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Robert W. Errett
Deputy Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File Number SR-NASDAQ-2016-13

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Require Listed Companies to Publicly Disclose Compensation or Other Payments by Third Parties to Board of Director's Members or Nominees

Dear Mr. Errett:

I write in support of NASDAQ's proposal to require a listed company to disclose third-party payments to director-nominees in connection with their candidacy or service as a director of the company. These payments are commonly known as "golden leash" payments, and they are highly controversial among corporate law scholars and other commentators.[1] There is, however, one matter upon which both friends and foes of the practice find common ground: All agree that golden leash payments must be fully and fairly disclosed to the shareholders.[2] For this reason alone, the present proposal merits the approval of the SEC.

I also write to address the possibility raised by NASDAQ in footnote 5 of its filing, namely that is considering whether to propose additional requirements related to the golden leash, including banning it entirely.[3] While NASDAQ cautions that it has not made any final decisions, the very fact that it is considering such a course underscores just how controversial the golden leash is. But before taking a view on the merits of the golden leash, it is surely vital to first endeavor to understand it, is it not?

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[1] *Compare, e.g.*, Yaron Nili, *Servants of Two Masters? The Feigned Hysteria over Activist-Paid Directors*, 18 U. PA. J. BUS. L. 509, 522–23, 569–70 (2016) (arguing in support of the golden leash), *and* Jack Ferdon, *Restrictions on Compensation for Dissident Nominees Encounter Shareholder Opposition*, GLASS LEWIS & CO. (Feb. 6, 2014) (defending the utility of the golden leash), *with* John C. Coffee, Jr., *Shareholder Activism and Ethics: Are Shareholder Bonuses Incentives or Bribes?*, COLUM. L. SCH. BLUE SKY BLOG (Apr. 29, 2013) (analogizing the golden leash to a bribe), *and* Stephen Bainbridge, *Can Corporate Directors Take Third Party Pay from Hedge Funds?*, PROFESSORBAINBRIDGE.COM (Apr. 8, 2013) ("If this nonsense is not illegal, it ought to be.").

[2] *See* Nili, *supra* note 1, at 566 (recognizing that "a full and complete disclosure of [golden leash] compensation agreements" is "extremely important"); ISS, *Director Qualification/Compensation Bylaw FAQs* (Jan. 13, 2014) (arguing in favor of disclosure of golden leash payments); Martin Lipton, *ISS Publishes Guidance on Director Compensation (and Other Qualification) Bylaws*, HARV. L. SCH. F. ON CORP. GOV. AND FIN. REG. (Jan. 16, 2014) ("all companies should require full disclosure of any third-party arrangements that director candidates may have").

[3] *See also* SEC Release No. 34-77481, at 6 n.11 (Mar. 30, 2016) (taking note of NASDAQ's plan to consider additional regulations).

In my view, and as I elaborate in my latest article, *Financing Corporate Elections*, the golden leash is best understood as a form of campaign contribution paid by one shareholder to a director-candidate in a contested proxy contest.[4] At its most basic, the golden leash is a transfer of consideration, contingent as it may be, from a shareholder to a director-candidate in support of her campaign. The same shareholder who is willing to pay a golden leash is also willing to bear all the costs of running the campaign. The point is that such a shareholder fits well into the conceptual framework of third-party campaign finance, where one party pays the expenses of the electoral campaign of another.

Accepting the golden leash as a type of campaign contribution, is it normatively desirable? On the one hand, the golden leash is beneficial because it can allow a dissident shareholder to recruit talented director-candidates to challenge the incumbent board, and to run a competitive proxy contest, thereby enhancing the vibrancy of corporate democracy.[5] On the other hand, just as in the political arena, large campaign contributions rouse the obvious suspicion that the candidate, should she be elected, may feel beholden to her sponsor and may seek to advance its interests, as opposed to those of the company.[6] As I discuss in *Financing Corporate Elections*, both points of view are valid; the golden leash represents both a benefit and a threat to the corporation. It therefore behooves NASDAQ to move cautiously beyond today's rule and to carefully balance all aspects of the golden leash before imposing additional requirements. All of this is discussed in much more detail in *Financing Corporate Elections*, especially Sections II.C and V therein.

Thank you for your time and consideration.

Sincerely,

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[4] Andrew A. Schwartz, *Financing Corporate Elections*, 41 J. CORP. L. __ (forthcoming 2016).
[5] *See generally* Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").
[6] *E.g.*, Coffee, *supra* note 1 (recognizing that the golden leash "can give rise to a conflict of interest that induces a director to subordinate his or her own judgment to that of the institution paying the director").