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Nasdaq.com

November 6, 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 Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets** (Release No. 34-89794; File No. SR- NASDAQ-2020-026)<sup>1</sup>

**Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Apply Additional Initial Listing Criteria for Companies Primarily Operating in Restrictive Markets** (Release No. 34-89779; File No. SR- NASDAQ-2020-027)<sup>2</sup>

Dear Ms. Countryman:

The Nasdaq Stock Market, LLC (“Nasdaq”) writes in connection with Nasdaq’s proposals (the “Proposals”), identified above, to enhance the listing requirements applicable to any company that principally administers its business in a jurisdiction that Nasdaq determines to have secrecy laws, blocking statutes, national security laws, or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction (a “Restrictive Market”). Capitalized terms not herein defined have the same meaning as set forth in the Proposals.

Investments in emerging markets may be inherently riskier than in developed markets for reasons related to macroeconomic, legal and political structures. However, investors who invest in these emerging markets through instruments listed on U.S. exchanges nonetheless should be able to rely on the critical processes and safeguards embedded in the U.S. capital market ecosystem that protect them and uphold

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<sup>1</sup> Securities Exchange Act Release No. 89794 (September 9, 2020), 85 FR 57260 (September 15, 2020). This proposal is referred to herein as the “Management Qualification Requirement Proposal” and the Commission’s Order is referred to as the “Management Qualification Requirement OIP.”

<sup>2</sup> Securities Exchange Act Release No. 89799 (September 9, 2020), 85 FR 57282 (September 15, 2020). This proposal is referred to herein as the “Initial Listing Requirement Proposal” and the Commission’s Order is referred to as the “Initial Listing Requirement OIP.”

market integrity. These include the disclosure and oversight regime on which capital markets regulation in the U.S. is founded. But where foreign jurisdictions have laws and regulations that limit access to information, regulators may be prevented from adequately enforcing violations of this regime, and investors are placed at higher risk. Numerous government officials have raised this concern about companies from Restrictive Markets, including SEC Chairman Jay Clayton,<sup>3</sup> Members of Congress,<sup>4</sup> the State Department<sup>5</sup> and the President's Working Group on Financial Markets.<sup>6</sup> Notwithstanding this significant public record, in the OIPs, the Commission Staff questions whether the Proposed Rules are consistent with Section 6(b)(5) of the Act and its requirement, among other things, that the rules of a national securities exchange not be designed to permit unfair discrimination. As outlined below, Nasdaq believes that the Proposed Rules are not designed to permit unfair discrimination and urges the Commission to promptly approve these proposals.

#### SR-NASDAQ-2020-026: Proposed Rule Change To Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets

In the Management Qualification Proposal, Nasdaq proposed to adopt a new requirement related to the qualification of management for companies whose business is principally administered in a Restrictive Market. As amended,<sup>7</sup> the proposal would require any newly listing company that principally administers its business in a Restrictive Market to have, and certify that it will continue to have until the third anniversary of its listing date, at least one member of senior management or a director who has relevant past employment experience at a U.S.-listed public company or other experience, training, or background that results in the individual's general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws.

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<sup>3</sup> See, e.g., Chairman Jay Clayton's Statement at the SEC's Emerging Markets Roundtable (July 9, 2020), available at <https://www.sec.gov/news/public-statement/clayton-emerging-markets-roundtable-2020-07-09>.

<sup>4</sup> See, e.g., Kennedy, Van Hollen introduce Holding Foreign Companies Accountable Act as NDAA amendment (June 25, 2020), available at <https://www.kennedy.senate.gov/public/press-releases?ID=FA4903D2-CA2A-4DAA-83A0-BFDB7CED19D0>.

<sup>5</sup> See, e.g., Press Statement of Michael R. Pompeo, Secretary of State, New Nasdaq Restrictions Affecting Listing of Chinese Companies (June 4, 2020), available at <https://www.state.gov/new-nasdaq-restrictions-affecting-listing-of-chinese-companies/>.

<sup>6</sup> See, e.g., President's Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies (July 24, 2020), available at <https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf>.

<sup>7</sup> On August 21, 2020, Nasdaq submitted an amendment to the Management Qualification Proposal to modify it such that a company to which the proposal applies would only be subject to the proposed requirement until the third anniversary of its listing. As originally proposed, a company subject to this requirement upon its initial listing would remain subject to the requirement for the duration of its listing. This change was designed to help address concerns expressed to Nasdaq that the original proposal unfairly discriminated among companies based on when they listed.

In the absence of such an individual, the proposal would require the company to retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the Company. Nasdaq believes that these requirements will heighten compliance by such companies and enhance investor protection.

In the Management Qualification Proposal OIP, the Commission notes that the proposed requirements would: “(1) Only apply to Restrictive Market Companies that apply to list on Nasdaq after the date of effectiveness of the proposed rules; (2) only apply until the third anniversary of a Restrictive Market Company’s listing date; and (3) do not apply to Restrictive Market Companies already listed on Nasdaq, even if such companies have been listed on Nasdaq for less than three years.” Accordingly, the Commission questions whether the proposal is consistent with Section 6(b)(5) of the Act and its requirement, among other things, that the rules of a national securities exchange not be designed to permit unfair discrimination.

Nasdaq notes that the Management Qualification Proposal will impose a new burden on companies from Restrictive Markets that choose to list on Nasdaq. While Nasdaq believes that this proposal will significantly enhance investor protections, Nasdaq notes that it will take effort for some companies to comply. Nasdaq believes that it is unfair to impose this additional requirement, and new burden, on a company which is very close to listing and has already taken substantial steps to prepare for that listing. However, in light of the concerns expressed by the Commission,<sup>8</sup> Nasdaq is filing an amendment to the proposal so that it will apply to all new listings, including companies that have previously applied, 90 days after approval.

Nasdaq also believes that it is not unfairly discriminatory to only apply the proposed requirement until the third anniversary of a company’s listing date. The underlying purpose of the proposed rule change is to help assure that companies are familiar with Nasdaq’s requirements and the federal securities laws, and thereby increase compliance by such companies and enhance investor protection. By the third anniversary of a company’s listing date, Nasdaq believes that companies and their officers and employees will have acquired the necessary experience, training, or background in the requirements applicable to operating a U.S. public company. As such, Nasdaq believes that it is not unfairly discriminatory to apply this rule for only three years.

Nasdaq further believes it is not unfairly discriminatory to exclude companies already listed on Nasdaq from the proposed requirement, even if such companies have been listed on Nasdaq for less than three years. Such companies would have listed before the rule was in effect and it would be unfair to force them to direct resources to comply with this new requirement absent any indication of problems related to their listing.<sup>9</sup> In fact, employees or board members at many of these companies may have gained the

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<sup>8</sup> See also Letter dated September 30, 2020 from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary Countryman available at <https://www.sec.gov/comments/sr-nasdaq-2020-028/srnasdaq2020028-7864225-224032.pdf> (suggesting that the proposal should apply to all companies from Restrictive Markets that apply to list or are already listed on Nasdaq) (“Mahoney Letter”).

<sup>9</sup> To the extent Nasdaq does identify concerns with any particular company not subject to this requirement, and Nasdaq believes such problems are attributable to a lack of experience with the Nasdaq or federal

relevant past experience at a U.S.- listed public company through their existing role such that the individual would qualify to satisfy this requirement at another company.

The proposed rule change will enhance investor protection. While others may desire that this proposal apply more broadly,<sup>10</sup> that is not a sufficient basis to disapprove the proposed rule change that is, in fact, before the Commission. Failure to approve this proposed rule change would result in the proposed investor protections, including an assurance that Restrictive Market companies are listing with a member of management, the board or an advisor that has sufficient experience with the regulatory and reporting requirements applicable to a U.S.-listed public company, being unavailable at all. Moreover, companies also have the alternative to list on other U.S. exchanges that do not impose this requirement. Any company that believes that the requirement unfairly discriminates against them could instead list on those markets.

SR-NASDAQ-2020-027: Proposed Rule Change To Apply Additional Initial Listing Criteria for Companies Primarily Operating in Restrictive Markets

In the Initial Listing Requirement Proposal, Nasdaq proposes to adopt new Rule 5210(l)(i), which would require a Restrictive Market Company listing its Primary Equity Security on Nasdaq in connection with its IPO to offer a minimum amount of securities in a Firm Commitment Offering in the U.S. to Public Holders that (i) will result in gross proceeds to the Company of at least \$25 million or (ii) will represent at least 25% of the Company's post-offering Market Value of Listed Securities, whichever is lower. Nasdaq also proposes to adopt new Rule 5210(l)(ii) to require a Company that is conducting a business combination, as described in Nasdaq Listing Rule 5110(a) or IM-5101-2, with a Restrictive Market Company to have a minimum Market Value of Unrestricted Publicly Held Shares following the business combination equal to the lesser of (i) \$25 million or (ii) 25% of post-business combination entity's Market Value of Listed Securities.

Nasdaq believes that the proposed listing requirements will provide an additional assurance that there are sufficient freely tradable shares and investor interest to support fair and orderly trading on the Exchange with respect to Restrictive Market Companies seeking to list on Nasdaq or when a target company in a business combination is a Restrictive Market Company.

*Data in Support of the Proposal*

As noted in our filing, Nasdaq has observed that Restrictive Market Companies listing on Nasdaq in connection with an IPO with an offering size below \$25 million or public float ratio below 25% have a high rate of compliance concerns.<sup>11</sup> In the Initial Listing Requirement OIP, the Commission states that:

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securities law requirements, Nasdaq could impose a similar requirement on the company using its authority contained in Rule 5101.

<sup>10</sup> See Mahoney Letter ("We believe that to best 'enhance investor protection,' the QM Proposal should be revised so that the requirements would apply equally to all companies from Restrictive Markets that apply to list or are already listed on Nasdaq. In the absence of such a change, CII believes the Commission should not approve the QM Proposal."(footnotes omitted)).

<sup>11</sup> See the Initial Listing Requirement OIP at page 12.

[T]he Exchange does not provide any other data or analysis to support the level at which the proposed thresholds are set. The Commission believes there are questions as to whether the proposed thresholds are set at levels which are not designed to permit unfair discrimination amongst Restrictive Market Company issuers.<sup>12</sup>

A comment letter submitted by the Council of Institutional Investors also states that “CII believes the Commission should not approve the AILC Proposal unless Nasdaq provides the data and analysis requested to support the threshold levels for the Firm Commitment Offering.”<sup>13</sup>

In developing the Proposal, Nasdaq analyzed the data behind its observations, which are described below.<sup>14</sup> Nasdaq also updated some of this data, as indicated.

An analysis of initial public offerings from January 1, 2015 to September 30, 2020, found that 39 Restrictive Market Companies had offering amounts of \$25 million or less as compared to fifteen other foreign issuers. In total, 113 Restrictive Market companies listed on Nasdaq through an IPO and 39 of such companies would not have qualified under proposed Rule 5210(l)(i). Nasdaq found that 32 of the 113 Restrictive Market Companies in this dataset were cited for a compliance issue. Of those, 20, or 51%, were from the group of 39 companies that would not have qualified for listing under proposed Rule 5210(l)(i), a significantly higher rate than other Restrictive Market Companies and other foreign issuers.

During the period from January 1, 2015 to September 30, 2020, 84 Restrictive Market Companies had a ratio of offering size to Market Value of Listed Securities of 25% or less. Of these, 25, or 30%, failed to comply with one or more listing standards after listing, which is a significantly higher non-compliance rate than other foreign companies that had such listings (11%). In some cases, when the ratio of offering size to Market Value of Listed Securities is low there may be concerns about whether there are sufficient freely tradable shares to meet investor demand.

Nasdaq has found that in many cases securities of companies with a low offering size or Market Value of Listing Securities trade infrequently, in a more volatile manner, and with a wider bid-ask spread, all of which may lead to trading at a price that may not reflect true market value. Nasdaq also believes that less liquid securities may be more susceptible to price manipulation and that, in particular, the risk of price manipulation due to insider trading is more acute with respect to a company that principally administers its business in a Restrictive Market because regulatory investigations into price manipulation, insider trading, and compliance concerns may be impeded, and, therefore, investor protections and remedies may be limited. As a result, Nasdaq believes that Restrictive Market Companies present unique potential risks to U.S. investors and established the thresholds in the Proposal based on its analysis of the above data to help alleviate such concerns.<sup>15</sup>

Nasdaq also found that out of seven business combinations involving Restrictive Market Companies from 2015 through September 30, 2020, five would not have qualified under proposed Rule 5210(l)(ii). All five

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<sup>12</sup> Id.

<sup>13</sup> See Mahoney Letter, supra.

<sup>14</sup> Nasdaq notes that it previously confidentially provided some of this information to the Commission.

<sup>15</sup> See the Order at page 2.

of these companies have been cited for a deficiency after the completion of their business combination. As such, Nasdaq believes that a business combination, as described in Nasdaq Rule 5110(a) or IM-5101-2, involving a Restrictive Market Company presents similar risks to U.S. investors as an IPO of a Restrictive Market Company and, therefore, believes it is appropriate to apply similar thresholds to post-business combination entities to ensure that a company listing through a business combination would have satisfied equivalent standards that apply to an IPO.

#### *Determination of Where a Business is Principally Administered*

In the Initial Listing Requirement OIP, the Commission lists the factors that Nasdaq will apply in determining whether a company's business is principally administered in a Restrictive Market. Specifically, as described in the Proposal, "[i]n determining whether a company's business is principally administered in a Restrictive Market, Nasdaq may consider the geographic locations of the company's: (a) principal business segments, operations or assets; (b) board and shareholders' meetings; (c) headquarters or principal executive offices; (d) senior management and employees; and (e) books and records."<sup>16</sup> Furthermore, in the Initial Listing Requirement OIP, the Commission also questions whether such broad discretion when making a determination of whether a Company's business is principally administered in a Restrictive Market is not designed to permit unfair discrimination.

As noted in the Proposal, "[t]he factors that Nasdaq would consider when determining whether a business is principally administered in a Restrictive Market is supported by SEC guidance regarding foreign private issuer status, which suggests that a foreign company may consider certain factors including the locations of: the company's principal business segments or operations; its board and shareholders' meetings; its headquarters; and its most influential key executives (potentially a subset of all executives)."<sup>17</sup>

Nasdaq notes that the 2013 SEC Guidance provides that "a foreign company could consider certain factors"<sup>18</sup> including the factors set forth above. Nasdaq notes that the SEC does not state how to consider the examples or whether more weight should be given to some elements, or whether companies could consider other factors. The SEC issued additional guidance in 2016 to clarify the application of these factors, stating that "There is no single factor or group of factors that are determinative under this clause. The issuer must assess on a consolidated basis the location from which its officers, partners, or managers primarily direct, control and coordinate the issuer's activities."<sup>19</sup> Similarly, Nasdaq proposes to consider the proposed factors holistically to assess whether the company

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<sup>16</sup> See the Proposal at page 4.

<sup>17</sup> See the Proposal at footnote 5, citing See Division of Corporation Finance of the SEC, Accessing the U.S. Capital Markets — A Brief Overview for Foreign Private Issuers (February 13, 2013), available at <https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml#IIA2c> (the "2013 SEC Guidance").

<sup>18</sup> See SEC 2013 Guidance.

<sup>19</sup> See SEC CD&I Questions 110.08 and 203.23 (December 8, 2016), available at: <https://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm#110.07>.

primarily operates in a Restrictive Market. Nasdaq believes the factors it proposes to consider, and its proposed holistic consideration of those factors, is consistent with existing SEC guidance relating to assessing the jurisdiction in which a company primarily administers its business. Further, Nasdaq believes that it is necessary to consider these factors to be able to capture both foreign private issuers based in Restrictive Markets and companies based or with operations in the U.S., Cayman Islands or another jurisdiction that principally administer their businesses in Restrictive Markets and that raise similar concerns. Just as the Commission Staff did when it issued the 2013 SEC Guidance and the additional guidance in 2016, the Commission Staff must today recognize that the ability to review all of the relevant factors in determining where a company's business is principally administered is necessary to protect investors and the public interest, as required by Section 6(b)(5) of the Act. On the other hand, forcing Nasdaq to instead adopt a formulaic approach to determining where a business is principally administered would limit Nasdaq's ability to fulfil this mandate.

Nasdaq believes that the Initial Listing Requirement Proposal will enhance transparency and ensure that securities listed on Nasdaq are liquid and have sufficient freely tradable shares to meet investor demand, which will reduce trading volatility and price manipulation, thereby protecting investors and the public interest and supporting fair and orderly trading. Illiquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value. Section 11A of the Act<sup>20</sup> reflects a Congressional finding that it "is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure ... economically efficient execution of securities transactions." The Commission should approve Nasdaq's proposal to fulfil this objective.

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15 U.S.C. 78k-1.

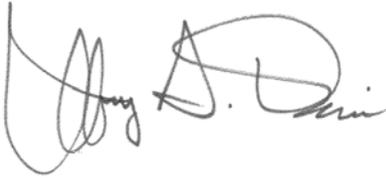
Ms. Vanessa Countryman

November 6, 2020

Page 8

For the above reasons, Nasdaq asks that the Commission approve the Proposed Rules without delay. If you have any questions or need additional information, please contact me at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Davis". The signature is fluid and cursive, with the first name "Jeffrey" being more prominent and larger than the last name "Davis".

Jeffrey S. Davis

Senior Vice President, General Counsel

Nasdaq, Inc.