

September 1, 2020

VIA ELECTRONIC MAIL

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Notice of Filing of Proposed Rule Change to Amend the Procedures Governing the Introduction of Legal Arguments and Material Information by Companies in a Proceeding Before a Hearings Panel (Release No. 34-89309; File No. SR- NASDAQ-2020-002)

Dear Ms. Countryman:

The Nasdaq Stock Market, LLC (“Nasdaq”) writes in connection with Nasdaq’s proposal to amend procedures governing the introduction of legal arguments and material information by companies in a proceeding before a Hearings Panel (the “Proposed Rule”)¹ to respond to a comment letter filed by Donohoe Advisory Associates, LLC (the “Donohoe Letter”) with the Securities and Exchange Commission (“SEC” or “Commission”).² The Donohoe Letter mischaracterizes the Proposed Rule by claiming it would “impede the Panel’s ability to make fully informed listing decisions.” In fact, the Proposed Rule will increase the information available to the Hearings Panel in advance of a Hearing, which will allow the Panelists adequate time to review the information and ask questions of the company during the Hearing and, thereby, make a fully informed decision. The Proposed Rule accomplishes this by establishing reasonable deadlines for the submission of both legal arguments and material information.

The Donohoe Letter states:

“Nasdaq’s efforts 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

¹ See Securities Exchange Act Release No. 34-89309 (July 14, 2020), 85 FR 43900 (July 20, 2020) (SR-Nasdaq-2020-002).

² See Letter from Mr. David A. Donohoe, Jr., Founder & President, Donohoe Advisory Associates, LLC to Secretary, SEC (August 10, 2020).

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.”³

The Proposed Rule does not in any way limit the nature and amount of information, whether legal arguments or factual statements, that a company may submit to the Hearings Panel for consideration. The Proposed Rule simply requires a company to submit the relevant legal arguments and material information by a reasonable deadline. Specifically, legal arguments must be made when the company provides its Written Submission (as defined in the rule filing) appealing a Nasdaq staff determination, and the company is allowed to submit material information in the company’s Written Update up to two days prior the Hearing. Subsequent information may also be provided at the Hearing if it was “rapidly evolving” and thus not available to the Company “right up to the time of the hearing.” In short, rather than limiting the nature and amount of information, the Proposed Rule prevents the *belated* submission of legal arguments and material information to the Hearings Panel.

This Proposed Rule does not establish an undue burden that will hamper the company’s efforts to obtain a fair *de novo* consideration of its appeal. Indeed, at the time of the Written Submission, the company and its advisors should have a clear understanding of the plan for compliance they will articulate at the Hearing. As noted in the Donohoe Letter, it is “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.”⁴ Each of these deficiencies allow the company a cure period lasting from 180 to 360 days or a period of at least 45 days to submit to Nasdaq staff a plan to regain compliance after which staff can allow the company up to 180 days to cure the deficiency.⁵ Most of the remaining hearings also relate to deficiencies where the company receives a cure period or is allowed to submit to Nasdaq staff a plan to regain compliance before receiving a delisting letter.⁶ Thus, both the nature of the deficiency and the timing that the company will receive a delisting letter is well known to the company long before the company enters the Hearings process, and the company has adequate time before receiving a delisting letter to assemble its team, consider its legal arguments, and develop its plan to regain compliance. Nasdaq would be concerned if a company instead

³ See Donohoe Letter at 2.

⁴ From January 1, 2020 through August 31, 2020, 28 of the 45 hearings held, or 62%, related only to bid price, market value of listed securities, market value of publicly held shares and stockholders’ equity deficiencies.

⁵ Rule 5810(c)(2) and (3).

⁶ Pursuant to Rule 5810(c)(1), the only generally applicable deficiencies where Nasdaq’s initial notice to the company is a Delisting Determination relate to the failure to solicit proxies or where staff has determined, under its discretionary authority in the Rule 5100 Series, that the Company’s continued listing raises a public interest concern. Nasdaq will also send a Delisting Determination in connection with certain deficiencies involving Equity Investment Tracking Stocks, Paired Share Units, non-convertible bonds and Subscription Receipts.

ignored its prior communications with staff about the deficiency and only began to act upon receiving the delisting letter.

Further, under the Proposed Rule, a company seeking an appeal of a Nasdaq staff determination may submit additional information relevant to its case two calendar days prior to the hearing. The company also has the opportunity to present new material information to the Hearings Panel at the hearing in one of three scenarios: first, if the material information is requested by the Hearings Panel; second, if the Hearings Panel determines that the material information did not exist at the time the company was permitted to submit a Written Update; and third, if the Hearings Panel determines that “exceptional or unusual circumstances” exist that warrant consideration of the new material information.⁷ Thus, the proposed process provides a company with ample opportunity to present the material information necessary to allow for a full and complete consideration of the issues by the Hearings Panel

For the same reasons, there is no merit to the Donohoe Letter’s claims that the Proposed Rule puts the company at a disadvantage by requiring the formulation and submission of all legal arguments under a compressed timeframe.⁸ As described above, the company is typically on notice of the nature of the deficiency and the timing of a putative delisting letter and, thus, should be well equipped to devise legal arguments at the time of the Written Submission. Nor is this procedural requirement unprecedented. As noted in Nasdaq’s rule filing, appellants are generally required to include all legal arguments in an opening brief submitted in the context of SEC Practice and Federal Appellate Procedure.⁹

Moreover, as the Donohoe Letter acknowledges, in most cases, the Hearings Panel does not render a decision regarding the legal merits of Nasdaq staff’s determination in the matter. Given that most matters do not require the Hearings Panel to consider legal arguments put forth by the company, it is therefore more important that such arguments be raised early in the process to allow Nasdaq staff adequate time to consider the claims raised and respond in advance of the Hearing. This will provide the Hearings Panel with a complete record to prepare for the Hearing and on which to make its decision. Contrary to the claims in the Donohoe Letter, there is no *de facto* 30-day extension following the Hearing during which time the Hearings Panel may receive new information and legal argument. Requiring the Hearings Panel to solicit subsequent submissions, as proposed in the Donohoe Letter, would only serve to delay the adjudication of the matter at hand, potentially to the detriment of prospective future investors.¹⁰

⁷ See Proposed Rule, supra at 43902.

⁸ See Donohoe Letter at 2.

⁹ See Proposed Rule, supra at 43901

¹⁰ See In re Tassaway, Securities Exchange Act Release No. 11291, 45 S.E.C. 706, 709, 1975 SEC LEXIS 2057, at *6 (Mar. 13, 1975) (“[P]rimary emphasis must be placed on the interests of prospective future investors . . . [who are] entitled to assume that the securities in [Nasdaq] meet [Nasdaq’s] standards. Hence the presence in [Nasdaq] of non-complying securities could have a serious deceptive effect.”).

Ms. Vanessa Countryman

September 1, 2020

Page 4

Finally, Nasdaq notes that a second comment letter was submitted by Jeff Mahoney, General Counsel of the Council of Institutional Investors ("CII") (the "Mahoney Letter").¹¹ Mr. Mahoney previously served as a Hearings Panel member and therefore has first-hand experience with the challenges faced by Panelists when a company fails to timely introduce legal arguments or material information that previously existed. As indicated by Mr. Mahoney, other current and former CII staff also serve, or have served, as Panelists. The Mahoney Letter noted that CII "strongly supports the Proposal" and agreed with Nasdaq's statements that "when companies belatedly provide information to the Hearings Panel . . . it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the hearing" and that "where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue."

In sum, Nasdaq believes that nothing in the Donohoe Letter should give the Commission pause in approving the Proposed Rule or doing so in a timely fashion, and that the Mahoney Letter supports Nasdaq's view that the Proposed Rule will help protect investors and the public interest. As described in Nasdaq's rule filing, the Proposed Rule is consistent with Sections 6(b)(5) and 6(b)(7) of the Act, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by preventing companies from engaging in gamesmanship in the hearings process while affording companies a fair process and reasonable opportunity to present material arguments and evidence to the Hearings Panel at an appropriate time in the hearings process.

Nasdaq asks that the Commission approve the Proposed Rule without delay. If you have any questions or need additional information, please contact me at (301) 978-8075.

Sincerely,



Arnold Golub

Vice President, Listing Qualifications

Deputy General Counsel

¹¹ See Letter from Mr. Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Ms. V. Countryman, Secretary, SEC (August 10, 2020).