CalPERS
California Public Employees' Retirement System
Investment Office
P.O. Box 2749
Sacramento, CA 95812-2749
TTY: (877) 249-7442
(916) 795-3400 phone • (916) 795-XXXX fax
www.calpers.ca.gov

February 15, 2016

Stan Higgins, Director
Nasdaq Listing Qualifications
805 King Farm Blvd.
Rockville, MD 20850

RE: Solicitation of Comments by the Nasdaq Stock Market Listing and Hearing Review Council ("Nasdaq") about Shareholder Approval Rules (Nasdaq Rule 5635)

Dear Mr. Higgins,

On behalf of the California Public Employees' Retirement System ("CalPERS"), thank you for the opportunity to provide responses to the Solicitation of Comments by Nasdaq about Shareholder Approval Rules (the "Solicitation of Comments").

CalPERS is the largest public pension fund in the United States with approximately $280 billion in global assets. CalPERS invests these assets on behalf of more than 1.7 million members, retirees and beneficiaries. As a significant institutional investor with a long-term investment horizon, we rely upon the integrity, stability and efficiency of the capital markets.

CalPERS believes that strong corporate governance serves as a foundation for strengthening investor protections and achieving long-term, sustainable investment returns. The CalPERS investment office is guided by ten Investment Beliefs[1] intended to provide a basis for the strategic management of our investment portfolio. Investment belief 2 states, "A long-term investment horizon is a responsibility and an advantage." Given our size and long-term liabilities, we have a keen interest in identifying market solutions to governance issues that threaten the integrity and efficiency of the capital markets. Therefore, we advocate for meaningful, high-quality market standards that enhance our ability to meet our long-term obligations.

Additionally, the CalPERS Global Governance Principles[2] (Principles) drive our advocacy efforts and guide how we vote our proxies. As a member of the Council of Institutional Investors (CII), we believe that "Nasdaq listing standards are to preserve

[1] See, https://www.calpers.ca.gov/docs/forms-publications/calpers-beliefs.pdf, dated May 2015

[2] See, https://www.calpers.ca.gov/docs/forms-publications/global-principles-corporate-governance.pdf, dated March 16, 2015

and strengthen the quality of, and public confidence in, its markets to protect investors. We, therefore, do not believe that weakening Nasdaq's standards requiring shareowner approval for significant stock issuances would be consistent with those goals." [3]

Embedded in our Principles, is the expectation that corporations will comply with all applicable federal and state laws and regulations, as well as stock exchange listing standards. Listing standards govern the securities markets by imposing quantitative and qualitative requirements that companies must meet in order for their shares to be available for trading in the public markets. Very generally, they serve an important public purpose to ensure confidence in the securities markets and promote sound corporate governance, each of which provides vital support for investment decision-making. Consequently, CalPERS relies on listing standards to govern national securities exchanges and associations in the development and implementation of key corporate governance standards and policies that better align corporate and shareowner interests.

As discussed in more detail below, Nasdaq is seeking comments on Nasdaq Rule 5635 in three areas:

(i) changes to prescribed thresholds at which an issuer would be required to obtain shareholder approval for an acquisition involving an issuance of common stock equal to or exceeding 20% of the voting power outstanding (or 5% where insiders have an interest in the target);

(ii) changes to establish a "bright-line" test to determine the existence of a change of control requiring shareowner approval; and

(iii) changes to the threshold at which shareowner approval is required for private issuances of stock at a price less than the greater of book or market value.

Although adopted twenty-five years ago, we believe that Nasdaq's shareowner approval rules continue to provide crucial investor protections. Shareowner approval rules serve the interest of shareowners by providing a mechanism by which fundamental shareowner rights are realized through overseeing significant transactions that may be dilutive or driven by inherent conflicts of interest that are potentially adverse to shareowner interests. As providers of capital, shareowners have a strong interest in the effective management and oversight of the companies in which they invest, and rely on national securities exchanges, in their important role as self-regulatory organizations, to establish and enforce listing standards that, in part, help safeguard investors' rights. CalPERS is, therefore, cautious about the imposition of regulatory changes in the absence of compelling and persuasive evidence that the changes are necessary when balanced against the strong possibility of eroding long-standing shareowner rights.

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[3] See, CII comment letter
http://www.cii.org/files/issues_and_advocacy/correspondence/2016/02_10_16_Nasdaq_shareholder_approval_proposal_comments.pdf, dated February 10, 2016

Although we support reviewing shareowner rules periodically, we also believe that Nasdaq's review of certain aspects of Nasdaq Rule 5635 should at the very least present evidence as to how each proposed change to its current standards would balance capital formation and efficient corporate governance with shareowner protection. As long-term shareowners, we would generally oppose any new rules, or changes to existing rules, that would directly or indirectly weaken fundamental shareowner rights and protections in the absence of persuasive evidence of their corresponding benefits. For example, the Solicitation of Comments led us to try to find evidence that supports making a change to the existing 20% threshold noted above. We found little. We support the points made by CII in their February 10, 2016 letter to Nasdaq in response to this solicitation for comments as we are deeply concerned about any proposal (conceptual or otherwise) that would weaken shareowner rights and protections where no clear, detailed and convincing purpose has been articulated.

We believe that any attempt to change current standards based on the very general and undeveloped reasons set forth in the Solicitation of Comments would be unreasonable and would fall short of Nasdaq's duties as a self-regulatory organization to protect the financial markets. CalPERS, however, supports improvements to existing rules that eliminate and address major deficiencies, such as establishing a bright-line test to determine a change of control; provided that, the adoption of a specific threshold properly strikes an appropriate balance protecting shareowner rights.

We thank the Securities and Exchange Commission's Investor Advisory Committee for highlighting this issue in its work to bring investor voices into the discussion. Set forth below are our responses to Nasdaq's specific requests for comments relating to the potential changes to, or consideration of, standards involving acquisitions, change of control and private placement of shares.

If you would like to discuss any of these points or should you have any questions, please do not hesitate to contact me at (916) 795-9058.

Sincerely,

JAMES ANDRUS
Investment Manager
Investment Office
Global Governance

cc: Anne Simpson, Investment Director – CalPERS Global Governance

Below are our responses to Nasdaq's specific requests for comments relating to the potential changes to, or consideration of, standards involving acquisitions, change of control and private placement of shares.

Acquisitions

Nasdaq Rule 5635(a) generally requires a listed company to obtain shareholder approval in connection with an acquisition if the potential issuance is equal to 20% of the number of shares of common stock or voting power outstanding, or, if insiders have an interest in the target entity, 5% of the number of shares of common stock or voting power outstanding.

It has been suggested that the 20% threshold is restrictive. Should Nasdaq consider changing the rule to allow companies to issue a higher percentage of total shares outstanding or voting power without shareholder approval in connection with an acquisition? Why or why not?

Acquisitions could materially impact essential investor rights and protections. Nasdaq's current standards establish a 20% threshold, which provides shareowners with adequate notice and disclosure of proposed offers that could materially impact their ability to sell shares or to vote. The 20% standard is designed to protect shareowners against potential intended and unintended consequences both pre and post-acquisitions. The force of the rule stems from the need to bring awareness of material concerns to impacted parties as soon as possible. It is the timeliness of the disclosure and the potential degree of impact that represents the crucial shareowner value embedded in the rule. Accordingly, the rule was meant to be reasonably restrictive given the complex goals it attempts to meet.

Although we acknowledge the regulatory progress made in financial market reform over the past few years, we found very little empirical evidence that supports revising the existing 20% threshold. In fact, we discovered two research papers written by James L. Parks suggesting the opposite.[4] Park's research suggests that managers tend to intentionally avoid shareowner approval which leads to agency misalignment that should be corrected by lowering the 20% threshold, thus making it even more restrictive, as opposed to increasing it to make it more permissive.[5] Given the lack of sound evidence in support of increasing the current threshold, it is our view that the existing 20% threshold should be maintained.

[4] See, https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=AFA2014&paper_id=783, dated March 13, 2013 and http://www.placementtracker.com/samplereports/Equity%20Issuance%20Distress%20and%20Agency%20Problems%20The%2020%20Rule%20for%20Privately%20Issued%20Equity.pdf, dated March 12, 2014

[5] See, http://www.placementtracker.com/samplereports/Equity%20Issuance%20Distress%20and%20Agency%20Problems%20The%2020%20Rule%20for%20Privately%20Issued%20Equity.pdf, dated March 12, 2014

We are cautious of solicitations and proposals where the purpose for change is unknown, and where the real effect of a change would be to deter or avoid shareowner approval. Instead, we are guided by the purpose and need for the 20% threshold. Historically, the policy underlying shareowner approval rules is that shareowners have the right to vote on any issuance of common stock that is materially dilutive of either their voting or economic interest in the company. Nasdaq should only consider amending the current 20% threshold if investor benefits can be clearly articulated or at least balanced against potential shareowner harm. Indeed, CalPERS believes there are very few investor benefits, if any - in terms of investor protection - to increasing the current 20% threshold, particularly in the absence of a persuasive purpose for compelling a more permissive change.

It has been suggested that given enhanced investor protection mechanisms and disclosure requirements surrounding related party transactions, the heightened shareholder approval rules governing insider interest in an acquisition are no longer necessary. Should Nasdaq consider changing the rule to allow companies to issue more than 5% of voting power or total shares outstanding without shareholder approval where insiders have an interest in the assets to be acquired? Why or why not?

The 5% threshold is an important mechanism highlighting conflicts of interests between corporate insiders and shareowners. In the aftermath of the financial crisis, less than eight years ago, the regulatory push has been to establish more robust safeguards highlighting conflicts of interest, not to lessen them. Indeed the essential purpose of Dodd-Frank, and its comprehensive regulatory overhaul, arguably is to highlight conflicts of interest that have a corrosive effect on the financial markets. A more permissive change to current standards in this context is antithetical to this important purpose.

Importantly, Nasdaq, in its capacity as a self-regulatory organization, should be focused on strengthening, not eroding, fundamental shareowner rights with particular focus on addressing the material risks in the form of unmanaged conflicts of interest, given their prominent role in contributing to the breakdown of financial markets. We acknowledge the need to streamline rules and mechanisms for investor protection as well as disclosure requirements; however, we also believe that enhanced disclosure requirements are not substitutes for shareowner approval rules. Accordingly, we believe that heightened shareowner approval rules governing insider conflicts of interest in acquisitions, change of control and private placements are complementary and remain vitally important.

We believe that links exist between issuances and their material impact to crucial investor rights, so we urge Nasdaq and other national securities exchanges in reviewing shareowner approval rules to consider striking a proper balance such that the interest of issuers and existing shareowners are better aligned. This can be accomplished by ensuring that any proposed changes to existing shareowner rules be accompanied by strong evidentiary support for the change. Since we have not found compelling evidence to support increasing the 5% threshold, CalPERS believes that it should remain unchanged.

Change of control

Nasdaq Rule 5635(b) requires shareowner approval prior to the issuance of securities when the issuance or potential issuance will result in a change of control. In determining whether an issuance will potentially result in a change of control, Nasdaq considers the voting power, ownership, and board representation of investors receiving securities in the transaction. Nasdaq also considers all facts and circumstances concerning a transaction, including whether there are any relationships or agreements between the company and the investors, and among the investors, and whether an investor is entitled to board representation.

Although there is no bright-line test or safe-harbor within the rule, the Nasdaq will generally conclude that a change of control would occur for purposes of the shareholder approval rules when, as a result of the issuance, an investor or a group of investors would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or of the voting power and such ownership or voting power would be the largest position.

Would a bright-line test or safe-harbor be beneficial to investors and companies to define when a transaction will result in a change of control?

Yes, we believe that a bright-line test or safe-harbor would benefit investors and companies in defining when a transaction results in a change of control because there are unintended costs associated with discretion and uncertainty. A bright-line test would bring clarity and consistency to transactions that could result in a change of control of the issuer.

Is Nasdaq's presumption that a change of control would occur when, as a result of the issuance, an investor or a group of investors would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or of the voting power and such ownership or voting power would be the largest position an appropriate threshold for purposes of the shareholder approval rules? If not, please indicate the level of ownership or voting power that you believe would represent a change of control for purposes of determining if shareholder approval should be required and list any other factors that you believe should be considered.

We support the 20% threshold indicating the level of ownership or voting power that would represent a change of control for purposes of determining if shareowner approval should be required. Although we find the current 20% threshold reasonable, we would support lowering the threshold as opposed to increasing it so as to better correct potential agency misalignment.

Are there other definitions of a change of control, such as in accounting literature or securities law, which Nasdaq should rely upon in determining whether a transaction should require shareholder approval because a change of control may occur?

We urge Nasdaq give proper consideration to all stakeholders and impacted parties in determining whether a transaction should require shareowner approval because a change of control may occur. Nasdaq may obtain guidance from other sources. For example, FINRA sets a 25% benchmark for a change of control. In addition, the Investment Company Act of 1940 (1940 Act) in Section 2(a)(9) defines "Control" as the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Section 2(a)(9) of the 1940 Act also contains a rebuttable presumption that:

> Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company.

If an investor or group of investors publicly discloses an intent, or enters into a covenant, to remain passive and not exert control of the listed company, is a higher threshold of ownership or voting power appropriate before Nasdaq determines that a change of control may occur for purposes of the shareholder approval rules? If not, why? If so, what would be an appropriate threshold accompanied by such disclosure?

The core issue is whether knowledge of an investor's intent to remain passive and/or refrain from exerting control is material to the threshold that triggers mandatory shareowner approval. For purposes of the shareowner approval rules, CalPERS believes that, when an investor publicly discloses an intent or covenant to remain passive and not exert control of the listed company, the existing threshold of ownership or voting power should remain the same.

Private Placements

Nasdaq Rule 5635(d) requires listed companies to obtain shareholder approval prior to the issuance of common stock or securities convertible into common stock equal to 20% or more of the common stock or voting power outstanding at a price less than the greater of book or market value of the stock.

Nasdaq rules measure market value by reference to the company's closing bid price. It has been suggested that this is not the best measure of market value for purposes of the shareholder approval rules and that Nasdaq should instead allow or require the use of: the Last Sale Price (which may be more transparent), the Nasdaq Official Closing Price (which may be more representative of the market), a volume-weighted average of closing prices over a period of days (which may address single-day anomalies), or other market measurements. Should Nasdaq continue to use the company's closing bid price to measure market value? If not, what other measures are more appropriate and why? If a volume-weighted average is preferable, how long is an appropriate measurement period?

We believe that Nasdaq should continue to use the closing bid price unless there is an evidenced-based reason to change the approach that would not adversely impact existing shareowners. All of the above options existed when the closing bid price was chosen in 1990. Simplicity favors keeping it the same. There can be little disagreement about what the number happens to be.

It has been suggested that shareholder approval should not be required for an issuance at a price below the book value of a security. Should Nasdaq eliminate the book value measurement for purposes of determining if shareholder approval is required? Why or why not?

We believe that the book value measurement has value in some contexts. We are not in favor of a change without an evidence-based reason. We have found no evidence that supports eliminating book value as a measurement for purposes of determining if shareowner approval is required, and no evidence has been presented by Nasdaq.

It has been suggested that the shareholder approval rules disproportionately affect smaller companies, which generally can raise less money before exceeding the 20% tests. Should Nasdaq consider changing the rule to allow smaller companies to issue a higher percentage of voting power or total shares outstanding without shareholder approval?

CalPERS has been consistently in favor of one set of rules for all companies in number of contexts. Identifying and tracking which companies qualify for exception to the 20% rule adds unneeded complexity. In fact, there have been instances where exceptions adversely impact market recipients because investors become more skeptical as a result of the reduced formalities. Managers of companies often choose to avoid compliance with existing rules and argue that the rules themselves are expensive. We see no reason why a smaller company should be able to dilute its shareowner base by a greater percent simply because it is a smaller company. Since shareowners currently approve nearly all requests, there does not appear to be an appreciable barrier to company fund raising. Further, shareowners have less information about smaller companies in regards to any exceptions they have already obtained in other contexts.

Providing more exceptions will compound the existing lack of transparency around smaller companies. Furthermore, in examining the existing definitions of a small company, the request to provide a different threshold for smaller companies appears to be far-fetched because in some cases the majority of publicly traded companies would fit the definition of a small company. As a practical matter, does it make sense to allow companies with fewer assets and less revenue to raise a larger percentage of their value without shareowner approval than companies with more assets and greater revenues? We believe that such a move would create greater risk at smaller and weaker companies.

If yes, what is the appropriate definition of a small company for this purpose? Should Nasdaq rely on existing definitions, such as those for Emerging Growth Companies, Smaller Reporting Companies, Non-accelerated Filers or companies that are not Well-Known Seasoned Issuers? How large of an issuance is appropriate before shareholder approval should be required for small companies?

First, we should examine the definitions of the so-called "small companies." In fact, Nasdaq should consider including such definitions in the requests for comments for clarity sake.

An Emerging Growth Company is a company with less than one billion in annual revenues.

A Smaller Reporting Company has less stringent reporting obligations, provides less historical financial information, is exempt from some provisions of the Sarbanes-Oxley Act of 2002, and has more time within which to file its reports. A Smaller Reporting Company will qualify as such if, as of the last business day of its second fiscal quarter, it has a public float of less than $75 million or it cannot calculate its public float and has annual revenue of $50 million or less.

A Non-accelerated Filer has a public float of less than $75 million.

A Non Well-Known Seasoned Issuer is, among other things, an issuer with a world-wide market value of less than $750,000,000 dollars.

It is clear that the question regarding the definition of a small company, when posed, suggests companies that are actually small in size, yet the reality is that the actual definition reflects companies that vary widely in revenue and market capitalization. For example, more than half of U.S. publicly traded companies are in fact Emerging Growth Companies and nearly 40% are not Well-Known Seasoned Issuers. There should be no exceptions for such companies.

Nasdaq may have a need to compete with the private markets regarding Smaller Reporting Companies and Non-Accelerated Filers, but any exceptions provided to these companies should be evidence-based and show no harm to existing shareowners and include a well-articulated benefit justifying the change.

Should Nasdaq allow a company to obtain pre-approval to issue shares in capital raising or acquisition transactions on a periodic basis? If so, what terms should be included in the approval (e.g., maximum discount, maximum number of shares, maximum voting power, use of proceeds, etc.)? How long should such approval be valid? Should Nasdaq's rules specify a maximum discount allowable for such pre-approval?

Shareowners currently grant approvals at a very positive rate. Markets may change drastically from pre-approval to use. There appears to be no evidence-based reason to support a change.

Nasdaq interprets its rules to require shareholder approval if any shares are issued to an officer or director in a private placement at a discount to market value. It has been noted that new investors often demand that insiders, including officers and directors, invest on the same terms that the investors have negotiated. Should Nasdaq consider changing its rules to allow such insiders to participate in a private placement without shareholder approval, where the insiders participate on the same terms negotiated by the other investors? If so, how much of such a transaction should the insiders be allowed to purchase? Are any other limits on such transactions appropriate?

Our initial research indicates that there is a lack of alignment of interest between such insiders and other shareowners with the insiders appearing to benefit significantly. It appears that such a change to rules to allow insiders to participate in a private placement without shareowner approval would further benefit insiders and create even greater misalignment and conflicts of interest. The change would also further encourage insiders negotiating the transaction to operate in their own best interest rather than in the best interests of the other shareowners. The rules should not be changed without providing reasonable evidence about how such a change would benefit shareowners other than insiders.

It has been suggested that the investor protections of the shareholder approval rules could be best achieved with a sliding scale, where the number of shares that could be issued without shareholder approval is based on the size of the discount to market price. Thus, a greater number of shares could be issued without shareholder approval if the shares are issued at a nominal discount, whereas few shares could be issued if there is a substantial discount. Should Nasdaq consider changing its rule to allow such a sliding scale when determining whether shareholder approval is required? If so, how should such a rule be structured? Are there other factors that should lead to a sliding scale, where more shares could be issued without shareholder approval, such as approval of the transaction by the company's independent directors or significant participation by retail investors in the transaction?

There should not be a sliding scale because the 20% cap serves existing shareowners. Allowing a larger percentage of shares to be placed privately without shareowner approval will substantially weaken the rights of existing shareowners. Issues already exist regarding the 20% threshold as shown by the number of clarifications requested by issuers when attempting to evade compliance with the rule. A sliding scale would be much more complex and difficult to monitor, without an articulated benefit to shareowners.

In determining whether a transaction is at market price, Nasdaq assigns a value of $0.125 to each warrant to purchase a share of common stock when warrants are issued along with common stock or other securities convertible into common stock. Should Nasdaq exclude the value of the warrant when determining if a transaction is at a discount if the warrant cannot be exercised for six months and the exercise price of the warrant is equal to or greater than market value? Are there other instances where Nasdaq should not consider the value of warrants issued in a transaction?

Nasdaq should provide examples of actual transactions and explain the change it would like to make along with evidence regarding how it would benefit existing shareowners. Absent a more detailed analysis, we would not favor any change.

When determining whether or not to aggregate two or more transactions for purposes of the shareholder approval rules, Nasdaq looks to the following factors: timing of the issuances; facts surrounding the initiation of the subsequent transaction(s); commonality of investors; existence of any contingencies between the transactions; specified use of proceeds for each of the transactions; and the timing of the board of directors' approvals. Generally Nasdaq does not aggregate transactions that are more than six months apart. It has been suggested that Nasdaq establish a bright line test for a specific time period after which two or more transactions would not be aggregated for purposes of the shareholder approval rules, unless governed by the same agreement. Should Nasdaq establish such a bright line time period? If yes, should this period be shorter than six months? If no, please explain why not.

We would prefer a bright line test that would not be shorter than six months with a preference of at least one year.

It has been suggested that a stable shareholder base of long-term holders is an indication of implied approval by shareholders of how the Company is managed and that companies with such support and approval should be allowed greater latitude to issue shares before shareholder approval is required. For example, companies with a stable shareholder base could be permitted to create a committee comprised of representatives of long-term holders empowered to consent to certain types of transactions in lieu of shareholder approval. Alternatively, companies with a stable shareholder base could be held to higher thresholds than the 20% requirement before needing shareholder approval for a private placement. Should Nasdaq consider proposing a rule to modify the shareholder approval requirements for a company with a stable shareholder base? Why or why not? If so, how should a stable shareholder base be defined and monitored?

Given the complexity of defining and monitoring a stable shareowner base, we believe that no such change should be made. We do not believe in exceptions to treat companies differently. In 2015, CalPERS voted on Rule 5635 transactions 55 times and approved 53 of those transactions. All 55 passed by significant majorities. Shareowners have not presented a road block. We do not see a need to make a change.