

May 22, 2026

VIA EMAIL (rule-comments@sec.gov)

Vanessa A. Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt a New Continued Listing Requirement (Release No. 34-105333; File No. SR-NASDAQ-2026-004)

Dear Secretary Countryman:

Sullivan & Worcester LLP ("Sullivan") is an international law firm that regularly represents public issuers, investment banking firms and investors, a large portion of which are either listed on the Nasdaq Capital Market or the Nasdaq Global Market themselves or frequently transact business with Nasdaq-listed issuers (as defined below). We previously submitted a comment letter dated February 17, 2026, in response to Release No. 34-104688 (the "Prior Letter"), in opposition to the proposed rule changes by The Nasdaq Stock Market LLC ("Nasdaq") to (i) adopt new Listing Rules 5450(a)(3) and 5550(a)(6) to require issuers listed on the Nasdaq Global and Capital Markets, respectively, to maintain a minimum Market Value of Listed Securities (as defined in Nasdaq Listing Rule 5005(a)(23)) of at least \$5 million for a period of thirty (30) consecutive business days, (ii) amend Rule 5810 to suspend trading and immediately delist from Nasdaq securities of issuers that do not satisfy the proposed new requirements, and (iii) amend Rule 5815 to set forth the procedures for requesting a hearing before a Hearings Panel and the scope of the Panel's discretion (collectively, the "Proposals"). We write to further articulate our position, as set forth in the Prior Letter, in response to the U.S. Securities and Exchange Commission's (the "Commission") Order Instituting Proceedings (Release No. 34-105333) ("OIP"), published in the Federal Register on May 1, 2026, and to address the Proposals' consistency with Sections 6(b)(5) and 6(b)(7) of the Securities Exchange Act of 1934, as amended (the "Act").

As stated in the Prior Letter, Sullivan supports Nasdaq's commitment to maintaining market integrity and its efforts to ensure investor protections as mandated by the Commission; however, having now reviewed the Proposals in light of the OIP and the statutory standards identified therein, we respectfully submit that the Proposals, as structured, appear inconsistent with the requirements of the Act, and would actually result in unintended consequences that are inconsistent with Section 6(b)(5)'s mandate to "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade." Specifically, while Proposals aver that their objective(s) are to promote "fair and orderly markets" they may in fact encourage opportunistic or manipulative trading strategies by creating an exploitable thirty (30) consecutive business day

measurement window, within which to encourage aggressive downward pressure on vulnerable issuers, contrary to the objective of Section 6(b)(5) of the Act. As structured, the Proposals would impose pernicious consequences for issuers that are otherwise in compliance with the Nasdaq listing standards for market factors or actions of third-parties that are outside of the issuers' control. Further, by eliminating customary cure periods and imposing immediate suspension and delisting without meaningful procedural safeguards, the Proposals fail to provide the fair procedure required by Section 6(b)(7) of the Act. Since the ultimate victims of delisting are the stockholders, the Proposals risk harming the very constituency they purport to protect by automatically relegating otherwise compliant issuers and their stockholders to the over-the-counter markets (the "OTC markets").

### **I. The Proposals May Encourage, Rather Than Prevent, Fraudulent and Manipulative Acts and Practices**

Section 6(b)(5) of the Act requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices. The Proposals may not fully satisfy this requirement and, in certain circumstances, could produce the opposite result. As discussed in the Prior Letter, the Market Value of Listed Securities is derived from two inputs: the consolidated closing bid price of an issuer's securities multiplied by the number of such securities listed on Nasdaq or another national securities exchange.<sup>1</sup> Of these two inputs, issuers have direct control only over the number of securities listed, less so over the market price of those securities, which is driven by, among other things, macro market or economic conditions, investor sentiment, and trading activity, which may be based on any number of facts, including downward pressure created by short sellers and opportunistic traders. As a result, smaller issuers, which generally have lower trading volumes and more limited float, may be more susceptible to these dynamics and therefore more vulnerable to manipulation.

The Proposals would measure compliance with the \$5 million minimum Market Value of Listed Securities requirement over a rolling thirty (30) consecutive business day period.<sup>2</sup> This compressed measurement window, coupled with the severe and immediate consequence of trading suspension and delisting under proposed amendments to Listing Rule 5810, creates a framework that is susceptible to exploitation. Regardless of the cause of a decline in market value, a thirty (30) consecutive business day measurement period is insufficient to permit issuers a meaningful opportunity to respond, whether through corrective corporate action or simply allowing market conditions to stabilize, before triggering automatic noncompliance and immediate delisting. This is particularly problematic given that Nasdaq's existing Listing Rules routinely provide significantly longer compliance periods, often 180 days, for other continued listing deficiencies, including those that are within an issuer's direct control, such as implementing a reverse stock split or increasing stockholders' equity.

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<sup>1</sup>See Nasdaq Listing Rule 5005(a)(23) (defining "Market Value"); Listing Rule 5005(a)(22) (defining "Listed Securities").

<sup>2</sup>See Proposed Listing Rules 5450(a)(3) and 5550(a)(6).

This dynamic is exacerbated by the Proposals' failure to include any cure or compliance period. Under Nasdaq's existing Listing Rules, deficiencies, such as a failure to maintain the minimum bid price of \$1.00 per share, are similarly measured over a rolling thirty (30) consecutive business day period; however, issuers are typically afforded at least one 180-calendar day compliance period in which to regain compliance.<sup>3</sup> These cure periods serve an important function beyond mere administrative convenience: they mitigate the risk of manipulation by requiring sustained, fundamental noncompliance rather than a short-term trading event to result in delisting. Where compliance can be restored through market stabilization or corrective corporate action over a reasonable period, the incentive to engage in manipulative trading strategies to trigger a delisting is substantially diminished. The Proposals eliminate this safeguard entirely.

Rather than preventing fraudulent and manipulative acts and practices, the Proposals risk creating outcomes that undermine the balance Section 6(b)(5) requires, including by failing to perfect the mechanism of a free and open market and a national market system and by harming, rather than protecting, investors and the public interest. In addition, by imposing an inflexible \$5 million threshold and an unusually short measurement period with no meaningful cure process, the Proposals disproportionately burden smaller issuers and raise serious concerns that they permit unfair discrimination among issuers, contrary to Section 6(b)(5). Accordingly, these dynamics raise significant concerns as to whether the Proposals are consistent with the requirements of the Act, as required for approval under Section 19(b)(2)(C) of the Act.

## **II. The Proposals Harm, Rather Than Protect, Investors and the Public Interest, and Would Permit Unfair Discrimination Between Issuers**

As explained above, Section 6(b)(5) requires that the rules of a national securities exchange be designed, in general, to protect investors and the public interest, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Proposals are inconsistent with each of these requirements.

The practical effect of the Proposals, as written, is to impose an unbalanced and disproportionately punitive delisting consequence on micro-cap and small-cap issuers, without any meaningful cure period, for a market-driven metric that is often outside an issuer's control. The OTC markets are typically characterized by reduced liquidity, diminished transparency and increased volatility. Unlike exchange-listed issuers, many OTC issuers are not subject to the same shareholder approval requirements for significant corporate actions, including certain dilutive issuances or changes of control. This reduced governance framework leaves retail investors with fewer procedural protections and limited recourse. Rather than protecting investors and the public interest, the Proposals would directly impair the interests of the shareholders they purport to safeguard by relegating them to less efficient and more speculative markets.

The consequences of delisting for retail investors are particularly severe. Securities that trade on OTC markets often experience decreased institutional participation, limited analyst coverage

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<sup>3</sup>See Nasdaq Listing Rules 5810(c)(3)(A), 5810(c)(3)(C) and 5810(c)(3)(D).

and restricted access to capital. As liquidity declines, shareholders may face difficulty exiting positions without significant price concessions. Additionally, many brokerage firms restrict or prohibit trading in OTC markets-traded securities altogether, meaning that retail shareholders may find themselves unable to purchase additional shares or even liquidate their existing holdings through their brokerage platforms. The Proposals would therefore remove these investors from the protections of an exchange-regulated environment and simultaneously impair their ability to manage their own investment risk, which we strongly believe is inconsistent with the purpose of Section 6(b)(5).

The Proposals also create impediments to, rather than perfect the mechanism of, a free and open market. The Proposals would disproportionately impact issuers whose shareholder bases consist primarily of long-term, fundamental investors who are not active traders and therefore do not contribute meaningfully to daily trading volume. In such circumstances, even modest sell-side activity, such as a single institutional rebalancing event, portfolio adjustment or liquidity-driven sale, can have an outsized impact on share price and, by extension, market capitalization, simply due to limited float and trading volume.<sup>4</sup> The resulting decline may not reflect any deterioration in the issuer's underlying business, financial performance or long-term prospects, or any of the other factors “observed” by the exchange. By applying a rigid, short measurement period without accounting for liquidity characteristics or shareholder composition, or any other factors that may account for the low market capitalization, the Proposals risk penalizing issuers with stable, long-term ownership structures, effectively treating structural illiquidity as evidence of listing unsuitability. Issuers that cultivate patient, fundamentally oriented institutional support may face greater compliance vulnerability than those with higher trading velocity but less fundamentally anchored investor bases. Such an outcome constricts access to exchange listing for the very issuers and investors that benefit most from the transparency, governance and liquidity protections that an exchange-regulated market provides.

Finally, the Proposals would permit unfair discrimination between issuers. The \$5 million Market Value of Listed Securities threshold, measured over a compressed thirty (30) consecutive business day period with no cure period, imposes a compliance burden that falls disproportionately on micro-cap and small-cap issuers, particularly those with more limited liquidity, as compared to similarly situated issuers with greater trading volume and float, even where both are otherwise comparable in size and operational profile. This disparate impact is not a function of the quality, governance or operational soundness of the affected issuers, but rather only a function of their size. Section 6(b)(5) expressly prohibits rules that are designed to permit unfair discrimination between issuers, and a listing standard that effectively applies only to the smallest class of listed companies, for a metric that is largely outside of their control, raises significant concerns under this standard.

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<sup>4</sup>As noted in the Prior Letter, in one case, an issuer's shareholder base consisted largely of a small group of long-term, value-oriented investors who held significant portions of the public float. Because much of the float was effectively locked up and not actively traded, the stock experienced price volatility driven primarily by thin trading volume rather than underlying operational performance. The issuer was generating meaningful revenue and operating income at the time and was ultimately acquired by a well-known private equity sponsor, reinforcing its intrinsic value and strategic relevance.

### **III. The Proposals Fail to Provide Fair Procedure as Required by Section 6(b)(7)**

Section 6(b)(7) of the Act requires, among other things, that the rules of a national securities exchange provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange. Delisting is the most severe limitation an exchange can impose on an issuer's access to its services. The procedural framework accompanying such an action must be commensurate with the severity of that consequence. The Proposals fall well short of this standard.

Nasdaq's existing Listing Rules provide cure periods for virtually every other continued listing deficiency. An issuer that fails to maintain the minimum bid price of \$1.00 per share, a metric that is similarly measured over a rolling thirty (30) consecutive business day period, is typically afforded at least one 180-calendar day compliance period in which to regain compliance.<sup>5</sup> Comparable cure periods are available for deficiencies related to stockholders' equity, market value of publicly held shares and other quantitative listing standards. These compliance periods reflect a longstanding recognition that temporary deficiencies, particularly those driven by market conditions rather than operational failures, should not result in the immediate and irreversible loss of exchange listing.

The Proposals depart from Nasdaq's existing compliance framework. Under the proposed amendments to Listing Rules 5810 and 5815, an issuer that fails to maintain a Market Value of Listed Securities of at least \$5 million for thirty (30) consecutive business days would be subject to immediate trading suspension and delisting, with no opportunity to cure the deficiency prior to suspension and limited Hearings Panel discretion to provide relief. In contrast, an issuer that fails the minimum bid price requirement may be eligible for compliance periods of up to 360 calendar days, while an issuer that fails the proposed Market Value of Listed Securities requirement, a metric driven by the same underlying stock price, would receive none. Nasdaq states that it believes issuers trading below certain market value thresholds may no longer be appropriate for continued listing because such conditions may reflect underlying challenges that are not temporary. However, a statement of belief does not, by itself, provide empirical support for the specific \$5 million threshold or for eliminating customary cure periods and meaningful procedural protections. For these reasons, the Proposals raise significant concerns under Section 6(b)(7)'s fair procedure requirement.

### **IV. The Proposals Represent a Novel and Unsupported Departure from Nasdaq's Established Listing Framework**

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization only if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations issued thereunder. Where, as here, a proposed rule change represents a significant departure from a self-regulatory organization's established regulatory framework, the Commission should require a correspondingly rigorous

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<sup>5</sup>See Nasdaq Listing Rule 5810(c)(3)(A).

demonstration that the departure is justified and that the proposed rule change satisfies the applicable statutory standards. Nasdaq has not made such a demonstration.

Most importantly, Nasdaq has not provided empirical evidence supporting the selection of \$5 million as the appropriate Market Value of Listed Securities threshold. Moreover, available market data appears inconsistent with the premise underlying the Proposals. Sullivan and its clients were able to review historical trading data for a broad set of issuers whose listed securities at various times fell below, or approached, a \$5 million market value threshold indicates that a significant number of such issuers subsequently recovered to substantially higher market capitalizations. In several instances, issuers whose listed securities temporarily traded at market values well below \$5 million later achieved valuations in excess of hundreds of millions, and in certain cases, billions of dollars. While this data<sup>6</sup> is illustrative, it underscores that short-term declines in market value are not necessarily indicative of sustained issuer deterioration or long-term listing unsuitability. Nasdaq has not addressed this dynamic in the Proposals or provided empirical analysis demonstrating that issuers crossing the \$5 million threshold are unlikely to recover. Further, Nasdaq has not explained why issuers with a Market Value of Listed Securities below \$5 million present risks that are not already addressed by existing continued listing standards, including the minimum bid price requirement, minimum stockholders' equity requirements and the existing Market Value of Listed Securities standards applicable to the Nasdaq Global Market.

The Proposals indicated that Nasdaq has “observed” or “believes” that the market has given up on these issuers and they are no longer suitable for an exchange listing; however, Nasdaq has not conducted, or at least has not disclosed, any analysis of the number of currently listed issuers that would be immediately or foreseeably noncompliant under the Proposals, the market capitalization characteristics of such issuers, or the extent to which such issuers are otherwise in compliance with all other applicable listing standards. Failure to support the proposals with concrete data and analysis render these proposals arbitrary and capricious and unsupported by any meaningful market evidence. Without it, neither the Commission nor the public can evaluate whether the Proposals are reasonably designed to achieve their stated objectives or whether they would instead sweep in fundamentally sound issuers based solely on temporary market conditions.

The Proposals also represent an internally inconsistent approach to continued listing compliance. As discussed in Section III above, Nasdaq's existing framework provides cure periods for deficiencies that are comparable to, or more within an issuer's control than, the proposed Market Value of Listed Securities requirement. The Proposals depart from this framework without explanation, imposing the most severe procedural consequences for a newly created standard while maintaining more lenient treatment for longstanding standards. This internal inconsistency undermines the coherence of Nasdaq's listing regime and raises questions about whether the Proposals reflect reasoned regulatory decision-making.

Federal courts have recently scrutinized novel regulatory actions adopted without adequate justification under longstanding statutory frameworks. In *National Association of Private Fund*

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<sup>6</sup> If the Commission or Nasdaq wishes to review the data from the empirical analysis undertaken in furtherance of these comments we are happy to discuss with our several clients making this data available.

Managers; Alternative Investment Management Association, Limited; and Managed Funds Association v. SEC, the United States District Court for the Northern District of Texas Fort Worth Division vacated an SEC rule that the court found was "untethered from the text, history, and structure of the Act," emphasizing that regulatory action must be "consistent with the provisions and purposes" of the governing statute.<sup>7</sup> While that case concerned the Commission's own rulemaking authority rather than its review of a proposed rule change filed by a national securities exchange, the principle is equally applicable here: regulatory action that departs from established frameworks without evidentiary support or adequate justification is not consistent with the requirements of the Act.

## V. Conclusion

For the reasons stated above, and as set forth in the Prior Letter, we respectfully urge the Commission to disapprove the Proposals. The Proposals are not consistent with Section 6(b)(5) of the Act in that they may encourage, rather than prevent, manipulative acts and practices, risk harming rather than protecting investors and the public interest, and would permit unfair discrimination against micro-cap and small-cap issuers. The Proposals are further inconsistent with Section 6(b)(7) of the Act in that they fail to provide fair procedure for the limitation of access to exchange services. The Proposals should not be approved unless substantially modified to address these deficiencies, including, at a minimum, the adoption of cure periods comparable to those available under existing Nasdaq Listing Rules.

We thank the Commission for its thoughtful approach to this review and for the opportunity to submit these supplemental comments. We would be pleased to engage further or provide additional data from our experience advising micro-cap and small-cap issuers, as well as the investment professionals and investors that regularly work with these issuers. We appreciate the Commission's consideration of our views.

Respectfully submitted,

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<sup>7</sup>See *Nat'l Ass'n of Priv. Fund Managers v. SEC*, No. 4:24-cv-00250-O (N.D. Tex. Nov. 21, 2024).