

Via Email

June 18, 2020

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

*Re: File Number SR-NASDAQ-2020-028*

Dear Madam Secretary:

I am writing in response to The Nasdaq Stock Market LLC (Nasdaq) *Notice of Filing of Proposed Rule Change To Amend IM-5101-1 (Use of Discretionary Authority) To Deny Listing or Continued Listing or To Apply Additional and More Stringent Criteria to an Applicant or Listed Company Based on Considerations Related to the Company's Auditor or When a Company's Business Is Principally Administered in a Jurisdiction That Is a Restrictive Market* (Proposed Rule).<sup>1</sup>

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of U.S. 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, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.<sup>2</sup>

As the leading U.S. voice for effective corporate governance and strong shareholder rights, CII believes that accurate and reliable audited financial statements are critical to investors in making informed decisions, and vital to the overall well-being of our capital markets.<sup>3</sup> Consistent with our membership approved policies, we have long been troubled by the lack of cooperation of

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<sup>1</sup> Notice of Filing of Proposed Rule Change To Amend IM-5101-1 (Use of Discretionary Authority) To Deny Listing or Continued Listing or To Apply Additional and More Stringent Criteria to an Applicant or Listed Company Based on Considerations Related to the Company's Auditor or When a Company's Business Is Principally Administered in a Jurisdiction That Is a Restrictive Market, Exchange Act Release No. 88,987, 85 Fed. Reg. 34,774 (proposed June 2, 2020), <https://www.federalregister.gov/documents/2020/06/08/2020-12271/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

<sup>2</sup> 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>.

<sup>3</sup> CII, Policies on Other Issues, Independence of Accounting and Auditing Standard Setters (updated Mar. 1, 2017), [http://www.cii.org/policies\\_other\\_issues#indep\\_acct\\_audit\\_standards](http://www.cii.org/policies_other_issues#indep_acct_audit_standards).

China's regulators with United States (U.S.) Securities and Exchange Commission (SEC or Commission) and Public Company Accounting Oversight Board (PCAOB or Board) requirements for companies listed on U.S. exchanges, including efforts to promote high quality audits of the financial reports of Chinese companies that are listed on U.S. exchanges.<sup>4</sup> In recent years those concerns have grown as the number of Chinese companies listed has increased significantly.<sup>5</sup> Since April the level of our concern has increased as the result of several significant events.

## Recent Significant Events

On April 2 Nasdaq-listed Chinese coffeehouse chain Luckin Coffee Inc. (Luckin) disclosed that it had fabricated as much as \$310 million in sales from the second quarter of 2019 to the fourth quarter.<sup>6</sup> Luckin's CEO and chief operating officer vacated their positions due to their alleged involvement in the scandal.<sup>7</sup> Luckin's stock price fell roughly 85% from the level it traded at before news of the accounting scandal broke.<sup>8</sup>

The auditor of Luckin was Ernst & Young Hua Ming LLP (EYHM).<sup>9</sup> While there is nothing in the press coverage to suggest that EYHM has any responsibility for the alleged accounting fraud,<sup>10</sup> EYHM has been a PCAOB-registered firm since 2004, but has never been subject to a

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<sup>4</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Office of the Secretary, PCAOB 6 (Sept. 6, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/September%206,%202018%20PCAOB%20Strategic%20Plan.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/September%206,%202018%20PCAOB%20Strategic%20Plan.pdf) (“We are particularly concerned about PCAOB-registered firms located in China for at least four reasons: (1) since 2010 the PCAOB has actively sought without success inspections of China-based audit firms and the mainland affiliates of the Big Four accountancies - Deloitte, KPMG, PricewaterhouseCoopers and EY; (2) many of the China-based audit firms do significant work on audits of major U.S. companies doing business in China; (3) the recent surge in the number of Chinese companies listed on U.S. stock exchanges; and (4) most of the Chinese companies listed on U.S. stock exchanges in recent years have a variable interest entity structure that is highly complex and might include risks that some investors and auditors may not fully understand or appreciate.”).

<sup>5</sup> See, e.g., Press Releases, Senate passes Kennedy and Van Hollen's bill to kick deceitful Chinese companies off U.S. exchanges (May 20, 2020), <https://www.kennedy.senate.gov/public/2020/5/senate-passes-kennedy-and-van-hollen-s-bill-to-kick-deceitful-chinese-companies-off-u-s-exchanges> (“In the last 10 years, the number of Chinese companies listed on U.S. stock exchanges has increased significantly, as those firms take advantage of the capital available in America.”).

<sup>6</sup> See Quentin Webb & Joanne Chiu, *Ernst & Young Says It First Found Accounting Issues at Luckin*, Wall St. J., Apr. 3, 2020, available at <https://www.chinabevnews.com/2020/04/ernst-young-says-it-first-found.html>; Jeanny Yu et al., Luckin Coffee Scandal Deals New Blow to Corporate China, Bloomberg (Apr. 3, 2020), available at <https://www.msn.com/en-in/money/news/luckin-coffee-scandal-deals-new-blow-to-corporate-china/ar-BB129nkw>; Bob Pisani, Trader Talk, Luckin Coffee is a painful reminder of ‘the extreme fraud risk’ of some China-based companies, CNBC (Apr. 3, 2020, 7:12 AM EDT), <https://www.cnbc.com/2020/04/03/luckin-coffee-debacle-is-a-painful-reminder-of-fraud-risk.html>.

<sup>7</sup> See, e.g., Joe Tenebruso, Why Luckin Coffee Stock Is Falling Today, Motley Fool (June 11, 2020, 11:45 AM) <https://www.fool.com/investing/2020/06/11/why-luckin-coffee-stock-is-falling-today.aspx>.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Quentin Webb & Joanne Chiu, *Ernst & Young Says It First Found Accounting Issues at Luckin*, Wall St. J. (“Ernst & Young Hua Ming LLP is the entity in China that audits Luckin.”).

<sup>10</sup> See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to William D. Duhnke III, Chairman, PCAOB 2 (Apr. 9, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2020/April\\_9\\_2020\\_PCAOB\\_Chinese\\_Auditor\\_Inspaction.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2020/April_9_2020_PCAOB_Chinese_Auditor_Inspaction.pdf) (“We acknowledge there is nothing in the press coverage to-date to suggest that Ernst & Young Hua

Board inspection.<sup>11</sup> And many market participants and policy makers believe the opaqueness of Luckin's accounting practices gave rise to the alleged fraud<sup>12</sup> and highlight the need for action by policymakers.<sup>13</sup>

On April 21, in what has been described as an “unprecedented public statement,”<sup>14</sup> SEC Chairman Jay Clayton, PCAOB Chairman William D. Duhnke III, and SEC senior staff warned investors that disclosures by SEC-registered companies from China may be incomplete and misleading (Chairmen's Statement).<sup>15</sup> The Chairmen's Statement also referenced a March 1 revision to the Peoples Republic of China Securities Law that provides that “without the approval of its securities regulator and various components of the Chinese government, no entity or individual in China may provide documents and information relating to securities business activities of overseas regulators.”<sup>16</sup>

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Ming LLP has any responsibility for the Luckin Coffee Inc. alleged accounting fraud, except perhaps in its uncovering following the release of a short-selling report.”)

<sup>11</sup> See PCAOB, Registration, Annual and Special Reporting, Firm Summary, Ernst & Young Hua Ming LLP (1408) (last visited June 17, 2020), <https://pcaobus.org/firms/1408> (Registration date: 07/08/2004).

<sup>12</sup> See Morgan Stanley, Execution Services Sales, Trading Unicorns Part 2: China ADRs & HK Secondary Listing Key Debates 10 (June 10, 2020) (on file with CII) (“The opaqueness of the accounting practices is said to have given rise to some recent cases of alleged accounting frauds among U.S.-listed Chinese companies and have posed significant risks to US investors.”); Matt Egan, Here Comes the U.S. Crackdown on China Stocks, CNN Bus. (May 21, 2020, 3:04 PM ET), <https://www.cnn.com/2020/05/21/investing/china-stocks-delist-nasdaq/index.html#:~:text=The%20US%20Senate%20unanimously%20passed.Chinese%20companies%20off%20US%20exchanges.%22> (“The Luckin Coffee accounting scandal has brought renewed attention to the transparency problems linked to U.S. listed companies from China.”).

<sup>13</sup> See Benjamin Bain et al., Market, SEC Chief Backs Bill to Delist China Firms Barring Audit Reviews, Bloomberg, (June 2, 2010, 11:50 AM EDT) (on file with CII) (“For some, the need for action was also highlighted by the accounting scandal surrounding China-based Luckin Coffee Inc.”); Letter from Honorable Marco Rubio, United States Senate et al. to The Honorable Mike Crapo, Chairman, Senate Committee on Banking, Housing, and Urban Affairs et al. (May 18, 2020), [https://www.rubio.senate.gov/public/\\_cache/files/b32ccb24-7e26-470c-b179-712802c0d79b/98155462D7858838A6D427207F8DAE6C.20.05.18--rubio--cotton--scott--equitable-act-letter-to-banking-chairman-and-ranking-member-signed.pdf](https://www.rubio.senate.gov/public/_cache/files/b32ccb24-7e26-470c-b179-712802c0d79b/98155462D7858838A6D427207F8DAE6C.20.05.18--rubio--cotton--scott--equitable-act-letter-to-banking-chairman-and-ranking-member-signed.pdf) (“Recent financial scandals involving Chinese companies listed on U.S. stock exchanges, like Luckin Coffee, demonstrate the need for full oversight of Chinese companies.”).

<sup>14</sup> Michael D. Mann & Arthur Levitt Jr., *Opinion|Commentary, The SEC's China Evasion*, Wall. St. J., May 6, 2020, available at [https://www.realclearenergy.org/2020/05/08/the\\_secs\\_china\\_evasion\\_491148.html](https://www.realclearenergy.org/2020/05/08/the_secs_china_evasion_491148.html).

<sup>15</sup> See SEC Chairman Jay Clayton et al., Public Statement, Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited (Apr. 21, 2020), <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting> (“in . . . China, there is substantially greater risk that disclosures will be incomplete or misleading and, in the event of investor harm, substantially less access to recourse, in comparison to U.S. domestic companies”).

<sup>16</sup> *Id.* at n.20; see Presidential Memorandum, Memorandum on Protecting United States Investors from Significant Risks for Chinese Companies, Foreign Policy (June 4, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-protecting-united-states-investors-significant-risks-chinese-companies/> (“Recently, the Chinese government enacted a statute that expressly prevents audit firms from providing this information without the prior consent of Chinese financial regulators [and] [p]reventing the PCAOB from complying with its statutory mandate means that investors cannot have confidence in the financial reports of audited companies and creates significant risks to investors in the securities listed on United States stock exchanges.”); see also Morgan Stanley, Execution Services Sales, Trading Unicorns Part 2: China ADRs & HK Secondary Listing Key Debates at 10 (commenting on the lack of “visibility to inspect audits of overseas listed Chinese companies as their audit papers are not allowed to be shared with overseas regulators without regulatory approval.”).

The Chairmen’s Statement indicated that the Commission’s cross-board regulation and enforcement of activity from China could not be relied upon.<sup>17</sup> In addition, the Chairmen’s Statement described the “significant risks related to investments in China due to the inability of the PCAOB to inspect audit work and practices of PCAOB-registered accounting firms in China (including Hong Kong, to the extent their audit clients have operations in China) . . . .”<sup>18</sup>

CII acknowledges that there are a number of potential alternative or supplemental actions that potentially could be taken to address the investor protection and public interest issues that arise from U.S. listed Chinese companies.<sup>19</sup> We note that, among other recent activities relating to these issues, Nasdaq has proposed two additional listing rules;<sup>20</sup> the Commission has announced a July 9 SEC staff roundtable on risks at emerging markets companies;<sup>21</sup> the Trump Administration has requested the President’s Working Group submit a report by early August that includes recommendations for actions to be taken, including “new listing rules”,<sup>22</sup> and the U.S. Senate passed by unanimous consent the Holding Foreign Companies Accountable Act<sup>23</sup> that, in the words of its sponsor Senator John Kennedy, is intended to “kick deceitful Chinese companies off U.S. exchanges.”<sup>24</sup>

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<sup>17</sup> See SEC Chairman Jay Clayton et al., Public Statement, Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited (“in China, there are significant legal and other obstacles to obtaining information needed for investigations or litigation”).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets Committee on Financial Services, United States House of Representatives et al. 6 (June 18, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/June%2018%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entrepreneuership%20and%20Capital%20Markets%20\(finalF\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/June%2018%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entrepreneuership%20and%20Capital%20Markets%20(finalF).pdf) (“We acknowledge that there are a number of possible alternative actions the SEC, the PCAOB, the stock exchanges, or Congress could potentially take to address, at least in part, the investor protection and general oversight issues that exist for U.S. Chinese listed companies”).

<sup>20</sup> Notice of Filing of Proposed Rule Change To Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets, Exchange Act Release No. 89,028, 85 Fed. Reg. 35,967 (proposed June 12, 2020), <https://www.federalregister.gov/documents/2020/06/12/2020-12686/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>; Notice of Filing of Proposed Rule Change To Apply Additional Initial Listing Criteria for Companies Primarily Operating in Restrictive Markets, Exchange Act Release No. 89,027, 85 Fed. Reg. 35,962 (proposed June 12, 2020), <https://www.federalregister.gov/documents/2020/06/12/2020-12685/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

<sup>21</sup> Press Release, U.S. Securities and Exchange Commission, SEC Staff to Host July 9 Roundtable on Emerging Markets (May 19, 2020), <https://www.sec.gov/news/press-release/2020-116>.

<sup>22</sup> Presidential Memorandum, Memorandum on Protecting United States Investors from Significant Risks for Chinese Companies, Foreign Policy.

<sup>23</sup> S. 945, the Holding Foreign Companies Accountable Act of 2019, 116th Cong. (engrossed in Senate May 5, 2020), <https://www.congress.gov/bil+1/116th-congress/senate-bill/945>; see Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets Committee on Financial Services, United States House of Representatives et al. at 2 (“CII generally supports . . . the Holding Foreign Companies Accountable Act of 2019”).

<sup>24</sup> See, e.g., Press Releases, Senate passes Kennedy and Van Hollen’s bill to kick deceitful Chinese companies off U.S. exchanges.

## Basis for Proposed Rule

In light of the recent significant events and CII policies and related public positions, we commend Nasdaq for issuing the Proposed Rule. We agree with Nasdaq that “accurate financial statement disclosure is critical for investors to make investment decisions.”<sup>25</sup> We share Nasdaq’s view that “constraints on the PCAOB’s ability to inspect auditor work in countries [like China] with national barriers on access to information weaken assurances that the disclosures and financial information of the companies with operations in such countries are not misleading.”<sup>26</sup>

We also agree with Nasdaq that “the PCAOB’s inability to inspect the audit work and practices of auditors in certain countries [like China] weakens the assurance that the auditor obtained sufficient appropriate audit evidence to express its opinion on a company’s financial statements, and decreases confidence that the auditor complied with PCAOB and SEC rules and professional standards in connection with the auditor’s performance of audits.”<sup>27</sup>

We also agree with Nasdaq that “without reasonable assurances that a company’s financial statements and related disclosures are free from material misstatements, there is a risk that a company that would otherwise not have qualified to list on Nasdaq may satisfy Nasdaq’s listing standards by presenting financial statements that contain undetected material misstatements.”<sup>28</sup> We believe that risk is further elevated by the use of variable interest entity<sup>29</sup> and dual class stock structures,<sup>30</sup> both of which are frequently adopted by U.S. listed Chinese companies.<sup>31</sup> And those structures and their related risks are not fully understood by many market participants.<sup>32</sup>

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<sup>25</sup> 85 Fed. Reg. at 35,135.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 35,136-37.

<sup>28</sup> *Id.* at 35,137.

<sup>29</sup> *See, e.g.*, CII Research Analyst Brandon Whitehill, Buyer Beware: Chinese Companies and the VIE Structure 2 (Dec. 2017),

[https://www.cii.org/files/publications/misc/12\\_07\\_17%20Chinese%20Companies%20and%20the%20VIE%20Structure.pdf](https://www.cii.org/files/publications/misc/12_07_17%20Chinese%20Companies%20and%20the%20VIE%20Structure.pdf) (“VIEs are fraught with complexity and risk for investors, including vulnerability to Chinese government pressures and management conflicts of interest”).

<sup>30</sup> *See, e.g.*, Letter from Ash Williams Chair, CII, et al. to John Zecca, Senior Vice President, General Counsel, North America and Chief Regulatory Officer, NASDAQ Stock Market (Oct. 24, 2018),

[https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf) (“over time and on average, the valuation of these [dual class stock structure] firms tends to decline, as the “wedge” between ownership and control widens, the agency costs of insider control and lack of shareholder accountability increase, founder’s entrepreneurial skills and insights that initially propelled a company become dated, and opportunities and risks change in ways not foreseeable by investors at IPO.”).

<sup>31</sup> *See, e.g.*, CII, Dual-Class Snapshot: Statistics (as of June 16, 2020) (on file with CII) (In 2019, 9.9% of initial public offerings (IPOs) were foreign private issuers (FPIs) from China (21 out of 212), of these 21 Chinese FPIs, 14 (66.67%) have a dual class structure and 7 (33.33%) have a Variable Interest Entity (VIE) structure, and thus far 16.7% of IPOs in 2020 have been Chinese FPIs (9 out of 54), of these 9 Chinese FPIs, 3 (33.3%) have a dual class structure and 6 (66.7%) have a VIE structure.”).

<sup>32</sup> *See generally* CII Research Analyst Brandon Whitehill, Buyer Beware: Chinese Companies and the VIE Structure (describing the frequency and risks of Chinese companies with VIEs).

## Improvements to Proposed Rule

CII believes that protecting investors and the public interest from the risks of Chinese companies listed on the U.S. stock exchanges demands more aggressive action and a narrower level of discretion<sup>33</sup> for the two most critical and related provisions of the Proposed Rule: (1) when the listing applicant or listed company has an “auditor or an accounting firm engaged to assist with the audit, [that] is located in a jurisdiction that limits the PCAOB’s ability to inspect the auditor”;<sup>34</sup> and (2) when the listing applicant or listed company has a business that “is principally administered 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” (Restrictive Market).<sup>35</sup> Our apprehension about the lack of aggressive action and level of discretion provided by the Proposed Rule with respect to these key provisions is confirmed by the language in the Proposed Rule indicating that: (1) “Nasdaq *may be* satisfied that an auditor that is not subject to PCAOB inspection has *mitigated* the risk that it may have significant undetected deficiencies in its system of quality controls by being a part of a global network,”<sup>36</sup> and (2) as an alternative to denying an initial or continued listing, Nasdaq may decide that a company whose audit is blocked from PCAOB inspection may simply need to have “[h]igher equity, assets, earnings *or* liquidity measures than otherwise required.”<sup>37</sup>

Consistent with our concerns, we believe Nasdaq should consider revising the Proposed Rule in the following manner:

- The proposed IM-5101-1(b)(1)<sup>38</sup> and IM-5101-1(c)<sup>39</sup> would be replaced by new rules that would require that listing applicants and listed companies from a Restrictive Market,

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<sup>33</sup> See, e.g., Evelyn Cheng, China Economy, China’s online grocery platform Dada debuts on the Nasdaq, calls for greater scrutiny on markets, CNBC (June 7, 2020, 11:47 PM EDT), <https://www.cnbc.com/2020/06/08/nasdaqs-latest-chinese-ipo-dada-calls-for-greater-scrutiny-on-markets.html> (quoting Philip Kuai, founder and CEO of Dada a Nasdaq listed company: “We particularly welcome better auditing and regulation, . . . [o]nly when your entire environment is as healthy as possible will the interests of everyone — investors, users etc. — be protected, and the market develop in a healthy way.”).

<sup>34</sup> 85 Fed. Reg. at 35,135.

<sup>35</sup> *Id.* at 35,136.

<sup>36</sup> *Id.* at 35,135 (emphasis added); see, e.g., Colleen Honigsberg, The Case for Individual Audit Partner Accountability, Harv. L. Sch. F. Corp. Governance (Dec. 17, 2019), <https://corpgov.law.harvard.edu/2019/12/17/the-case-for-individual-audit-partner-accountability/> (“The limited research on the use of overseas audit participants suggests that they are associated with increased risk of audit failure.”).

<sup>37</sup> 85 Fed. Reg. at 35,136 (emphasis added).

<sup>38</sup> *Id.* at 35,135 (“IM-5101-1 to add a new subparagraph (b) that sets forth factors Nasdaq may consider in applying additional and more stringent criteria to an applicant or listed company based on the qualifications of the company’s auditor [and] [s]uch factors include: (1) Whether the auditor has been subject to a PCAOB inspection, such as where the auditor is newly formed and has therefore not yet undergone a PCAOB inspection or where the auditor, or an accounting firm engaged to assist with the audit, is located in a jurisdiction that limits the PCAOB’s ability to inspect the auditor.”).

<sup>39</sup> 85 Fed. Reg. at 35,136 (“Nasdaq also proposes to amend IM-5101-1 to add a new subparagraph (c) to clarify that Nasdaq may also use its discretionary authority to impose additional or more stringent criteria, including the criteria set forth in IM-5101-1(b), in other circumstances, including when a company’s business is principally administered

including companies listed prior to the effectiveness of the new rules, be prohibited from having an auditor or an accounting firm engaged to assist with their company audit that is located in a jurisdiction that limits the PCAOB's ability to inspect the auditor (New Auditor Inspection Rules).

- Generally consistent with the Proposed Rule, a Nasdaq staff determination to deny the initial or continued listing of a company for lack of compliance with the New Auditor Inspection Rules would result in the issuance “of a denial or delisting letter to the company that will inform the company of the factual basis for Nasdaq’s determination and its right for review of the decision pursuant to the Rule 5800 Series.”<sup>40</sup>
- Nasdaq Rule 5810 would be amended to provide Nasdaq Hearings Panel the discretion to grant a listed company an exception from the New Auditor Inspection Rules for a period not to exceed 540 days from the date of the delisting letter.<sup>41</sup>

As indicated, we believe the above referenced revisions to the Proposed Rule would better protect investors and the public interest by taking more aggressive action and narrowing the discretion for imposing compliance on listing applicants and listed companies for the two most critical and related aspects of the Proposed Rule. Moreover, our revisions would provide listed companies a reasonable period of time to come into compliance with the New Auditor Inspection Rules;<sup>42</sup> the time period would be three times the 180 days generally permitted under existing Nasdaq rules.<sup>43</sup> We believe our proposed longer time period for regaining compliance with the New Auditor Inspection Rules would better ensure that the delisting of a potentially substantial number of Chinese companies would not negatively impact long-term investors or be disruptive to the continued fair and orderly operation of the U.S. financial markets.<sup>44</sup>

For all the above reasons, we believe that the Proposed Rule with our revisions could be a model for all other exchanges and would be directly responsive to President Trump’s statement that “[t]he time has come to take firm action in an orderly fashion to put an end to the practice that has tacitly permitted companies with significant Chinese operations to flout protections United States law requires for investors in United States markets.”<sup>45</sup>

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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.”).

<sup>40</sup> *Id.*

<sup>41</sup> See Nasdaq Rule 5815(c)(1)(A) (Mar. 12, 2009) (“Scope of the Hearings Panel's Discretion (1) When the Hearings Panel review is of a deficiency related to continued listing standards, the Hearings Panel may, where it deems appropriate: (A) grant an exception to the continued listing standards for a period not to exceed 180 days from the date of the Staff Delisting Determination with respect to the deficiency for which the exception is granted”), [http://nasdaq.cchwallstreet.com/nasdaq/main/nasdaq-equityrules/chp\\_1\\_1/chp\\_1\\_1\\_3/chp\\_1\\_1\\_3\\_3/chp\\_1\\_1\\_3\\_3\\_10/chp\\_1\\_1\\_3\\_3\\_10\\_6/default.asp](http://nasdaq.cchwallstreet.com/nasdaq/main/nasdaq-equityrules/chp_1_1/chp_1_1_3/chp_1_1_3_3/chp_1_1_3_3_10/chp_1_1_3_3_10_6/default.asp).

<sup>42</sup> See Benjamin Bain et al., Market, SEC Chief Backs Bill to Delist China Firms Barring Audit Reviews (quoting Securities and Exchange Commission Chairman Jay Clayton: “There’s a period of time to come into compliance and if you don’t then it’s time to take measures beyond just disclosure.”).

<sup>43</sup> See Nasdaq Rule 5815(c)(1)(A).

<sup>44</sup> See Presidential Memorandum, Memorandum on Protecting United States Investors from Significant Risks for Chinese Companies, Foreign Policy (“Any such actions should take into account the impact on investors and ensure the continued fair and orderly operation of United States financial markets.”).

<sup>45</sup> *Id.*

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We appreciate your consideration of our comments. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large, stylized "J" and "M".

Jeffrey P. Mahoney  
General Counsel