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February 28, 2018

Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Attention: Brent J. Fields, Secretary

Re: SR-NASDAQ-2018-008

Gentlepersons:

We are submitting this comment letter in response to the notice (the “**Solicitation Notice**”) from the Securities and Exchange Commission (the “**SEC**”), Release No. 34-82702 with respect to File No. SR-NASDAQ-2018-008 - Notice of Filing of Proposed Rule Change to Modify the Listing Requirements Contained in Listing Rule 5635(d) to Change the Definition of Market Value for Purposes of the Shareholder Approval Rules and Eliminate the Requirement for Shareholder Approval of Issuances at a Price Less than Book Value but Greater than Market Value (the “**Nasdaq Proposal**”) to discuss proposed revisions to Nasdaq Rule 5635(d), which we refer to herein as the “**20 Percent Rule**”.

As we previously disclosed in our prior letters to the Nasdaq Listing and Hearing Review Council (the “**Listing Council**”), we believe that the 20 Percent Rule, as currently in effect, is a blunt tool that unnecessarily restricts the growth of issuers by preventing capital raising without any analysis, understanding or adjustments from the use of proceeds, size of the public float, timing when the shares are eligible to be freely resold, market volume or volatility of a security at such time. Since the adoption of the 20 Percent Rule in 1990, there have been considerable changes in the capital markets. We have seen the proliferation of passive investments by financial institutions through convertible securities and warrants containing 4.99% or 9.99% voting and ownership blockers, that permit significant investments in an issuer (above 20% of such outstanding securities) without a corresponding adverse impact on the “control” of the issuer. With improvements in technology and forms of offering documents, a “shelf-takedown” off an issuer’s Registration Statement on Form S-3 can now often be drafted, negotiated and consummated on an overnight basis. We have also seen adjustments in the general perception of the value of securities in the market, as parties in financial transactions frequently enter into the arms-length discussions to find more “fair” methods of determining the value of a security in an offering, with an understanding that daily volatility is an integral part of

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any valuation analysis. We have provided comment letters to the Listing Counsel with respect to the 20 Percent Rule in light of the foregoing and we have expressed our recommendation for more significant changes to the 20 Percent Rule. We consider the Nasdaq Proposal to be the “low hanging fruit” of a broader discussion and we believe the approval by the SEC of the Nasdaq Proposal would be a strong first step in correcting the inadequacies and inequitableness of the 20 Percent Rule. For your convenience, we will separately discuss the “book value” and “market value” sections of the Nasdaq Proposal:

*I. Proposal #1 – Elimination of “Book Value” from Rule 5635(d)*

We agree with the opinions of other practitioners that “book value” is an historical accounting artifact that has little or nothing to do with the actual value of the securities of an issuer to stockholders or other investors. In our experience, based on numerous discussions with placement agents, underwriters, issuers and investors, we have yet to find anyone who relies on the book value of an issuer in connection with an investment decision and we believe the market price of the common stock of an issuer represents the market’s consensus on the value of a security. In those rare situations where book value exceeds the market price, we often find accounting treatment of certain types of capital investments by an issuer is the primary culprit. We do not believe the nature of a capital investment by an issuer should have any effect on the ability of such issuer to raise capital at market prices. While we recognize that a market correction, “burst of a bubble” or a financial crisis (as in 2008 and 2009) may also cause book value to exceed the market price of a security, we would argue that this type of arbitrary restriction on capital raising is particularly troubling during a financial crisis. Dilution is better than extinction. An issuer needs to be able to raise sufficient capital during a financial crisis to weather the storm and maintain value for its stockholders. Consequently, we agree with the Nasdaq Proposal to eliminate the book value requirement.

*II. Proposal #2 – Determination of Market Value*

Listing Rule 5005 currently defines “market value” as the closing bid price of a security immediately prior to the time of the offering. The Nasdaq Proposal would change the definition of “market value” to the lower of the Nasdaq closing price and the five-day average of the Nasdaq closing prices. We fully support the Nasdaq Proposal.

As noted earlier in this letter, parties to financial transactions routinely try to find the most fair method to determine the “market value” of a security. In our view, the “market value” of a security for the purpose of a new issuance by an issuer should be the value that such issuer and an investor would obtain in an arms-length negotiation of the pricing of a security. When asking placement agents, underwriters, issuers and investors how they negotiate such provisions, we have found that they tend to rely on the lower of the closing price as of the trading day immediately prior to the time of signing and an average of closing prices for some period (as

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short as 5-days and as long as 20-days) to determine a “fair” pricing of the securities in such offering. Using only a 1-day price, for example, typically overstates or understates an abrupt change. An issuer may have market fluctuations for a day or so as a result of a press release or other filing with the SEC. Depending on the timing of such press release or filing, it may take time for the market to digest the information and for the pricing on the exchange to adequately reflect such information. If a party to a financial transaction wants to determine accurate pricing, the person will typically evaluate the pricing over a period of time to determine whether the 1-day price was a true movement in the stock or a temporary “blip” in the stock price. Meanwhile, using only a 5-day price period does not account for transformative events during the applicable measurement period. For example, if an issuer sold a material portion of its business on the fourth day of a five day period, the value of the security on the last day of the period might be the most accurate measurement of the actual worth of the security to a potential investor or stockholder.

In concept, a multi-day pricing period is best suited for a large issuer with high volume, less volatility and a more stable market price. Still, these larger issuers are not the primary target of the 20 Percent Rule as their large capitalization permits significant capital raising without triggering the 20 Percent Rule. Smaller issuers, however, often face the hurdles created by the 20 Percent Rule, tend to have more volatility in their stock prices and may be disproportionately and adversely effected by an uneven or unfair multi-day measurement without the safety-valve of being able to price based upon the 1-day Nasdaq closing price. By using the lower of the 1-day Nasdaq closing price and the average of the Nasdaq closing price over a 5-day period, the Nasdaq Proposal gives itself the flexibility to account for market fluctuations and events, without incurring the typical adverse consequences of material movements, positive or negative, in a stock price at or near the end of a 5-day period. We believe the Nasdaq Proposal will more accurately reflect the type of pricing that would occur in an arms-length negotiation and, consequently, is a better determination of “market value” than the current 20 Percent Rule.

## *II. Conclusion*

As stated earlier in this letter, we applaud the Nasdaq Proposal’s removal of the “book value” requirement and we believe the Nasdaq Proposal’s new determination of “market value” provides a more useful and fair method of determining the “market value” of a security. While we still believe the 20 Percent Rule needs further revisions to promote a more open marketplace, we believe the Nasdaq Proposal is an excellent start.

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We would like to thank The Nasdaq Stock Market and its Listing Counsel for their significant efforts in promoting a productive discussion of methods to improve the 20 Percent Rule with practitioners, issuers and investors and we look forward to future changes that may further address the inadequacies and inequitableness of the 20 Percent Rule.

Best regards,

A handwritten signature in blue ink, appearing to read "Michael A. Adelstein", with a long horizontal flourish extending to the right.

Michael A. Adelstein  
Partner  
Kelley Drye & Warren LLP