



Nasdaq.com

April 30, 2021

VIA ELECTRONIC MAIL

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

Re: Response to Comments of Proposed Rule Change to Adopt Additional Initial Listing Criteria for Companies Primarily Operating in Jurisdictions That Do Not Provide the PCAOB with the Ability to Inspect Public Accounting Firms (Release No. 34-91089; File No. SR- NASDAQ-2021-007)¹

Dear Ms. Countryman:

The Nasdaq Stock Market, LLC (“Nasdaq”) writes in connection with Nasdaq’s proposal (the “Proposal”), identified above, to enhance the listing requirements applicable to any company that principally administers its business in a jurisdiction that does not provide the Public Company Accounting Oversight Board (the “PCAOB”) with access to conduct inspections of public accounting firms that audit Nasdaq-listed companies (a “Restrictive Market”). Nasdaq will consider a company’s business to be principally administered in a Restrictive Market if: (i) the company’s books and records are located in that jurisdiction; (ii) at least 50% of the company’s assets are located in such jurisdiction; or (iii) at least 50% of the company’s revenues are derived from such jurisdiction.²

In the Proposal, Nasdaq proposes to adopt new Rule 5210(k)(i), which would require a company that is listing its Primary Equity Security on Nasdaq in connection with its IPO, and that principally administers its business in a Restrictive Market, to offer a minimum amount of securities in a Firm Commitment Offering in the U.S. to Public Holders that: (a) will result in gross proceeds to the company of at least \$25 million; or (b) 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(k)(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.

¹ Securities Exchange Act Release No. 91089 (February 9, 2021), 86 FR 9549 (February 16, 2021).

² 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 nonetheless desire exposure to these emerging markets because those investments offer different return profiles. For this reason, Nasdaq believes it is appropriate to list these emerging market companies on U.S. exchanges where they satisfy the listing requirements and other critical processes and safeguards embedded in the U.S. capital market ecosystem. These include the disclosure and oversight regime on which capital markets regulation in the U.S. is founded.

As stated in the Proposal:

Nasdaq believes that the PCAOB's inability to inspect the audit work and practices of auditors in certain countries 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. Nasdaq believes that without reasonable assurances from an auditor 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.³

For this reason, Nasdaq has proposed to adopt heightened listing requirements for companies from Restrictive Markets.

A comment letter submitted by the Council of Institutional Investors ("CII") "shares the concerns expressed by The Nasdaq Stock Market LLC (Nasdaq) in the Proposed Rules" described above, however, suggests that Nasdaq should instead prohibit Restrictive Market Companies from having an auditor that the PCAOB cannot inspect.⁴

Nasdaq appreciates CII's recommendations. However, the questions surrounding PCAOB inspection of audit forms in a foreign jurisdiction are supranational issues that stem, to a significant extent, from a long-standing, persistent and to-date unresolved tension arising from the differences between U.S. legal requirements and their related national goals and procedures, and the legal requirements and related national goals and procedures of certain foreign jurisdictions. As noted in the CII Letter, there are multiple governmental initiatives underway to resolve these concerns, including recommendations of the President's Working Group on Financial Markets⁵ and the Holding Foreign Companies Accountable Act

³ See Proposal at 9554.

⁴ See Letter dated February 18, 2021 from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary Countryman, available at <https://www.sec.gov/comments/sr-nasdaq-2021-007/srnasdaq2021007-8389976-229379.pdf> ("CII Letter").

⁵ 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>.

("HFCAA").⁶ Former SEC Chairman Jay Clayton stated that Commission Staff was actively working on proposals relating to these issues,⁷ and on March, 24, 2021, the Commission issued interim final amendments to implement the submission and disclosure requirements of the HFCAA.⁸ These efforts, like the proposed alternative expressed in the CII Letter, exist outside of the requirements of a single Exchange's listing requirements and while CII may prefer that they be adopted, they are not the proposed requirements currently before the Commission in Nasdaq's Proposal.

Instead, to address the concerns Nasdaq has observed arising from the unique potential risks to U.S. investors due to restrictions on the PCAOB's ability to inspect the audit work and practices of auditors in Restrictive Markets, Nasdaq has proposed heightened liquidity requirements designed to ensure that Restrictive Market Companies have sufficient investor base and public float to support fair and orderly trading on the Exchange. Nasdaq believes these proposed rules, as structured, are consistent with Section 6(b)(5) of the Exchange Act. The Proposal will provide a greater assurances to investors that a Restrictive Market Company meets Nasdaq's financial listing requirements, thereby preventing fraudulent and manipulative acts, protecting investors and promoting the public interest.

The Proposal will also provide additional assurances that there are sufficient freely tradable shares and investor interest to support liquid 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. 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. Nasdaq believes the Proposal will reduce trading volatility and price manipulation, thereby protecting investors and the public interest and supporting fair and orderly trading. Further, Section 11A of the Act⁹ 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."

⁶ See Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020), available at <https://www.congress.gov/116/plaws/publ222/PLAW-116publ222.pdf>.

⁷ See Statement after the Enactment of the Holding Foreign Companies Accountable Act, available at <https://www.sec.gov/news/public-statement/clayton-hfcaa-2020-12>.

⁸ See SEC Issues Amendments, Seeks Public Comment on Holding Foreign Companies Accountable Act (March 24, 2021), available at <https://www.sec.gov/news/press-release/2021-53>.

⁹ 15 U.S.C. 78k-1.

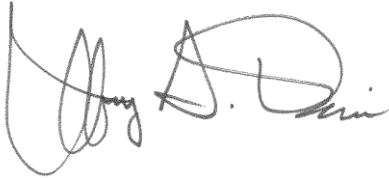
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For the above reasons, Nasdaq asks that the Commission approve the Proposal without delay. If you have any questions or need additional information, please contact me at [REDACTED]

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Davis". The signature is written in a cursive style with a large, stylized "J" and "D".

Jeffrey S. Davis
Senior Vice President, Senior Deputy General Counsel
Nasdaq, Inc.