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NASDAQ HAS PROPOSED NEW LISTING RULES THAT FOCUS ON “RESTRICTIVE MARKET” COMPANIES - SPECIFICALLY CHINA

This week, Nasdaq submitted rule change proposals to the SEC mainly impacting companies with businesses principally administered in jurisdictions newly-defined as “Restrictive Markets.”

The three new Nasdaq proposals that would apply to “Restrictive Market” companies are:

1. to adopt a new requirement related to the qualifications of management;
2. to apply additional initial listing criteria related to offering size and liquidity; and
3. to apply more stringent criteria based on the qualifications of the company’s auditor.

Among the other proposals that pertain to Restrictive Market companies, (i) for an IPO, Nasdaq has set a minimum IPO offering size or public float percentage; (ii) for a business combination, a minimum market value of publicly-held shares; and, (iii) for a direct listing, the requirement to list directly on the NASDAQ Global Market or NASDAQ Global Select Market.

Restrictive Market Definition

A “Restrictive Market” would be defined as “a jurisdiction that Nasdaq determines to have 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.” To determine whether a company’s business is principally administered in a Restrictive Market and, thus subject to the requirement, Nasdaq may consider “the geographic locations of the company’s: (a) principal business segments, operations or assets; (b) board and shareholders’ meetings; (c) headquarters or principal executive offices; (d) senior management and employees; and (e) books and records.” In examining where the company conducts its principal business activities, the location of a company’s headquarters is not necessarily determinative.

Under the new proposed rules, Nasdaq has implicitly and verbally confirmed that China is a Restrictive Market.

Management Public Company Experience Proposal

Nasdaq proposes to require that listing applicants from a Restrictive Market have a member of senior management or a director with relevant past employment experience at a U.S.-listed public company or other experience, training or background sufficient to give the individual general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws. Restrictive Market companies will have an ongoing obligation to have at least one member of senior management or a director who satisfies such requirements. In the absence of such an individual, the company could retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the company. The individuals would be expected to assist in corporate governance, internal controls and securities issues.

Additional Listing Criteria Proposal **\$25M IPO Offering Size or 25% Public Float Rule**

For an IPO

Nasdaq would require a Restrictive Market company that is listing its primary equity securities on Nasdaq in connection with its IPO to offer a minimum amount of securities in a firm commitment offering in the U.S. 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**.

For a Business Combination

Nasdaq would require a Restrictive Market company to have a minimum market value of unrestricted publicly held shares following the business combination equal to the **lesser** of: (i) \$25 million; or (ii) 25% of the post-business combination entity's market value of listed securities.

For a Direct Listing

A Restrictive Market company is only permitted to list on the Nasdaq Global Select Market or Nasdaq Global Market in connection with a Direct Listing.

Audit Concern Proposal

Nasdaq has proposed specific, more stringent criteria for auditors of companies (not only Restrictive Market companies) that are applicants or currently-listed companies. Such factors include:

- (1) whether the auditor has been subject to a PCAOB inspection, such as where the auditor is newly formed and has therefore not yet undergone a PCAOB inspection, or where the auditor, or an accounting firm engaged to assist with the audit, is located in a jurisdiction that limits the PCAOB's ability to inspect the auditor;

- (2) if the company's auditor has been inspected by the PCAOB, whether the results of that inspection indicate that the auditor has failed to respond to any requests by the PCAOB or that the inspection has uncovered significant deficiencies in the auditors' conduct in other audits or in its system of quality controls;
- (3) whether the auditor can demonstrate that it has adequate personnel in the offices participating in the audit with expertise in applying U.S. GAAP, GAAS or IFRS, as applicable, in the company's industry;
- (4) whether the auditor's training program for personnel participating in the company's audit is adequate;
- (5) for non-U.S. auditors, whether the auditor is part of a global network or other affiliation of individual auditors where the auditors draw on globally common technologies, tools, methodologies, training and quality assurance monitoring; and
- (6) whether the auditor can demonstrate to Nasdaq sufficient resources, geographic reach or experience as it relates to the company's audit.

Nasdaq will consider these factors holistically and may be satisfied with an auditor's qualifications notwithstanding the fact that the auditor raises concerns with respect to some of the factors set forth above.

The final rule will include examples of additional and more stringent criteria that Nasdaq may apply to an applicant or a Nasdaq-listed company, such as requiring (i) higher equity, assets, earnings or liquidity measures; (ii) requiring any offering be underwritten on a firm commitment basis, or (iii) companies imposing lock-up restrictions on officers and directors.

The final rule is not yet effective, subject to the approval of the Securities and Exchange Commission, and comments are currently being solicited.