

Via E-Mail

May 2, 2019

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

Re: File Number SR-NASDAQ-2019-017

Dear Madam Secretary:

I am writing in response to the Securities and Exchange Commission's (Commission or SEC) solicitation of comments on the Notice of Filing of Proposed Rule Change to Adopt Additional Requirements for Listings in Connection With an Offering under Regulation A of the Securities Act (Proposed Rule).¹

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$35 trillion in assets under management.²

CII agrees with the Nasdaq Stock Market LLC (Nasdaq) that "it is necessary and appropriate to enhance investor protection from companies [relying on Regulation A] with limited accounting and disclosure requirements in furtherance of the investor protection purposes of the Exchange Act."³ We note that CII membership-approved policies state:

[F]inancial statements including related disclosures are a critical source of information to institutional investors making investment decisions. The efficiency of global markets—and the well-being of the investors who entrust their financial present and future to those markets—depends, in significant part, on the quality,

¹ Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Additional Requirements for Listings in Connection with an Offering under Regulation A of the Securities Act, Exchange Act Release No. 85,687, 84 Fed. Reg. 17,224 (Apr. 24, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-04-24/pdf/2019-08205.pdf>.

² For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at <http://www.cii.org>.

³ 84 Fed. Reg. at 17,226.

comparability and reliability of the information provided by audited financial statements and disclosures.⁴

As you are aware, Regulation A was amended in 2015 to implement provisions of the Jumpstart Our Business Startups Act that was promoted as a vehicle to facilitate smaller companies' access to capital.⁵ Companies relying on Regulation A are subject to "less burdensome accounting and disclosure standards than a traditional initial public offering on Form S-1."⁶ The Proposed Rule includes the following example:

[A] Regulation A company qualifying its offering statement nine months after its most recently completed fiscal year can include balance sheets for its last two fiscal years, with no interim financial statements. In contrast, a company conducting its initial public offering on Form S-1 at that same time would be required to include balance sheets for its last two fiscal years, in the case of emerging growth and smaller reporting companies, or three fiscal years, in the case of all other companies, and interim financial statements dated no later than 134 days prior to effectiveness. As a result, the financial information presented to investors in Regulation A offerings may not be as current as the financial information presented to investors [participating in] traditional public offerings.⁷

Perhaps not surprisingly,⁸ Nasdaq has found "problems with certain Regulation A companies"⁹ and believes that:

[C]ompanies seeking to list in conjunction with a Regulation A offering process may not adequately prepare companies for the rigors of operating a public company and satisfying the SEC and Exchange's reporting and corporate governance requirements. The Exchange also notes that the financial press,^[10] Congress . . . and others have raised concerns about the potential for fraud by companies conducting offerings under Regulation A.¹¹

⁴ Council of Institutional Investors, Policies on Other Issues, Independence of Accounting and Auditing Standard Setters (updated Mar. 1, 2017), https://www.cii.org/policies_other_issues#indep_acct_audit_standards.

⁵ See 84 Fed. Reg. at 17,224-25.

⁶ *Id.* at 17,225 (footnotes omitted); see, e.g., Council of Institutional Investors, JOBS Act Report, Expanding Public Offerings Under New Section 3(b) Exemption 2 (July 2012) (on file with CII) ("under Regulation A . . . companies are allowed to . . . [make] minimal disclosures and comply[] with fewer regulations than those required in a normal registered offering").

⁷ 84 Fed. Reg. at 17,225.

⁸ See, e.g., Council of Institutional Investors, JOBS Act Report, Expanding Public Offerings Under New Section 3(b) Exemption at 3-4 (prominent law professor recommending that investors "should consider advocating for [JOBS Act] implementing rules that include those disclosures and other investor protections that are valued by institutional investors and that have historically been associated with the sale of larger offerings of securities").

⁹ 84 Fed. Reg. at 17,225.

¹⁰ See, e.g., Jean Eaglesham & Aaron Black, Markets, Longfin Collapse Puts Focus on Lax IPO Rules, Wall St. J., Apr. 3, 2018, <https://www.wsj.com/articles/longfin-collapse-puts-focus-on-lax-ipo-rules-1522788520> ("highlighting the risks for individual investors from a program [Regulation A] designed to help small companies go public").

¹¹ 84 Fed. Reg. at 17,225 (footnotes omitted).

We commend Nasdaq for its proposed solution “to enhance its initial listing standards by adopting a new requirement at Listing Rule 5210(j) that a company listing in connection with an offering under Regulation A must, at the time of approval of its initial listing application, have a minimum operating history of two years.”¹² We generally share Nasdaq’s views that:

[T]his proposed requirement will help assure that companies have more established business plans and a history of operations upon which investors can rely. In addition, the proposed operating history requirement will help assure that the company has been able to fund the initial phase of its operations. Further, Nasdaq believes that these more seasoned companies are more likely to be ready for the rigors of being a public company, including satisfying the SEC and Exchange’s reporting and corporate governance requirements. Nasdaq believes that these are important benefits given the lighter disclosure requirements otherwise associated with a Regulation A offering.¹³

More broadly, we would respectfully request that the Commission perform their own detailed analysis of the costs to investors resulting from companies that have opted into the limited accounting and disclosure requirements of Regulation A. That analysis should then be explicitly discussed and carefully considered in any future SEC or exchange rulemaking that permits less burdensome accounting and disclosure standards for some, or all, SEC registrants.

Thank you for consideration of our views. If we can answer any questions or provide additional information with respect to this letter, please do not hesitate to contact me.

Sincerely,



Jeffrey P. Mahoney
General Counsel

¹² *Id.*

¹³ *Id.*