MEMORANDUM

TO: Disability:IN

FROM: Morgan, Lewis & Bockius LLP

DATE: April 5, 2021

SUBJECT: Inclusion of People with Disabilities as Diverse Board Members

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This memorandum examines the investment case for disability diversity inclusion on corporate boards. In sum, we find that a) the disability composition of a company's board has a material and relevant impact on company performance and investors, and b) disability inclusion is critical to achieving diverse and inclusive representation across corporate America.

People with disabilities have long been recognized by Congress,[1] the courts,[2] and executive agencies[3] as a minority group that has been subjected to a history of unequal treatment and marginalization based on myths, fears, and stereotypes.

And yet, the very experiences that have resulted in exclusion from all levels of corporate America are what make people with disabilities such important assets to corporate boards. People with disabilities are regularly forced to adapt to an inaccessible world, and these experiences have sharpened their problem-solving skills and their capacity for innovation; they are a large untapped labor force market due to inaccurate assumptions about their abilities; they represent

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[1] *See*, *e.g*., 42 U.S.C §12101(a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and. . . such forms of discrimination continue to be a serious and pervasive social problem."); *Id.* at §12101(a)(notes) ("[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.")

[2] *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 516 (2004) ("[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." (quoting original text of 42 U.S.C. § 12101(a)(7)); *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 ("The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from archaic attitudes and laws and from the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.") (internal citations and quotations omitted).

[3] *See*, *e.g.*, 29 CFR Part 1630 (App'x) ("[D]iscrimination against individuals with disabilities continues to be a serious and pervasive social problem and that the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.") (internal citations omitted).

a significant consumer population; and they bring different perspectives that are not normally considered at the board level.

Companies with a disability-inclusive board are thus better positioned to execute responsible governance, effective risk management, and optimal decision-making, as well as enhanced customer alignment, employee engagement, and transparency, as compared to those without disability representation on their boards. Therefore, disability diversity data should be included in the disclosure framework and the representation component of any board diversity guidance, including the Nasdaq Stock Market LLC's ("Nasdaq's") proposed listing rules.

I. Information Regarding Inclusion of Persons with Disabilities is Material

Corporate securities laws and disclosure requirements are centered on the concept of "materiality." Essentially, information is "material" if its disclosure would be viewed by a reasonable investor as significantly altering the total information made available. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011). Information regarding whether a company's board has directors with disabilities is material because investors care about disability inclusion and there are strategic and financial benefits of having persons with disabilities in decision-making positions.[4]

There is a compelling body of credible research on the association between financial performance and disability inclusion.[5] Over the years, several academic and practitioner studies have been conducted that analyze – and demonstrate – the performance advantage of diversity, inclusive of gender, race, and disability, in the context of corporate boards and senior leadership teams. These studies underscore the fact that companies with enhanced diversity attributes, including disability, are better positioned to reap financial and operational benefits for their investors.

A. Investors Care About Disability Inclusion and Demonstrated Support for Such Inclusion May Impact Investor Decision-Making

Many investors take disability inclusion into account based on economic justifications, as well as diversity concerns, based on public comments and diversity information provided in their disclosures. As demonstrated by the comments on Nasdaq's proposed rule and diversity policies, investors and investor-focused organizations find director disability information important. These comments and policies alone indicate that real investors in the marketplace find this

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[4] *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc*., 873 F.3d 85, 151 (2d Cir. 2017) ("Materiality casts a net sufficiently wide to encompass every fact that would significantly alter the total mix of information that a reasonable investor would consider in making an investment decision.") (emphasis added); *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 308 (S.D.N.Y. 2010) ("Material facts include those "which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." They include any fact "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities." (emphasis added)); *see also Appert v. Morgan Stanley Dean Witter, Inc*., 673 F.3d 609, 616 (7th Cir. 2012) ("The "reasonable investor" standard ensures that investors have access to information important to their investment decisions.")

[5] *See infra* Section I.B.

information important and material. Below is a sampling of several investor statements about the Nasdaq proposed rule urging Nasdaq to include disability in the definition of "diverse" or stressing the importance of diversity policies that are inclusive of disability:

- "I believe the Proposal ***could be improved by including other categories of diversity, such as persons with disabilities***." – Thomas P. DiNapoli, New York State Comptroller[6]

- "In Section B. 9. Board Talent Assessment and Diversity, our Principles emphasize that diversity should be thought of in terms of skill sets, gender, age, nationality, race, sexual orientation, gender identity, ***disability***, and historically under-represented groups." – Marcie Frost, CEO CalPERS[7]

- "We believe that diversity is critical in order for the board to properly oversee management, business strategy and risk mitigation. Diversity encompasses, but is not limited to, gender, race, ethnicity, sexual orientation, ***and disability status***." – Jay Huish, San Francisco Employee Retirement System[8]

Recently, a chorus of investors with over $2.8 trillion in assets under management– including companies such as Bank of America, Voya Financial, and TD Bank – signed a joint letter emphasizing the importance of disability inclusion.[9] This group stated that "we seek to encourage our portfolio companies to capitalize on the opportunities of disability inclusion." They further recommended, among other things, that companies: (1) use third-party benchmarking indices to analyze their disability inclusion policies, (2) ensure their Diversity & Inclusion statement specifically mentions people with disabilities, and (3) establish a public, company-wide hiring goal for people with disabilities and measure progress on achieving that goal. Additionally, investors in the United States have adopted proxy voting guidelines with an emphasis on increasing the inclusion of persons with disabilities within companies.[10]

We note that this would not be the first proposed regulation to include people with disabilities. For example, the Canada Business Corporations Act (CBCA) and its implementing regulations recognize the importance of disability inclusion and, since January 1, 2020, require federally

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[6] *See* Letter from Thomas P. DiNapoli to Secretary Vanessa Countryman, Securities and Exchange Commission, Dec. 30, 2020.

[7] *See* Letter from Marcie Frost to Secretary Vanessa Countryman, Securities and Exchange Commission, Dec. 31, 2020.

[8] *See* Letter from Jay Huish to Secretary Vanessa Countryman, Securities and Exchange Commission, Dec. 30, 2020.

[9] Joint Investor Statement on Corporate Disability Inclusion, https://disabilityin-bulk.s3.amazonaws.com/2020/InvestorStatement_DisabilityInclusion_final.pdf.

[10] *See, e.g.,* Massachusetts Pension Reserves Investment Management proxy voting guidelines, https://www.masstreasury.org/single-post/2020/03/10/prim-board-approves-treasurer-goldbergs-proposed-proxy-voting-guidelines-increasing-board; ClearBridge Investments, "ESG Investment Proxy Voting Guidelines" at 3 https://www.clearbridge.com/content/dam/clearbridge/esg-education/pdf/esg-proxy-guidelines-2016.pdf. New York State Common Retirement Fund, "Proxy Voting Guidelines 2020" at 7, https://www.osc.state.ny.us/files/common-retirement-fund/corporate-governance/pdf/proxy-voting-guidelines-2020.pdf.

incorporated companies to disclose the number and percentage of board seats and senior management positions occupied by four designated groups: women, Indigenous Peoples, **persons with disabilities** and members of visible minorities.[11] CBCA corporations listed on the Toronto Stock Exchange and other exchanges must abide by this requirement. According to a 2020 study of CBCA disclosures from 270 companies, just six of 2,023 board positions at those companies (less than 0.3%) were held by persons with disabilities.[12]

Investors care about disability inclusion because it is critical to achieving a holistic approach to environmental, social, and governance ("ESG") criteria, as disabilities cut across virtually every "S" issue in ESG. Disability inclusion is a powerful tool to create lasting value in companies and perhaps more importantly, across society. As a 2018 KPMG report noted, "[D]isability is board business. It affects every single aspect of your organisation. In fact, it affects approximately 1 billion people worldwide; 15% of the total population."[13] Disability inclusion is a business imperative. Companies that seize upon that imperative have a brand, reputation, and bottom-line advantage over their peers. They also are better able to create lasting value for society than companies that fail to embrace disability inclusion. Simply put, disability inclusion is increasingly important to investors' and organizations' decision-making.

B. Disability Inclusion at the Board Level Yields Material Benefits

Investor interest in disability inclusion is justified based on studies that have found that companies that are more inclusive of persons with disabilities perform better financially in material ways. Under federal securities laws, "materiality" in terms of financial impact is not defined as a clear-cut percentage or amount, but in practice financial impacts as low as 5% have been found to be material in the financial statement context.[14] Under this rule of thumb, the financial impact of transparency relating to board member disability status is clearly material.

Studies conducted by Accenture in 2018 and 2020 found that companies that engaged in more disability inclusion best practices created more profit and long-term value than companies that

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[11] R.S.C., 1985, c. C-44, 172.1 (1), https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/rsc-1985-c-c-44.html; Canada Business Corporations Regulations, 2001, SOR/2001-512, § 72.2(4)(h), (i), http://canlii.ca/t/547g3; *see also* Employment Equity Act, SC 1995, c. 44, https://canlii.ca/t/54wgf. Canada adopted these regulations to "improve shareholder democracy, and drive shareholder value through better transparency." Innovation, Science and Economic Development Canada, *Diversity disclosure for boards of directors and senior management comes into force*, last modified July 18, 2019, https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs08317.html. Notably, these regulations were established by the government, not by a stock exchange.

[12] Osler, Diversity Disclosure Practices 2020: Diversity and Leadership at Canadian Public Companies, https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf.

[13] *See* KPMG (UK) Leading from the Front: Disability and the Role of the Board, at 5 https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/05/leading-from-the-front-disability-and-the-role-of-the-board.pdf.

[14] *See IBEW Local Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 390 (2d Cir. 2015) (citing Staff Accounting Bulletin (SAB') No. 99 ("The SEC's Staff Accounting Bulletin ("SAB") No. 99 provides that a misstatement related to less than 5% of a financial statement carries the preliminary assumption of immateriality. *See* 64 Fed.Reg. 45150, 45151 (Aug. 19, 1999).").

maintained fewer of these practices.[15] The 2018 report found that over a four-year period these disability inclusion "Champions" had "28% higher revenue, double the net income and 30% higher economic profit margins."[16] The 2020 study found that organizations focused on disability engagement grew sales 2.9 times faster and profits 4.1 times faster than their peers.[17] Moreover, companies that improved their inclusion of persons with disabilities over time were four times more likely than others to have total shareholder returns that outperformed those of their peer group.[18]

The purchasing power of people with disabilities is also significant. According to a 2018 study by the American Institutes for Research, the "total after-tax disposable income for working age people with disabilities is about $490 billion."[19] Further, NielsenIQ noted in 2016 that 35% of survey respondent households had at least one household member with a disability and "[t]his prevalent consumer segment deliver[ed] a considerable annual spend."[20] Access to talent is enhanced as well. Accenture found that if companies embraced disability inclusion, they would gain access to a new talent pool of 10.7 million people.[21]

Additionally, the Center for Talent Innovation found that 75% of employees with disabilities in the United States have ideas that would drive value for their companies – compared with 61% of employees without disabilities.[22] As Nasdaq points out, "increased diversity reduces groupthink and leads to robust dialogue and better decision making."[23] The potential value created by

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15 Accenture, Getting to Equal: The Disability Inclusion Advantage, https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf; Accenture, Getting to Equal 2020: Disability Inclusion, https://www.accenture.com/_acnmedia/PDF-142/Accenture-Enabling-Change-Getting-Equal-2020-Disability-Inclusion-Report.pdf.

16 Accenture, Getting to Equal: The Disability Inclusion Advantage, n.14 at 6.

17 Accenture, Getting to Equal 2020: Disability Inclusion, n. 14 at 15.

18 Accenture, Getting to Equal: The Disability Inclusion Advantage, n. 14 at 7.

19 Michelle Yin, et al., "A Hidden Market: The Purchasing Power of Working Age Adults With Disabilities," April 2018, at 7, cited in *Solving"ThenWhat?": Empowering Investors to Achieve Competitive, IntegratedEmployment for Persons with Disabilities*, The Harkin Institute for Public Policy & Citizen Engagement (Jan. 2021), at 12.

20 NielsenIQ, Reaching Prevalent, Diverse Consumers with Disabilities, https://www.accenture.com/_acnmedia/PDF-142/Accenture-Enabling-Change-Getting-Equal-2020-Disability-Inclusion-Report.pdf.

21 Yin, n.18 at 5. KPMG found that "[g]rowing the proportion of disabled people on boards can only help organisations to focus on how they can become more inclusive as employers and in the delivery of their products and services." *See* KPMG (UK) Leading from the Front: Disability and the Role of the Board, at 30, https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/05/leading-from-the-front-disability-and-the-role-of-the-board.pdf.

22 Center for Talent & Innovation, Disability and Inclusion – US Findings, https://coqual.org/wp-content/uploads/2020/09/CoqualDisabilitiesInclusion_KeyFindings090720.pdf.

23 Nasdaq proposed rule at p. 29. Nasdaq cites Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1391 (June 2002) ("[H]eterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences."); Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies* (March 6, 2017), https://ssrn.com/abstract=2733394 ("[D]iversity in the board of directors reduces stock return volatility, which is

directors with disabilities with innovative and different ideas is critical for a company's success and, likewise, material to investors.

Despite Accenture's and others' persuasive findings, Nasdaq has suggested that there is a "dearth" of academic research with respect to the financial benefits directly related to having persons with disabilities on boards.[24] But adding disability to the definition of diversity should be dependent on the strength of the case for its importance to investors, not on the number of research studies. For example, LGBTQ+ persons are appropriately included in the definition of "diversity" because, as Nasdaq correctly observed, many of the reasons that gender diversity is considered beneficial are also applicable to LGBTQ+ diversity.[25] We would posit that the same is true for disability diversity.

Moreover, the lack of data regarding both groups is unsurprising given the stigma both groups have historically faced and the resulting decision by many to "hide." Just as LGBTQ+ individuals have long chosen not to "come out," many people with "invisible" disabilities, such as psychiatric illness, epilepsy, HIV infection, and early manifestations of multiple sclerosis, Parkinson's disease, and rheumatoid arthritis, among others, have chosen not to disclose their disabilities so as to avoid facing discrimination. It is only by recognizing the value these perspectives bring that we will be able to reduce the stigma that has been associated with LGBTQ+ status and disability.

Further, not including people with disabilities under the definition of "diversity" ignores the relevant research that does exist, such as the studies mentioned above, and compounds the invisibility of people with disabilities. Indeed, without required disclosure of people with disabilities on boards, it will continue to be difficult to examine the potential effects of disability inclusion at the board level.

II. Defining "Disability" for the Purposes of Board Diversity

In Nasdaq's February 26, 2020 supplemental comments to the Securities and Exchange Commission (the "SEC"), it addressed the fact that a number of commenters had requested that disability be included in the definition of "diverse" for the proposed rule. Nasdaq stated that it had considered this option when it constructed the proposal and when it reviewed the

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consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with 'groupthink.'")

[24] *See* NASDAQ Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity at 82 ("Nasdaq's review of academic research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities.").

[25] Nasdaq included two studies in its proposed rule regarding the investment value of including LGBTQ+ people on boards. See *id.* at 19 (citing Credit Suisse ESG Research, LGBT: the value of diversity 1 (Apr. 15, 2016), https://plus.credit-suisse.com/rpc4/ravDocView?docid=QYuHK2 (discussing the impact of LGBT employees on corporate performance); 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 (discussing board composition in relation to the LGBTQ+ community); see also supra n. 1, 8, 10.

comments, but had chosen not to do so because it would result in "inconsistent and noncomparable data across companies."[26]

Nasdaq's concern was that when too many categories are part of the definition of diversity, and companies are permitted to define which of those categories should be counted as part of diversity, "diversity disclosures become inconsistent, confusing, and potentially misleading."[27]

In considering this issue, Nasdaq had looked at all the categories in the SEC staff's Compliance & Disclosure Interpretations ("C&DIs") for companies to consider for purposes of providing disclosure of a director's or director nominee's self- identified diverse attributes under Items 401 and 407 of Regulation S-K. These categories included not only race, gender, ethnicity, and sexual orientation, but also religion, nationality, disability, cultural background, diverse work experiences, military service, or socio-economic or demographic characteristics.[28] Companies were then permitted to pick among these categories in defining diversity resulting in the inconsistent and noncomparable data across companies that Nasdaq's proposed rule was designed to rectify.[29]

Nasdaq's concern is valid. However, adding just disability to the list of diverse characteristics does not create the problem envisioned by Nasdaq, as long as disability is clearly defined in the rule.

Unlike other characteristics listed in the proposal, "disability" has a range of definitions in federal laws and regulations designed to meet the particular goals of those statutes and regulations. Thus, it is essential that the rule adopt a definition of disability that is appropriate for carrying out the objectives of this particular rule.[30]

The best definition for that purpose is the first prong of the definition of "disability" under the Americans with Disabilities Act of 1990 (ADA): "a physical or mental impairment that substantially limits one or more major life activities of such individual."[31] This definition covers people with the full range of physical and mental conditions, including those with manifest disabilities (for example, being blind or deaf, having cerebral palsy, being a little person, or using a wheelchair),

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[26] Nasdaq Supplemental Comments to the Securities and Exchange Commission, at 14. https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf.
[27] *Id*., citing comments of Professor Lisa M. Fairfax.
[28] Supplemental Rule at p. 14, citing SEC C&DI 116.11 and 133.13.https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#116-11
[29] *Id*., citing its Proposal at 80,493
[30] Definitions of disability vary based on the purpose of a statute, rule or program. For example, to receive Social Security disability benefits, a person must have an impairment that prevents that individual from being able to work in a job or business (20 C.F.R. § 404.1505); to receive vocational rehabilitation services, a person must have a type of impairment that will benefit from rehabilitation services (34 C.F.R. § 371.6); and to be counted as a person with a disability for purposes of Census data collection, a person must have significant sensory, physical, or mental limitations, or have difficulties with activities of daily living. *See* U.S. Census Bureau official website page "How Disability Data are Collected from The American Community Survey" (https://www.census.gov/topics/health/disability/guidance/data-collection-acs.html).
[31] 42 U.S.C. § 12102(A). The statutory definition of 'disability' under the ADA also includes "a record of such an impairment" or being "regarded as having such an impairment." 42 U.S.C. § 12102(B) and (C). For purposes of this proposal, we recommend that the Nasdaq adopt only the first prong of the ADA definition of "disability."

to significant physical or mental conditions such as epilepsy, missing limbs, schizophrenia and bipolar disorder, to having conditions that range from minor to debilitating, such as post-polio syndrome, scoliosis, spina bifida, cancer, depression, and anxiety disorder.

Congress was quite intentional when it created this inclusive definition of disability in the ADA in 1990. It recognized that people with disabilities have historically been denied access to education, transportation, public accommodations and employment because of their physical or mental impairments.[32] Congress doubled down on this intent when it enacted the ADA Amendments Act of 2008 to reverse court decisions that had narrowed the definition of "disability" and to reaffirm that people with disabilities are entitled to broad civil rights protections, just like other under-represented groups that have been the target of discrimination.[33]

Given the history of marginalization and segregation of people with disabilities, especially at all levels in corporate America, we recommend that Nasdaq include in its definition of "diverse" people who self-identify as people with disabilities within the meaning of the ADA. Investors will want to know if board candidates/members self-identify this way, as that will suggest that they bring unique perspectives not normally represented in the boardroom, would increase financial performance by attracting new employees and customers, and would improve decision-making across the board. Further, by placing an emphasis on disability inclusion in the boardroom, Nasdaq will help foster opportunities for individuals who for too long have been denied such opportunities based not on their abilities, but upon negative societal perceptions. Finally, incentivizing board members and candidates to self-identify as people with disabilities will go a long way toward reducing the stigma commonly associated with such self-identification.

To the extent there is a concern that by adopting a broad definition of "disability," existing board members may come "out of the woodwork" and self-disclose their disabilities, this is something to be applauded, rather than feared. "Coming out" as a person with a disability is as important for disability inclusion as "coming out" as an LGBTQ+ person is for LGBTQ+ inclusion. While there might be a concern that a large number of people could self-identify as people with disabilities under the ADA definition, thus resulting in companies choosing to meet their representation goals by finding a board member with an ADA-covered disability rather than another diverse characteristic, this is quite speculative.[34]

First, it is not easy to self-disclose as a person with a disability and to identify oneself as a member of the disability community. That is precisely why creating an incentive to do so is important. Second, the compelling societal reasons to expand the diversity of boards along racial and ethnic lines will continue to shape efforts with regard to board membership, even if a company could conceivably meet its obligations by seeking out a person with an ADA-covered disability. Finally,

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[32] 42 U.S.C. § 12101(a)(2). *See also* n.1, *supra*.

[33] See Chai Feldblum, et al., *The ADA Amendments Act of 2008*, 13 Tex. J. C.L. & C.R. 187-240 (2008)(describing passage of the law and the importance of the broad definition of "disability").

[34] See n.13, supra (according to a 2020 study of CBCA disclosures from 270 companies, just six of 2,023 board positions at those companies (less than 0.3%) were held by persons with disabilities).

many people with disabilities are women and racial and ethnic minorities. Requiring disability representation on a board is not limited to white men with disabilities, but rather is inclusive of a number of under-represented groups.

We note that a number of non-profit organizations representing women, racial and ethnic minorities, and LGBTQ+ individuals support inclusion of people with disabilities within the meaning of "diverse" in the proposed Nasdaq rule. As one coalition of organizations explained, "[d]isregarding this community in [the] definition of diversity further hinders the progress we have collectively worked to bring underserved communities the recognition they deserve." [35]

III. Closing Comments

Disability diversity should be included in the data disclosure and the representation component of any board diversity rules, including Nasdaq's proposed rule. By not including persons with disabilities within the definition of "diverse," a conscious choice is being made to provide investors with less information that could be material to their investing decisions, and the exclusion of persons with disabilities from corporate boards may be perpetuated. These results are easily avoided by being disability-inclusive in board diversity rules.

[35] *See* Letter from NGLCC, NaVOBA, Out & Equal, WIPP, USHCC, USPAACC, and USBC to Secretary Vanessa Countryman, Securities and Exchange Commission, April 2, 2021; Letter from Wade Henderson and LaShawn Warren, The Leadership Conference on Civil and Human Rights, to Secretary Vanessa Countryman, Securities and Exchange Commission, April 6, 2021