

## Nasdaq to Propose Additional Initial Listing Criteria for Restricted Market Companies 纳斯达克对受限市场公司 提议新增挂牌要求

On May 18, 2020, Nasdaq Stock Market (“Nasdaq” or the “Exchange”) filed three proposals with the Securities and Exchange Commission (“SEC”) to (i) apply additional initial listing criteria for companies primarily operating in “Restricted Market” (defined below), (ii) adopt a new requirement relating to the qualification of management or board of director for Restricted Market companies, and (iii) apply additional and more stringent criteria to an applicant or listed company based on the qualifications of the company’s auditor (the “Proposals”). This memorandum discusses these three proposed rule changes.

纳斯达克交易市场于2020年5月18日（简称“纳斯达克”）向美国证券交易委员会（简称“证监会”）提交了三份修改提案，涉及（i）增加对“受限市场”（定义见下文）运营的公司首次公开发行要求，（ii）增加对受限市场公司的管理层或董事会的新要求，以及（iii）根据审计师的资质对拟申请上市公司适用额外且更严格的标准。本备忘录将讨论这三项修改提案。

### I. Definition of “Restricted Market” “受限市场”的定义

In recent years, emerging market companies have sought to raise funds in the U.S. and list on the Nasdaq. To minimize the unique potential risks raised by the lack of transparency from certain emerging markets, such as the accuracy of disclosures, accountability, and access to information, particularly when a company is based in a jurisdiction that is less transparent and restricts access to information by regulators of U.S.-listed companies, Nasdaq proposes to add a new definition of “**Restricted Market**” in Rule 5005(a)(37) 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.”

近年来，众多来自新兴市场的公司寻求在美国募集资金并在纳斯达克挂牌上市。由于一些新兴市场缺乏透明度，这些公司存在着特殊的风险，例如披露的准确性，问责制和信息获取，特别当这些公司在美国上市监管机构难以获取信息的司法管辖权。为了减少这些风险，纳斯达克提议新增规则 5005(a)(37)，定义“受限市场”为“纳斯达克认定受当地保密法律，禁止法规，国家安全法律或其他限制美国上市公司监管机构获取信息的法律法规的司法管辖区”。

A “**Restricted Market Company**” is a company that principally administers its business in a Restricted Market. In determining whether a company is a Restricted Market Company, 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. Nasdaq will consider these factors holistically, recognizing that a company’s headquarters may not be the office from which it conducts its principal business activities. This proposed rule applies to both foreign private issuers based in Restricted Markets and companies based in the U.S. or another jurisdiction that principally administer their businesses in Restricted Markets.

初在受限市场中运营的公司即为“受限市场公司”。在确定一个公司的业务与运营是否主要处在这些受限市场，纳斯达克会考虑这个公司的（a）主要业务部门、业务或资产所在地；（b）董事会和股东大会的举办地点；（c）总部或主要行政办公室所在地；（d）高级管理层和员工所在地；以（e）账簿和记录的所在地。纳斯达克将全面考虑这些因素，并意识到公司总部可能不是开展主要业务活动的办公室。这一拟定的规则将适用于在受限市场的外国发行人，以及在美国或其他司法管辖区成立但在受限市进行运营或被管理的发行人。

### II. Additional Initial Listing Criteria<sup>1</sup> 新增首次挂牌要求

Nasdaq is concerned that a small offering size for an IPO may not accurately reflect the company’s initial valuation or ensure sufficient liquidity to support trading in the

<sup>1</sup> <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2020/SR-NASDAQ-2020-027.pdf>.

secondary market. Nasdaq proposes to adopt new Rules 5210(k)(i) and (ii) that would require a minimum offering size or public float for Restricted Market Companies applying to be listed in connection with an IPO or a business combination (as described in Rule 5110(a) or IM-5101-2).

纳斯达克担忧小型 IPO 可能无法准确反映公司的初始估值或无法确保足够的流动性来支持二级市场的交易。纳斯达克提议采用新规则 5210(k) (i) 和 (ii) 来要求准备通过 IPO 或并购完成在纳斯达克上市的受限市场公司达到最低发行规模或公众持股的要求（如规则 5110(a) 或 IM-5101-2 所述）。

Minimum Offering Size or Public  
Float Percentage for an IPO  
最低 IPO 发行量  
或融资后公众持股比例

Nasdaq's proposed rule would require a Company that is listing its primary equity security on Nasdaq in connection with its IPO, and that principally administers its business in a Restricted Market to offer a minimum amount of securities in a firm commitment offering in the U.S. to Public Holders 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. "Market Value" is "the consolidated closing bid price multiplied by the Company's Publicly Held Shares."

纳斯达克提议的新增规则将要求通过 IPO 在纳斯达克挂牌其主股本证券的受限市场公司必须通过承销商以包销的承销形式在美国向公众股东发行以下两者中较低的证券发行量：（i）总融资金额至少 2500 万美元的股票，或（ii）至少占发行后挂牌证券公众市值的 25%。此处的“公众市值”是指收盘价乘以公司当天的总公众持股数。

Minimum Market Value of Publicly Held  
Shares for a Business Combination

合并后挂牌公司的  
公众持股最低市值要求

The Nasdaq's proposed rule would require the listed company to have a minimum market value of unrestricted publicly held shares following a 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. The business combination refers to a transaction whereby the listed company combines with a non-Nasdaq entity, resulting in a change of control of the listed company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing, as described in Rule 5110(a) or IM-5101-2.

纳斯达克提议的新增规则将要求通过合并并在纳斯达克挂牌的公司的流通公众持有股的最低市值至少为以下两者中较低值：（i）2500 万美元，或（ii）占并购后挂牌证券总公众市值的 25%。如规则 Rule 5110(a) 或 IM-5101-2 所述，这里的“合并”被定义为一家纳斯达克上市公司和一家非纳斯达克上市公司的合并所引发的上市公司控制权的变更并且使得原非上市企业变为拟纳斯达克挂牌公司。

Direct Listings of Restricted Market Companies  
受限市场公司的直接挂牌

Nasdaq is also proposing to adopt a new Rule 5210(k)(iii) to permit Restricted Market Companies to only list on the Nasdaq Global Select or Nasdaq Global Markets if they are listing in connection with a Direct Listing (as defined in IM-5315-1). Such companies would not be permitted to list on the Nasdaq Capital Market, which has lower requirements for Unrestricted Publicly Held Shares, in connection with a Direct Listing. "Direct Listing" refers to listing of common equity securities sold in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market immediately prior to the initial pricing.

纳斯达克也提议采用新规则 5210(k) (iii) 允许受限市场公司只能在纳斯达克全球精选或全球市场上直接挂牌（按 IM-5315-1 定义）。此类公司不得在对流通公众持有股数量要求较低的资本市场版申请直接挂牌。这里的“直接挂牌”指挂牌通过私募融资所增发的股权证券，此证券在首次定价之前尚未在任何国家级证券交易所或场外交易市场上挂牌交易。

### III. Qualification of Management or Director<sup>2</sup> 对受限公司管理层董事资格的新要求

Nasdaq proposes to adopt a new listing standard in Rule 5210(c) to require that listing applicants from Restricted Market to include a member of senior management or a director with relevant past employment experience at a U.S.-listed public company or equivalent experience, training or background in regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws. In the absence of such an individual, the company could retain an advisor, acceptable to Nasdaq, that will provide such guidance to the company.

纳斯达克提议新增规则 5210(c)，要求受限市场国家的上市申请人必须拥有一名高级管理人员或董事具有在美国上市公司中相关过往工作经验的，或者具有同等纳斯达克以及美国联邦法律监管及披露合规经验，培训或背景。在没有此类人员的情况下，公司可以聘请纳斯达克许可的一位或多位顾问来为公司提供此类指导。

The proposed rule changes would apply to companies from Restricted Market countries that apply to list on Nasdaq after the date of effectiveness, but would not apply to companies from other countries or to companies already listed on Nasdaq.

提议的规则变更将适用于在新规生效之日后申请在纳斯达克上市的受限市场国家的公司，不适用于其他国家公司或已在纳斯达克上市的公司。

Any applicable company shall continue to comply with such requirement as long as it is a Restricted Market Company. It shall provide Nasdaq Staff with a plan to regain compliance if it does not maintain compliance with this requirement. Based on its review of the company's plan, Nasdaq Staff generally would be able to allow the company up to 180 days to regain compliance.

被适用上市公司只要处在受限市场公司就应持续遵守该要求。如果公司未能遵守此项要求，应向纳斯达克提供合规计划。根据对公司计划的审阅，纳斯达克通常可以给公司最多 180 天的期限来修复对管理层资质的合规。

### IV. Additional and More Stringent Criteria Based on the Qualification of Auditor<sup>3</sup> 针对审计师资质增加额外更严格要求

Currently, Nasdaq has the authority to rely upon its broad discretion provided under Rule 5101 to deny initial or continued listing or to apply additional and more stringent criteria when the auditor of an applicant or a Nasdaq-listed company: (1) has not been subject to an inspection by the Public Company Accounting Oversight Board (the "PCAOB") (either historically or because it is newly formed and as therefore not yet undergone a PCAOB inspection), (2) is an auditor that the PCAOB cannot inspect, or (3) 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 auditors' conduct in other audits or in its system of quality controls.

目前，纳斯达克有权依赖其根据第 5101 条规定的广泛授权，在以下情况下拒绝公司首次或继续上市，或对公司适用其他更严格的标准：1) 当申请人或纳斯达克上市公司的审计师未接受上市公司会计监督委员会 ("PCAOB") 的检查时 (包括由于公司过去从未接受过 PCAOB 的检查，或由于其是新成立的，因此尚未接受 PCAOB 的检查的情况)；2) 是 PCAOB 无法检查的会计师事务所；3) 在其他方面未能证明与公司审计相关的足够资源、地域范围或经验，包括 PCAOB 检查发现审计师在其他审计或其质量控制体系中的行为存在重大缺陷的情况。

Nasdaq proposes to apply additional and more stringent criteria to an applicant or listed Restrict Market Company based on the qualifications of the company's auditor, including:

纳斯达克提议修改现有规则，根据公司审计师的资质，对上市申请公司使用额外且更严格的标准，可能考虑的因素包括：

- 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;

<sup>2</sup> <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2020/SR-NASDAQ-2020-026.pdf>.

<sup>3</sup> <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2020/SR-NASDAQ-2020-028.pdf>

- 审计员是否接受了 PCAOB 的检查，例如审计员是新成立的，因此尚未接 PCAOB 的检查，或者审计师或参与协助审计的会计师事务所所在的司法管辖区限制了 PCAOB 检查审计师的权力；
- 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;
- 如果 PCAOB 对公司审计师进行了检查，检查结果是否表明审计师未对 PCAOB 的任何要求作出回应，或检查发现审计师在其他审计或其质量控制体系中的行为存在重大缺陷；
- 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;
- 审计员是否能证明其在参与审计的办事处有足够的人员，并具有根据美国公司所在行业、应用所适用的共识通用的审计准则和程序或国际通用的财务报告标准审计的专业知识；
- whether the auditor's training program for personnel participating in the company's audit is adequate;
- 审计师对参与公司审计人员的培训计划是否充分；
- 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
- 对于非美国本土会计师事务所，审计师是否属于此所全球附属网络的一部分，或审计师是否可以利用上全球通用技术、工具、方法、培训来完成质量保证监测；

- whether the auditor can demonstrate to Nasdaq sufficient resources, geographic reach or experience as it relates to the company's audit.

审计师是否能够向纳斯达克证明与公司审计相关的足够资源和地域性覆盖力或经验。

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.

纳斯达克将全面考虑以上因素，并可能在即使审计师对上述一些因素有顾虑的情况下依然对审计师的资格表示满意。

In order to obtain comfort that the company satisfies the financial listing requirements and is suitable for listing, Nasdaq may apply additional and more stringent criteria including:

为能更确信拟上市公司能满足上市要求并适合挂牌交易，纳斯达克可能附加更严格标准，包括：

- higher equity, assets, earnings or liquidity measures than otherwise required;  
对权益、资产、收益或流动性措比通常更高的要求；
- any offering be underwritten on a firm commitment basis;  
包销形式完成承销；
- Lock-up restrictions on officers and directors to allow market mechanisms to determine an appropriate price before such insiders can sell shares.
- 要求公司对高管和董事持股实施锁定期，以允许市场在此类内幕人士出售股份之前体现公司的适当价格。

Lastly, for those Restricted Market Companies trading over the counter (the "OTC"), Nasdaq may impose additional liquidity measures on the company, such as requiring a higher public float percentage, market value of unrestricted publicly held shares or average OTC trading volume, or requiring offerings to be underwritten.

最后，就针对在受限市场交易的场外交易市场挂牌公司，纳斯达克可能会对该公司证券流动性应用额外要求，例如要求更高的公众持股比例、更高的流通公开持股市值，更高的平均场外交易量，以及包销形式完成公募融资。

## V. Author's Final Thoughts 作者结语

Author believes that prospective issuers from China will be subject to Nasdaq's latest proposed rule changes, as the Exchange considers China to be a Restricted Market per its definition. Nasdaq would have broad discretionary authority to apply more stringent criteria (including a firm commitment offering of at least \$25 million or 25% of company's post-offering Market Value), or even deny listing of a Restricted Market Company. Firm commitment offerings are preferred by Nasdaq for the reasons that: (i) they typically involve a book building process that helps to generate an investor base and trading interest that promotes sufficient depth and liquidity to help support fair and orderly trading; (ii) involving more due diligence by the broker-dealer as opposed to a best efforts offering, and (iii) there are sufficient investor base and public float to support fair and orderly trading. The requirement of an experienced board or management personnel is to heighten internal compliance oversight by companies from Restricted Markets and thus enhance investor protection.

作者认为由于交易所将中国定义为“受限地区”，因此来自中国的拟上市公司将被纳斯达克的最新修改提议适用。纳斯达克将有在是否应用包括至少包销融资 2500 万美元或公众持股市值 25%等额外更严格要求上有宽泛的自由裁量权，甚至拒绝挂牌申请。纳斯达克通常倾向于包销性发行因为 i) 包销融资通常涉及建立簿记额过程，有助于建立投资者基础和兴趣，促进流动性以支持在交易市场公平有序交易；(ii) 与代销相比，承销商在包销融资师需要进行更多的尽职调查；(iii) 有助于确保有足够的投资者基础和公众持股量以支持公平有序的交易。具有经验的董事或管理层这一要求则将提高受限市场公司的内部合规监督水平，以此增强对投资者的保护

Nasdaq's proposed rule changes were designed to safeguard investor and public interest, ensure that a company seeking to list on Nasdaq is prepared for the rigors of operating as a public company; to provide transparent disclosure to investors in accordance with the SEC's and

Nasdaq's reporting requirements; and to ensure sufficient investor interest to support liquid trading. While the above rule changes submitted to the SEC are in the proposal stage, author advises that prospective issuers to apply such rules as if they were in effect and are encouraged to discuss these proposals in details with its legal advisor to form a plan of actions to meet the additional requirements.

纳斯达克的修改提议旨在保障投资者和公众利益；确保公司准备好面对作为上市企业面临的更严格规范制度；确保公司按照证交会和纳斯达克的要求向投资者提供透明的披露；并确保足够投资者基础来支持流通性。虽然以上所述的规则修改处于提议阶段，作者建议任何拟发行人都应假设此次修改建议的批准并将这些额外要求放入上市规划，并与其法律顾问商讨相应的计划来符合此些新增要求。

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