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Will Nasdaq's Diversity Rules Harm Investors?

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Abstract

In December 2020, Nasdaq asked the Securities and Exchange Commission to approve new diversity rules. The aim is for most Nasdaq-listed firms to have at least one director self-identifying as female and another self-identifying as an underrepresented minority or LGBTQ+. While Nasdaq claims these rules will benefit investors, the empirical evidence provides little support for the claim that gender or ethnic diversity in the boardroom increases shareholder value. In fact, rigorous scholarship—much of it by leading female economists—suggests that increasing board diversity can actually lead to lower share prices. Adoption of Nasdaq's proposed rules would thus generate substantial risks for investors.

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JEL Classifications: G30, G34, G38, K22

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Will Nasdaq's Diversity Rules Harm Investors?

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March 31, 2021

Abstract

In December 2020, Nasdaq asked the Securities and Exchange Commission to approve new diversity rules. The aim is for most Nasdaq-listed firms to have at least one director self-identifying as female and another self-identifying as an underrepresented minority or LGBTQ+. While Nasdaq claims these rules will benefit investors, the empirical evidence provides little support for the claim that gender or ethnic diversity in the boardroom increases shareholder value. In fact, rigorous scholarship—much of it by leading female economists—suggests that increasing board diversity can actually lead to lower share prices. Adoption of Nasdaq's proposed rules would thus generate substantial risks for investors.

*Thanks to Michal Barzuza, Keith Bishop, Alex Edmans, Elisabeth de Fontenay, Joe Grundfest, Yaron Nili, and Steven Davidoff Solomon for helpful comments, and to Jake Laband for excellent research assistance. I serve on the Research Advisory Council of proxy advisor Glass Lewis, but my views here are not necessarily those of Glass Lewis. Comments are welcome and can be sent to me at jfried@law.harvard.edu.

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Introduction

COVID-19 and the terrible events of 2020, including the killing of George Floyd, have brought into sharp focus many of the ills afflicting American society—such as systemic racism and sexism. Individuals and institutions have commendably mobilized to address these stubborn problems. But some such efforts, though well-intentioned, may well generate collateral damage. A case in point: Nasdaq's proposed diversity rules.

In December 2020, Nasdaq asked the Securities and Exchange Commission (SEC) to approve new diversity rules.[1] The aim is for Nasdaq-listed firms to have at least one director self-identifying as female and another self-identifying as an underrepresented minority or LGBTQ+.[2] To avoid forced delisting, a firm must "diversify or explain": either have two such diverse directors, or say why it does not.[3] Nasdaq also wants firms to disclose *every* director's self-identified race, gender, and LGBTQ+ status.[4]

In February 2021, Nasdaq amended its proposal,[5] loosening it in various respects. Among other things, boards with five or fewer members now need (or explain why they lack) only one diverse member, not two;[6] newly-listed firms have a longer phase-in period;[7] and firms that unexpectedly lose a diverse director are given a grace period before being considered noncompliant.[8]

But Nasdaq knows that appealing to social justice is not enough; it justifies the proposed rules by claiming they will benefit investors. According to Nasdaq CEO Adena Friedman, "there are many studies that indicate that having a more diverse board…

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[1] *See* Notice of Filing of Proposed Rule Change to Adopt Listing Rule IM-5900-9 to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution to Help Advance Diversity on Company Boards, Exchange Act Release No. 34-90571, 85 Fed. Reg. 80,472 (Dec. 4, 2020) [hereinafter, "Nasdaq Proposal"], https://www.govinfo.gov/content/pkg/FR-2020-12-11/pdf/2020-27091.pdf.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Response to Comments and Notice of Filing of Amendment No. 1 of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity (File No. SR-NASDAQ-2020-081) (February 26, 2021) [hereinafter, Nasdaq Response], https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf.

[6] *Id.*, at 5.

[7] *Id.*, at 6.

[8] *Id.*

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improves the financial performance of a company."[9] Nasdaq's 271-page proposal[10] to the SEC cites numerous studies in an attempt to support this claim.

However, a close look at these studies, as well as studies that Nasdaq fails to cite, suggests that increasing board diversity may well reduce investors' returns.[11] Part I considers the studies cited by Nasdaq, showing these studies actually provide little support for the claim that gender or ethnic diversity in the boardroom increases shareholder value. Part II explains that Nasdaq curiously ignores rigorous scholarship—much of it by leading female economists—which suggest that increasing board diversity can actually lead to lower share prices.[12] Part III explains why large asset managers' support for Nasdaq's diversity proposal does not necessarily mean the proposal is good for their own investors, or for retail shareholders directly owning shares of public firms.

Of course, no academic study (or set of studies) can prove beyond doubt that Nasdaq's proposed rules will harm or benefit shareholders. Nobody has run this precise experiment before; economists will not know the effects of these rules unless they are adopted. But a fair review of the evidence suggests that Nasdaq's proposal creates real downside risks for investors—risks that Nasdaq does not honestly confront. Thus, Nasdaq's pursuit of social justice objectives may well cause collateral damage to investors.

I. The Evidence Offered by Nasdaq

For evidence of the link between diverse boards and stock returns, Nasdaq relies almost entirely on reports—prepared by consulting and financial firms for marketing purposes—that claim to find a *correlation* between the two.[13] But these reports are not

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[9] Alexander Osipovich, *Nasdaq CEO Pushes Corporate Boards to Diversify*, WALL ST. J. (Dec. 1, 2020), https://www.wsj.com/articles/nasdaq-ceo-pushes-corporate-boards-to-diversify-11606868215 (interviewing Nasdaq CEO Adena Friedman).

[10] *See* Nasdaq Stock Mkt. LLC, Filing with respect to proposed rule changes by self-regulatory organizations (Form 19b-4) (Dec. 1, 2020) [hereinafter, Nasdaq Filing], https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf.

[11] Most investors invest in the stock market, either directly or through assets managers such as BlackRock, for the primary if not exclusive purpose of generating returns to pay for retirement and other expenses. By "investors," I mean "return-seeking investors."

[12] *See, e.g.*, Renee Adams & Daniel Ferreira, *Women in the boardroom and their impact on governance and performance*, 94 J. FIN. ECON. 291 (2009); Kenneth Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. ECON. 137 (2012); Daniel Greene et al., *Do board gender quotas affect firm value? Evidence from California Senate Bill No. 826*, 60 J. CORP. FIN. (Feb. 2020), https://doi.org/10.1016/j.jcorpfin.2019.101526. All are discussed *infra* Part II.

[13] *See, e.g.*, Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/thecs-gender-3000-women-in-senior-management.pdf; McKinsey & Company, *Diversity wins: How inclusion matters* 13 (May 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-

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academic studies; rather, they are marketing materials crafted to attract paying clients, presumably those seeking to "do good while doing well."

More importantly, correlation does not imply causation. Other factors, such as firm size or industry, could explain both higher returns and a more diverse board. For example, certain industries may have a larger pool of qualified diverse director candidates, and those industries might also (for separate reasons) happen to out-perform. Or, as Deborah Rhode and Amanda Packel pointed out, more successful firms may be better able to attract female and minority candidates in high demand for board service.[14] To prove causation, sophisticated statistical techniques are needed to control for omitted variables of this kind.

On the link between diversity and shareholder value, Nasdaq cites only three sources that go beyond mere correlation. The first is a terse claim made by the Carlyle Group in marketing materials.[15] Because the data and methodology are not disclosed, and the analysis is not subject to academic peer review, the claim cannot be assessed and relied upon. The second is a 2003 academic paper[16] whose failure to adequately control for omitted variables was subsequently noted in a leading finance journal.[17] The third is a high-quality study (one good enough to be published in a top finance or economics journal) that shows a positive effect of board diversity on shareholder value.[18] But this high-quality study measures diversity as a single variable that blends together six ingredients—gender, ethnicity, age, college attended, financial expertise, and other board experience.[19] The results from this study generally hold even when any

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inclusion-matters#; Moody's Investors Service, *Gender diversity is correlated with higher ratings, but mandates pose short-term risk* 2 (Sept. 11, 2019), https://www.moodys.com/research/MoodysCorporate-board-gender-diversity-associated-with-higher-credit-ratings--PBC_1193768; Quorum, *Out Leadership's LGBT+ Board Diversity and Disclosure Guidelines* 3 (2019), http://www.insurance.ca.gov/diversity/41-ISDGBD/GBDExternal/upload/Quorum-Template-Board-Diversity-Guidelines-2019-Mar.pdf.

[14] Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 387 (2014).

[15] *See* Carlyle Group, *From Impact Investing to Investing for Impact* 5 (Feb. 24, 2020), https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf. ("Over the past three full years, the average earnings growth of Carlyle portfolio companies with two or more diverse board members has been nearly 12% per year greater than the average of companies that lack diversity After controlling for industry, fund, and vintage year, companies with diverse boards generate earnings growth that's five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth.")

[16] *See* David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003).

[17] *See* Adams & Ferreira, *supra* note x, at ___.

[18] Gennaro Bernile et al., *Board diversity, firm risk, and corporate policies*, 127 J. FIN. ECON. 588 (2018).

[19] *See* Bernile et al., *supra* note x, at 591-92.

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one of the individual components is omitted.[20] Thus, the paper cannot show that gender or ethnic diversity of the board improves financial performance.

To be sure, Nasdaq describes various studies showing that diverse boards are associated with (or in some cases, cause) better corporate governance metrics, such as increased board attendance and improved financial reporting quality.[21] But even if diverse boards cause better corporate governance outcomes, these effects matter to investors if, *and only if,* they translate into better bottom-line results: higher stock prices.

To see why, consider an investor choosing between (i) a firm that delivers a 12% return with worse board attendance and (ii) a firm that delivers a 10% return with better board attendance. The investor will obviously choose the former over the latter. Better board attendance or other desirable corporate governance outcomes (such as improved financial reporting quality) cannot, by themselves, finance one's retirement. At the end of the day, returns are what count for investors.

II. The Meaningful Evidence Ignored by Nasdaq

Nasdaq cannot cite any high-quality study showing that board gender or ethnic diversity boosts returns, because there has been none.[22] In fact, there is a sizeable body of academic work reporting the opposite result: diversifying boards can harm financial performance. Troublingly, Nasdaq fails to engage with—or even report—this evidence. I first describe this evidence (Section A) and then discuss its applicability to Nasdaq's proposed rules (Section B).

A. Ignored Evidence

High-quality academic studies suggest that board diversity can harm shareholders, but Nasdaq ignores this information.

1. Evidence that Board Diversity Impairs Firm Performance

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[20] See Bernile et al., *supra* note x, at 590.

[21] *See* Adams & Ferreira, *supra* note x, at ___ (finding that directors of gender-diverse boards have better attendance records). For a review of studies of the effect of gender diversity on corporate governance metrics, see Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L. J. 145, 662-164 (2019) (describing studies).

[22] A recently-circulated working paper claims, based on a study of the effects of gender quotas throughout Europe, that adding women to boards increases shareholder returns. *See* Olga Kuzmina and Valentina Melentyeva, *Gender diversity in corporate boards: Evidence from quota-implied discontinuities* (Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805617. If these results survive peer review at a leading finance or economics journal, this will be the first high-quality study showing that board gender diversity boosts returns.

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One of the leading papers on the effects of board diversity is a 2009 study of almost 2,000 U.S. firms by Renee Adams and Daniel Ferreira.[23] Nasdaq is obviously aware of the work: it repeatedly highlights the paper's findings that boards with female directors have better attendance records and impose greater oversight over CEOs.[24] But Nasdaq omits the paper's bottom line: "the average effect of gender diversity on firm performance is negative."[25] Why? Apparently, greater gender diversity in boards leads to excessive monitoring of executives.[26] The paper's key finding is troubling. But that does not excuse Nasdaq's failure to acknowledge it.

2. Evidence that Pressuring Boards to Diversify Harms Investors

Nasdaq also fails to note several studies demonstrating that stock returns suffer when firms are pressured to hire new directors for diversity reasons. A famous 2012 paper by Kenneth Ahern and Amy Dittmar, published in one of the world's leading economic journals, focuses on Norway's 2003 board gender law.[27] The paper shows that the law caused an immediate 3.5% decrease in the stock prices of firms without female directors; these firms' stock prices remained low, along with lower stock prices at these firms over the next few years.[28] The apparent reason: investors expected firms to replace more experienced male directors with less experienced female ones.[29]

Turning back to America, several recent papers examine California's 2018 board gender law.[30] The law required U.S.-listed firms with California headquarters to have at least one female director by the end of 2019, and at least two by the end of 2021.[31]

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[23] *See* Adams & Ferreira, *supra* note x, at ___.

[24] *See* Nasdaq Filing at 21, 28, 148-49, 155.

[25] *See* Adams & Ferreira, *supra* note x, at 291.

[26] *See id.* at 307 ("Our interpretation of the results is that gender-diverse boards appear to be tougher monitors.").

[27] *See* Ahern & Dittmar, *supra* note x.

[28] *See id.* at 139-40. *See also* D.A. Matsa and A.R. Miller, *A female style in corporate leadership? Evidence from quotas*, 5 AM. ECON. J. APP. ECON. 136, 144-48 (2013) (reporting that effect of Norway's gender rule was to reduce firm profitability). *Cf.* Eckbo et al., *Valuation Effects of Norway's Board Gender-Quota Law Revisited*, MAN. SCI. (forthcoming, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746786&download=yes (questioning the magnitude of some of these results).

[29] *See* Ahern & Dittmar, *supra* note x, at 140-41.

[30] *See* Daniel Greene et al., *supra* note x; Sunwoo Hwang et al., *Mandating Women on Boards: Evidence from the United States* (Kenan Inst. Priv. Enterprise Research Paper No. 18-34, Oct. 13, 2018), https://ssrn.com/abstract=3265783. Felix von Meyerinck et al., *As California Goes, So Goes the Nation? Board Gender Quotas and the Legislation of Non-Economic Values* (Working Paper, Oct. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303798.

[31] *See* S.B. 826, 2017-18 Regular Sess. (Cal. 2018), codified at CAL. CORP. CODE §301.3, 2115.5.

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Firms can avoid complying by paying penalties that, for a public company, are relatively modest, between $100,000 and $900,000 per year.[32] For many firms, this is less than the cost of adding an additional board member.

But California's law, like Nasdaq's proposal, publicizes noncompliance to name and shame firms into diversifying. The law's announcement caused stock prices of affected firms to drop by a market-adjusted 2.6%, with a mean value loss of $328.31 million.[33] This far exceeds the present value of potential noncompliance penalties. The paper partially attributes the decrease to the costs associated with changing boards.[34] But it could also reflect beliefs that, as prior work suggests,[35] a more diverse board can harm performance. Other papers report similar findings.[36]

Perhaps the market's reaction to the California law was wrong-headed. Maybe the California law will actually increase (or at least not reduce) shareholder value. Maybe the market was spooked by California's intervention in corporate governance, and expected worse down the road. But investors generally have strong incentives to get things right; stock price reactions to the announcements of new rules are considered highly probative of the effects of these rules on shareholder value.

Nasdaq says it "believes that the academic studies support the conclusion that board diversity does not have adverse effects on company financial performance."[37] But many studies showing a causal effect, most of which Nasdaq fails to even cite, reach the opposite conclusion.

B. Applicability to Nasdaq

The studies mentioned above cannot prove that adhering to Nasdaq's diversity target will harm investors. But they do raise a red flag.

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[32] *See* Meyerinck et al., *supra* note x, at 3.

[33] *See* Meyerinck et al., *supra* note x, at 3.

[34] To understand how the law can inflict transition costs on firms, consider a hypothetical San Diego biotech firm. Suppose each of its five male directors has a unique skill set needed to commercialize the firm's cancer drug, and the firm does not need any more directors. To satisfy California's new gender law, the firm now must replace one current director with a woman, or add an unneeded sixth board member. Substituting directors is costly, in part because the incoming director, regardless of gender, lacks the outgoing director's knowledge of the firm. Adding and paying for a superfluous sixth is also costly. Either way, the firm's investors should expect to lose from the law.

[35] *See* Adams & Ferreira, *supra* note x.

[36] *See, e.g.*, Daniel Greene et al., *supra* note x; Sunwoo Hwang et al., *supra* note x.

[37] Nasdaq Filing at 22.

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Nasdaq could argue that its proposed rules, unlike California's gender law, do not actually require a firm to change its board or pay a penalty. A firm always has the option of leaving the board unchanged and explaining why the board is insufficiently diverse. From investors' perspective, Nasdaq's rules ideally would lead to changes in boards only when increasing diversity improves—or at least does not harm—financial performance. Otherwise, boards would remain unaffected.

But can investors count on this rosy result? Not necessarily. The sharply negative stock-price reaction to California's law cannot be explained by the modest penalties imposed on non-compliant firms. But it is consistent with an expectation that directors, fearing controversy, will be improperly pressured into making board changes that harm shareholders.[38] Nasdaq's rules—including its request for every director's "diversity" status—are designed to have this same naming-and-shaming effect. Many boards will feel that explaining their lack of diversity is not actually a feasible alternative to complying. Nasdaq appears to acknowledge this intention in the title of its press release, which indicates the goal of increasing diversity rather than merely disclosing it: "Nasdaq to Advance Diversity through New Proposed Listing Requirements."[39]

The fact that Nasdaq felt compelled to modify its proposed rules in February 2021 demonstrates that explaining is often not seen as an adequate alternative for complying.[40] The modifications loosen Nasdaq's requirements by (among other things) lowering the diversity target for small boards and allowing a "cure" period for boards that unexpectedly lose a diverse member. This loosening would not be necessary if directors believed they could opt for the "explain" option when the firm inadvertently fails to meet Nasdaq's target without facing reputational damage (e.g., "we have only one diverse director because our second diverse director became ill and resigned"). The fact that Nasdaq felt pressure from firms to loosen the requirements shows that directors are eager to avoid being labelled non-compliant, even if non-compliance is easy to explain.

If investors continue to believe that pressuring firms to diversify boards is value-destroying, SEC approval of Nasdaq's diversity rules can thus be expected to cause market-adjusted declines in the share prices of affected firms.

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[38] Fear of adverse publicity can cause directors to take steps that harm shareholders. *See* Alex Edmans et al., *CEO Compensation: Evidence from the Field* 3 (working paper, 2021) (67% of directors surveyed would sacrifice shareholder value by giving CEO suboptimal compensation arrangements to avoid controversy over CEO pay).

[39] *See* Press Release, Nasdaq, *Nasdaq to Advance Diversity through New Proposed Listing Requirements* (Dec. 1, 2020), https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01.

[40] Nasdaq Response, at ___.

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III. What Can Be Inferred from Asset Managers' Support for Diversity?

In justifying its diversity proposal, Nasdaq notes that investors such as Vanguard, State Street Advisors, and BlackRock include board diversity expectations in their engagement and proxy voting guidelines.[41] Does this mean that these asset managers believe, notwithstanding the studies described above, that pressuring firms to diversify boards increases shareholder returns? Not necessarily. Return-seeking investors have different interests around these proposed rules than asset managers, particularly index fund operators. Index fund managers are likely to benefit financially from Nasdaq's diversity rules, even if they have no effect on stock prices. Why? They facilitate governance activism used to attract assets from a particular subset of market participants—socially-minded millennials and pension fund stewards. This in turn increases managers' fees.[42]

Indeed, asset managers' compensation structures may well incentivize them to engage in asset-attracting activism even when it reduces the value of firms in their portfolios. For example, an index fund operator will benefit from engaging in activism that sacrifices 1% of aggregate portfolio company value but attracts 2% more in managed assets.[43] Thus, one cannot infer from asset manager support for Nasdaq's diversity rules that the rules will benefit return-seeking investors.

Conclusion

Many individuals and institutions are mobilizing to address various social ills in America, such as systemic racism and sexism. Nasdaq's proposed diversity rules may well have desirable social effects, but we should not pretend that, conveniently, these rules will also benefit investors. High quality scholarship, including a study Nasdaq itself cites and several studies that Nasdaq ignores, tends to point in the opposite direction. If the SEC approves Nasdaq's proposed rules, do not expect investors to cheer.

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[41] Nasdaq Response, at 72.

[42] *See* Michal Barzuza et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1244 (2020) ("With fee competition exhausted and returns irrelevant for index investors, signaling a commitment to social issues is one of the few dimensions on which index funds can differentiate themselves…").

[43] For other sources of the disconnect between index fund managers and their beneficiaries, s*ee generally* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019).

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