

Via email

August 4, 2020

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

*Re: File Number SR-NASDAQ-2020-002*

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), 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 and defined contribution plans with more than 15 million participants – true “Main Street” investors through their 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 \$40 trillion in assets under management.<sup>1</sup>

The purpose of this letter is to express CII’s unqualified support for the Nasdaq Stock Market LLC (Nasdaq) proposal to “amend the procedures governing the introduction of legal arguments and material information by companies in a proceeding before a Hearings Panel”<sup>2</sup> (Proposal).

One strength of the Nasdaq regulatory process is that companies may seek review of a Nasdaq staff delisting determination by requesting a hearing before the Hearings Panel. The Hearings Panel consists of two experienced professionals who are independent of Nasdaq, and have been authorized by Nasdaq’s Board of Directors to render delisting decisions.<sup>3</sup> The pool of panelists

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<sup>1</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>2</sup> Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the Procedures Governing the Introduction of Legal Arguments and Material Information by Companies in a Proceeding Before a Hearings Panel, Exchange Act Release No. 89,309, 85 Fed. Reg. 43,900 (proposed July 14, 2020), available at <https://www.federalregister.gov/documents/2020/07/20/2020-15552/self-regulatory-organizations-the-nasdaq-stock-market-llc-notice-of-filing-of-proposed-rule-change>.

<sup>3</sup> See Nasdaq, Listing Center, Reference Library, Identification No. 441 (last visited Aug. 4, 2020), [https://listingcenter.nasdaq.com/Material\\_Search.aspx?mcd=LQ](https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ) (“The Panel consists of two professionals from the

includes academics, accountants, auditors, corporate officers, investor advocacy representatives (including current and former CII staff), investment bankers, securities lawyers and venture capitalists.<sup>4</sup>

In our view, the Nasdaq Hearings Panel and related delisting process provides for a level of independence, rigor and transparency that should be the standard for all exchanges. We, therefore, commend Nasdaq for its efforts to continue to seek improvements to the effectiveness of Hearings Panel proceedings by amending Listing Rule 5815(a)(5) and (a)(6) to:

(1) Establish a requirement, and set forth the process, for a company to provide a written submission and written update in connection with either a written or oral hearing; (2) prohibit a company from introducing in a written update or during an oral hearing before a Hearings Panel any legal arguments that were not previously raised; and (3) prohibit a company from introducing during an oral hearing before a Hearings Panel any material information unless the material information was previously raised by the company in writing or was solicited by the Hearings Panel, or the company can show that the material information did not earlier exist or exceptional or unusual circumstances are present.<sup>5</sup>

We agree with Nasdaq that the above referenced amendments would:

[A]void situations. . . where, in advance of a hearing, companies provide little information about their plan to achieve or regain compliance . . . and instead present such information for the first time during the hearing. When companies belatedly provide information to the Hearings Panel . . . it does not provide the Hearings Panel with adequate time to prepare for and consider the information in advance of the hearing.<sup>[6]</sup> Similarly, where companies belatedly provide legal arguments to the Hearings Panel, Nasdaq staff is unable to adequately brief the Hearings Panel concerning its response to the legal argument and, as a result, the Hearings Panel does not have adequate time to prepare for and consider the legal argument in advance of the hearing and thus cannot properly adjudicate the issue.<sup>7</sup>

For the above referenced reasons, we strongly support the Proposal.

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business community, who are independent of Nasdaq, and have been authorized by Nasdaq's Board of Directors to render decisions.”).

<sup>4</sup> *Id.*

<sup>5</sup> 85 Fed. Reg. at 43,901.

<sup>6</sup> *See id.* at 43,903 (proposed amendments may prevent “companies from engaging in gamesmanship in the hearings process . . .”).

<sup>7</sup> *Id.* at 43,902.

Thank you for considering our views on this matter. Please contact me with 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