

Nasdaq Stock Market to Apply Additional Criteria for Initial and Continued Listing 纳斯达克交易所对首次和持续挂 牌应用额外要求

Nasdaq Stock Market has recently released two new Frequently Asked Questions (FAQs 416 and 1696) in connection with the particular circumstances under which Nasdaq will apply additional and more stringent criteria as part of its review of initial and continued listings. This memorandum discusses the FAQs and relevant Nasdaq listing rules.

纳斯达克交易所最近发布了两个新的常见问题解答（编号 416 和 1696），纳斯达克在审批首次和持续上市时将采取额外和更严格标准。本备忘录将讨论常见问题解答以及相关的纳斯达克上市规则。

Additional and More Stringent Criteria (FAQ 416) 更多更严格的标准 (FAQ 416)

Pursuant to Nasdaq Rule 5101 (the “Rule”), Nasdaq has “broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.” Nasdaq may use such discretion to apply additional or more stringent criteria for the initial or continued listing of particular securities. Nasdaq, based on its review of the application, may even deny, suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.

根据纳斯达克挂牌规则 5101（简称“规则”）纳斯达克“对于在其交易所首次和持续上市的证券具有广泛的自由裁量权，以保持其交易市场的质量和公众信心、防止欺诈和操纵行为、促进公正和公平的贸易原则、并保护投资者和公众的利益。纳斯达克可以使用这一自由裁量权对特定证券的首次或持续上市采用额外或更加严格的标准。纳斯达克在审批的过程中，如果发现任何纳斯达克认为不宜或不当的事件、条件或情况，可以拒绝特定证券的上市、暂停其交易或将其从交易所除名，即使该证券符合纳斯达克所列举的首次或持续上市的所有要求与标准。

The Rule further provides that Nasdaq may deny initial or continued listing to a company when

规则另外规定，当有以下情况时，纳斯达克可以拒绝一个公司的首次或持续上市：

- an individual with a history of regulatory misconduct is associated with the company. Such individuals are typically an officer, director, substantial security holder or consultant to the company;

当一个公司的关联人具有违法违规的历史时。这里的关联人通常是指公司的高管、董事、持有大量股票的股东、或顾问；

- a company files for bankruptcy protection;

当公司申请破产保护时；

- a company's independent auditors issue a disclaimer opinion on the financial statements that are required to be audited or when financial statements do not contain a required certification;

当公司的独立审计师对需要审计的财务报表发表免责声明、或当财务报表不包含所需的认证时；

- a company fails to submit requested information, or makes any communication to Nasdaq containing a material misrepresentation or omits material information necessary to make a communication to Nasdaq not misleading.

当公司未能提交纳斯达克所要求的信息、向纳斯达克提供任何重大失实陈述、或者忽略重要信息而误导纳斯达克时。

Nasdaq has indicated that it will use its discretion to apply additional and more stringent criteria resulting in the denial of initial or continued listing in the following instances:

纳斯达克表示会在以下情况下使用其自由裁量权来采取额外和更严格的标准来拒绝一个公司的首次或持续上市：

- Where the company plans a public offering resulting in insiders holding a large portion of the company's listed securities, the offering size was insufficient to establish the company's initial valuation, and there would not be sufficient liquidity to support a public market. See "*Compliance with the Minimum Round Lot Shareholder Requirement for Initial Listing*" and "*Nasdaq's Proposed Changes to the Listing Rules*" below.

如果公司计划的公开发行为小型，导致公司的内部人员占有该公司大部分的上市证券。这样的发行规模不足以支持公司的初始估值，并且没有足够的流动性来支持一个公开交易的市场。请参阅下文“符合首次上市的最低股东要求”和“纳斯达克对上市规则的修改提议”部分。

- Where the company did not demonstrate sufficient nexus to the U.S. capital

market, including having no U.S. shareholders, operations or members of the board of directors or management.

公司未能证明其与美国资本市场有足够的联系，包括没有在美国的股东、实际运营或董事会及管理层成员。

- Based on the embryonic nature of the company's business, where the company had not commenced operations and would turn over most proceeds from its IPO to third parties to advance the company's business plan.

在公司初创阶段，如果公司尚未开始运营，却将其 IPO 的大部分收益转交给第三方以推进公司的业务。

- Where the company failed to make any meaningful progress on its business plan two years after listing and had not generated any revenue. Where the company's management did not appear to have adequate prior public company experience or an understanding of the requirements to be a public company listed on Nasdaq.

公司在上市两年后未能在其业务计划方面取得任何有意义的进展且未产生任何收入。公司的管理层缺乏足够的上市公司管理经验或对纳斯达克的挂牌认知。

- Where the company engaged an auditor that has not been subject to an inspection by the Public Company Accounting Oversight Board (PCAOB), an auditor that PCAOB cannot inspect, or an auditor that has not demonstrated sufficient resources, geographic reach or experience to adequately perform the company's audit. See section "*Additional Criteria Based on a Company's Auditor*" below.

公司聘请未经上市公司会计监督委员会（PCAOB）审查的审计师、PCAOB 无法审查的审计师、或没有充分资源、区域覆盖或经验的审计师。请参阅下面的“基于公司审计师的附加标准”部分。

Additional Criteria Based on a Company's Auditor (FAQ 1696) **基于公司审计会所的附加标准（FAQ 1696）**

With respect to Nasdaq's review of the company's auditor, Nasdaq may require information relating to:

纳斯达克可能向公司的独立审计会所要求以下信息：

- 1) whether the company's audit firm has been inspected by the PCAOB, the results of that inspection, and whether the auditor has failed to respond to any requests by the PCAOB;

PCAOB 是否对公司的审计会所进行了检查、其检查结果、以及审计师是否未能回应 PCAOB 的任何要求；

- 2) whether the audit firm can demonstrate that it has adequate personnel in the offices participating in the audit with expertise in applying U.S. GAAP and GAAS in the company's industry;

审计会所是否能够证明其在参与审计的办事处拥有足够的人员，并对公司行业和应用美国公认会计准则（GAAP）和美国公认会计标准（GAAS）具备的专业知识；

- 3) the scope of the firm's training program for personnel participating in the company's audit; and

审计会所对参与公司审计的人员培训的范围；以及

- 4) for non-U.S. firms, whether the firm is part of a global network or other affiliation of individual firms, where the firms draw on globally common technologies, tools, methodologies, training and quality assurance monitoring.

对于非美国的审计会所，无论该审计会所是全球网络的一部分还是独立审计会所的关联实体，该审计公司都应利用全球共同的技术，工具，方法，培训和质量保证监控。

When the PCAOB cannot inspect a company's auditor, Nasdaq may use its discretionary authority to obtain comfort that the company satisfies the financial listing requirements and is suitable for listing (e.g. higher equity, assets, or earnings). Nasdaq could also require that any offering be underwritten on a firm commitment basis and companies to impose lock-up restrictions on officers and directors to allow market mechanisms to determine an appropriate price for the company before such insiders can sell shares.

当 PCAOB 无法检查公司的审计会所时，纳斯达克会行使其自由裁量权来确保公司满足上市的财务要求并且适合上市（例如：要求更高的股权权益、资产或收入）。纳斯达克可以要求以包销形式承销，且要求公司对高管和董事施加禁售限制，以在此类内部人员出售股票之前确定公司股票的适当定价。

In addition, Nasdaq would typically deny listing or delist a company if the company's auditor is newly formed and has therefore not yet undergone a PCAOB inspection cycle or if the company's auditor otherwise does not demonstrate sufficient resources, geographic reach or experience as it relates to the company's audit, including in circumstances where a PCAOB inspection has uncovered significant deficiencies in the audit firms' conduct in other audits or in its system of quality controls.

此外，如果公司的审计会所以新成立的并且尚未经历 PCAOB 的检查，或者对于公司的审计会计没有充分资源、区域覆盖或经验（包括 PCAOB 检查发现审计公司在其他审计项目或质量控制系统中的行为存在重大缺陷的情况）纳斯达克通常会拒绝公司上市或要求退市。

Compliance with the Minimum Round Lot Shareholder Requirement for Initial Listing (FAQ 1415)

符合首次上市的股东要求 (FAQ 416)

Nasdaq requires at least 300 round lot holders for listing on the Nasdaq Capital Market. Nasdaq will aggregate information on shareholders lists for accounts held by the same person to eliminate duplicates from the count, including individual and retirement accounts for the same person. Nasdaq may also aggregate accounts that appear to represent a single investment decision, such as separate accounts for an individual and his or her minor children. In general, Nasdaq will seek to insure that each account represents a separate investment decision by a bona fide holder and, for this reason, would also exclude accounts that only hold shares that were given as gifts or for minimal consideration to the holder, especially if such gifts were made to allow the company to satisfy Nasdaq's listing requirements.

在纳斯达克资本市场上市，必须有至少 300 名股东。在审阅这些股东名单信息时，纳斯达克会汇总同一人持有的账户，包括同一个人的个人和养老金账户，以消除重复计算。纳斯达克还可能汇总看似代表独立投资决策的多个账户，例如一个投资人及其未成年子女分别的单独账户。一般而言，纳斯达克将寻求确保每个账户代表一个真正的投资人单独的投资决定，并且排除那些由于赠送股票（或支付很少对价而取得的股票）而开设的账户，尤其当这些添加的账户是为了让公司满足纳斯达克的上市要求时。

Nasdaq's Proposed Changes to the Listing Rules 纳斯达克对上市规则的修改提议

On April 3, 2019, Nasdaq proposes to the Securities and Exchange Commission (the "SEC") to revise its initial listing standards to increase Nasdaq's requirement for initial listing and help assure adequate liquidity for listed securities (Release No. 34-85503; File No. SR-NASDAQ-2019-009). The proposed rule changes have been published to solicit comments. They have not been adopted as of the date of this memorandum.

在 2019 年 4 月 3 日，纳斯达克提议美国证券监管委员会(简称“证交会”)修改其首次上市的标准，以提高纳斯达克的首次上市要求，并帮助确保上市证券具有充足的流动性(Release No. 34-85503; File No. SR-NASDAQ-2019-009)。纳斯达克已发布这些修改提议以征求意见。截至本备忘录发布之日，这些修改提议尚未通过。

I. *Nasdaq proposes to exclude restricted securities from the Exchange's calculations of a company's publicly held shares, market value of publicly held shares and round lot holders ("Initial Liquidity Calculations"). To do so, Nasdaq proposes to amend or add new definitions.*

纳斯达克建议在公开持股数量、公开持股市值和整股股东的计算中（“流动性计算”）排除受限性证券。为此，纳斯达克建议修改或增添新的定义。

Currently, securities subject to resale restrictions are included in the Exchange's Initial Liquidity Calculations, however, such securities are not freely transferrable or available for outside investors to purchase and therefore do not truly contribute to a security's liquidity upon listing.

目前，交易所对流通股数计算包含受限性的证券，但是，这些带受限制的证券不能自由

转让也不可供外部投资者购买，因此在上市时并不真正有助于证券的流动性。

To address this concern, Nasdaq proposes to adopt three new definition:

为了解决这一问题，纳斯达克建议采纳三个新的定义：

- 1) “restricted securities” shall mean any securities subject to resale restrictions for any reason, including restricted securities (1) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S, which cannot be resold within the United States; (4) subject to a lockup agreement or a similar contractual restriction; or (5) considered “restricted securities” under Rule 144.

“受限性证券”为所有因任何原因受转售限制的证券，包括（1）从发行人或发行人的关联方直接或间接收购的未注册的受限制证券（如私募或 Regulation D）；（2）通过员工股票福利计划或专业服务补偿获得；（3）依靠 Regulation S 获得，不能在美国境内转售；（4）受制于锁定协议或类似的合约限制；或（5）根据 144 规则被视为“受限制证券”。

- 2) “unrestricted shares” to mean securities of a company that are not restricted securities.

“无限制证券”为所有不受转售限制的证券。

- 3) “round lot holder” to mean a holder of a normal unit of trading of unrestricted securities. As a result of these changes, a holder of only restricted securities would not be considered in the round lot holder count.

“整股股东”为持有普通交易单位不受限制证券的股东。因此，只持有受限制证券的股东将不会被计入整股股东的人数计算。

As a result of the new proposed definitions, only securities that are freely transferrable will be included in the calculation of publicly held shares and market value of publicly held shares to determine whether a company satisfies the Exchange’s initial listing criteria. Nasdaq believes that excluding restricted securities will better reflect the liquidity of, and investor interest in, a security and therefore will better protect investors.

根据这些新定义，只有不受限制的流通证券才会计入公开持股数和市值来确认一个公司是否满足纳斯达克的上次标准。纳斯达克认为，排除受限制证券将更好地反映出证券的流动性和投资者的利益，从而更好地保护投资者。

II. *Nasdaq proposes to impose a new requirement that at least 50% of a company’s round lot holders must each hold shares with a market value of at least \$2,500.*

纳斯达克建议要求公司至少 50% 的股东必须各自持有市值不少于 2,500 美元的股票。

Nasdaq proposes to impose a new requirement of the minimum investment amount held by shareholders. For initial listing, at least 50% of a company's required round lot holders must each hold shares with a market value of at least \$2,500. Nasdaq does not propose to impose this requirement on initial listings of warrants.

纳斯达克建议对股东的最低投资额度提出新要求。至少 50% 的整股股东必须各持有市值不少于 2,500 美元的股票。这一标准将不用于认股权证的首次挂牌。

III. *Nasdaq proposes to require a minimum average daily trading volume for securities trading over-the-counter ("OTC") at the time of their listing.*

纳斯达克建议要求场外交易 ("OTC") 的最低日均交易量。

For a company uplisting from the OTC, Nasdaq seeks to require such company's securities to have a minimum average daily trading volume over the 30 trading days prior to listing of at least 2,000 shares a day, with trading occurring on more than half of those 30 days (i.e., at least 16 days).

对于从 OTC 升板的公司，纳斯达克建议公司的证券在上市前的 30 个交易日内的每日最低平均交易量为 2,000 股，且交易发生在这 30 天中一半以上（即至少 16 天）。

Nasdaq proposes to adopt an exemption from the proposed average daily trading volume requirement for securities (including ADRs) listed in connection with a firm commitment underwritten public offering of at least \$4 million.

纳斯达克建议对于价值不低于 400 万美元的公开承销，可以免除每日平均交易量的要求。

AUTHOR'S FINAL THOUGHT 作者结语

For public interest reasons, Nasdaq Stock Market exercises its broad discretion on listing, suspending and delisting companies. Through its latest FAQs, Nasdaq attempts to explain its plans to increase its review process specifically with respect to small-cap and/or non-U.S. issuers. The additional criteria may be applied on a case-by-case basis. Any potential issuer should consider these factors even when it meets all enumerated criteria for initial or continued listing on Nasdaq. While the above rule changes submitted to the SEC are in the proposal stage, the author advises that any issuer considering a Nasdaq listing should apply such rules as if they were in effect.

出于公共利益原因，纳斯达克在上市，暂停交易和退市方面拥有广泛的自由裁量权。通过其最新的常见问题解答，纳斯达克试图解释其增加审查程序的计划，尤其是针对小型和/或非美国发行公司。这些额外的标准会根据具体情况适用。任何潜在发行人都应该考虑这些因素，即使发行人符合纳斯达克首次或继续上市的所有列举标准。上述所提交至证交会规则变更虽然仍处于提案阶段，但作者建议任何计划在纳斯达克上市的发行人都应该将这些规则列入考虑。

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