



April 26, 2016

VIA Email

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090
rule-comments@sec.gov

RE: File Number SR-NASDAQ-2016-013. Proposal to require listed companies to publicly disclose compensation or other payments by third parties to any nominee for director or sitting director in connection with their candidacy for or service on the companies' Board of Directors.

The National Venture Capital Association (“NVCA”) represents the vast majority of American venture capital under management.¹ Venture capital funds invest across the spectrum of company stages of development, typically from early stage startup through initial public offering (IPO) or acquisition.

Nasdaq is the listing exchange for many venture-backed IPOs. The opportunity for successful venture-backed companies to complete initial public offerings is a critical component of the virtuous cycle of venture investing. Often, investment proceeds from an IPO are distributed to venture fund limited partners after an IPO company has traded for a set time called the lock-up period. During this period of initial public trading (and sometimes thereafter), the venture capitalist who has served on the board of the IPO company for much of its life usually continues to serve on the company’s board. This VC’s continued service on the board benefits

¹Venture capitalists are committed to funding America’s most innovative entrepreneurs, working with them to transform breakthrough ideas into emerging growth companies that drive U.S. job creation and economic growth. As the voice of the U.S. venture capital community, the National Venture Capital Association empowers its members and the entrepreneurs they fund by advocating for policies that encourage innovation and reward long-term investment. As the venture community’s preeminent trade association, NVCA serves as the definitive resource for venture capital data and unites its members through a full range of professional services. For more information about the NVCA, please visit www.nvca.org.

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both the IPO company and the venture capital fund investors. Therefore, listing requirements that affect board membership for IPO companies are important to the entire venture capital ecosystem.

This VC board member is subject to the same duties of loyalty and care as other board members. However, unlike the typical outside board member he or she sits on the board as the general partner of the venture capital fund partnership that owns a substantial interest in the company. The VC board member, while a general partner of the VC fund investor, is also a member or an associate of the venture capital firm that formed the VC fund. Since these arrangements are somewhat complex, our comments are aimed at ensuring that Nasdaq is fully informed of these arrangements as it considers whether to move forward with this new rule.² As we read the rule proposal, Nasdaq intends to exempt the typical venture capital board member from this proposed new disclosure.³ However, we are concerned that the rule language intended to accomplish this may be too narrow to encompass the legal relationships that exist between a VC board member and the venture capital firm or the fund that he or she represents on the board as the general partners.

While we recognize that this proposed rule would require disclosure only, we are also commenting because Nasdaq is considering whether to develop rules that would actually prohibit some individuals from board service based on their receipt of compensation from third parties.⁴ Should a restrictive rule be developed with the same exemption language as the current disclosure rule, such a restriction could raise serious concerns for venture-backed IPO companies considering a Nasdaq listing. With this possibility in mind, our comments are intended to inform Nasdaq of the typical relationships between VC board members and parties other than the IPO company, which we believe should fit clearly within any exception.⁵

In general, it is part of the VC fund director's job to serve on these boards and create value in the companies in which the VC fund invests. Therefore, in most cases, the VC board member receives no additional compensation from his or her employer or the affiliated VC fund

² NVCA has not consulted its members or their securities law counselors on the question of whether this type of disclosure is appropriate for Nasdaq listed companies. Therefore, our comments are intended to address the proposed exemption only rather than the rules *per se*.

³ SR-NASDAQ-2016-013, p. 6-7. ("An example of an agreement or arrangement falling under this exception is a director or a nominee for director being employed by a private equity fund where employees are expected to and routinely serve on the boards of the fund's portfolio companies and their remuneration is not materially affected by such service. If such a director or a nominee's remuneration is materially increased in connection with such person's candidacy or service as a director of the company, only the difference between the new and the previous level of compensation needs to be disclosed under the proposed rule.")

⁴ *Id.*, p. 8, footnote 9. ("Separate from this proposed rule change, Nasdaq is surveying interested parties as to whether Nasdaq should propose additional requirements surrounding directors and candidates that receive third party payments, including whether such directors should be prohibited from being considered independent under Nasdaq rules or prohibited from serving on the board altogether.")

⁵ While we confine our present comments to the proposed exemption and we appreciate the concerns that prompt the proposed new disclosure rule, we see significant issues in general around a rule that prohibited or restricted board membership based on third party relationships.

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for serving on the board of directors of a company in which the affiliated VC fund invests. However, should a VC director receive additional compensation for some board service, the nature of his or her relationship to the company would be no different.

The key rule language that should provide an exemption for VC board members is set out in proposed rules 5350(b)(3)(A) as follows:

[a] Company need not disclose pursuant to this rule agreements and arrangements that: ... (ii) existed prior to the nominee's candidacy (including as an employee of the other person or entity) and are otherwise publicly disclosed in a proxy statement or annual report (such as in the director or nominee's biography)....⁶

While one could read this language to encompass the pre-existing relationship between the VC board member and either the VC firm or the VC fund investor, we encourage Nasdaq to be more explicit as to the types of relationships it intends to encompass. This is particularly necessary because Nasdaq intends that the disclosure requirements in the new rule be applied "broadly,"⁷ an instruction that could imply the need to construe exemptions narrowly. In practice, this could prompt IPO legal counsel or underwriters to require disclosure unless the application of the exemption is crystal clear, for example.

Given the routine occurrence of VC board members in Nasdaq IPO companies, we recommend that Nasdaq either amend its rule language to more clearly encompass such relationships or provide interpretive materials to accompany the rule that would accomplish the same purpose. For example, we recommend clarifying the requirement that the "agreements or arrangements" be "publicly disclosed" in the proxy statement as that presents a challenge in terms of the amount of detail regarding the nature of such relationships that a company would need to include in its proxy statement. We feel that a disclosure (i) that the VC fund director was initially elected to the board as a designee of the VC fund in connection with such fund's investment in the company and (ii) whether such director receives any additional compensation from the VC fund for serving on such board should be sufficient rather than having to set out and describe the complex applicable provisions of the agreement between the director and the VC fund relating to compensation.

CONCLUSION

NVCA appreciates that Nasdaq appears to understand the fact that venture capitalists on the boards of venture-backed companies do not raise the concerns that these proposed disclosure requirements seek to address. We hope our comments help Nasdaq understand such relationships more thoroughly. We encourage Nasdaq to make any final rule explicit that these types of relationships are exempt from new disclosure requirements and any future rules that arise from similar concerns. We would be pleased to provide Nasdaq any additional information and stand

⁶ *Id.*, p. 21, Exhibit 5.

⁷ *Id.* p. 6. ("The proposed rule is intended to be construed broadly and apply to both compensation and other forms of payment such as health insurance premiums that are made in connection with a person's candidacy or service as a director.")

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ready to work with Nasdaq on this and other important matters. Please feel free to contact me at 202-864-5925 or bfranklin@nvca.org, or Jeff Farrah, Vice President of Government Affairs, at 202-864-5927 or jfarrah@nvca.org.

Sincerely,

A handwritten signature in black ink that reads "Bobby Franklin". The signature is written in a cursive, flowing style.

Bobby Franklin
President & CEO