Council of Institutional Investors®
The voice of corporate governance

June 26, 2017

Via e-mail: comments@nasdaq.com

NASDAQ Listing Qualifications
c/o Nikolai Utochkin
805 King Farm Boulevard
Rockville, MD 20850

Dear Mr. Utochkin:

The Council of Institutional Investors ("CII") writes to provide comment on whether to modify Rule 5635(d) of the Nasdaq Listing Rules.[1] CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit plans, foundations and endowments with combined assets that exceed $3 trillion. Our associate members include a range of asset managers with more than $20 trillion in assets under management, many or most also with long-term investment horizons. 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. CII policies state that "an action should not be taken if its purpose is to reduce accountability to shareholders."[2]

As you are aware, the existing rule provides that a private placement generally requires shareholder approval if the issuance is less than the greater of book or market value and the shares constitute at least 20 percent of outstanding shares or voting power.[3] The proposal contemplates the following test for determining whether shareholder approval is required for a private placement:

> *Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which:*
>
> *1) alone or together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power of outstanding shares before the issuance; and*
>
> *2) (A) is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement of the issuance; or*

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[1] See https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf.
[2] See Policies on Corporate Governance, section 1.4 (available at http://www.cii.org/corp_gov_policies#shareowner_rights)
[3] See p. 5 Exhibit A at https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf.

> *(B) is not approved either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors*

The revised language effectively would mean that a 20%+ dilutive private placement made at or above market value would require a favorable vote from independent directors in order to avoid a shareholder vote, whereas currently the same private placement does not require an independent director vote to avoid a shareholder vote.

We believe that requiring independent director approval of private placements involving full or premium consideration in order to avoid a shareholder vote would have limited impact. We believe Nasdaq has an opportunity to meaningfully enhance shareholders' ability to evaluate and, where appropriate, reject issuances that could destroy long-term value. Such a safeguard could not only reduce investor risk, but in so doing improve companies' ability to attract new capital investment. We respectfully suggest revising the proposed rule to ensure a shareholder vote on private placements involving 20%+ dilution or a discount to market value, as follows:

> *Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which:*
>
> *1) alone or together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power of outstanding shares before the issuance;* or ~~*and*~~
>
> *2)~~(A)~~ is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement of the issuance.~~; or~~*
>
> ~~*(B) is not approved either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors*~~

Thank you for considering our views. If we can answer any questions or provide additional information on this important matter, please do not hesitate to contact me at 202.822.0800 or ken@cii.org.

Sincerely,

Kenneth A. Bertsch
Executive Director
Council of Institutional Investors