Nasdaq Proposed Additional Listing Criteria Applicable to Companies in Restrictive Markets

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On May 18, 2020, Nasdaq Stock Market LLC ("***Nasdaq***") submitted three proposals to the Securities and Exchange Commission ("***SEC***") to adopt additional listing criteria applicable to companies that primarily operate in countries where there are secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of US listed companies ("***Restrictive Markets***"). On June 8 and June 2, the SEC published the first two proposals and the third proposal in the Federal Register for comments, respectively. The comment period for the first two proposals closed on July 6, 2020, and the comment period for the third proposal closed on June 29, 2020.

The first proposal is to adopt a new requirement related to the qualification of the management. Nasdaq noted instances where the management lacked familiarity with the requirements to be a Nasdaq-listed public company in the US or was otherwise unprepared for the rigors of operating as a public company, and such risks are intensified when a company's business is principally administered in a Restrictive Market. To address this issue, Nasdaq is proposing a new listing standard which would require Restrictive Market companies listing on Nasdaq to have one member of senior management or a director that has experience at a US listed public company or familiarity with the US public company regulatory framework or, alternatively, a third-party advisor to provide the company with guidance on an ongoing basis. Companies that fail to meet this new requirement would need to disclose that information and would have a 180-day compliance period to regain compliance. The proposed rule changes would be applied prospectively to Restrictive Markets companies newly listed on Nasdaq but not to companies that were already listed.

The second proposal is to apply additional initial listing criteria as to the offering size and liquidity requirements. Nasdaq has long been concerned that small IPO offering size or low public float percentage may not ensure sufficient liquidity to support primary or secondary market trading, leaving these securities susceptible to greater risk of price manipulation. To address these concerns, the proposal would require companies listing via an IPO on Nasdaq to have a certain minimum offering size or public float percentage if they are primarily operating in a Restrictive Market. Specifically, the proposed rule would require the company to offer a minimum amount of securities in a Firm Commitment Offering in the US to Public Holders that: (i) will result in gross proceeds to the Company of at least $25 million; or (ii) will represent at least 25% of the Company's post-offering Market Value of Listed Securities, whichever is lower. Nasdaq would also impose similar requirements on business combinations with companies primarily operating in Restrictive Markets.

The third proposal is to apply additional criteria to a listing applicant or a listed company based on the qualifications of the company's auditor. This proposal would codify Nasdaq's discretionary authority to apply additional listing criteria if a company is primarily operating in a Restrictive Market, as well as in situations where a company's auditor does not demonstrate sufficient Public

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Company Accounting Oversight Board ("***PCAOB***") inspection history, quality controls, resources, geographic reach and experience to adequately perform the company's audit. Nasdaq will consider several discretionary factors in deciding whether it would apply the additional listing criteria to an applicant or listed company on a case-by-case basis, such as the auditor's PCAOB inspection history, experience with US listed companies in the company's industry and geography, the global network and geographic outreach . . . etc. Once identified, to ensure suitability for listing, Nasdaq would apply additional and more stringent criteria to the company, such as requiring higher equity, assets, earnings or liquidity measures, that any offering be underwritten on a firm commitment basis (which typically involves more due diligence), or that companies impose lock-up restrictions on officers and directors. Nasdaq believes that these higher standards may provide comfort that, even if the company's equity, assets and revenues are inflated, the company still satisfies the financial listing criteria or that the company will have adequate public float.

The focus of these above proposals is consistent with recent statements and actions by U.S. regulators and lawmakers on emerging market risks, particularly the China based issuers. In early 2020, several China-based US-listed companies were alleged to have engaged in fraudulent activity, and in some cases, the allegations were followed by SEC enforcement, private lawsuits and de-listings. In April 2020, the SEC and PCAOB jointly issued a statement warning investors about investing in "emerging market" (i.e., Chinese) companies given the absence of PCAOB inspections.

On May 20, 2020, the U.S. Senate passed S. 945, the Holding Foreign Companies Accountable Act, by unanimous consent. This bill, if adopted in its current form, would prohibit certain companies from listing and trading their securities on any U.S. securities exchanges or through any other method regulated by the SEC if the PCAOB is denied access to conduct inspections of the companies' auditors, as is the case for China-based auditors. US listed Chinese companies should proactively consider their options now to protect their ability to access capital, especially given the heightened political tension between the US and China potentially leading to further regulatory tightening.

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