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April 4, 2024

**Via Electronic Delivery**

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

**Re: File No. SR-NASDAQ-2023-005 and SR-NYSE-2023-12; Comments on Notices of Filing of Proposed Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation**

Dear Ms. Countryman:

We are pleased to submit this letter to the U.S. Securities and Exchange Commission (the “Commission”) in response to the Commission’s solicitation of comments on the above-captioned proposed listing standards (together, the “Proposed Listing Standards”). On October 26, 2022, the Commission adopted Rule 10D-1 to require national securities exchanges to adopt listing standards that require issuers to develop and implement a policy providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers (a “Compensation Recovery Policy”) and to prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of Rule 10D-1. On February 22, 2023, the Nasdaq Stock Market LLC (“Nasdaq”) and New York Stock Exchange LLC (“NYSE”) filed their respective Proposed Listing Standards with the Commission. We appreciate the opportunity to comment on the Proposed Listing Standards.

Our firm is the premier provider of legal services to technology, life sciences, and growth enterprises worldwide. We represent over 300 public companies and have represented over 300 issuers in initial public offerings since 1998. We regularly advise public companies and their directors and officers regarding executive compensation and governance. We support the Commission’s efforts to improve the transparency and quality of corporate financial statements, investor confidence in those statements, and the accountability of executive officers to investors. However, for the benefit of issuers, their investors and other stakeholders, we respectfully request that the Commission consider the recommendations included below for potential changes and clarifications to the version of the Proposed Listing Standards that will ultimately be adopted (such final listing standards, the “Final Listing Standards”).



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### **Comments Regarding Implementation of Rule 10D-1**

As a general matter, the Proposed Listing Standards adequately implement the requirements of Rule 10D-1.

The Proposed Listing Standards both carefully follow Rule 10D-1 in requiring a listed company to adopt and disclose a Compensation Recovery Policy. For that reason, except as discussed below regarding the “reasonably promptly” standard, we do not have any comments on the portion of the Proposed Listing Standards that implements Rule 10D-1.

### **Comments Regarding Delisting for Noncompliance with the Final Listing Standards**

The NYSE’s Proposed Listing Standards should be amended to allow issuers a period of time to submit a plan of compliance and to cure any failure to comply with the Final Listing Standards before being delisted, similar to Nasdaq’s Proposed Listing Standards.

Under Rule 10D-1(a)(1), the exchange’s listing standards must “prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion of [Rule 10D-1].” Nasdaq’s Proposed Listing Standards provide that an issuer that fails to comply with the Final Listing Standards must submit a plan to regain compliance to Nasdaq Staff. Similar to the administrative process for other corporate governance deficiencies, Nasdaq Staff would be permitted to allow the issuer up to 180 days to cure the deficiency. Thereafter, Nasdaq Staff would be required to issue a delisting letter, which the issuer could appeal to Nasdaq’s Hearings Panel. The Hearings Panel could allow the issuer up to an additional 180 days to cure the deficiency.

In contrast, the NYSE’s Proposed Listing Standards provide for a bifurcated approach to delisting procedures, neither of which may result in any cure period. If a NYSE-listed issuer fails to adopt a compliant Compensation Recovery Policy by the effective date (a “Late Recovery Policy Adoption Delinquency”), then the issuer would be required to notify the NYSE of such delinquency in writing within five days of the effective date. Next, the NYSE would send a written notification to the issuer with the applicable administrative process. For a Late Recovery Policy Adoption Delinquency, the NYSE may provide a cure period for an issuer to regain compliance. However, unlike Nasdaq, the NYSE Proposed Listing Standards would not require a cure period and the NYSE may instead commence suspension and delisting procedures without affording any cure period at all. Unlike Section 802.01E of the NYSE Listed Company Manual, with respect to the failure to timely file an annual report (including failure to include a material element required by the applicable Commission form), the NYSE Proposed Listing Standards do not provide relevant factors that the NYSE may consider in determining whether it may or may not afford a cure period.

Further, the NYSE’s Proposed Listing Standards provide that in any case where the NYSE determines that an issuer is non-compliant with any of the provisions of Section 303A.14 of the NYSE Listed Company Manual (other than a Late Recovery Policy Adoption Delinquency), including that the issuer has not recovered erroneously awarded compensation as required by its Compensation Recovery Policy reasonably promptly after such obligation is incurred and/or that the issuer has not provided the required disclosures in the applicable Commission filings, trading in all listed securities of such issuer would be immediately suspended and the NYSE would immediately commence delisting procedures with respect to all such listed securities.



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As noted in Section 303A.13 of the NYSE Listed Company Manual, suspending trading or delisting can be harmful to the very shareholders that the listing standards seek to protect. For this reason, suspending trading and delisting is typically reserved as a measure of last resort for repeated and flagrant violations of listing standards. Very few corporate governance deficiencies result in immediately suspending trading and commencing delisting.

Noncompliance with a Compensation Recovery Policy does not warrant immediate delisting. Rule 10D-1 requires that a listed company recover the amount of erroneously awarded incentive-based compensation reasonably promptly, but it does not specify the time by which the issuer must recover the applicable amount or what steps constitute compliance with a Compensation Recovery Policy. In the Final Rule: Listing Standards for Recovery of Erroneously Awarded Compensation (Release Nos. 33-11126; 34-96159; IC-34732; File No. S7-12-15, or the “Final Rules”), the Commission declined to adopt a definition of “reasonably promptly” recognizing that the appropriate means of recovery may vary by issuer and by type of compensation arrangement. We agree with the Commission that many different means of recovery may be appropriate in different circumstances and issuers should be able to exercise discretion in how to accomplish recovery, subject to the conditions of Rule 10D-1. However, the exchanges may disagree with the issuer and conclude that the means and timing of recovery were insufficient for compliance. Under the NYSE’s Proposed Listing Standards, even if an issuer intended to comply with the Final Listing Standards in good faith, the NYSE could conclude that the issuer did not satisfy the undefined “reasonably promptly” standard and immediately commence delisting the issuer, which would result in unnecessary harm to the issuer and its shareholders. To put a fine point on it, one of the most widely-held and largest market capitalized companies in the world could be immediately delisted if the NYSE determined that its recovery efforts did not satisfy the undefined “reasonably promptly” standard. While an issuer may request a review of the delisting determination, this process is time-consuming and may negatively impact the price of an issuer’s securities until resolved. Given the uncertainty about what constitutes compliance in different circumstances, this is not the type of repeated and flagrant violation that should warrant immediate delisting.

We note that the differences between the NYSE Proposed Listing Standards and the Nasdaq Proposed Listing Standards as it relates to their delisting processes creates the potential for regulatory arbitrage that would not be beneficial for either exchange, for listed companies, or for their shareholders.

In acknowledgment of the discretion required under different circumstances, issuers should be given an opportunity to submit a plan of compliance and to cure noncompliance in good faith to the extent that Nasdaq or the NYSE disagree with their means of recovery. As such, permitting a listed company to submit a plan of compliance and have a cure period prior to delisting for noncompliance, as outlined in Nasdaq’s Proposed Listing Standards, strikes the right balance in deterring issuers from violating the Final Listing Standards without unnecessarily harming the shareholders that the Commission seeks to protect. Accordingly, we request that the NYSE’s Proposed Listing Standards be amended to allow issuers a period of time to submit a plan of compliance and to cure any failure to comply with the Final Listing Standards before being delisted.



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### **Comments Regarding the “Reasonably Promptly” Standard for Recovery**

The Nasdaq and NYSE Proposed Listing Standards should be amended to provide guidance regarding the list of factors that each exchange will consider in determining whether an amount of erroneously awarded incentive-based compensation was recovered reasonably promptly.

As noted above, Rule 10D-1 requires that an issuer must pursue recovery “reasonably promptly,” but does not provide a definition of this requirement, either as it relates to what constitutes reasonable efforts or prompt efforts. Similarly, neither of the Proposed Listing Standards provides any definition or specific timeframe. The exchanges provide minimal guidance regarding how each will assess whether a recovery is “reasonably promptly” made.

In evaluating whether an issuer is pursuing recovery “reasonably promptly,” both Nasdaq and the NYSE will consider whether the issuer is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the issuer is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount. However, this guidance is based on the Commission’s comments in the adopting release and does not provide additional clarification regarding what specific factors each exchange will consider.

The Final Rules noted that the exchanges were not restricted “from adopting more prescriptive approaches to the timing and method of recovery under their rules.” Such guidance should be implemented prior to the Final Listing Standards being adopted and modified over time if necessary. We support Nasdaq and the NYSE including guidance in their Final Listing Standards with a list of non-exclusive factors that each exchange will consider in evaluating whether an issuer is pursuing recovery “reasonably promptly.” For instance, the exchange could consider the following factors among others:

- Whether the issuer is recovering erroneously awarded compensation from a current executive officer (where there is an active, ongoing relationship that might simplify recovery) or from a former executive officer;
- How quickly the issuer provided notice to the current or former executive officer about recovery after discovering the applicable accounting restatement;
- Whether the incentive-based compensation is derived from stock price or total shareholder return and thus not subject to mathematical recalculation directly from the applicable accounting restatement;
- What steps were taken to recover the erroneously awarded compensation and associated costs;
- The time value of any potentially recoverable compensation; and
- Likelihood of recovery compared to the cost of litigation to pursue recovery.

It is important to include this list of factors now in the Final Listing Standards, or at the very least in rule interpretations provided publicly prior to the Final Listing Standards being effective, to guide issuers during this transition period. The list of factors should be consistent between the exchanges; otherwise, the risk of regulatory arbitrage, with its potential ill effects on issuers and their shareholders, would result. This guidance is particularly important for NYSE-listed issuers that currently risk being immediately delisted based on an undefined “reasonably promptly” standard.

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Nasdaq and the NYSE could update this guidance later after they have had an opportunity to observe issuer performance and assess any resulting data.

**Comments Regarding the Deadline for Compliance with the Final Listing Standards**

We support delaying the effective date of the Final Listing Standards until November 28, 2023, to allow issuers more time to adopt and implement compliant Compensation Recovery Policies.

As you know, we are a signatory to a multi-firm letter advocating that the Commission approve the adoption of the Final Listing Standards no earlier than November 28, 2023, to allow issuers more time to adopt and implement compliant Compensation Recovery Policies.

We appreciate the opportunity to provide these comments regarding the Proposed Listing Standards. If you have any questions or comments do not hesitate to contact Richard C. Blake.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

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*Wilson Sonsini Goodrich & Rosati, P.C.*

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