September 13, 2024

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

RE: ***The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Application of the Minimum Bid Price Compliance Periods and the Delisting Appeals Process for Bid Price Non-Compliance in Listing Rules 5810 and 5815 Under Certain Circumstances*** **(Release No. 34–100767; File No. SR– NASDAQ–2024–045)**

Dear Ms. Countryman:

The American Consumer & Investor Institute ("ACII") respectfully submits this comment letter to the U.S. Securities and Exchange Commission (the "Commission") in response to the above proposal by The Nasdaq Stock Market LLC ("Nasdaq").[1] Nasdaq seeks to update its delisting process for (1) securities that fail to regain compliance with the Nasdaq listing standard that requires a listed equity security to maintain a closing bid price that is no less than $1.00 (the "bid price requirement") and (2) securities that are non-compliant with the bid price requirement and conducted a reverse stock split in the prior year. This follows a recent Nasdaq proposal to update its process when a company takes action to regain compliance with the bid price requirement that causes non-compliance with another listing requirement.[2]

We support Nasdaq's efforts to address concerns about exchange listed penny stocks.[3] These stocks are frequently subject to forms of market manipulation and repeated use of reverse stock splits to remain listed, both of which pose significant risks to market integrity and retail investors. ACII urges the Commission to approve Nasdaq's proposals as a *first step* towards further protecting retail investors, broker-dealers, and market integrity from the risks associated with such penny stocks. ACII also believes the Commission must do more on its own to address risks posed by exchange listed penny stocks. In fact, the Commission under Chair Gensler has done little, if anything, to address this core investor protection concern, which is particularly troubling in light of the SEC's statutory mission, its own rules on penny stocks, and its responsibility to oversee exchange self-

[1] Exchange Act Rel. No. 100767; 89 FR 68228 (Aug. 23, 2024).
[2] Exchange Act Rel. No. 100461; 89 FR 56457 (July 3, 2024) (Notice of Filing of Proposed Rule Change To Modify the Application of Bid Price Compliance Periods). Nasdaq gave the example of a company that conducts a reverse stock split to regain compliance with the bid price requirement but the reduction in the number of publicly held shares causes the company to no longer satisfy the minimum number of publicly held shares required to remain listed. Under the current rules, the company would be compliant with the bid price requirement and would be notified of a new deficiency with the publicly held shares requirement. The proposal would change the process such that the company would continue to be considered noncompliant with the bid price requirement until both the new deficiency was cured and the company was compliant with the bid price requirement.
[3] *See, e.g.*, https://www.wsj.com/finance/stocks/nasdaq-penny-stock-proposed-rule-change-74677b00. The term "penny stock" generally refers to a security issued by a very small company that trades at less than $5 per share.

regulatory organizations.

The Commission adopted penny stock rules in response to the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. The rules were designed to protect investors from risks associated with penny stocks, including sales-practice abuses and market manipulation. The rules require, among other things, that broker-dealers provide investors with a disclosure document describing the risks of investing in penny stocks and approve customer accounts for transactions in penny stocks.[4] However, the Commission specifically exempts securities that are listed on a national securities exchange from the penny stock rules based upon the initial and continued listing standards implemented by the exchanges.[5] Each exchange has specific requirements for continued listing.[6]

Notably, all of the major stock exchanges require listed companies to maintain a minimum share price of $1.00. In early 2021, there were less than a dozen listed stocks trading below $1.00 a share. In December 2023, however, there were as many as 557 stocks listed on exchanges trading below the $1.00 requirement.[7] The exponential growth in the number of penny stocks trading below $1.00 but still listed on major exchanges presents serious risks to market integrity and retail investors.[8]

Additionally, more companies have sought to regain compliance with the bid price requirements of exchange continued listing rules by effecting a reverse stock split, which increases a company's stock price by consolidating the outstanding shares.[9] The reverse stock splits can "cure" the price requirement deficiency even as the share price declines. For example, beginning in 2020, Bit Brother executed three reverse splits, including a 1000-for-1 reverse split, to maintain its Nasdaq listing even though its share price fell by more than 99% after adjusting for the splits.[10] Nasdaq delisted Bit Brother earlier this year.

Similarly, AEye was trading at $0.15 in December 2023 and had been below the $1.00 requirement for nearly a year.[11] On December 22, 2023, AEye announced a 1-for-30 reverse stock split specifically to ensure compliance with Nasdaq's minimum bid price requirement.[12] Following the split, AEye's share price has fallen by more than 55%. Securities listed on the New York Stock Exchange ("NYSE") have also used reverse stock splits to "cure" price requirement deficiencies. Virgin Galactic received notice in May that it was non-compliant. Pursuant to NYSE rules, the company had six months to regain compliance. In June, Virgin Galactic announced a 1-for-20 reverse stock split to ensure NYSE minimum share price compliance. In the month after the announcement of the reverse stock split, the share price, adjusted for the split, fell over 50%.

Despite these concerns, the Commission has not acted to protect investors and prevent securities from remaining listed when not satisfying exchange standards, including bid price requirements, for long periods of time. When listed, the securities are exempt from penny stock regulations and have a seal

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[4] *See, e.g.*, U.S. Securities and Exchange Commission, Key Points About Regulation SHO, https://www.sec.gov/investor/pubs/regsho.htm.

[5] *See* 17 CFR § 240.3a51-1.

[6] While initial listing requirements are also ripe for review and update, this comment letter is focused on continued listing.

[7] *See* https://www.wsj.com/finance/stocks/hundreds-of-stocks-have-fallen-below-1-theyre-still-listed-on-nasdaq-c8e36abf.

[8] https://www.wsj.com/finance/stocks/hundreds-of-stocks-have-fallen-below-1-theyre-still-listed-on-nasdaq-c8e36abf.

[9] 89 FR at 56457.

[10] https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b.

[11] https://www.wsj.com/finance/stocks/hundreds-of-stocks-have-fallen-below-1-theyre-still-listed-on-nasdaq-c8e36abf.

[12] AEye, Release Details, https://investors.aeye.ai/news-releases/news-release-details/aeye-announces-reverse-stock-split-ensure-nasdaq-minimum-bid.

of approval from the listing exchange, a perception that can be impactful for retail investors. The exemption is significantly based on exchange listing standards, which should prevent securities that have the characteristics of penny stocks from being listed. If companies remain listed despite not meeting exchange listing standards, the structure of the penny stock rules and exchange exemption breaks down.

The Nasdaq proposals would update the Nasdaq continued listing requirements[13] to:

- provide that a company will not be considered to have regained compliance with the bid price requirement if the company takes an action to achieve compliance with that requirement and that action results in the company's security falling below the numeric threshold for another listing requirement;[14]
- provide that a company will be suspended from trading on Nasdaq if the company has been non-compliant with the $1.00 bid price requirement for more than 360 days;[15] and
- modify the listing standards such that Nasdaq will immediately send a delisting notice, without any compliance period, to any company that becomes non-compliant with the $1.00 minimum bid price requirement if the company effected a reverse stock split within the prior one-year period.[16]

Importantly, while the Nasdaq proposals are a step in the right direction, much more is needed to address the issues presented by exchange listed penny stocks. Over the last year, and as noted above, there has been increasing focus and concern among market participants about issuers circumventing exchanges' continued listing requirements and a significant rise in the utilization of reverse stock splits to do so.[17] The Financial Industry Regulatory Authority ("FINRA") has warned retail investors about reverse stock splits, noting that investors should "proceed with caution" because they "tend to go hand in hand with low-priced, high risk stocks," especially when the splits "result in a post-split share price that is many times the price of the stock's current price."[18]

Even if the Nasdaq proposal is implemented, a company may trade on the exchange for 360 days while being non-compliant with the bid price requirement. Also, a company may continue to use reverse stock splits to gain compliance with the bid price requirement so long as the reverse splits are effected before the company becomes non-compliant with the requirement. Similarly, a company listed on the NYSE will be considered to be non-compliant if the average closing price of the company's stock is less than $1.00 over a consecutive 30 trading-day period. The company then has six months to regain compliance and, during that time, the stock will continue to be listed and traded on the NYSE. The company can then effect a reverse stock split to gain compliance with the bid price requirement. During these periods, despite lengthy non-compliance with exchange listing standards, the securities are exempt from penny stock regulations and have the same seal of approval as securities that, in fact, meet the exchange listing requirements.

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[13] Although much of the focus has been on Nasdaq, close to 100 of the listed securities trading below the $1.00 requirement were listed on other exchanges.

[14] 89 FR at 56457.

[15] 89 FR at 68228.

[16] 89 FR at 68228.

[17] *See, e.g.*, https://www.wsj.com/finance/stocks/nasdaq-penny-stock-proposed-rule-change-74677b00; https://www.wsj.com/finance/stocks/hundreds-of-stocks-have-fallen-below-1-theyre-still-listed-on-nasdaq-c8e36abf; https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b; Letter from Thomas H. Merritt, Deputy General Counsel, Virtu Financial, Inc. to SEC (July 15, 2024) (https://www.sec.gov/files/rules/petitions/2024/petn4-830.pdf) ("Virtu Petition").

[18] FINRA, Stock Splits, https://www.finra.org/investors/investing/investment-products/stocks/stock-splits.

Recently, Virtu Financial, Inc. petitioned the Commission to initiate rulemaking that would require exchanges to, among other things:

- strengthen listing standards for stocks trading below $1.00 and reduce the timeline thresholds that result in a violation of the minimum share price requirement and delisting;
- adopt rules limiting excessive reverse stock splits and target reverse stock splits used to avoid delisting due to share price violations; and
- monitor for potentially misleading and manipulative promotional activity.[19]

The reverse split suggestion is especially relevant because the increase in reverse splits is dramatic. In 2023, there were 495 reverse splits of exchange-listed stocks, the largest total in the two decades that the number has been measured.[20] The use of reverse splits to manipulate compliance with continued listing requirements "can lead to significant investor harm, questions about the integrity of our capital markets, and operational strains and losses at member firms."[21] Operationally, the manual processing necessary for each reverse split creates burdens for broker-dealers, which indirectly raises costs for investors. The reverse stock splits "are often rushed through with little notice to the market, which creates a significant operational risk to FINRA member firm broker-dealers that must ensure they are all properly accounted for in their back-office systems."[22] Further, they can create confusion for retail investors due to the often drastic reduction of the number of shares held in a customer's account.

Similarly, SIFMA has made suggestions for improving Nasdaq's continued listing rules, including:

- shortening the 180-day time period for a company to regain compliance after a deficiency notice;
- limiting the ability of a company to engage in multiple reverse stock splits over a certain period of time to remain listed; and
- immediately delisting a company that has filed for bankruptcy.[23]

ACII believes in the need for robust and deep public markets, which are characterized by the ability of companies of all sizes to access capital. This includes the ability for smaller companies to reasonably regain compliance with continued exchange listing standards. Capital formation and access to capital markets are vital to support innovation and financial opportunity; however, this must also be balanced with reasonable protections for investors who might not appreciate the risks posed by penny stocks, such as those described above, when these securities have the imprimatur of being listed on major national securities exchanges. As noted in a recent petition to the Commission, "[t]hese are classic penny stock companies that are often tied to pump-and-dump trading activity and other forms of market manipulation."[24] We recommend that the Commission engage with the industry, including a review of the suggestions that have already been made, and update its own penny stock rules and the rules for continued listing on exchanges. Such enhanced standards would help to address the existing investor protection, market integrity, and operational concerns that have been raised.

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[19] Virtu Petition.
[20] https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b.
[21] Letter from Ellen Greene, Managing Director and Joseph Corcoran, Managing Director, Securities Industry and Financial Markets Association to SEC (July 30, 2024) (https://www.sec.gov/comments/sr-nasdaq-2024-029/srnasdaq2024029-498535-1461442.pdf) ("SIFMA Letter").
[22] Virtu Petition.
[23] *See* SIFMA Letter.
[24] Virtu Petition.

ACII appreciates the opportunity to comment on this issue and we look forward to continuing to work with the Commission on improvements to U.S. capital markets that promote retail investor access, opportunity, and protection.

Sincerely,
The American Consumer & Investor Institute