Council of Institutional Investors
The Voice of Corporate Governance

February 10, 2016

NASDAQ Listing Qualifications
c/o Stan Higgins
805 King Farm Boulevard
Rockville, MD 20850

Dear Mr. Higgins:

The Council of Institutional Investors ("CII") writes to provide comment on the Solicitation of Comments by the Nasdaq Listing and Hearing Review Council (the "Review Council") About Shareholder Approval Rules (the "Solicitation"). The Solicitation seeks input regarding the continuing utility of the listing standards mandating that listed companies seek shareowner approval for stock issuances in connection with acquisitions, changes of control and certain private placements when the issuance would exceed 20 percent of outstanding shares or voting power, or 5 percent when insiders have an interest in the assets to be acquired.

CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit plans, foundations and endowments with combined assets that exceed $3 trillion. Many of those assets are traded in Nasdaq markets. Our members include large, long-term shareowners responsible for safeguarding the retirement savings of millions of American workers. CII's policies reflect the principle that shareowners should be permitted to vote on corporate actions that would significantly affect the nature or value of their investment. Further, CII policies state that "an action should not be taken if its purpose is to reduce accountability to shareholders."[1]

Among the stated objectives of the Nasdaq listing standards are to preserve and strengthen the quality of, and public confidence in, its markets and to protect investors.[2] CII does not believe that weakening Nasdaq's standards requiring shareowner approval for significant stock issuances would be consistent with those goals.

As an initial matter, the Solicitation provides no evidence that the current shareowner approval requirements are harming issuers. The Solicitation observes that issuers "may face higher costs of capital by structuring transactions in sub-optimal ways in order to satisfy Nasdaq's shareholder approval rules." Although the precise meaning of that phrasing is unclear, we question the argument that the requirements should be changed because issuers are incurring costs to avoid seeking shareowner approval. That reading is supported by service provider "compliance" advice that suggests alternative transactional or financing structures designed to avoid seeking shareowner approval.[3]

That issuers may be trying to avoid a shareowner vote is not a compelling basis for weakening the listing standards. Nasdaq also requires shareowner approval for equity based compensation plans in which employees, consultants or directors participate, in order to provide shareowners

[1] See Policies on Corporate Governance, section 1.4 (available at http://www.cii.org/corp_gov_policies#shareowner_rights)
[2] See https://listingcenter.nasdaq.com/assets/NLHRC_Charter.pdf; Nasdaq Rule 5101 (available at http://nasdaq.cchwallstreet.com/NASDAQTools/bookmark.asp?id=nasdaq-rule_5100&manual=/nasdaq/main/nasdaq-equityrules/).
[3] E.g., https://www.mintz.com/newsletter/2011/Advisories/1162-0511-NAT-SEC/web.htm.

with "voice" in decisions that could result in dilution of their interests.[4] No reasonable observer would suggest weakening that requirement simply because issuers complained they had to shift to cash compensation to avoid having to seek shareholder approval.

CII also does not agree with the Review Council that "other investor protection mechanisms" have reduced the utility of the shareowner approval requirements. CII and its members have strongly supported majority-independent boards[5] and other "stronger corporate governance practices" cited in the Solicitation, but we do not believe that those mechanisms obviate the need for a shareowner vote on significant stock issuances. (The Solicitation does not identify those corporate governance practices.)

There are important differences, however, between those mechanisms and a shareowner approval requirement. Board oversight is an indirect mechanism for shareowners to communicate their preferences, and the disciplining effect of board elections allows shareowners to replace directors who they believe have not acted in shareowners' interests only after the fact. A shareowner vote, by contrast, provides direct input and operates prospectively.

Similarly, shareowner litigation is not an effective substitute for direct shareowner input. Like director elections, litigation operates only retrospectively, and it may take years to resolve. In the case of derivative claims for breach of fiduciary duty, the business judgment rule and exculpatory charter provisions provide directors with strong protections, absent evidence of bad faith or self-dealing.

The NYSE has shareowner approval requirements that are substantially similar to the listing standards discussed in the Solicitation, including the percentage increases required to trigger a shareowner vote. CII is concerned that stock exchanges may try to compete in what is now a for-profit marketplace by offering more lenient terms to issuers in a "race to the bottom." In the past, CII has opposed changes that would contribute to this kind of unhealthy competition.[6]

We appreciate the opportunity to express our views on the Solicitation. If you have any questions, please do not hesitate to contact me directly at 202.261.7082 or amy@cii.org.

Sincerely,

Amy Borrus

Amy Borrus
Interim Executive Director

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[4] See Order Approving NYSE and Nasdaq Proposed Rule Changes and Nasdaq Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to NYSE Amendments No. 1 and 2 and Nasdaq Amendments No. 2 and 3 Thereto Relating to Equity Compensation Plans
(available at http://www.sec.gov/rules/sro/34-48108.htm)(section discussing IM-4350-5).

[5] We note that companies may classify as independent directors whose ties to senior management or other directors, or whose duration of service, could, in our view, impair their objectivity.

[6] See, e.g., https://www.sec.gov/rules/sro/nasd200280/srnasd200280-1.pdf (urging the SEC to conform Nasdaq's more permissive director independence lookback period to the NYSE's stricter standard).