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July 8, 2020

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: July 9, 2020, SEC Staff Roundtable on Emerging Markets**

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)<sup>1</sup> appreciates the opportunity to participate in the Securities and Exchange Commission’s (“SEC”) Staff Roundtable on Emerging Markets (the “Roundtable”). As the SEC recently noted, “[i]nvestor choice has long been a core component of our capital markets regulatory framework, and emerging market investments, including as a component of a diversified portfolio, have proven to be beneficial to many investors.”<sup>2</sup> Nasdaq applauds the SEC for convening this roundtable of various stakeholders and hopes it will generate actionable solutions to address the risks posed by certain emerging market companies. We believe every stakeholder plays a critical role in collectively assuring that our capital market functions effectively and investors are protected.

Despite the global pandemic, the U.S. capital markets remain the envy of countries around the world. The more than 3,100 listings on The Nasdaq Stock Market from both mature and developing markets include the most innovative and high-growth companies in the world. Their ground-breaking and pioneering work in a wide range of sectors propels the U.S. and world economies, creating millions of jobs and enriching our lives in countless ways. They are critical to our economic recovery.

Many of these companies are from emerging markets. A listing on Nasdaq provides these companies with unrivalled access to investors and opportunities to raise capital to fund research, jobs and technological advancements. For their part, emerging market companies provide an opportunity for

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<sup>1</sup> Nasdaq (Nasdaq: NDAQ) is a global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute their business vision with confidence. To learn more about the company and its technology solutions, visit us on [LinkedIn](#), on Twitter [@Nasdaq](#), or at [www.nasdaq.com](#).

<sup>2</sup> See SEC Chairman Jay Clayton, PCAOB Chairman William D. Duhnke III, SEC Chief Accountant Sagar Teotia, SEC Division of Corporation Finance Director William Hinman and SEC Division of Investment Management Director Dalia Blass, *Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited* (April 21, 2020), available at <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting> (the “Public Statement”).

portfolio diversification to U.S. Main Street investors through exposure to industries and companies in developing economies that may not otherwise be readily available to them. Nasdaq's research shows U.S. investors have injected \$1.211 billion over the past 13 years into mutual funds and ETFs focused on offshore companies.<sup>3</sup>

Investments in emerging markets may be inherently riskier than in developed markets for reasons related to macroeconomic, legal and political structures. However, investors who invest in these emerging markets through instruments listed on U.S. exchanges are nonetheless able to rely on a number of critical processes and safeguards embedded in the U.S. capital market ecosystem that protect them and uphold market integrity.<sup>4</sup> These include the disclosure and oversight regime on which capital markets regulation in the U.S. is founded. While U.S. securities laws provide for some degree of flexibility for reporting by non-U.S. issuers, in many respects, these foreign issuers are SEC-registered companies that are subject to the same general standards regarding materiality and disclosure of financial information as U.S. issuers.<sup>5</sup> Investors, regulators, auditors, investment advisers, underwriters, lenders, equity analysts, brokers, and journalists rely on this information to monitor regulatory compliance, make investment decisions, evaluate a company's financial and operational health, and understand a company's business and management.

### **Stakeholders Must Collaborate to Protect Investors**

Nasdaq believes that no single stakeholder can effectively mitigate the unique risks presented by emerging market companies on its own. Each participant is part of a wider ecosystem and collectively we share the responsibility to protect investors as effectively as possible. Representatives of many, although not all, stakeholders in that ecosystem are represented on panels at this Roundtable.

Each stakeholder helps enable companies to become publicly-traded and available to Main Street investors, and each helps to protect investors in unique, important and interconnected ways. The SEC reviews registration statements, declares them effective and enforces the federal securities laws; the PCAOB, and ultimately the SEC, is responsible for establishing and applying auditing standards to auditors of public companies; and auditors review and opine on financial statements. Law firms counsel companies on how to comply with their public company obligations. Underwriters conduct road shows to stimulate investor interest in the deal, conduct due diligence on the company and, for firm commitment underwritten offerings, purchase all securities from the issuer.<sup>6</sup>

Listing exchanges also play an important role in this ecosystem, assuring that listed companies meet certain specified quantitative, governance and qualitative standards. In so doing, Nasdaq relies on

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<sup>3</sup> Based on analysis by Nasdaq Economic Research.

<sup>4</sup> Many of these same safeguards would be absent if these same retail investors were instead forced to seek diversification by investing directly in these emerging markets.

<sup>5</sup> See supra, note 2.

<sup>6</sup> Unfortunately it does not appear that representatives from any investment banks will participate in the Roundtable. Therefore, the SEC will not benefit from a discussion of their role in bringing emerging market companies to market and how they might help in addressing the problems the SEC and PCAOB have identified with some emerging market companies.

the same disclosure documents that other regulators and investors do.<sup>7</sup> Indeed, if a company satisfies these requirements, listing exchanges are obligated under the federal securities laws to provide fair access to the markets. This is consistent with our long-held belief in open capital markets, which serves all investors over the long term, especially retail investors who rely upon our deep liquidity to fund their retirements and children's education.

As part of its regulatory evaluation of listing applications, Nasdaq reviews a company's financial disclosures for red flags that may warrant inquiry, such as unusual concentrations of customers, a preponderance of related party transactions, or large cash balances relative to market capitalization. We also conduct background checks of each executive officer, director and large shareholder and, in appropriate cases, escalate issues we find to other regulators including the SEC for further action. Based on the information available to it, Nasdaq's diligence in this regard focuses in particular on whether these individuals have a history of fraud or regulatory misconduct.

Further, Nasdaq closely monitors each listed company for compliance with applicable listing standards. As part of this review, Nasdaq regulatory staff, with the assistance of technology, reviews over 41,000 periodic reports, proxy statements, registration statements and other SEC filings every year to assure listed companies remain qualified for listing. When our review identifies concerns or risks to investor protection, or when such matters are brought to our attention, Nasdaq will conduct its own inquiries, often engaging in extensive dialogue with applicants and listed companies to assess whether there are risks to investors or market integrity. In addition, in the course of its regulatory diligence, Nasdaq often becomes aware of concerns raised by investors or other interested parties, including allegations regarding the integrity of a company's management, financial statements and operations. Nasdaq takes these allegations very seriously and our dedicated investigations team will generally initiate its own investigation to assess the credibility of these concerns. Where we believe there is a basis, we will take appropriate regulatory action and make referrals to other regulatory agencies, including the SEC for further investigation utilizing its broader governmental authority. This illustrates that all components of the regulatory ecosystem are mutually co-dependent and why Nasdaq, while playing a key role, must necessarily rely on other components of the ecosystem to assure investors are protected.

Other stakeholders also play key roles. After the company's initial public offering, financial advisors construct indexes and portfolios that include shares of emerging market companies. Brokers, financial advisors, investment advisors and other fund managers, in some cases, have obligations to assess the suitability of these products or company's shares for a particular investor.

Most importantly, however, issuers themselves have the ultimate responsibility to operate ethically, report transparently and accurately, and comply with public company obligations. In Nasdaq's experience, companies endeavor to comply with Nasdaq rules and federal securities laws and companies generally have more success complying when they have sufficient maturity, management qualifications, competent external advisors and nexus to U.S. capital markets.

### **Certain Emerging Market Companies Present Unique Potential Risks to Investors**

This regulatory disclosure regime and other safeguards in the overall ecosystem, however, are potentially undermined and threatened – and the risks to investors elevated—where a company is based

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<sup>7</sup> Listing exchanges also surveil markets to detect and deter misconduct such as manipulative trading.

in a jurisdiction that has secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction (a “Restrictive Market” or “Restrictive Market Company”). For example, the PCAOB is currently prevented from inspecting the audit work and practices of PCAOB-registered auditors in Belgium, France, China and Hong Kong (to the extent their audit clients have operations in mainland China).<sup>8</sup> In addition, Article 177 of the 2020 Revised Chinese Securities Law, which became effective in March 2020, may be interpreted to limit the ability of an entity or individual in China to provide documents and information to foreign regulators. While companies may disclose these matters in their risk factors, it is unclear the extent to which investors, particularly Main Street investors, understand or are aware of these matters or the risks they pose. It is also not clear how investors and other stakeholders should evaluate the audited financial statements of SEC-registered companies when the PCAOB is unable to inspect the audit work papers of a PCAOB-registered auditor.

Nasdaq and investors rely on the work of auditors to provide reasonable assurances that the financial statements provided by a company, including foreign companies, are free of material misstatements. Nasdaq and investors further rely on the PCAOB’s critical role in overseeing the quality of the auditor’s work. While some audit firms that operate through a global network of member firms implement a common audit methodology and impose quality reviews and additional control procedures that provide some assurances given the inability of PCAOB to inspect the firm, it is our understanding that not all audit firms adopt such actions. As such, Nasdaq is concerned that constraints on the PCAOB’s ability to inspect auditor work in Restrictive Markets may weaken assurances that the disclosures and financial information of companies with operations in such countries are not misleading.

### **Nasdaq Took Action to Protect U.S. Investors**

While Nasdaq’s role is not to regulate or inspect auditors, in light of the limitations placed on the PCAOB and other regulators, we believed that it was incumbent upon us to have a role in qualitatively assessing these accounting firms and proposed rule changes to strengthen investor protection. The Nasdaq rule changes that we proposed to the SEC on May 18, 2020 aim to enhance listing standards applicable to companies whose business is principally administered in a Restrictive Market. These proposed rule changes also address auditor and management qualifications.

The three proposed rule changes are intended to ensure that Restrictive Market Companies seeking to list on Nasdaq have: (i) accounting firms that are sufficiently staffed and qualified to conduct the company’s audit; (ii) sufficient public float and investor interest; and (iii) management experience with the regulatory and reporting requirements applicable to U.S.-listed public companies, or the ongoing guidance of a qualified advisor (which may include a director of the company) on these requirements.

Nasdaq is only one listing venue among many in the U.S. and overseas and we do not compete on regulation. Nasdaq believes that any action will be more effective if taken by all exchanges globally and as such we encourage other exchanges to adopt similar requirements to help protect investors. However,

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<sup>8</sup> See Public Company Accounting Oversight Board, *Public Companies that are Audit Clients of PCAOB-Registered Firms from Non-U.S. Jurisdictions where the PCAOB is Denied Access to Conduct Inspections* (June 1, 2020), available at <https://pcaobus.org/International/Inspections/Pages/IssuerClientsWithoutAccess.aspx>. According to the PCAOB, it expects to enter into bilateral cooperative arrangements soon that will permit the PCAOB to commence inspections in Belgium and resume inspections in France.

Nasdaq firmly believes that U.S. regulators already have multiple tools at their disposal to augment investor protection, for example through the SEC's authority to declare registration statements effective and the PCAOB's authority to enforce its auditing standards. Nasdaq hopes the Roundtable will enable the SEC to review more thoroughly the entire ecosystem, focus specifically on the role of the PCAOB in Restrictive Markets, and generate additional solutions to protect investors in Restrictive Market Companies.

### **Government Leadership is Needed**

While Nasdaq believes the SEC and PCAOB can take action under their existing authority to resolve the issue of the PCAOB's inability to inspect auditors, a resolution could also be reached through economic diplomacy between the U.S. and China at the highest level,<sup>9</sup> including Congress, the U.S. Treasury Department,<sup>10</sup> and the U.S. State Department.<sup>11</sup> On May 20, 2020, the Senate passed S. 945, the Holding Foreign Companies Accountable Act (the "Act") by unanimous consent. The Act would prohibit securities of a company from being traded in the U.S. on any securities exchange, over-the-counter or through any other method regulated by the SEC if the SEC determines that, for three consecutive "non-inspection years," the company retains an auditor that has a branch or office that (i) is located in a foreign jurisdiction; and (ii) the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction.

Some stakeholders are concerned that the Act would require Chinese companies to delist from U.S. exchanges after three years and argue that U.S. investors will follow these companies to foreign jurisdictions with weaker investor protections. While Nasdaq is not opposing the Act, we are concerned that the Act may cause unintended consequences to U.S.-listed companies with substantial operations in less transparent jurisdictions, and that companies may try to circumvent the Act by switching to smaller U.S.-based auditors that, while subject to PCAOB inspection, do not have the geographic reach or expertise necessary to conduct complex audits in these foreign jurisdictions. The Act may also lead to unintended consequences for U.S. Main Street investors who may struggle to sell holdings or sell at below market prices when companies leave U.S. jurisdiction. Lastly, the Act will certainly provide competing listing exchanges in jurisdictions without similar restrictions with a lesser regulatory burden that will have the effect of diminishing the role of the U.S. capital markets on the world stage.

That is why Nasdaq is encouraging U.S. regulatory bodies to engage with their foreign counterparts to reach an agreement to eliminate or significantly reduce the difficulties currently constraining the PCAOB's ability to inspect certain auditors. Regulatory resolution, government to

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<sup>9</sup> See e.g. Letter to The Honorable Robert E. Lighthizer, United States Trade Representative, from Senators Chris Van Hollen and John Kennedy, dated June 12, 2019, available at <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-kennedy-urge-ustr-to-include-holding-foreign-companies-accountable-act-in-china-trade-negotiations>.

<sup>10</sup> See Presidential Memorandum, *Memorandum on Protecting United States Investors from Significant Risks from Chinese Companies* (June 4, 2020), available at <https://www.whitehouse.gov/presidential-actions/memorandum-protecting-united-states-investors-significant-risks-chinese-companies/>.

<sup>11</sup> See Michael R. Pompeo, Secretary of State, *New Nasdaq Restrictions Affecting Listing of Chinese Companies* (June 4, 2020), available at <https://www.state.gov/new-nasdaq-restrictions-affecting-listing-of-chinese-companies/>.

government, is best placed to resolve these issues quickly and without hardwiring rigid, restrictive policies into laws that are difficult to modify as situations change. Legislation should be a last resort. However, to the extent Congress feels compelled to act, Nasdaq encourages legislators to clarify ambiguities in the Act to avoid the issues discussed above and other unintended consequences.

### **SEC Guidance and Securities Law Reforms May Provide Clarity**

To effectively protect investors, all stakeholders need a clear, consistent understanding of any weaknesses in the audits of emerging market companies and what additional steps could be taken to provide confidence in a company's financial statements where auditors are not subject to PCAOB inspection. It is difficult for stakeholders to evaluate whether the steps taken by multinational audit firms are sufficient to mitigate the concerns raised by a lack of PCAOB inspection and whether smaller U.S. auditors have the resources and expertise needed to sufficiently audit companies located in foreign jurisdictions that lack transparency. The SEC and PCAOB should consider describing minimum steps that audit firms should take in these situations and requiring disclosure about specific additional steps that are undertaken by these firms. The SEC should also consider whether to enhance the current standards used by the PCAOB to register firms authorized to audit public companies. Similarly, underwriters, law firms and other stakeholders need clear guidance about their obligations to conduct diligence about Restrictive Market companies and whether they also have obligations to report what they discover.

In addition to providing guidance to stakeholders, the SEC should consider broader reforms to disclosure requirements applicable to emerging market companies, particularly those primarily operating in Restrictive Markets. For example, the SEC should consider whether the current disclosure requirements applicable to Restrictive Market Companies regarding related party transactions sufficiently capture and describe these transactions to investors.<sup>12</sup> The SEC should also consider whether it is appropriate to require Restrictive Market Companies to provide additional disclosure related to trading by insiders.

### **Conclusion**

In a critical and timely way, this Roundtable implicates two important objectives of the U.S. capital markets: providing all companies, including emerging market companies, with access to additional capital to fund ground-breaking research and technological advancements; and providing U.S. investors with opportunities to diversify their portfolio by providing exposure to emerging markets. In furtherance of these principles, Nasdaq is committed to improving the U.S. capital markets for public companies and investors in order to keep our capital markets the envy of the world.

While Nasdaq has taken a number of proactive steps within its authority to help protect investors, they are only pieces of a larger puzzle. Nasdaq believes that a multi-stakeholder dialogue offers the best mechanism for exploring complementary actions to improve the untenable status quo. Without the benefit of such a dialogue among multiple stakeholders, U.S. securities markets are prone to a piecemeal

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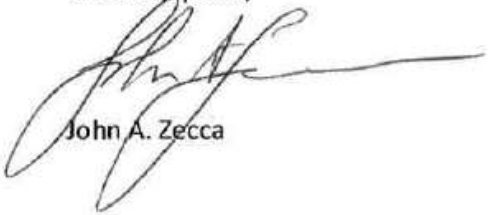
<sup>12</sup> See Item 7.B of Form 20-F, available at <https://www.sec.gov/files/form20-f.pdf> (requires foreign private issuers to disclose "material" or "unusual transactions" within the last three financial years and does not require disclosure of a company's policies and procedures to approve such transactions). Compare with Item 404 of Regulation S-K (17 CFR 229.404), which requires domestic companies to disclose related party transactions exceeding \$120,000 within the last fiscal year and the company's policies and procedures to review, approve or ratify such transactions.

approach that does not holistically address the risks posed to U.S. Main Street investors. It is our hope that the Roundtable will identify elements of the investor protection challenge faced by multiple stakeholders and analyze and discuss potential solutions for the SEC and PCAOB to implement under their existing authority. Ultimately, stakeholders require aggressive action led by the U.S. executive branch to avoid sacrificing a principle that has stood us well from the early days of the United States: the U.S. capital markets are open and well-regulated. We can achieve both goals, if we move with clarity of purpose and conviction.

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Thank you for your consideration of these important issues. Please feel free to contact me with any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John A. Zecca", with a long horizontal flourish extending to the right.

John A. Zecca