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Sent Via Electronic Mail (rule-comments@sec.gov)

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Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments on SR-NASDAQ-2020-002

Dear Members of the Commission:

Thank you for the opportunity to provide our views on a rule change proposed by The Nasdaq Stock Market LLC (“Nasdaq”) that would fundamentally change the independent Listing Qualifications Hearings process (the “hearings process”) currently available to issuers that have been denied initial or continued listing or been subject to a public letter of reprimand as a result of a determination by the Nasdaq Listing Qualifications Staff (“Staff”).¹

By way of background, I formerly served as Chief Counsel in the Listing Qualifications Department at Nasdaq and I was responsible for overseeing the hearings process from 1995 until 2004. In July of 2004, I founded Donohoe Advisory Associates LLC (“Donohoe Advisory”) (www.donohoeadvisory.com), a consulting firm made up of former members of the staffs of Nasdaq and the New York Stock Exchange (“NYSE”). Donohoe Advisory assists companies seeking to list, or maintain a listing, on both Nasdaq and the NYSE. Our firm has represented hundreds of companies in the Nasdaq hearings process discussed herein over the last 16 years.

The large majority of companies that engage us to assist with the hearings process do so only after they have received a delisting determination letter from the Staff. In fact, many companies have advised us that they were not aware of our firm or the need for such a niche service until after receiving a delist determination and beginning to plan and prepare for the hearing by seeking the assistance of their existing service providers (*e.g.*, law firms and investment banks) and advice from other companies that have previously navigated the Nasdaq hearing process.²

Once an issuer receives a Nasdaq delisting determination, the issuer has seven calendar days within which to request a hearing before an independent Nasdaq Hearings Panel (the “Panel”). Companies use this time to evaluate the steps necessary to maintain their exchange listing over the near and longer term, the

¹ Given that initial listing hearings and hearings relating to public letters of reprimand are extraordinarily rare, this letter focuses on companies appealing Nasdaq Staff delisting determinations.

² Since we do not assist companies with SEC filings, we do not generally work pursuant to long term retainer agreements as law firms do; rather, our engagements are generally project specific and limited in duration. Nonetheless, we represent far more companies in Nasdaq delisting hearings than any law firm.

resources required to do so, and the likelihood of success. It is also common for management to consult with their board during this seven-day window in order to ensure a fully informed decision as to whether to pursue a hearing before the Panel.

Nasdaq typically responds to a hearing request with an acknowledgement letter within one to two business days of the request, which letter sets forth the date of the hearing and various interim deadlines. Pursuant to the Nasdaq Listing Rules and to the extent practicable, hearings must be held within 45 calendar days of the hearing request. The prehearing submission, which is optional but generally anticipated by the Staff and the Panel, is due at noon Eastern Time 20 calendar days in advance of the hearing; that is, typically, within just 7 to 14 calendar days of the hearing request (although that period may be even further truncated). The Staff thereafter issues its own hearing memorandum to the Panel, which is also provided to the Company, approximately seven calendar days in advance of the hearing. The Staff's memorandum summarizes the issuer's status and plan to regain compliance with the applicable listing criteria and also references the issuer's compliance history over the most recent three years. The memorandum affords the Staff the opportunity to comment on the issuer's compliance plan and to make a recommendation to the Panel regarding its forthcoming decision. In addition, the Staff is allowed to provide new information in support of a delisting determination, including new legal arguments that may or may not be in response to arguments set forth in the issuer's prehearing submission to the Panel approximately one week prior to the hearing. Finally, the memorandum includes a recitation of the Nasdaq hearing procedures, copies of documents within the record, and the identities and biographies for the two independent Panelists.

Based upon the above schedule, the issuer is very often still in the process of assembling the team that will represent it at the hearing (including both internal and external representatives) in the days leading up to the deadline for making the prehearing submission, which thus limits the issuer's ability to provide any and all comprehensive legal arguments or other detailed information regarding its compliance plan. To require the issuer to submit the totality of its compliance plan and any legal arguments in connection therewith several weeks ahead of the hearing would place the issuer at a significant disadvantage before the Panel. This hardship is indeed exacerbated when applied to foreign issuers that are located in time zones that are significantly ahead of or behind U.S. Eastern Time.

Nasdaq's effort to limit the nature and amount of information that an issuer may provide prior to the hearing and the Panel's final listing determination fails to take into consideration the fact that companies that are subject to delisting, particularly those that have requested a hearing, which occurs within a very compressed timeframe, are typically dealing with a very fluid set of circumstances in their efforts to regain compliance with the applicable listing criteria; circumstances that are rapidly evolving, sometimes right up to the time of the hearing.

To be clear, the Panel's determination is based upon a *de novo* review of the facts of the particular matter and the issuer's compliance plan and proposed timing to complete same. Importantly, in the majority of cases, the Panel is not rendering a determination as to whether the Staff erred in its determination to delist an issuer, but rather is seeking to determine whether, at the time of the Panel's decision, the issuer has adequately addressed the Staff's concerns and presented a definitive plan to regain compliance within a reasonable period of time and, certainly within the discretionary period available to the Panel under the Nasdaq Listing Rules. The Listing Rules are clear that the Panel's authority exceeds that of the Staff, particularly with respect to market-based deficiencies (*e.g.*, bid price, market value of listed securities, and market value of publicly held shares) and stockholders' equity deficiencies that represent the lion's share of compliance issues resulting in hearings. Thus, while the Staff may have acted appropriately in issuing a delisting determination due to the limits on their authority under the Listing Rules, the Staff's determination in no way forecloses the Panel, which has much broader, delineated authority, from granting a further extension to an issuer if and when appropriate.

It is our view that the additional constraints Nasdaq is seeking to place on an issuer's ability to present all relevant information and legal arguments to the Panel will impede the Panel's ability to make fully informed listing decisions and, therefore, such constraints are inconsistent with Nasdaq's mission of protecting both prospective and current investors that could be disadvantaged by a premature or ultimately incorrect or unfounded delisting determination and is inconsistent with Nasdaq's mission to preserve and enhance the integrity of The Nasdaq Stock Market.

Is there not another method to ensure that the Staff has an adequate opportunity to respond to an issuer's compliance plan and any legal arguments in connection therewith without arbitrarily limiting the issuer's ability to present information it deems relevant to the Panel's decision right up until and through the issuer's meeting with (hearing before) the Panel? The simple answer is yes: the Panel already has the necessary tools to accomplish this within the confines of Nasdaq's current hearing procedures. The Listing Rules require that the hearing, to the extent practicable, be held within 45 days of the hearing request; however, the rules do not require the Panel to issue its decision within any particular number of days following the hearing. That said, Nasdaq advises all issuers in advance of the hearing that it is their intention to issue the Panel decision within 30 calendar days of the hearing date. Clearly, that 30-day window is more than sufficient for the Panel to seek a response from the Staff on any new information provided at the hearing. In fact, it is not uncommon for the Panel to afford the Staff an opportunity to make a responsive submission post-hearing and then to give the company the opportunity to respond to such post-hearing submission. Such an exchange can easily be completed within two weeks, allowing the Panel to make a decision within 30 days. At present, the prehearing submission by the issuer to the Panel is optional. If a primary goal of Nasdaq's rule filing is to require that an issuer make such submission, we have no objection. In fact, it has always been our practice to submit such document to the extent we are engaged by the deadline for submission. We strongly believe that the prehearing submission is important to the process and the Panel as it gives the issuer an opportunity to introduce itself – its business and strategy, challenges faced, etc. – to the Panel, to address its plan and commitment to regaining compliance with the Listing Rules, and to provide all appropriate material non-public information for the Panel's consideration in advance of the hearing. However, we must once again emphasize the fluid nature of the situations that issuers in the hearings process face. The overall market conditions change continually, and the individual company circumstances change from day to day. Plans that seem viable or not viable 20 calendar days in advance of the hearing can quickly change for good or for bad. If companies are required to "put a stake in the ground" in the prehearing submission for each and every possible compliance solution, it will drastically limit the utility of such submissions, and it will undermine the credibility of the company's more viable compliance options.

Given the brief period of time between the Staff delisting determination and the Company's prehearing submission, limiting the legal arguments of the issuer, some of which cannot be made until proper investigation and research have been completed and appropriate advisors have been engaged, seems highly prejudicial to the issuer and not at all in keeping with Nasdaq's mission to maintain the integrity of the marketplace, particularly given that the process as it currently exists does not in any way prevent the Staff from responding to an issuer's representations if deemed necessary and appropriate by the Panel (the ultimate arbiter of the issuer's listing on Nasdaq). In that regard, the Staff has the right to attend any hearing and listen to all arguments and presentations first-hand. In short, the current process has served Nasdaq, investors, and issuers well for many years and, in our view, the proposed changes are unnecessary and will be detrimental to the interests of all three constituencies.

We thank you for the opportunity to comment on the proposed rule. I can be reached at (240) 485-7400 or ddonohoe@donohoeadvisory.com to extent the Commission Staff has any questions or requires further clarification.

Sincerely,

A handwritten signature in blue ink, appearing to read "David A. Donohoe, Jr.", written in a cursive style.

David A. Donohoe, Jr.