efforts to comply with Nasdaq's new mandate since its announcement.[88]

i. Almost Half of Amazon's Board Is Diverse

Prior to Nasdaq's announcement, in 2019, Amazon did not disclose gender diversity nor racial or ethnic diversity.[89] Five women sat on Amazon's board, which consisted of ten members.[90] In the next two years, Amazon followed the same disclosure method and omitted all diversity statistics in their 2020 and 2021 proxy statements.[91] In both years, at least four of the ten directors on the board were women.[92] Despite Nasdaq announcing its mandate in 2020 and the SEC granting

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86 *See, e.g.*, *PepsiCo 2022 Employee Demographics*, PEPSICO, https://www.pepsico.com/docs/default-source/sustainability-and-esg-topics/2022-employee-demographics.pdf?sfvrsn=30fba5a6_13 (Dec. 31, 2022) (disclosing demographics for all employee levels including Nasdaq's Board Diversity Rule); *Board of Directors*, IPOWER [hereinafter *Board of Directors*], https://ir.meetipower.com/corporate-governance/board-of-directors (last visited Oct. 10, 2023) (disclosing its 2022 board composition included five members—one woman and three identified as racially or ethnically diverse, including the one woman).

87 Green & Doherty, *supra* note 22.

88 *See* Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 9 (Apr. 14, 2022); Apple Inc., Definitive Proxy Statement (Schedule 14A) 1, 6, 23–28 (Jan. 6, 2022).

89 Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 3 (Apr. 11, 2019).

90 *Id.*; *see* Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 2, 9 (Apr. 14, 2022) (showing that four of the five directors who self-identified as women in 2022 sat on the board in 2019).

91 Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 5 (Apr. 16, 2020); Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 5 (Apr. 15, 2021).

92 Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 5 (Apr. 16, 2020); Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 5 (Apr. 15, 2021); *see also* Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 3–9 (Apr. 14, 2022) (showing that four of the five directors who self-identified as women in 2022 were on the board in 2020 and 2021).

its approval in 2021, Amazon did not disclose diversity statistics[93] and without racial or ethnic diversity statistics, it could not have met Nasdaq's soon-to-be effective mandate of having at least one woman and one person from an underrepresented group on its board.

In 2022, two years after Nasdaq's announcement, Amazon finally disclosed diversity statistics, including gender diversity and racial or ethnic diversity.[94] Amazon's board consisted of eleven directors, five of whom were women, constituting 45 percent of the board, and two of who identified as racially or ethnically diverse, comprising only 18 percent.[95] Of the two directors who identified as racially or ethnically diverse, both were women.[96] Women held the highest percentage of Amazon's board seats of the two Nasdaq listed companies analyzed in this Comment, holding at least half of board seats.[97] Without any statistics for comparison to previous years, it is unclear whether the number of Amazon's racially or ethnically diverse directors have increased, decreased, or remained the same; however, only two directors is scant.[98] Amazon also did not disclose whether any directors identified as LGBTQ+.[99] While Amazon did not comply with the mandate immediately, if Nasdaq's rule was already in effect, Amazon would have met the requirements of having two diverse directors. The mandate itself, however, is likely ineffective, as will be discussed below, because as seen with Amazon,[100] a company can have only two racially

93 Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 3 (Apr. 11, 2019); Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 5 (Apr. 16, 2020); Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 5 (Apr. 15, 2021).

94 Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 9 (Apr. 14, 2022).

95 *Id.* at 9.

96 *Id.*

97 *Id.*; *see also, e.g.*, Apple Inc., Definitive Proxy Statement (Schedule 14A) 1, 6, 23–28 (Jan. 6, 2022) (stating three women sit on Apple's board, 33 percent of the nine-member board).

98 *See, e.g.*, *QuickFacts*, *supra* note 43 (stating the total population in the United States where Black individuals make up 13.6 percent of the population, American Indians make up 1.3 percent, Asian individuals make up 6.3 percent, Native Hawaiians make up 0.3 percent, White individuals make up 58.9 percent, and Hispanic or Latinx make up 19.1 percent).

99 *See* Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 9 (Apr. 14, 2022).

100 Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 9 (Apr. 14, 2022) (stating Amazon's eleven-member board only included two racially diverse directors); *see* discussion *infra* Part III.

diverse directors and still meet the mandate, which does not improve diversity but only slides by it.

ii. Apple Sufficiently Disclosed Every Category of Diversity

Similar to Amazon, Apple did not disclose diversity statistics, including gender and racial or ethnical diversity, in 2019 or 2020.[101] Despite not disclosing gender diversity, at least two women sat on Apple's board out of its eight directors in 2019, exactly 25 percent,[102] and at least two women sat on its board out of its seven directors in 2020, approximately 28 percent.[103] Conversely, in 2021, a year after Nasdaq's announcement, Apple disclosed gender diversity and racial or ethnic diversity—vaguely.[104] Apple revealed that half of its directors were from underrepresented groups, without defining whether that included gender diversity.[105] While the board consisted of eight members, women made up 50 percent of the board.[106]

The following year, Apple implemented a change to its diversity disclosures, promoting more transparency.[107] Apple began disclosing gender diversity apart from racial or ethnic diversity.[108] Apple's nine-member board consisted of four directors from underrepresented communities, or 44 percent, each identifying as one of the following: Black, Asian, Latinx, or LGBTQ+.[109] Additionally, women occupied three seats on Apple's board, or 33 percent of the board.[110] Assuming that Apple's diversity statistics from 2021 included gender diversity and racial or ethnic diversity, Apple's board diversity increased to 63

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101 Apple Inc., Definitive Proxy Statement (Schedule 14A) 1, 4, 17–20 (Jan. 8, 2019); Apple Inc., Definitive Proxy Statement (Schedule 14A) 1, 4, 19–22 (Jan. 3, 2020).

102 Apple Inc., Definitive Proxy Statement (Schedule 14A) 4, 17–20 (Jan. 8, 2019); *see also* Apple Inc., Definitive Proxy Statement (Schedule 14A) 6, 23–28 (Jan. 6, 2022) (showing that two of the three directors who self-identified as women in 2022 were on the board in 2019).

103 Apple Inc., Definitive Proxy Statement (Schedule 14A) 4, 19–22 (Jan. 3, 2020); *see* Apple Inc., Definitive Proxy Statement (Schedule 14A) 6, 23–28 (Jan. 6, 2022) (showing that two of the three directors who self-identified as women in 2022 were on the board in 2020).

104 Apple Inc., Definitive Proxy Statement (Schedule 14A) 12, 24–28 (Jan. 5, 2021).

105 *Id.*

106 *Id.*

107 Apple Inc., Definitive Proxy Statement (Schedule 14A) 6, 23–28 (Jan. 6, 2022).

108 *Id.*

109 *Id.*

110 *Id.*

percent, achieving a board primarily composed of diverse directors.[111] Out of the four companies analyzed in this Comment, Apple is the only company to meet that margin. Apple is also the only company that disclosed whether any director on the board identified as LGBTQ+.[112] If Nasdaq's rule was effective, Apple exceeded the minimum requirements.

D. *Diversifying Boards Still Needs Work*

Despite the NYSE's and Nasdaq's efforts, neither initiative significantly diversified board composition. The majority of companies listed on Nasdaq would not meet the requirement of having two diverse directors because only 25 percent of listed companies had a director from an underrepresented group.[113] In 2019, Black board members possessed only 11 percent of board seats.[114] More recently, men from underrepresented groups have occupied less seats on boards as on average, "Black men lost one seat in the Fortune 100 [companies] and five seats in the Fortune 500 [companies]."[115] In 2022, examining companies in the Russell 3000 index—where 97 percent of investable companies lie—only 2 percent of directors identified as Hispanic, 6 percent identified as Black, and 5 percent identified as Asian or Pacific Islander descent.[116]

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111 *Id.*; Apple Inc., Definitive Proxy Statement (Schedule 14A) 1, 12, 24–28 (Jan. 5, 2021).

112 This is likely attributed to the fact that Apple's CEO, Tim Cook, is openly gay. *See* Laura Lorenzetti, *Apple's CEO Tim Cook Has These 7 Openly Gay Leaders to Thank*, FORTUNE (Oct. 30, 2014, 12:14 PM), https://fortune.com/2014/10/30/apples-ceo-tim-cook-has-these-7-openly-gay-leaders-to-thank.

113 Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 59–60 (2022).

114 Lee, *supra* note 43. *See, e.g.*, *QuickFacts*, *supra* note 43 (stating the total population in the United States where Black individuals make up 13.6 percent of the population, American Indians make up 1.3 percent, Asians make up 6.3 percent, Native Hawaiians make up 0.3 percent, White individuals make up 58.9 percent, and Hispanic or Latinx individuals make up 19.1 percent).

115 DELOITTE, MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 1, 6 (6th ed. 2021) [hereinafter MISSING PIECES REPORT], https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/missing-pieces-report-board-diversity.html.

116 Stan Choe, *Boards of U.S. Companies Are Still Disproportionately White, Despite Greater Overall Diversity*, PBS NEWS HOUR: NATION (May 5, 2022, 5:03 PM), https://www.pbs.org/newshour/nation/boards-of-u-s-companies-are-still-disproportionately-white-despite-greater-overall-diversity; *see, e.g.*, *QuickFacts*, *supra* note 43 (stating the total population in the United States where Black individuals make up 13.6 percent of the population, American Indians make up 1.3 percent, Asian

Gender diversity, however, has made more progress, with women holding approximately 26 percent of board seats in Fortune 500 companies and around 28 percent in Fortune 100 companies.[117] In both Fortune 100 and 500 companies, women from underrepresented groups have occupied less than 7 percent of board seats.[118] While gender diversity has increased, most reports do not include the percentage of directors who self-identify as LGBTQ+[119]—an area that needs significantly more diversity. Despite companies' efforts, a majority of directors are still White men.[120] The progress shown can likely be attributed to shareholder and government pressure.[121] The SEC has even hinted at implementing their own disclosures to promote diversity, not just within corporate boards but in senior management as a whole.[122] The NYSE's and Nasdaq's efforts, although commendable, are ineffective at meaningfully promoting diversity in the corporate world.

III. THE NYSE'S AND NASDAQ'S INEFFECTIVENESS IN PROMOTING DIVERSITY

As both the NYSE and Nasdaq attempt to tackle issues with representation on corporate boards, the problem remains and has yet to significantly improve. The BAC of the NYSE aims to diversify boards by connecting diverse candidates with companies seeking new directors.[123] Conversely, Nasdaq implemented their Board Diversity Rule.[124] Regardless of these efforts, both initiatives fall short of substantially impacting the lack of diversity in corporate boards, and senior management in general.[125]

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individuals make up 6.3 percent, Native Hawaiians make up 0.3 percent, White individuals make up 58.9 percent, and Hispanic or Latinx individuals make up 19.1 percent).

117 MISSING PIECES REPORT, *supra* note 115, at 10, 18.

118 *Id.*

119 *See* discussion *supra* Part II.C.

120 *See* Choe, *supra* note 116 ("Boards of directors . . . are much more [W]hite and much less diverse than the overall population, often starkly so.").

121 Lee, *supra* note 43.

122 Andrew Ramonas, *SEC Considering Corporate Disclosures on Diversity, Gensler Says*, BLOOMBERG L. (May 26, 2021, 5:01 PM) [hereinafter Ramonas, *SEC*], https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X8SBCIOC000000?#jcite.

123 *Board Diversity Initiative*, *supra* note 9.

124 Press Release, Nasdaq to Advance Diversity, *supra* note 16.

125 *See* discussion *supra* Part II.

This Part demonstrates the ineffectiveness of each approach. Section A explains why the NYSE's initiative fails by having no guarantee that companies seeking new directors will hire diverse candidates supported by the BAC. Additionally, the NYSE's initiative starts and stops with their BAC; its initiative only extends as far as their connections. Likewise, Section B details Nasdaq's pitfalls of its Board Diversity Rule—specifically, companies' ability to simply avoid hiring diverse directors by explaining. Furthermore, Nasdaq's mandate is also ineffective due to potential legal challenges. This Part details why both the NYSE's BAC and Nasdaq's mandate are not doing enough to promote diversity.

A. *The NYSE's BAC Lacks Affirmation and Application*

The NYSE's diversity initiative fails its goal of diversifying corporate boards. The BAC uses its personal networks to connect diverse candidates with companies seeking new board members.[126] This Part explains that by only using this initiative, there is no guarantee that companies seeking new directors will hire these candidates. Additionally, this Part details that the BAC's initiative only extends as far as their members' networks. Ultimately, the NYSE's diversity efforts rise and fall with their BAC, which limits its effectiveness in promoting diversity.

1. The NYSE's Initiative Makes No Guarantee Diverse Candidates Will Be Hired

The BAC has shared little data demonstrating that the candidates its members have endorsed have actually been hired. A year after its inception, the BAC announced that a NYSE-listed company hired its first candidate from a pool of 121 candidates nominated by members through its annual board networking summit.[127] The NYSE also shared that Dow elected one candidate to their board in 2021 through the BAC.[128] Even with these two examples, little research exists linking an increase in board diversity composition with the NYSE's BAC. Without this information, the BAC's initiative seems superficial.

While the BAC may endorse and introduce diverse board-ready candidates, there is no certainty that companies will hire them. The NYSE contends that its candidate pool consists of an upwards of three

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[126] *Board Diversity Initiative*, *supra* note 9.

[127] Liu, *supra* note 12.

[128] King, *supra* note 7.

hundred board-ready diverse individuals, while more than thirty candidates have already been hired since the BAC's inception.[129] If only approximately 10 percent of diverse candidates are actually hired, the vast majority of diverse candidates in this initiative are not receiving employment as a result of the BAC. The BAC cannot require companies to hire diverse candidates. The success of diversifying boards, therefore, solely depends on whether companies will even hire these candidates, and the data shows that they are not.[130]

Furthermore, out of the three candidates the BAC has featured, two remain featured on its website since August 2022, despite recently adding one additional new candidate to its website in 2023.[131] The short biographies given provide a snapshot of how qualified these directors are;[132] however, companies are still not hiring them. The BAC promotes candidates who are board-ready and are actively seeking employment.[133] Because the NYSE is continuing to promote these candidates, this implies that no NYSE-listed company has hired them. Therefore, in the past year and a half, two of the featured, diverse candidates promoted by the BAC are still seeking employment.

If after six months, the BAC is featuring the same board-ready candidates, it is probable that the initiative is not as effective as it claims to be. In the alternative, if the NYSE has simply not updated its website to feature other board-ready candidates, then this demonstrates that the BAC is not working diligently to ensure diverse candidates receive employment. With this major pitfall, the NYSE's diversity initiative cannot ensure that boards include more diverse representation.

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129 *Id.*

130 *See* discussion *supra* Part II.

131 *Board Diversity Initiative*, *supra* note 9 (showing Jené Elzie and Hema Nealon remain featured candidates since August 2022).

132 *Id.*

133 *Id.*

2. The NYSE's Initiative Is Limited to Its Members' Networks

The NYSE's BAC boasts twenty-seven members who are executive officers of top companies.[134] The BAC utilizes its members' personal and professional networks to connect diverse candidates with companies seeking new directors.[135] While these members are undoubtedly in a prominent position to nominate diverse candidates, the BAC itself is not equally diverse. Out of its twenty-seven members, eleven identify as women, constituting approximately 40 percent of the council.[136] Individuals from underrepresented groups make up even less of the council, upwards of only 11 percent.[137] Unfortunately,

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134 *Id.* (stating that council members are executive officers of companies including Brookdale Senior Living; Delta Air Lines, Inc.; Slack Technologies Inc.; Consolidated Edison Inc.; MSCI Inc.; Fortune Brands Home & Security; and Dow Inc., to name a few).

135 *Id.*

136 *See Lynn Martin*, INT'L EXCH., https://ir.theice.com/governance/board-of-directors-and-committee-composition/person-details/default.aspx?ItemId=ea578c4f-6720-4ba6-966c-1316256d3f35 (last visited Oct. 11. 2023) (stating that Lynn Martin identifies as a woman); *Elizabeth King*, INT'L EXCH., https://ir.theice.com/governance/board-of-directors-and-committee-composition/person-details/default.aspx?ItemId=28fcfc52-67d4-4e69-aac2-cc9f6d3134cc (last visited Oct. 11. 2023) (stating that Elizabeth King identifies as a woman); Intercontinental Exch., Inc., Definitive Proxy Statement (Schedule 14A) 1, 2, 6–9 (May 13, 2022) (stating that Duriya Farooqi and Sharon Bowen identify as women); PagerDuty, Inc., Definitive Proxy Statement (Schedule 14A) 1, 7 (Jan. 31, 2022) (stating that Jennifer Tejada identifies as a woman); The New York Times Co., Definitive Proxy Statement (Schedule 14A) 1, 21 (Apr. 27, 2022) (stating that Meredith Levien identifies as a woman); Franklin Resources, Inc., Definitive Proxy Statement (Schedule 14A) 1, 7 (Feb. 23, 2022) (stating that Jenny Johnson identifies as a woman); American Water Works Co., Definitive Proxy Statement (Schedule 14A) 1, 22 (May 11, 2022) (stating that Susan Hardwick identifies as a woman); Brookdale Senior Living Inc., Definitive Proxy Statement (Schedule 14A) 1, 8 (June 21, 2022) (stating that Lucinda Baier identifies as female); *Yie-Hsin Hung*, STATE ST., https://www.statestreet.com/pl/en/asset-owner/about/our-people/leaderships/yie-hsin-hung (last visited Oct. 25, 2023) (stating that Yie-Hsin Hung identifies as a woman); United Parcel Service, Inc., Definitive Proxy Statement (Schedule 14A) 22 (Mar. 21, 2022) (stating that Carol Tomé identifies as a woman).

137 *See* Intercontinental Exch., Inc., Definitive Proxy Statement (Schedule 14A) 1, 2, 6–9 (May 13, 2022) (stating that Duriya Farooqi and Sharon Bowen identify as racially or ethnically diverse); William Laurent, *Most Powerful Women in Finance: No. 17, Yie-Hsin Hung, New York Life Investment Management*, AM. BANKER (Oct. 5, 2022, 6:00 AM), https://www.americanbanker.com/news/most-powerful-women-in-finance-no-17-yie-hsin-hung-new-york-life-investment-management (stating that Yie-Hsin Hung identifies as an Asian woman); *see also, e.g.*, *QuickFacts*, *supra* note 43 (stating the total population in the United States where Black individuals make up 13.6 percent of the

White men dominate membership on the BAC, like the majority of public companies' boards.[138]

Additionally, only using members' networks limits the candidate pool. There are many open board positions for companies that seek diverse candidates; however, they cannot be filled by solely using the BAC's initiative. The BAC's candidate pool extends only as far as its members' professional and personal networks, which is not enough to diversify corporate boards. Lastly, by using only members' connections, the BAC fails to acknowledge qualified candidates not within these networks.

Therefore, the NYSE's initiative falls flat in creating a substantive candidate pool. The BAC fails by not having enough diverse members, by limiting its candidate pool to its members' networks, and by not impacting whether companies will hire its endorsed diverse candidates.

B. *Nasdaq's Board Diversity Rule Lacks Accountability and Legality*

Nasdaq's Board Diversity Rule does not effectively increase board representation. The new mandate requires companies to disclose their diversity statistics and have two diverse directors: one woman and one individual from an underrepresented group.[139] If a listed company does not have two diverse directors, they must explain why.[140] This Part explains that while Nasdaq's rule is arguably more effective than the NYSE's initiative because there is an affirmative disclosure requirement, it lacks commitment because companies can avoid diversifying their boards by simply explaining why they do not have two diverse directors. This Part subsequently finds Nasdaq's mandate ineffective because it is under legal scrutiny and may therefore not go into effect. Although Nasdaq's Board Diversity Rule is a tremendous effort, it falls short of being an effective long-term solution in promoting diversity in corporate boards.

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population, American Indians make up 1.3 percent, Asian individuals make up 6.3 percent, Native Hawaiians make up 0.3 percent, White individuals make up 58.9 percent, and Hispanic or Latinx individuals make up 19.1 percent).

138 *Board Diversity Initiative*, *supra* note 9; *see* discussion *supra* Part II.

139 Press Release, Nasdaq to Advance Diversity, *supra* note 16.

140 *Id.*

1. Companies Can Avoid Diversifying Their Boards by Explaining

While Nasdaq's diversity disclosures are a great first step, its Board Diversity Rule does little to successfully create representation in boards of directors. Nasdaq's mandate allows companies to explain why they do not have two diverse directors.[141] Ultimately, companies can evade diversifying their board by simply explaining. This absolves companies from taking any accountability for not meeting the bare minimum for diverse representation—one woman and one individual who identifies with an underrepresented group. Allowing companies to explain why they do not meet these requirements also implicitly removes the need to disclose board composition.

Additionally, neither Nasdaq nor the SEC will be enforcing this rule because the SEC will not assess the merits of each companies' explanation.[142] Therefore, companies can provide any explanation without fear of enforcement or scrutiny. For example, companies could explain they are using a different approach to increase diversity. The Board Diversity Rule lacks integrity and a commitment to diversity by allowing companies to evade their responsibility of diversity. Although the option of explanation is included to combat being deemed a quota,[143] which the Supreme Court views negatively,[144] the mandate does little to diversify corporate boards over time.

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141 *Id.*

142 Adediran, *supra* note 2, at 348.

143 *See* Posner, *supra* note 26 (explaining Nasdaq's president, Friedman, stated the explain element to the diversity mandate avoids the risk of being deemed a quota because companies are not required to have two diverse directors).

144 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90, 320 (1978) (holding that an admissions program that reserves sixteen spots for minorities—a quota—violated the Fourteenth Amendment).

2. The Legality of Nasdaq's Board Diversity Rule

Nasdaq's Board Diversity Rule received considerable backlash—even more so when the SEC approved its disclosure.[145] Nasdaq's mandate has incurred several legal challenges based on various laws including administrative law, securities law, and constitutional law.[146] Merely days after the SEC's approval, the Alliance for Fair Board Recruitment, a nonprofit organization, petitioned the Fifth Circuit for review of the SEC's approval of Nasdaq's Board Diversity Rule in *Alliance for Fair Board Recruitment v. SEC.*[147]

The Alliance for Fair Board Recruitment not only challenged the approval order under securities law but also under constitutional law for violating the First and Fourteenth Amendments. The Alliance for Fair Board Recruitment argued that the mandate is unconstitutional under the First Amendment for forcing companies to engage in compelled disclosure.[148] Additionally, they asserted that the mandate violates the Equal Protection Clause of the Fourteenth Amendment by using a coercive quota to require diverse directors.[149] They stated that "quotas such as these are unfair, polarizing, and illegal."[150] The Fifth

145 *See* Press Release, Nasdaq to Advance Diversity, *supra* note 16. Prior to Nasdaq's announcement of its Board Diversity Rule, California enacted several corporate laws requiring gender diversity in director seats. *See Los Angeles Country Trial Court Strikes Down Another California Board Diversity Law*, CAL. LAB. & EMP. L. BLOG (June 10, 2022) [hereinafter *California Board Diversity Law*], https://www.callaborlaw.com/entry/los-angeles-country-trial-court-strikes-down-another-california-board-diversity-law. The Alliance for Fair Board Recruitment sued the state of California for enacting these laws as a violation of the Fourteenth Amendment, among various other challenges. *See generally* Alliance for Fair Board Recruitment v. Weber, No. 21-1951 (9th Cir. filed Oct. 21, 2021). The California suit can shed light on how the challenges to the Nasdaq mandate may be resolved.

146 Ramonas, *Nasdaq Diversity Rule Challenge*, *supra* note 5; *see generally* Alliance for Fair Board Recruitment v. SEC, No. 21-60626, 2023 WL 6862856 (5th Cir. Oct. 18, 2023).

147 *See Alliance for Fair Board Recruitment*, 2023 WL 6862856, at *1; Ramonas, *Nasdaq Diversity Rule Challenge*, *supra* note 5.

148 *Id.* at *3; Alexa Rosen, *SEC Approves Nasdaq's Proposal to Increase Board Diversity*, UNIV. OF MIA. BUS. L. REV.: UMBLR INSIGHTS (Sept. 24, 2021), https://business-law-review.law.miami.edu/sec-approves-nasdaqs-proposal-increase-board-diversity; Ramonas, *Nasdaq Diversity Rule Challenge*, *supra* note 5.

149 *Alliance for Fair Board Recruitment*, 2023 WL 6862856, at *3; *California Board Diversity Law*, *supra* note 145; Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/business/corporate-board-diversity.html.

150 Andrew Ramonas, *Nasdaq to Defend Board Diversity Push After California Setbacks*, BLOOMBERG L. (Aug. 26, 2022, 5:00 AM),

Circuit held that Nasdaq, a SRO, is not a state actor and therefore not subject to the First and Fourteenth Amendments, despite being regulated by the SEC.[151] The court reasoned Nasdaq is a private entity, relying on other circuits that held "SROs registered with the SEC are private entities" and the US Supreme Court that found "a private entity does not become a state actor merely by virtue of being regulated."[152] While the Fifth Circuit ultimately denied the petition,[153] the Alliance for Fair Board Recruitment is currently seeking appeal.[154] Despite the court's decision, it remains unclear whether Nasdaq's Board Diversity Rule will become effective in December 2023 while the mandate is still the subject of legal scrutiny.

Due to the impending appeal, it is improbable for Nasdaq's diversity efforts to sufficiently translate to a more representative corporate board. Despite Nasdaq's commendable efforts, which have made a slight difference in board representation, its diversity mandate falls short of being effective because of its lack of enforcement and accountability along with continued legal scrutiny. An effective method to promote diversity in the corporate world must be constitutional and foster integrity.

C. *Stock Exchanges Must Do More for Diversity*

Ultimately, both the NYSE's and Nasdaq's diversity efforts are ineffective in efficiently promoting diversity in the corporate world. Both the NYSE's BAC and Nasdaq's Board Diversity Rule only target corporate boards, ignoring that most of the disparity in diverse

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https://www.bloomberglaw.com/bloomberglawnews (search "Nasdaq to Defend Board Diversity Push After California Setbacks" within the search bar). Other critics contend that Nasdaq's mandate is also a violation of the Civil Rights Act of 1964, in addition to the Fourteenth Amendment. DAVID R. BURTON, HERITAGE FOUND., NASDAQ'S PROPOSED BOARD-DIVERSITY RULE IS IMMORAL AND HAS NO BASIS IN ECONOMICS 3 (2021), https://www.heritage.org/civil-rights/report/nasdaqs-proposed-board-diversity-rule-immoral-and-has-no-basis-economics.

151 *Alliance for Fair Board Recruitment*, 2023 WL 6862856, at *3–4, *8, *10.

152 *Id.* at *4.

153 *Id.* at *1, *25.

154 Clara Hudson, *Nasdaq Board Diversity Opinion Appealed by Conservative Group*, BLOOMBERG L. (Oct. 25, 2023, 2:28 PM), https://news.bloomberglaw.com/esg/nasdaq-board-diversity-opinion-appealed-by-conservative-group.

representation lies within all executive positions and not just director seats.[155]

The NYSE's BAC fails by having no enforcement powers. There is no guarantee that companies will hire the diverse candidates that the BAC introduces. This initiative also does not allow for close examination because there is little data showing whether its initiative is actually diversifying corporate boards. Additionally, the BAC does not have diverse representation itself. A majority of the council is composed of White men, while women and underrepresented groups constitute less than a quarter of the BAC.[156] By using only the BAC's connections, its candidate pool is also limited.

Similarly, Nasdaq's ineffectiveness consists of no enforcement power. Neither Nasdaq nor the SEC has discussed how and who would enforce the Board Diversity Rule. Companies can simply explain why they do not have two diverse directors, which defeats the mandate's purpose. Furthermore, Nasdaq's mandate might still be subject to legal scrutiny following the Fifth Circuit's decision.[157] These shortcomings reflect the need for a new proposal that will effectively promote diversity in the future.

IV. THE NYSE AND NASDAQ SHOULD IMPLEMENT NEW METHODS TO PROMOTE DIVERSITY

The NYSE's BAC, connecting diverse candidates with companies seeking new directors,[158] and Nasdaq's Board Diversity Rule, requiring companies to disclose their diversity statistics and whether they have two diverse directors or explain why they do not,[159] falter in effectively promoting diversity. Neither initiative allows for diverse representation of all people in the corporate world at all ranks. This Part advocates for a new approach that should be implemented and enforced by both the NYSE and Nasdaq to effectively diversify the corporate sector now and in the years to come.

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155 *See* NASDAQ, WHAT COMPANIES SHOULD KNOW, *supra* note 16, at 1; *Board Diversity Initiative*, *supra* note 9; Lee, *supra* note 43.

156 *Board Diversity Initiative*, *supra* note 9.

157 *Alliance for Fair Board Recruitment*, 2023 WL 6862856, at *3–4, *8, *10; *see also* Hudson, *supra* note 154 (explaining the Alliance for Fair Board Recruitment seeks to appeal).

158 *Board Diversity Initiative*, *supra* note 9.

159 Press Release, Nasdaq to Advance Diversity, *supra* note 16.

Diversifying companies can be accomplished with corporate governance,[160] as this Comment proposes and advocates for. Section A explains that this proposal will retain an aspect of Nasdaq's diversity disclosure, which requires companies to disclose their diversity statistics in their corporate board. Section B furthers Nasdaq's Board Diversity Rule by requiring companies to have and disclose their DEI initiatives to ensure DEI programs exist. Additionally, Section C advocates for a significant enforcement provision to guarantee that companies will actively participate in promoting diversity. Moreover, Section D details that investors will favor this proposal because it discloses diversity. Lastly, Section E illustrates this proposal's constitutionality. Ultimately, both exchanges should implement these mandates to be disclosed in proxy statements to increase the number of diverse individuals in public companies.

A. *Disclose Diversity Statistics of All High-Ranking Positions*

This Comment's proposal would require all listed companies on both the NYSE and Nasdaq to disclose diversity statistics for all high-ranking positions.[161] This information would include percentages of gender diversity and underrepresented-group diversity in all upper management positions, including not just boards of directors but officers and executives. Companies should further disclose the exact numbers of directors, officers, and executives who self-identify as women, racially or ethnically diverse, LGBTQ+, or as having disabilities. While Nasdaq's diversity disclosure requirement does not include disclosing disability status,[162] this Comment's proposal would require disclosure of information regarding all underrepresented communities, not just racial or ethnic groups.

Furthermore, the definition of "racially or ethnically diverse" will extend Nasdaq's definition of "underrepresented group," which does not include individuals who self-identify as Muslim and not White.[163] The exchanges should instead define racially or ethnically diverse to

[160] *See* Hannah Geyer, *When It Comes to Board Diversity, Regulation Helps But Is No "Silver Bullet,"* HARV. L. SCH. F. ON CORP. GOVERNANCE (June 5, 2022), https://corpgov.law.harvard.edu/2022/06/05/when-it-comes-to-board-diversity-regulation-helps-but-is-no-silver-bullet.

[161] The NYSE and Nasdaq are the two most prominent stock exchanges in the United States and majority of companies are listed on these two stock exchanges. *See infra* note 184 and accompanying text. Therefore, this proposal focuses on the NYSE and Nasdaq.

[162] *See* Press Release, Nasdaq to Advance Diversity, *supra* note 16.

[163] *See id.*

include those who self-identify as Muslim, 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. Moreover, companies can have the option to disclose how many directors, officers, and executives are veterans and foreign-born, defined as anyone who was born outside of the United States.[164] This proposal seeks to disclose statistics of all underrepresented groups in the best interests of investors in addition to promoting diversity,[165] unlike Nasdaq, which seeks to require these disclosures based on the sole interest of investors.[166]

Moreover, this requirement would be more of a formality. Many companies listed on both the NYSE and Nasdaq are already disclosing diversity statistics, despite not being formally required to do so yet, by neither the exchanges nor the SEC.[167] Therefore, there would be minimal backlash to implementation because most companies are voluntarily disclosing this data. Favorably, disclosing information pertaining to all diverse groups will not just promote diversity but inclusivity by including all underrepresented groups. Requiring disclosures of diversity statistics will also be an important first step for companies because they can use this data internally to acknowledge whether they have diverse employment and can pursue their own initiatives to improve representation.

B. *Disclose the Recruitment Process and DEI Initiatives and Programs*

While there are many qualified diverse candidates seeking executive positions, unequal representation in the majority of upper management positions remains.[168] Unfortunately, studies have shown that when two candidates, one person from an underrepresented

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164 *See* CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 1, 6, 13–18 (Apr. 1, 2022) (disclosing how many directors are born outside of the United States).

165 *See QuickFacts*, *supra* note 43 (displaying percentages of all noted underrepresented groups in the United States including race, ethnicity, gender, veteran status, and foreign-born).

166 *See* Posner, *supra* note 26.

167 To view companies who are already disclosing their diversity statistics, see CVS Health Corp., Definitive Proxy Statement (Schedule 14A) 1, 6, 13–18 (Apr. 1, 2022); Walmart Inc., Definitive Proxy Statement (Schedule 14A) 1, 4, 9 (Apr. 21, 2022); Apple Inc., Definitive Proxy Statement (Schedule 14A) 1, 6, 23 (Jan. 6, 2022); Amazon.com, Inc., Definitive Proxy Statement (Schedule 14A) 1, 9 (Apr. 14, 2022); *Board of Directors*, *supra* note 86; *PepsiCo 2022 Employee Demographics*, *supra* note 86.

168 Choe, *supra* note 116 ("Boards of directors . . . are much more [W]hite and much less diverse than the overall population, often starkly so.").

group and one White individual—both with identical qualifications—apply for the same job, White individuals are more often hired over Black individuals.[169] When diverse individuals removed indications of their diversity off their application materials, they received more callbacks than those who shared their diverse information.[170] These studies show the importance of examining recruitment protocols and how efficient processes can be utilized to diversify companies. Therefore, companies should be required to disclose their recruiting methods to promote diversity.

Specifically, companies would be required to disclose their hiring criteria. Companies are already required to disclose some of directors' qualifications, including past employment, as part of the process of selecting and hiring a director.[171] Companies would also be required to disclose whether they interviewed diverse candidates and whether diverse candidates were considered for the position.[172] This requirement would also benefit investors, who are requiring diversity through transparency.[173] With this information disclosed, companies can utilize this data to improve their own hiring processes to increase the amount of diversity within their general employment.

Additionally, this proposal requires companies to disclose what DEI initiatives and programs they have implemented. Employers are

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169 *See* Dina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARV. BUS. SCH. (May 17, 2017), https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews; *see, e.g.*, *Racial Bias in Hiring Practices Widens the Black-White Wealth Disparity*, NAT'L FUND FOR WORKFORCE SOLUTIONS (Mar. 11, 2022), https://nationalfund.org/racial-bias-in-hiring-practices-widens-the-black-white-wealth-disparity (explaining that Fortune 500 companies account for approximately 50 percent of the total instances of racial discrimination in job applications); David Brancaccio et al., *New Research Shows Racial Discrimination in Hiring Is Still Happening at the Earliest Stages*, MARKETPLACE (Aug. 3, 2021), https://www.marketplace.org/2021/08/03/new-research-shows-racial-discrimination-in-hiring-is-still-happening-at-the-earliest-stages (reciting a job application study where Fortune 500 companies called back more White men and denied 10 percent of people with "Black names"); Eduardo Porter, *Who Discriminates in Hiring? A New Study Can Tell*, N.Y. TIMES (July 29, 2021), https://www.nytimes.com/2021/07/29/business/economy/hiring-racial-discrimination.html (emphasizing five companies in the Fortune 500 that are the most discriminatory against Black applicants and showing Black candidates received significantly less callbacks).

170 Gerdeman, *supra* note 169.

171 17 C.F.R. § 229.401(a) (2007).

172 *See* Rhode & Packel, *supra* note 3, at 412 (advocating for companies to disclose recruiting methods).

173 Posner, *supra* note 26; *see* discussion *infra* Part IV.D.

continuously creating DEI initiatives and programs.[174] More employers are paying attention to ESG and CSR, and more employees want to work at a place where DEI is acknowledged.[175] Despite the increasing desire to have DEI initiatives and programs, external resistance continues.[176] Florida Governor Ron DeSantis is one source of opposition, aiming to eliminate DEI programs and initiatives in schools.[177] DEI initiatives are fading out of the spotlight years after the death of George Floyd, and companies only created these programs to check a box and nothing more.[178] DEI professionals declare "[t]he honeymoon is over," while acknowledging companies "may fall back into patterns that create unhealthy or exclusive work culture " and may continue discriminatory practices.[179]

Understanding that the "George Floyd guilt" is fading, this proposal advocates for disclosing DEI initiatives and programs. Initiatives not only improve employee satisfaction but also increase companies' profits.[180] The continued requirement of having DEI initiatives will only increase company performance. This fact demonstrates why opposers of DEI initiatives, like Governor DeSantis, are wrong in believing there is no benefit. These programs acknowledge the institutional barriers placed on people from

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174 *See* RACHEL MINKIN, PEW RSCH. CTR., DIVERSITY, EQUITY AND INCLUSION IN THE WORKPLACE 4, 13–14 (2023), https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace.

175 Antoine Andrews, *4 Critical DEI Trends to Watch in 2023*, FORBES (Mar. 7, 2023, 8:00 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2023/03/07/4-critical-dei-trends-to-watch-in-2023/?sh=63b9a7d02f06.

176 Eric Shuman et al., *To Overcome Resistance to DEI, Understand What's Driving It*, HARV. BUS. REV. (Mar. 1, 2023), https://hbr.org/2023/03/to-overcome-resistance-to-dei-understand-whats-driving-it.

177 *Id.*; Anthony Izaguirre, *DeSantis Pushes Ban on Diversity Programs in State Colleges*, ASSOCIATED PRESS (Feb. 1, 2023, 10:55 AM), https://apnews.com/article/ron-desantis-florida-state-government-race-and-ethnicity-b1d847ddc5e1f136b17f254f71fd15dc.

178 Kiara Alfonseca & Max Zahn, *How Corporate America Is Slashing DEI Workers Amid Backlash to Diversity Programs*, ABC NEWS (July 7, 2023, 6:26 AM), https://abcnews.go.com/US/corporate-america-slashing-dei-workers-amid-backlash-diversity/story?id=100477952.

179 *Id.*

180 *Supreme Court's Affirmative Action in Education Ruling Leaves Employment Diversity Initiatives Untouched—for Now*, COOLEY (June 30, 2023) [hereinafter *Employment Diversity Initiatives*], https://www.cooley.com/news/insight/2023/2023-06-30-supreme-court—affirmative-action-in-education-ruling-leaves-employment-diversity-initiatives-untouched-for-now ("As EEOC Chair Charlotte A. Burrows observed in her statement, 'diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers.'").

underrepresented communities.[181] Shedding light on this aspect leads to companies' ability to confront and amend this systemic oppression in the workplace.

Moreover, this aspect of the proposal serves accountability purposes, as discussed below, because public companies will have to disclose these initiatives if they want to list on the NYSE or Nasdaq. Employees of public companies will reap the benefits of this requirement as more employees recognize the importance of DEI and want their employers to do more with DEI.[182] So while DEI initiatives are fading in some spheres,[183] the public company realm will maintain the last few years of DEI progress.

C. *Enforcement Through Listing Requirements*

In order to see a long-lasting increase in diversity, both stock exchanges would be instrumental in this approach by enforcing this proposal's requirements through listing requirements.[184] Both the NYSE's and Nasdaq's efforts fail by not having any guarantees or enforcement of their initiatives.[185] Effective changes to increase diversity require the participation of both exchanges to ensure that companies are engaging in consistent efforts to diversify their employment. Therefore, both the NYSE and Nasdaq should implement this proposal as listing requirements.

If a company wants to list its securities on a securities exchange, it must comply with that exchanges' listing requirements.[186] Over six

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181 *See* MINKIN, *supra* note 174, at 6.

182 *See id.*

183 *Id.*; Shuman et al., *supra* note 176.

184 The NYSE and Nasdaq are the largest stock exchanges in the United States with over six thousand companies listed on both exchanges. *NYSE and Nasdaq Monthly Number of Listed Companies Comparison 2018-2023, by Domicile*, STATISTA (May 22, 2023) [hereinafter *Number of Listed Companies*], https://www.statista.com/statistics/1277216/nyse-nasdaq-comparison-number-listed-companies. With this many companies listed on both exchanges, most corporations will be subject to this proposal.

185 *See* discussion *supra* Part III.

186 *Listing Standards*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/education/smallbusiness/goingpublic/listingstandards (last visited Oct. 11, 2023); *see* MAYER BROWN, SUMMARY OF DIFFERENCES BETWEEN THE NYSE AND NASDAQ LISTING STANDARDS 1, 2, 4 (2018), https://www.freewritings.law/wp-content/uploads/sites/24/2019/02/NYSE-vs-Nasdaq-Listing-Standards.pdf (stating that the NYSE and Nasdaq both require companies to have an audit and compensation committee along with implementing a code of conduct).

thousand companies are listed on either the NYSE or Nasdaq,[187] meaning most well-known companies will be subject to this proposal. This proposal calls for the NYSE and Nasdaq to require companies to disclose their diversity statistics, hiring criteria, and DEI initiatives and programs in order to be listed on these exchanges. With the NYSE and Nasdaq enforcing this proposal as a listing requirement, companies will not falter, and diversity representation will increase.

D. *Favorable to Investors*

Investors are the primary targets for disclosures because disclosure requirements are aimed at informing investors in what and who they are investing in. In the current climate, investors are calling for more diversity,[188] and they have substantially impacted the effort in promoting board diversity.[189] Investors believe that diverse boards increase diversity of thought, which improves decision-making and performance over time.[190]

This Comment's proposal is favorable to investors because investors want to know if companies' boards are diverse. By requiring companies on both the NYSE and Nasdaq to disclose their diversity statistics for all high-ranking positions, investors will easily see whether a company is worth investing in based on how diverse their executives are. Investors also want boards to look more like their employees and customers.[191] By requiring disclosures of all diverse executive positions with an inclusive definition that includes all underrepresented

[187] *Number of Listed Companies*, *supra* note 184; *NASDAQ vs. NYSE*, DIFFEN, https://www.diffen.com/difference/NASDAQ_vs_NYSE (last visited Oct. 11, 2023); *see also Stock Market Listing*, ACCA, https://www.accaglobal.com/uk/en/business-finance/types-finance/stock-market.html (last visited Oct. 26. 2023) (explaining companies want to be listed on an exchange because it raises long-term equity financing).

[188] *See* Choe, *supra* note 116 (explaining investors want diverse corporate boards because it creates a more profitable business).

[189] *See* Meghan McCarty Carino, *To Boost Gender Diversity on Corporate Boards, Investor Pressure Works*, MARKETPLACE (Nov. 23, 2022), https://www.marketplace.org/2022/11/23/to-boost-gender-diversity-on-corporate-boards-investor-pressure-works (stating the biggest investors have caused S&P 500 companies to increase their gender board diversity by 50 percent); Lydia Beyoud & Andrew Ramonas, *Nasdaq Diversity Rules Gives Investors More Tools in Proxy Fights*, BLOOMBERG L. (Aug. 10, 2021, 1:48 PM), https://www.bloomberglaw.com/bloomberglawnews (search "Nasdaq Diversity Rules Gives Investors More Tools in Proxy Fights" within the search bar).

[190] Choe, *supra* note 116.

[191] *Id.*

groups,[192] investors will see diversity throughout all high-ranking positions.[193]

Moreover, this proposal argues for disclosure of recruiting criteria and DEI programs. Investors will appreciate this transparency because they will know if a company took active measures to ensure that there is more diversity in all high-ranking positions and if business strategy incorporates DEI. Therefore, this proposal is favorable to investors because it requires disclosure of all high-ranking positions' diversity composition, hiring criteria, and DEI initiatives and programs as well as includes a complete definition of diversity.

E. *Constitutionality*

Following the Fifth Circuit's decision in *Alliance for Fair Board Recruitment*, the court determined Nasdaq is not a state actor and, therefore, not subject to the Fourteenth Amendment.[194] While the case is on appeal, this proposal still escapes the pitfalls that Nasdaq's mandate potentially succumbs to regarding its constitutionality under the Fourteenth Amendment. Despite the proposal's similarity to Nasdaq's disclosure requirements, it avoids requiring listed companies to employ a specific number of diverse persons, including all executive, officer, and director positions, and only asks for companies to disclose their diversity statistics. Moreover, because there is no quota, this proposal does not violate the Equal Protection Clause.[195]

While the Supreme Court overruled affirmative action in higher education settings—diversity cannot be used as a factor—in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[196] this decision does not impact an employer's implementation of DEI initiatives, an additional part of this proposal.[197] Therefore, despite the

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[192] *See* discussion *supra* Part IV.A.

[193] Choe, *supra* note 116 (explaining investors want companies to outperform and diversity allows them to do that).

[194] Alliance for Fair Board Recruitment v. SEC, No. 21-60626, 2023 WL 6862856, at *3, *8, *10 (5th Cir. Oct. 18, 2023). For the purposes of this analysis, this Comment argues the proposal would still be constitutional if a court later determines Nasdaq is a state actor.

[195] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978) (holding racial quotas violate the Equal Protection Clause of the Fourteenth Amendment).

[196] *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141 (2023) (holding affirmative action unconstitutional in higher education settings).

[197] Press Release, U.S. Equal Emp. Opp. Comm'n, Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action

recent decision, requiring companies to *disclose* their diversity statistics, initiatives, and whether diverse candidates were considered in the hiring process is constitutional and does not violate the Fourteenth Amendment's Equal Protection Clause.[198]

Accordingly, this proposal advocates for disclosure of diversity statistics for all high-ranking positions along with recruitment processes, such as hiring criteria and whether diverse candidates were considered for vacant positions, and DEI initiatives and programs. While the exchanges will be enforcing this proposal through their listing requirements, ultimately, companies will be willing to comply because they are already disclosing most of this information.[199] This proposal should be implemented because it formalizes the existing procedures companies are already participating in, reflects transparency, does not offend constitutional law, favors investors and companies, and looks ahead in the pursuit of continuous increases in representation of all director, officer, and executive seats.

V. CONCLUSION

While the NYSE and Nasdaq have taken two admirable but distinct approaches when confronting diversity in listed companies, both initiatives ultimately falter. The NYSE rejected mandates, and instead utilizes its BAC to connect diverse candidates with companies seeking new board members. Conversely, Nasdaq implemented its Board Diversity Rule where listed companies will disclose their board composition, and if they do not have one woman and one person from an underrepresented group, they must explain why not. The NYSE's inability to guarantee diverse candidates receive employment, instead solely relying on their members' networks—most of whom are likely not diverse—ultimately falls short of promoting diversity. Nasdaq's

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Programs (June 29, 2023), https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action ("It remains lawful for employers to implement [DEI], and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.").

[198] *Id.*; *Employment Diversity Initiatives*, *supra* note 180. *But see* Zachary M. Seward, *The US Supreme Court Is Coming for Workplace Diversity Initiatives Next*, QUARTZ (Nov. 1, 2022), https://qz.com/supreme-court-affirmative-action-workplace-diversity-1849724225 (explaining that the current Supreme Court conservative majority will target employment affirmative action next); Noah Feldman, *The Supreme Court Will Make It Harder to Hire a Diverse Team*, WASH. POST (Oct. 31, 2022, 12:30 PM), https://www.washingtonpost.com/business/the-supreme-court-will-make-it-harder-to-hire-a-diverse-team/2022/10/31/fa5d12c4-590b-11ed-bc40-b5a130f95ee7_story.html (same).

[199] *See* discussion *supra* Part II.

explain disclosure—which allows companies to avoid hiring diverse directors—and legal drawbacks demonstrate that the rule will not yield success. Undeniably, both initiatives prove ineffective in the long-term promotion of diversity.

Consequently, this Comment's proposal should be implemented by both the NYSE and Nasdaq because it requires listed companies to disclose diversity statistics concerning all upper management positions. This proposal also acknowledges all underrepresented groups, with the inclusion of Muslims in the definition of underrepresented group, and the disparity of representation in all high-ranking positions. Additionally, companies will have to disclose their hiring criteria to ensure diverse candidates are given equal opportunity. The NYSE's and Nasdaq's enforcement of this proposal will ultimately yield success because companies will have to comply in order to be publicly traded on either exchange. This proposal accounts for the long-term goal of diversifying the corporate world, and by having the exchanges enforce this proposal as a listing requirement, companies will be more proactive in increasing representation in their high-ranking positions.