

Morgan Lewis

MEMORANDUM

TO: Disability:IN
FROM: Morgan, Lewis & Bockius LLP
DATE: December 19, 2023
SUBJECT: Inclusion of People with Disabilities as Diverse Board Members

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 agencies³ 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

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))); *Sch. Bd. of Nassau Cnty. 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 C.F.R. pt. 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).

untapped labor force market due to inaccurate assumptions about their abilities; they represent a significant consumer population; and they bring different perspectives that are not normally considered at the board level. Recent studies further support that companies at the forefront of disability inclusion in their business models and in their boardrooms see increased revenue, net income, and profits.

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 Securities and Exchange Commission's ("SEC's") proposed diversity disclosure rules.

I. Information Regarding Inclusion of Persons with Disabilities 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 emerged 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, stemming from public comments and diversity information provided in

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.

company disclosures. As demonstrated by various public comments on diversity-reporting rules and policies, including the proposed version of Nasdaq’s reporting rule, investors and investor-focused organizations find director disability information important. These comments and policies alone indicate that real investors in the marketplace find this information important and material. Below is a sampling of several investor statements advocating for disability inclusion in corporate disclosure and governance statements or stressing the importance of diversity policies that are inclusive of disability (emphasis added):

- “[C]ompared to companies with no disability representation on their boards, those with **disability-inclusive boards are better equipped** to govern responsibly, manage risk effectively, make sound decisions, align with customers, engage employees, and be transparent.” – Thomas P. DiNapoli, New York State Comptroller⁶
- “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 CalPERS⁷
- “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 System⁸

In 2022, 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 – also 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.”¹⁰ They further recommended, among other things, that companies (1) use third-party benchmarking indices to analyze their disability inclusion policies, (2) ensure their Diversity and 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.¹¹ Additionally, investors in the United States have adopted proxy voting guidelines with an emphasis on increasing the inclusion of persons with disabilities within companies.¹²

⁶ Letter from Thomas P. DiNapoli to Satya Nadella, Chairman and CEO of Microsoft Corp., Sept. 25, 2023, at 1 (on file with Disability:IN).

⁷ Letter from Marcie Frost to Vanessa Countryman, Sec’y SEC, Dec. 31, 2020 (on file with Disability:IN).

⁸ Letter from Jay Huish to Vanessa Countryman, Sec’y SEC, Dec. 30, 2020 (on file with Disability:IN).

⁹ Joint Investor Statement on Corporate Disability Inclusion (Mar. 18, 2022), https://disabilityin-bulk.s3.amazonaws.com/2020/InvestorStatement_DisabilityInclusion_final.pdf.

¹⁰ *Id.*

¹¹ *Id.*

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 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.¹³ 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.¹⁴ That number has doubled over the past three years.¹⁵ The United Kingdom also requires disclosure of persons with disabilities in corporate board diversity statements of public companies.¹⁶

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.”¹⁷ 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

¹² See, e.g., Massachusetts Pension Reserves Investment Management Proxy Voting Guidelines (Mar. 10, 2020), <https://www.masstresury.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://web.archive.org/web/20220119005138/https://www.osc.state.ny.us/files/common-retirement-fund/corporate-governance/pdf/proxy-voting-guidelines-2020.pdf>.

¹³ 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), <https://www.canlii.org/en/ca/laws/regu/sor-2001-512/latest/sor-2001-512.html>; 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://web.archive.org/web/20210615105047/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.

¹⁴ 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>.

¹⁵ Osler, Diversity Disclosure Practices 2023: Diversity and Leadership at Canadian Public Companies, at 41, <https://www.osler.com/osler/media/Osler/reports/corporate-governance/Osler-Diversity-Disclosure-Practices-report-2023.pdf> (in a 2023 updated study of CBCA disclosures from 253 companies, twelve board positions at those companies (0.7%) were held by persons with disabilities).

¹⁶ Thomson Reuters Foundation & Disability:IN, Global Boardroom Diversity: Legal Findings on Disability & Diversity, <https://disabilityin-bulk.s3.amazonaws.com/2023/TRF+DisabilityIN+ENE+508.pdf>.

¹⁷ 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>.

companies that fail to embrace disability inclusion. Simply put, disability inclusion is increasingly important to investors' and organizations' decision-making.

B. Market Participants Care About Disability Inclusion But Federal Regulations Are Needed to Standardize Efforts

Investors are not alone in their commitment to disability inclusion. Perhaps fueling their interest is the support for this effort exhibited by a large swath of market participants. In recent years – amidst increased national and global scrutiny over DEI efforts – disability inclusion continues to receive bipartisan support in business.

For example, in 2023, 485 global companies participated in the Disability Equality Index, an independent third-party benchmark for tracking disability inclusion policies and programs.¹⁸ From that report, companies disclosed several efforts that they have employed to build more inclusive work cultures, such as establishing a disability-focused Employee Resource Group, including disability-focused information in new hire orientation, offering flexible work options and extended mental health and wellness benefits, and employing confidential self-identification initiatives.¹⁹

Additionally, a handful of companies are already including disability in governing documents, and an SEC requirement for widespread disclosure would expand this initiative. Disability:IN has uncovered that “only 2.5% of [U.S.] companies mention people with disabilities in documents that govern the nomination of directors.”²⁰ Another report by Disability:IN and the Thomson Reuters Foundation similarly revealed that few countries mandate diversity disclosure on corporate boards, and even fewer of those countries – just Canada and the United Kingdom – specifically require disclosure regarding disability status on corporate boards.²¹ This research indicates that companies need incentives to track and disclose boardroom disability inclusion practices and efforts, a role that the proposed SEC rule could play.

The research also shows that such disclosure and initiatives are possible to implement. In fact, Disability:IN's report on U.S. companies' director nomination governance documents included model language from those documents to assist companies in crafting disability inclusion provisions of their own.²² Companies that voluntarily report on disability inclusion in their 10-K statements per the company's own sustainability principles haven't risen since 2020 when the SEC required human capital overviews in filings.²³

¹⁸ Am. Ass'n of People with Disabilities & Disability:IN, Disability Equality Index 2023, at 1, 6, https://disabilityin-bulk.s3.amazonaws.com/DEI+2023+Report_Final+508.pdf.

¹⁹ *Id.* at 9.

²⁰ Disability:IN, Boards are IN: Modernizing the Corporate Board to Include People with Disabilities, at 1, <https://disabilityin-bulk.s3.amazonaws.com/Nom+Gov+Model+Language+DisabilityIN+508.pdf>.

²¹ Thomson Reuters Foundation & Disability:IN, Global Boardroom Diversity: Legal Findings on Disability & Diversity.

²² Disability:IN, Boards are IN: Modernizing the Corporate Board to Include People with Disabilities, at 2-3.

²³ Accenture, The Disability Inclusion Imperative 2023, at 35.

Finally, public opinion favors disability inclusion. In recent years, disability rights attorney and advocate Ted Kennedy Jr., who also serves as immediate past chair of the Board of the American Association of People with Disabilities, has penned op-eds in the *New York Times*, the *Wall Street Journal*, and the *New Haven Register* making the case for disability inclusion on corporate boards.²⁴ Nonprofit organizations similarly align on this issue. In April 2021, the Leadership Conference on Civil and Human Rights, a coalition of more than 220 national advocacy organizations, wrote to the SEC in support of disability inclusion in board disclosure requirements.²⁵ Representatives of Disability:IN have also shared the disability inclusion mission at conferences and events worldwide, including at the ESG Investment North America conference, the Directors & Boards Annual Conference, and the Thirty Percent Coalition annual meeting, all in 2023.

In the past, the SEC has foregone an opportunity to include people with disabilities in the meaning of “diverse” in the ratification of a Nasdaq board diversity requirement rule.²⁶ Now, with the knowledge gained three years later, the Commission has the chance to do right by moving in line with investor interest, strong corporate governance, and public policy through ratification of the proposed rule.

C. 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.²⁷ Under this rule of thumb, the financial impact of transparency relating to board member disability status is clearly material.

Research has long suggested that corporations with diverse leadership teams, including those that differ in gender, race, and disability status, enjoy performance advantages.²⁸ However,

²⁴ See Ted Kennedy Jr., *Recognizing the Value of Disabled Workers*, THE WALL STREET JOURNAL, Feb. 5, 2019, <https://www.wsj.com/articles/recognizing-the-value-of-disabled-workers-11549321435>; Ted Kennedy Jr., *Hiring People with Disabilities Is Good Business*, N.Y. TIMES, Dec. 27, 2018, <https://www.nytimes.com/2018/12/27/opinion/disability-rights-employment.html>; Ted Kennedy Jr., *Sen. Ted Kennedy Jr.: Towards a More Inclusive Society*, NEW HAVEN REGISTER, July 10, 2017, <https://www.nhregister.com/opinion/article/Sen-Ted-Kennedy-Jr-Towards-a-more-inclusive-11308708.php>.

²⁵ Letter from The Leadership Conference on Civil and Human Rights to Vanessa Countryman, Sec’y SEC (Apr. 6, 2021), [https://disabilityin-bulk.s3.amazonaws.com/2021/SEC Comment on Corporate Diversity+508.pdf](https://disabilityin-bulk.s3.amazonaws.com/2021/SEC%20Comment%20on%20Corporate%20Diversity+508.pdf).

²⁶ Disability:IN, *Nasdaq’s New Board Diversity Reporting Rule Is a Missed Opportunity for People with Disabilities* (Aug. 6, 2021), <https://disabilityin.org/releases/nasdaqs-new-board-diversity-reporting-rule-is-a-missed-opportunity-for-people-with-disabilities/>.

²⁷ 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 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).”)).

²⁸ See generally McKinsey & Co., *Diversity Wins: How Inclusion Matters*, <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf>.

findings focused specifically on the corporate benefits of including persons with disabilities are particularly striking. Studies conducted by Accenture in 2018, 2020, and 2023 found that companies that engaged in more disability inclusion best practices created more profit and long-term value than companies that maintained fewer of these practices.²⁹ 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.”³⁰ 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.³¹ 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.³² This pattern only continued in 2023, with organizations leading on disability inclusion criteria showing 1.6 times more revenue, 2.6 times more net income, and 2 times more economic profit than peer companies.³³ These “Leaders” in the disability inclusion space were also significantly more likely to outperform their industry peers in productivity, measured as revenue per employee, by 25%.³⁴

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.”³⁵ 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.”³⁶ Access to talent is enhanced as well. The American Institutes for Research study found that if companies embraced disability inclusion, they would gain access to a new talent pool of 10.7 million people.³⁷

²⁹ See generally Accenture, Getting to Equal 2018: The Disability Inclusion Advantage, <https://www.accenture.com/content/dam/accenture/final/a-com-migration/pdf/pdf-89/accenture-disability-inclusion-research-report.pdf>; Accenture, Getting to Equal 2020: Disability Inclusion, <https://www.accenture.com/content/dam/accenture/final/a-com-migration/pdf/pdf-142/accenture-enabling-change-getting-equal-2020-disability-inclusion-report.pdf>; Accenture, The Disability Inclusion Imperative 2023, <https://www.accenture.com/content/dam/accenture/final/accenture-com/document-2/Disability-Inclusion-Report-Business-Imperative.pdf>.

³⁰ Accenture, Getting to Equal 2018: The Disability Inclusion Advantage, at 6 n.14.

³¹ Accenture, Getting to Equal 2020: Disability Inclusion, at 15 n.14.

³² Accenture, Getting to Equal 2018: The Disability Inclusion Advantage, at 7.

³³ Accenture, The Disability Inclusion Imperative 2023, at 12.

³⁴ *Id.* at 13.

³⁵ Michelle Yin, et al., “A Hidden Market: The Purchasing Power of Working Age Adults With Disabilities” (April 2018), at 7, cited in *Solving “Then What?”: Empowering Investors to Achieve Competitive, Integrated Employment for Persons with Disabilities*, The Harkin Institute for Public Policy & Citizen Engagement (Jan. 2021), at 12.

³⁶ NielsenIQ, Reaching Prevalent, Diverse Consumers with Disabilities, <https://nielseniq.com/global/en/insights/report/2016/reaching-prevalent-diverse-consumers-with-disabilities/>.

³⁷ *Supra* Yin, at 5 n.18. 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>.

Additionally, Coqual 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.³⁸ As Nasdaq points out, “increased diversity reduces groupthink and leads to robust dialogue and better decision making.”³⁹ The potential value created by 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, some parties, such as Nasdaq in its consideration of a proposed rule concerning board diversity, have suggested that there is a “dearth” of academic research with respect to the financial benefits directly related to having persons with disabilities on boards.⁴⁰ 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.⁴¹ 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.

³⁸ Coqual, Disability and Inclusion – US Findings, https://coqual.org/wp-content/uploads/2020/09/CoqualDisabilitiesInclusion_KeyFindings090720.pdf.

³⁹ See, e.g., NASDAQ Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity at 29, <https://www.sec.gov/files/rules/sro/nasdaq/2020/34-90574.pdf>. 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 consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with ‘groupthink.’”)

⁴⁰ 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.”).

⁴¹ 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://labd.co.uk/wp-content/uploads/2019/01/Credit-suisse-lgbt.pdf>) (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/GBDEExternal/upload/Quorum-Template-Board-Diversity-Guidelines-2019-Mar.pdf>) (discussing board composition in relation to the LGBTQ+ community); see also *supra* nn.1, 8, 10.

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.

Some parties have raised the perceived difficulty of finding persons with disabilities to serve on corporate boards as a concern. Given that up to 50% of working-age individuals may identify as having disabilities, and 37% of those individuals are employed as of 2023, persons with disabilities likely are not difficult to find in the workplace.⁴² It is additionally likely that individuals currently serving on corporate boards may already have a disability. But for companies specifically searching to include directors that disclose their disability status, resources exist to help those efforts. In 2021, Disability:IN and Equilar – the leading provider of corporate leadership data collection – in consultation with the American Association of People with Disabilities developed a mechanism in Equilar’s existing platform to capture disability self-identification data on individual profiles of board-ready candidates.⁴³ “Senior executives and board members can create a profile on the Equilar BoardEdge database of over one million candidate profiles,” and Equilar plans to compile this data “to help companies find talent with disabilities as well as report on the progress made toward improved representation.”⁴⁴ Fear of not being able to find persons with disabilities to serve on boards is misplaced and should not serve as an impediment to requiring companies to report their Board’s disability representation.

II. Defining “Disability” for the Purposes of Board Diversity

During the rulemaking process for a board reporting rule proposed by Nasdaq, February 26, 2021 supplemental comments to the SEC revealed Nasdaq’s reasoning behind declining to include disability in the rule’s definition of “diverse” – it believed doing so would result in “inconsistent and noncomparable data across companies.”⁴⁵ 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.”⁴⁶

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

⁴² Accenture, *The Disability Inclusion Imperative 2023*, at 7.

⁴³ BusinessWire, “Equilar Partners with Disability:IN to Advance the Inclusion of Board Candidates with Disabilities” (July 27, 2021), <https://www.businesswire.com/news/home/20210727005295/en/Equilar-Partners-with-DisabilityIN-to-Advance-the-Inclusion-of-Board-Candidates-with-Disabilities>.

⁴⁴ *Id.*

⁴⁵ Nasdaq Supplemental Comments to the Securities and Exchange Commission (Feb. 26, 2021) at 14, <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf>.

⁴⁶ *Id.* (citing comments of Professor Lisa M. Fairfax).

experiences, military service, or socio-economic or demographic characteristics.⁴⁷ 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.⁴⁸

Concerns of inconsistency are valid and may similarly apply to the SEC's rule. However, adding just disability to the list of diverse characteristics does not create the problem envisioned by Nasdaq if disability is clearly defined in the rule.

"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.⁴⁹

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."⁵⁰ This definition covers people with the full range of physical and mental conditions, including those with manifest disabilities (e.g., being blind or deaf, having cerebral palsy, being a little person, or using a wheelchair), to significant physical or mental conditions (e.g., epilepsy, missing limbs, schizophrenia and bipolar disorder), to having conditions that range from minor to debilitating (e.g., post-polio syndrome, scoliosis, spina bifida, cancer, depression, and anxiety disorders).

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.⁵¹ 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

⁴⁷ 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>.

⁴⁸ *Id.* (citing its Proposal at 80,493).

⁴⁹ 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, *see* 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, *see* 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>.

⁵⁰ 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 SEC adopt only the first prong of the ADA definition of "disability."

⁵¹ 42 U.S.C. § 12101(a)(2). *See also supra* n.1.

protections, just like other under-represented groups that have been the target of discrimination.⁵²

Given the history of marginalization and segregation of people with disabilities, especially at all levels in corporate America, we recommend that the SEC 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, the SEC 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. 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. In fact, according to Accenture’s 2023 report on disability inclusion, employees’ various reasons for opting not to disclose their disability status is “rooted in fear” including “fear of backlash in the form of limited opportunities for growth and fear of being compelled to take on unfulfilling roles.”⁵³ That is precisely why creating an incentive to disclose 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, 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 underrepresented groups.

We note that several non-profit organizations representing women, racial, and ethnic minorities, and LGBTQ+ individuals support inclusion of people with disabilities within the meaning of “diverse” as is proposed in the SEC rule. Collaborative efforts towards disability inclusion reflect the intersectional nature of this issue. Eighty percent (80%) of disabilities are acquired between the ages of 18 and 64, and disabilities do not discriminate between gender, race, geography, socio-economic status, or any other characteristic, making anyone susceptible to becoming a person with a disability at any time.⁵⁴ As one coalition of organizations explained, “[d]isregarding this community in [the] definition of diversity further hinders the progress we have collectively

⁵² 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”).

⁵³ Accenture, *The Disability Inclusion Imperative 2023*, at 19.

⁵⁴ Accenture, *The Disability Inclusion Imperative 2023*, at 3.

worked to bring underserved communities the recognition they deserve.”⁵⁵ That is why the Thirty Percent Coalition, an advocacy organization to increase gender, racial, and ethnic diversity on corporate boards and in senior leadership, includes people with disabilities in their board diversity goals.⁵⁶

III. Closing Comments

Disability diversity should be included in the data disclosure and the representation component of any board diversity rules, including the SEC’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.

⁵⁵ See Letter from NGLCC, NaVOBA, Out & Equal, WIPP, USHCC, USPAACC, and USBC to Vanessa Countryman, Sec’y SEC, April 2, 2021; Letter from Rob Randhava, The Leadership Conference on Civil and Human Rights, to Secretary Vanessa Countryman, Securities and Exchange Commission, April 2, 2021, <https://disabilityin-bulk.s3.amazonaws.com/2021/Diversity+Org+Support+for+Disability+Signed%5B53%5D%5B11%5D+508.pdf>.

⁵⁶ See About Us, Thirty Percent Coalition, <https://www.30percentcoalition.org/about/> (last accessed Dec. 14, 2023).