UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:

THE SMALL PUBLIC COMPANY COALITION

File No. SR-NASDAQ-2026-004

PETITION FOR REVIEW OF ORDER TAKEN BY DELEGATED AUTHORITY GRANTING APPROVAL OF A PROPOSED RULE CHANGE BY THE NASDAQ STOCK MARKET LLC, AS MODIFIED BY AMENDMENT NO. 1, TO ADOPT A NEW CONTINUED LISTING REQUIREMENT

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Date: August 5, 2026

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Under Rules 430 and 431 of the Commission's Rules of Practice, 17 C.F.R. §§201.430, 201.431, the Small Public Company Coalition ("SPCC") petitions the Commission to review and set aside the *Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt a New Continued Listing Requirement*, Exchange Act Release No. 34-105971 (July 22, 2026), 91 Fed. Reg. 46,995 (July 27, 2026) ("Approval Order").

INTRODUCTION

In the Approval Order, the Division of Trading and Markets, acting pursuant to delegated authority, 17 C.F.R. §200.30-3(a)(12), approved a proposal by the Nasdaq Stock Market to adopt a continued-listing requirement of at least $5 million in Market Value of Listed Securities ("MVLS"), and to suspend from trading any company that remains below that threshold for 30 consecutive business days (the "MVLS Requirement"). The rule provides no cure period, no stay of suspension pending Hearings Panel review, and no issuer-specific determination that the company presents any risk to investors or the market. As far as SPCC is aware, the Commission has never approved a continued-listing standard of that design.

Review is warranted because Nasdaq has effectively conceded the case against its own rule. In Amendment No. 1, Nasdaq acknowledged that companies falling below the $5 million threshold "may meaningfully recover" and their "continued listing on the Exchange may be appropriate." Release No. 34-105747, 91 Fed. Reg. 38,460, 38,462 (June 22, 2026). Nasdaq thus acknowledges the rule will inevitably suspend companies that should remain listed.

The only empirical evidence in the record was presented by SPCC and shows just how many companies will be wrongly suspended. Professor Craig M. Lewis, the Commission's former Chief Economist, found that 816 Nasdaq companies would have been delisted between 2006 and 2025 had the new MVLS Requirement been in force, but 640 later recovered above the threshold at least once and 365 remained listed as of December 2025 (representing $22 billion in market capitalization). Nasdaq never disputed Professor Lewis's methodology, identified an error in his data, or offered competing analysis. It merely repeated its conclusory assertion that the difficulties facing companies below $5 million "generally are not temporary." And where the Division backfilled data Nasdaq failed to provide, commenters had no chance to respond.

The Approval Order conflicts with the Exchange Act, and reflects flawed and arbitrary decision making, for multiple independent reasons:

First, the MVLS Requirement is not reasonably "designed to prevent fraudulent and manipulative acts and practices" or "protect investors and the public interest" under Section 6(b)(5). 15 U.S.C. §78f(b)(5). The Division credited Nasdaq's unsupported predictions about issuer recovery while disregarding unrebutted empirical evidence to the contrary. And the rule regulates the wrong variable: commenters who identified manipulation risks pointed to things such as public float, ownership concentration, jurisdictional regulatory access, and promotional conduct. They did not point to total market value, which has minimal relevance to predicting or identifying manipulation.

Second, the Commission's own Order Instituting Proceedings asked whether the proposal satisfied Section 6(b)(7). It does not. The rule does not "provide a fair procedure" for limiting access to exchange services under Section 6(b)(7), 15 U.S.C. §78f(b)(7). Suspension precedes any hearing. The Hearings Panel may reverse Staff only for factual error in the threshold calculation, so an issuer cannot avoid delisting by showing that its decline reflected temporary market conditions or some other innocuous explanation. Amendment No. 1's discretionary 180-day exception does not cure that defect, because it requires full initial-listing compliance—including at least $15 million in unrestricted public float, more than three times the threshold the company failed—on a clock that runs while the company trades over the counter.

Third, neither Nasdaq nor the Division conducted the analysis Section 6(b)(8) and Rule 700(b)(3) require. Nasdaq asserted both that the proposal will have "no impact on competition" and that any competitive impact that does arise is necessarily justified—a position that cannot be tested against any record. It did not assess the cumulative effect of parallel NYSE American filings that would install automatic delisting triggers across both principal exchange venues for smaller issuers. It also declined to evaluate multiple other record-supported alternatives, beginning with the 180-day cure period from its own rulebook.

Fourth, Nasdaq and the Division failed to consider a more narrowly tailored rule that would advance the same regulatory objectives—such as a rule targeting the foreign corporations where risk of fraud or manipulation is alleged to be disproportionally concentrated.

These are not close questions of degree. They are questions about what the Commission's affirmative finding under Section 19(b)(2)(C) requires when an exchange concedes overbreadth, declines to engage with contrary evidence, and refuses to evaluate alternatives that would advance the same regulatory goals while reducing the burden on listed companies. Those questions should be answered by the full Commission, not by the Division acting under delegated authority, before the rule displaces issuers to the over-the-counter market. SPCC respectfully requests that the Commission grant review, maintain the automatic stay under Rule 431(e), and set aside the Approval Order.

BACKGROUND

A. Nasdaq's Continued-Listing Framework and Its Ordinary Cure Process

Nasdaq's listing rules distinguish between initial listing—the standards a company must satisfy to be admitted—and continued listing, the standards it must maintain thereafter. When a company falls out of compliance with a continued-listing standard, Nasdaq ordinarily provides notice and a compliance period—typically 180 days—during which the company remains listed and may regain compliance with the standard it failed.

That practice governs MVLS deficiencies today. Under Nasdaq Rule 5810(c)(3)(C), a company that fails continued-listing MVLS requirement for 30 consecutive business days is notified and has 180 calendar days to achieve compliance—ordinarily measured by maintaining the required level for ten consecutive business days. The New York Stock Exchange likewise affords a six-month cure period (with possible extensions) for comparable deficiencies. *See* NYSE Listed Company Manual §802.01C.

Nasdaq's rules also ordinarily stay a delisting determination pending review. A timely hearing request stays suspension until the Hearings Panel issues a written decision. Nasdaq departs from that default only in narrow circumstances involving deficiencies that have already proved incurable or that cannot be cured at all—bankruptcy or liquidation, failure following an additional compliance period, or a special purpose acquisition company's failure to complete a business combination by a fixed deadline.

B. The Proposed MVLS Requirement

In January 2026, Nasdaq filed a proposed rule change to adopt a new continued-listing requirement of at least $5 million in MVLS. *See* 91 Fed. Reg. 3935 (Jan. 29, 2026). Unlike every other Nasdaq MVLS standard, this proposal would attach *immediate suspension* to a 30-business-day deficiency, with no notice period or "cure" period. A suspended company could request a hearing, but the request would not stay its delisting—often a functional death blow to the company.

Nasdaq justified this revolutionary proposal on the premise that companies below $5 million generally cannot regain compliance, that a low market value "can be a leading indicator of other listing compliance concerns," and that it is "more difficult" to maintain "fair and orderly" markets and for market makers to make markets in such securities. Nasdaq supplied no data or empirical analysis supporting any of those propositions.

The Commission extended its review period on March 11, 2026, and then instituted proceedings under Section 19(b)(2)(B). The Commission solicited comment on whether the proposal was consistent with Sections 6(b)(5) and 6(b)(7), and on the sufficiency of Nasdaq's statements in support.

C. SPCC's Comments and Professor Lewis's Unrebutted Analysis

SPCC submitted comment letters on February 19, March 19, May 22, June 5, and July 10. SPCC's February 19 submission included the expert report of Professor Craig M. Lewis, who served from 2011 to 2014 as the Chief Economist at this Commission.

Professor Lewis analyzed data for every Nasdaq-listed company from 2006 through 2025. He identified 816 companies that the rule would have delisted had it been in effect since 2006. Of those companies, 640—78%—recovered. *See* Ex. A, at 8. As of December 2025, 365 of these companies remained listed on Nasdaq. Furthermore, 212 of these companies were trading above $5 million, with a median market capitalization of $6 million, an average of $61 million, and an aggregate of approximately $22.3 billion. Professor Lewis concluded that "temporarily falling below the proposed threshold is not a reliable indicator of permanent failure." *See id.*

Individual cases illustrate the aggregate. LightPath Technologies fell below the threshold during the financial crisis, but later raised capital several times, diversified from component manufacturing into imaging subsystems, and reported a $137 million market capitalization and 350 employees in 2025, *see id.* at 9—with a more than $650 million market cap in 2026. Patrick Industries fell below the threshold, funded a series of strategic acquisitions, and exceeded $2.3 billion in market capitalization in 2025 (over $2.6 billion today) with roughly 10,000 employees.

See id. Cellectar Biosciences recovered sharply after reporting positive clinical trial results and meeting regulatory milestones. *See id.* at 9-10.

Professor Lewis also identified the mechanism by which a bright-line trigger becomes self-fulfilling. Investors face a first-mover advantage: selling before suspension permits exit at exchange-traded prices, while waiting risks being trapped in a less liquid over-the-counter market. Collective sales depress the price, which raises the probability of crossing the threshold, which intensifies the incentive to sell. He described the resulting dynamic as a "cliff effect."

Professor Lewis's analysis establishes that the trigger Nasdaq selected sweeps in a large majority of companies that proceed to recover, and that readily available adjustments to the window or the threshold would have dramatically narrowed that overbreadth. No commenter, and neither Nasdaq nor the Division, disputed any of it.

D. Amendment No. 1 and the Division's Approval

In the middle of the comment period, Nasdaq filed Amendment No. 1. The Commission published it on June 25 and set a comment deadline of July 10. Release No. 34-105747, 91 Fed. Reg. 38,460 (June 22, 2026).

Amendment No. 1 made one substantive change. Conceding that some companies falling below $5 million "may meaningfully recover" and that their "continued listing on the Exchange may be appropriate," Nasdaq proposed that a Hearings Panel may, where "appropriate," grant an exception "for a period not to exceed 180 days from the Staff Delisting Determination" for the issuer to demonstrate compliance with "all requirements for initial listing." 91 Fed. Reg. at 38,462. Amendment No. 1 continued to deny a deficient company the ordinary stay of suspension pending the Hearings Panel's review. The amendment supplied no new empirical analysis, no threshold-specific market data, and no assessment of costs or alternatives.

On July 22, 2026, the Division of Trading and Markets approved the proposal, as modified by Amendment No. 1. *See* Release No. 34-105971, 91 Fed. Reg. 46,995 (July 27, 2026). SPCC filed a notice of intention to petition for review under Rule 430(b)(1) on July 29, 2026. Under Rule 431(e), the Approval Order has been automatically stayed.

STANDING

SPCC is a "person aggrieved" by the Approval Order and is therefore entitled to seek the Commission's review. *See* 17 C.F.R. §201.430(a). SPCC is an association that represents small public companies and investment firms. Its members include many Nasdaq-listed companies whose MVLS is at or near the $5 million threshold and therefore could face suspension 30 days after the rule takes effect. SPCC files this petition on behalf of its members, whose access to exchange listing, and whose shareholders' interests in liquidity, coverage, and the investor protections attaching to NMS securities, are directly affected by the Approval Order.

STANDARD OF REVIEW

The Commission may approve a proposed rule change filed by a self-regulatory organization only if it "finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." 15 U.S.C. §78s(b)(2)(C)(i). That finding is affirmative and independent; the Commission may not accept the exchange's characterization of its own rule in place of the Commission's own analysis. *See Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 445-47 (D.C. Cir. 2017) (an agency may not "delegate its responsibility to the regulated party") (quoting *Idaho v. ICC*, 35 F.3d 585, 596 (D.C. Cir. 1994)).

The burden of making that showing rests on the exchange. Under Commission regulations, a "mere assertion that the proposed rule change is consistent with" the Act "is not sufficient." 17 C.F.R. §201.700(b)(3)(i). "Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding." *Id.* Where the filing does not supply that analysis, the Commission lacks a sufficient basis to make the required finding, and the proposal must be disapproved.

Section 6(b)(5) requires that the rules of an exchange be—

> [D]esigned to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

15 U.S.C. §78f(b)(5). Two features of that text control here. The rule must be "designed to prevent" the identified harm, which requires a rational connection between the mechanism selected and the risk invoked to justify it; a rule aimed at a variable other than the one that generates the risk is not so designed. *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 183-84 (5th Cir. 2024) (en banc). And the rule must "protect investors," which the Commission cannot find satisfied by the removal of compliant issuers from exchange trading without evidence that investors are better off for it.

Section 6(b)(7) separately requires that the rules of an exchange "provide a fair procedure" for, among other things, "the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange." 15 U.S.C. §78f(b)(7). Suspension and delisting are the paradigmatic limitation of access to exchange services, and the procedural adequacy of the mechanism by which an exchange imposes them is therefore an independent statutory requirement.

Additionally, Section 6(b)(8) adds that the rules of an exchange must "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." 15 U.S.C. §78f(b)(8). The word "necessary" is inherently comparative: whether a burden is necessary cannot be determined without reference to whether the same objective could be achieved at lower cost. By definition, an exchange cannot establish that a burden is "necessary" while declining to evaluate whether proposed alternative policies would be more appropriate.

Finally, an order approving a proposed rule change must satisfy the Administrative Procedure Act's requirements of reasoned decision making. This means that the Commission is obligated to respond to significant comments, *see Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); to properly consider the important aspects of the problem before it, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); to adequately explain any departure from prior practice, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); to consider potential alternative policies and explain why it did not adopt them, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020); and to reach a decision that is "reasonable and reasonably explained," *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

REASONS FOR GRANTING THE PETITION

In determining whether to grant review, the Commission considers whether the petition "makes a reasonable showing" that the decision embodies "(A) A finding or conclusion of material fact that is clearly erroneous; or (B) A conclusion of law that is erroneous; or (C) An exercise of discretion or decision of law or policy that is important and that the Commission should review." 17 C.F.R. §201.411(b)(2), incorporated by 17 C.F.R. §201.431(b)(2). All three are satisfied here.

The Division's core factual premise—that companies falling below \$5 million for 30 consecutive business days generally cannot recover—is contradicted by the only comprehensive empirical evidence in the record and abandoned by Nasdaq's own amendment. Its legal conclusions that the rule is "designed to prevent" manipulation under Section 6(b)(5), that it supplies a "fair procedure" under Section 6(b)(7), and that Nasdaq satisfied Rule 700(b)(3) are erroneous. And even if those questions were close, the Approval Order resolves questions of first impression—the first automatic, no-cure, no-stay continued-listing trigger the Commission has approved—with potentially severe consequences that reach well beyond this specific rule.

I. THE APPROVAL ORDER IS INCONSISTENT WITH THE EXCHANGE ACT AND COMMISSION RULES

A. The Approval Order impermissibly imposes requirements beyond the purposes of the Exchange Act.

Under Section 6(b)(5), the Commission must "determine[]" that "[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices … [and] to protect investors and the public interest." 15 U.S.C. §78f(b)(5). Nasdaq may not "regulate … matters not related to the purposes" of the Act." *Id.* So "before SEC approves a proposed exchange regulation, it must find that the regulation is related to the purposes of the … Act." *All. for Fair Bd. Recruitment*, 125 F.4th at 165.

The MVLS Requirement does not reasonably relate to the Act's purposes. It is not designed to prevent fraud, avoid manipulation, or protect investors. Nasdaq presented no evidence it *does* prevent harm or protect investors. In proposing the MVLS Requirement, Nasdaq said it had "observed that the challenges facing companies that fail to maintain a minimum MVLS of at least $5 million generally are not temporary and may be so severe that the company is not likely to regain and maintain compliance with continued listing requirements." 91 Fed. Reg. at 46,997. But, even in Amendment No. 1, after criticism from commenters, Nasdaq provided no empirical support for this bare assertion. *See Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To Adopt a New Continued Listing Requirement*, 91 Fed. Reg. 38,460, 38,464 (Jun. 25, 2026). "If Nasdaq possesses evidence supporting those assertions, *Nasdaq* should present it." SPCC Comment, SR-NASDAQ-2026-004 (July 10, 2026), at 4, perma.cc/E42H-PLXY. The Order does no better, simply parroting Nasdaq's unsupported claim. *See* 91 Fed. Reg. at 46,997.

Indeed, the only meaningful empirical evidence in the record flatly contradicts any notion that delisting companies that fall below $5 million is calculated to protect investors. *See* SPCC Comment, SR-NASDAQ-2026-004 (Feb. 19, 2026), Ex. A, perma.cc/NV5N-TULP. Professor Craig Lewis studied Nasdaq-listed companies over a 20-year span, starting in 2006. *See id.* Ex. A, at 8. He found that, of the firms that had fallen below the $5 million for 30 consecutive days, 78% had recovered to over $5 million at least once. *See id.* Almost half of those firms remain listed on Nasdaq, with many well above the $5 million threshold. *See id.* Professor Lewis's analysis highlights "firms that temporarily fell below the $5 million threshold for 30 consecutive days but ultimately recovered and remain viable today." It "illustrates that temporarily falling below the threshold is not an absolute predictor of permanent failure or eventual delisting." *Id.*

Even supporting commenters did not suggest that market value best correlated with harm to investors or risk of manipulation. They pointed instead to "low publicly available floats." 91 Fed. Reg. at 46,999. But market value is different from publicly available floats. The same is true of "smaller issuers," another variable that a commenter associated with "fraud and manipulation." *Id.* "A low-MVLS company need not have unusually concentrated ownership or a particularly thin public float, and a company with a greater total market value may have little stock available for public trading." SPCC Comment, SR-NASDAQ-2026-004 (July 10, 2026), at 6. And Nasdaq's premise *assumes*, without supporting evidence, that manipulation is more prevalent among small or low-float issuers, never specifying whether "more" means frequency, dollar losses, share volume, price impact, or other metric.

Not only does the MVLS Requirement do nothing to prevent manipulation—it may actually *promote* manipulation. "A rigid, time-bound trigger creates the possibility that coordinated short pressure could force a company below the $5 million threshold long enough to compel automatic delisting." *See* SPCC Comment, SR-NASDAQ-2026-004 (Feb. 19, 2026), at 8. Traders could engage in a concentrated selling campaign to drive the market value below $5 million for 30 days and thus get the company delisted.

The Order responds that "market manipulation is illegal and commenters should submit any evidence of violations to the appropriate authorities." 91 Fed. Reg. at 47,005. But if existing prohibitions suffice to stop manipulation, it is unclear why the new requirement is necessary at all. The MVLS Requirement "rests on the premise that the illegality of manipulation does not prevent it from occurring," yet the Order "invokes that same illegality as a reason to disregard the manipulation risk [that the MVLS Requirement] may create." SPCC Comment, SR-NASDAQ-2026-004 (July 10, 2026), at 4. This self-contradictory logic "reveal[s] a significant mismatch between the … decision and the rationale … provided." *Dep't of Com. v. New York*, 588 U.S. 752, 755 (2019).

B. The Approval Order violates the Fair Procedure Requirements of the Exchange Act.

Section 6(b)(7) permits approval of an exchange's rules only if the Commission "determine[s]" that "[t]he rules of the exchange … provide a fair procedure for … the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof." 15 U.S.C. §78f(b)(7). Delisting falls squarely within that provision, because "revocation of … membership" in an exchange "manifestly limit[s] … access to services." *MFS Sec. Corp. v. New York Stock Exch., Inc.*, 277 F.3d 613, 620 (2d Cir. 2002).

Section 6(d)(2) then supplies the content of the procedure the statute demands. In determining whether a person will be "prohibited or limited with respect to access to services offered by the exchange," the exchange "shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for … prohibition or limitation under consideration and keep a record." 15 U.S.C. §78f(d)(2). That is, notice and hearing must precede the sanction.

The Order inverts that sequence. It authorizes "immediate suspension from trading for a company that failed to maintain the MVLS Requirement." 91 Fed. Reg. at 47,009. A company that spends thirty business days below $5 million is suspended automatically—no notice, no hearing, no opportunity to be heard. And it cannot cure: "Nasdaq does not allow the company to restore its MVLS above $5 million." SPCC Comment, SR-NASDAQ-2026-004 (July 10, 2026), at 8. The grounds are never "under consideration." They are executed immediately.

The Order defends this scheme with *In the Matter of Tassaway, Inc.*, 45 SEC 706 (Mar. 13, 1975), where a company was suspended for falling below a $250,000 capital-and-surplus requirement. *Id.* at *2. But *Tassaway* proves SPCC's point. There, the exchange "first informed Tassaway that the deletion of its stock from NASDAQ was being considered," and then "gave Tassaway many months to bring itself into compliance." *Id.* at *2 n.11, *3 n.24. Notice first, then time to cure, then deletion. Here, there is only deletion. Two commenters made exactly this distinction, and the Order records the objection at footnote 154 without ever answering it.

The Hearings Panel does not supply the missing procedure. It is not a hearing on whether the sanction should issue; it is a proceeding that begins only *after* the sanction has issued and the company has been delisted. *See* 91 Fed. Reg. at 47,009-10. By the time the Panel convenes, the consequences that matter—forced migration to the over-the-counter market, reduced liquidity, loss of institutional eligibility and analyst coverage, reputational harm, impaired access to capital—would have already occurred.

Nor can the Panel reach the facts that matter. It "may reverse a delisting decision where the Hearings Panel determines that the Staff Delisting Determination was in error." *Id.* at 47,010.

That reduces the proceeding to a ministerial confirmation of arithmetic—whether MVLS was in fact below \$5 million for the requisite period. By contrast, an issuer could not obtain continued listing by showing that its decline was temporary, that it reflected sector-wide dislocation or broader market conditions, or that it resulted from the very manipulative pressure the rule invites.

The Panel's single provided remedy is illusory. It may "grant an exception for a period not to exceed 180 days from the Staff Delisting Determination for the company to demonstrate that it meets all requirements for *initial* listing." *Id.* (emphasis added). Four features make that no meaningful remedy at all: (1) It does not address the deficiency: the issuer cannot cure by restoring MVLS above \$5 million but must instead satisfy every initial-listing requirement, including at least \$15 million in unrestricted public float—at least three times the threshold it failed—plus price, distribution, market-maker, and financial criteria designed for *first-time applicants*. (2) The clock runs against the issuer: the 180 days begin at the Staff Delisting Determination, not at the Panel's grant, and are consumed preparing an appeal, awaiting a hearing, and awaiting a decision—all while the securities trade over the counter. (3) The standard is no standard: relief issues "where appropriate," with nothing identifying what a Panel should weigh or how it should separate temporary difficulty from lasting decline. (4) And it disregards important reliance interests: many listed companies were admitted under initial-listing standards less demanding than those now imposed as the price of curing a temporary continued-listing deficiency.

The remedy therefore requires recovery under precisely the conditions that prevent it. A procedure whose only relief is relief the procedure itself renders unattainable is not a fair procedure. The Commission's answer—that a suspended company "will still be able to seek review"—speaks to the form of process and not its substance. Section 6(b)(7) requires the latter.

C. Nasdaq Did Not Establish That The Rule's Competitive Burdens Are Necessary Under Section 6(b)(8), And Declined To Evaluate Available Alternatives

Section 6(b)(8) requires the Commission to ensure that Nasdaq's rules "do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." 15 U.S.C. §78f(b)(8). Exchanges may not "adopt[] rules that would unnecessarily burden competition." *All. for Fair Bd. Recruitment*, 125 F.4th at 174. Here, commenters including SPCC, offered several better-tailored alternatives that would advance Nasdaq's policy objectives while imposing far less onerous burdens on listed companies. SPCC Comment, SR-NASDAQ-2026-004 (July 10, 2026), at 11-14.

The Division nonetheless wrote that it was not required to consider the alternative proposals, because those alternatives were "not part of Nasdaq's proposal and the Commission must approve the proposal if it finds the proposal is consistent with the Act." 91 Fed. Reg. at 47,008. But what is "necessary" or "appropriate" as a burden is inherently a comparative judgment, especially when commenters offer multiple better-tailored and less-burdensome alternatives.

Section 6(b)(8) therefore cannot be satisfied merely by examining Nasdaq's proposal in isolation. It requires the Commission to compare the proposal against *other potential means of advancing the same regulatory objective*. Where that comparison is never undertaken, the Commission cannot reasonably conclude that the purposes of the Exchange Act are being served. Here, the Division (like Nasdaq) did not address whether other options could serve the same purpose without imposing such draconian burdens.

Nasdaq's proposal does not undertake that analysis. Nasdaq asserts both that the proposal will have "no impact on competition" and that any competitive impact that does arise is justified. Heads-I-win-tails-you-lose. Under Nasdaq's reasoning, there is no need to consider alternatives because there is no burden and there is also nothing to weigh because every burden is justified.

This position conveniently allows Nasdaq to avoid *any* reasoned discussion of the many well-documented alternatives raised in the record. A position framed so that the record cannot disturb it is ipse dixit, not the careful analysis Section 6(b)(8) contemplates.

The burdens Nasdaq ignored are discussed extensively in the record. NYSE American has filed parallel proposals that would install the same automatic trigger at the other principal venue for smaller issuers. If both exchanges adopt materially identical rules, a small company would no longer have a choice between listing frameworks—it could either satisfy the new common standard or trade over the counter. That will leave less competition among exchanges for small-company listings, a harder time competing for capital against larger issuers, fewer choices for investors, and the loss of inter-exchange migration as a safety valve. Nasdaq did not consider the cumulative impact of these dual proposals. Neither did the Approval Order—which itself is a flaw that would doom the rule in court. *See Nat'l Ass'n of Priv. Fund Mgrs. v. SEC*, 151 F.4th 252, 258 (5th Cir. 2025).

Nasdaq also never meaningfully considered whether existing legal and regulatory tools could be used to address any wrongdoing. It recently raised its initial-listing requirements to address the very liquidity and manipulation concerns it invokes here, and gave itself discretionary authority to turn away any companies, including those it thinks vulnerable to manipulation. The Commission's short-sale rules, surveillance systems, and enforcement authority do more still. Nasdaq neither explained how those systems operate nor identified what regulatory gap is left for its new rule to fill. Its own briefing makes this deficiency plain: When commenters raised manipulation risk resulting from the new $5 million MVLS (e.g., targeted short sales on companies approaching the limit), Nasdaq pointed to the Commission's naked-short-selling rule as an answer. An exchange cannot invoke existing protections to dispose of objections but then, in the next breath, decline to consider whether those same protections already handle the risk the exchange says justifies the new rule. *See Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178-79 (D.C. Cir. 2010); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011).

If Nasdaq or the Division had properly considered the alternatives proposed by commenters, it would have been apparent that the new MVLS Requirement was untenable. At least five alternatives were proposed in the record. Amendment No. 1 engaged with none of them, and neither did the Approval Order.

<u>Nasdaq's own longstanding cure framework.</u> Rule 5810(c)(3)(C) is built specifically for the sorts of deficiencies at issue and already sorts temporary trouble from permanent trouble *while the company remains listed*. Relying on the long-established cure process would also blunt the manipulation incentive this rule creates, because crossing the line would trigger a notice and opportunity to cure rather than an immediate suspension that would allow traders to prey on companies that get close to the $5 million limit. Nasdaq's only answer was to quote (with no further analysis) a proponent who opined that a cure period would "unnecessarily prolong" risk.

<u>The ordinary stay.</u> Relatedly, a stay of suspension pending Hearings Panel review is—in all other circumstances—Nasdaq's default rule. In practice, hearings are scheduled promptly, so any stay of delisting would be short and would give no company an open-ended right to stay listed. What the ordinary stay process would do is keep a suspension from becoming irreversible before any adjudicator has heard the company's side.

<u>Better tailoring to risk.</u> Nasdaq could apply heightened scrutiny, faster procedures, or even an MVLS trigger at the issuers whose characteristics its own record ties to manipulation. It does exactly that at initial listing. A universal trigger instead sweeps up companies that look nothing like the profile: 69% of the captured issuers were U.S.-based, and the great majority of the more

than 800 U.S.-listed companies below $50 million in market capitalization sit nowhere near the foreign jurisdictions that generated Nasdaq's regulatory-access concerns.

A tailored solution, focusing on the greater risks from companies based abroad, would have better aligned with the SEC's recent approach. Earlier this year, Nasdaq adopted, and the SEC approved, heightened initial listing standards for companies primarily operating in China. *See* 91 Fed. Reg. 29,183 (May 19, 2026). That is because "companies headquartered, incorporated or whose business is principally administered in China are more frequently the subject of trading concerns than those from other regions." *Id.* at 29,185. This reflected other recent SEC findings that companies in countries like China pose unique risks of market manipulation. In September, the SEC created a Cross-Border Task Force to "investigat[e] potential U.S. federal securities law violations related to foreign-based companies, including potential market manipulation, such as 'pump-and-dump' and 'ramp-and-dump' schemes." See Press Release, *SEC Announces Formation of Cross-Border Task Force to Combat Fraud* (Sept. 5, 2025). This Task Force "examine[s] potential securities law violations related to companies from foreign jurisdictions, such as China, where governmental control and other factors pose unique investor risks." *Id.*

Different thresholds and duration period for delisting. Nasdaq could hold the $5 million line for issuers with the identified risk characteristics and set a lower floor (such as $2 million) for everyone else. $2 million would still be a real backstop—twice the $1 million market value of publicly held shares the Capital Market already requires for continued listing, and MVLS is always at least as large as the market value of publicly held shares.

Relatedly, Nasdaq could extend the calculation period for delisting beyond a mere 30 days—a window short enough to generate many false positives. Professor Lewis proposed specific numbers: Measure over 120 business days instead of 30, and the rule captures 177 of today's still-listed companies rather than 365. A longer calculation period would reduce the risk of delisting companies experiencing a transitory price drop.

A later effective date with transition/implementation period. Even if a new MVLS Requirement is justified to some extent (which SPCC disputes), there should be an implementation period of at least 12 months to allow the industry to prepare for the new requirements. *See* SPCC Comment, SR-NASDAQ-2026-004 (July 10, 2026), at 13. In the current market, issuers, investors, and lenders made decisions—about capital, covenants, eligibility, and investment mandates—against a framework that provided cure periods, discretionary review, and a stay pending appeal. Listing status runs through debt covenants, margin requirements, institutional mandates, analyst coverage, index inclusion, insurance terms, and merger negotiations. Because Nasdaq did not include any transition or implementation period, companies could begin getting delisted just 30 days after the rule takes effect. Nasdaq points to no emergency that the existing rules cannot hold at bay during a transition. And it neither acknowledges the massive reliance interests at stake nor says why the rule had to take effect at once rather than giving affected parties a reasonable transition period to prepare for the new requirements.

In sum, each of these alternative proposals would serve Nasdaq's own stated concerns better than the rules actually adopted. Each alternative uses a mechanism Nasdaq or the Commission *already employs*. Each alternative was presented on this record. Nasdaq adopted none of them, and more importantly, never explained its rejection. That leaves the Commission without the one thing Section 6(b)(8) requires it to have: A reason to believe that the burdens this rule imposes are *necessary* to further the purposes of the securities laws.

D. Nasdaq Failed To Carry Its Burden Under Rule 700(b)(3)

Rule 700(b)(3) requires that Nasdaq's description of the proposed rule change, "its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements" be "sufficiently detailed and specific to support an affirmative Commission finding." 17 C.F.R. §201.700(b)(3). A "mere assertion" of consistency "is not sufficient." *Id.* Nasdaq's filing does not meet that standard.

First, Nasdaq never attempted to quantify the rule's effect. It did not estimate how many issuers trade within range of the threshold, how often companies move in and out of that range through ordinary volatility, how many issuers its "own experience" encompasses, or what happens to suspended issuers' liquidity, spreads, volume, financing access, or shareholder value. When the principal effect of a rule change is to impose the most severe available burden on an identifiable group, the exchange must acknowledge that effect and explain why the burden is warranted. *Cf. State Farm*, 463 U.S. at 43.

Second, Nasdaq did not perform the marginal analysis its own rationale requires. It asserts that companies below the threshold "often" become subject to delisting for other reasons. If that is so, existing rules already identify and remedy those deficiencies when they arise. The relevant question is what *incremental* protection the new MVLS Requirement supplies beyond the current regulatory framework. As Professor Lewis explained, the new rule would remove hundreds of companies that would not otherwise be delisted. It was thus Nasdaq's burden to explain why preexisting law was inadequate and why investors are better served by those additional removals. Nasdaq answers neither question. *See Bus. Roundtable*, 647 F.3d at 1151.

Third, Nasdaq never explained how the actual market value calculation operates. MVLS is the consolidated closing bid price times the shares outstanding of the listed class. *See* Nasdaq Listing Rule 5005(a)(23). But while Nasdaq can see a company's price point in real time, it does not see the company's share count in real time. Nasdaq learns of changes in shares outstanding from a form due ten days after an aggregate change exceeding five percent, Rule 5250(e)(1); from an additional-shares notification that omits registered offerings and at-the-market sales, Rule 5250(e)(2); and otherwise from periodic reports—quarterly, or semiannual for foreign private issuers. Nasdaq does not say which source controls, as of what date, how unreported changes count, whether an intra-period issuance above $5 million breaks the thirty-day sequence, or whether an issuer may contest the figure at all. A company might actually be well above a market value of $5 million, but still below $5 million in Nasdaq's records that don't take into account fluctuating share counts.

Fourth, the Commission may not supply the analysis absent from Nasdaq's filing, nor treat comments from supporters as a substitute for the exchange's required justification. *Susquehanna*, 866 F.3d at 446-48. When a Nasdaq proposal lacks the analysis required by the Exchange Act, the Commission's role is to disapprove. This would still leave Nasdaq free to try to develop a new proposal that is supported by data and better tailored to the risks it identifies.

The Division attempted to backfill Nasdaq's complete lack of data or empirical evidence by offering *its own* data and analysis: seven thresholds tested against three measurement windows. This data was published for the first time in the Approval Order. *See* Order 12-17 (Figures 1-4 and Tables 1-2). But this renders the Order invalid for two separate reasons. Rule 700(b)(3) puts the burden of demonstrating consistency with the Act on *Nasdaq* and forecloses any inference that the burden was met. 17 C.F.R. §201.700(b)(3). The Division cannot invoke justifications that Nasdaq itself never offered or considered. Moreover, the Approval Order now rests on backfilled data the public never saw. No parties were given an opportunity to review the sample, test the coding, or comment on the analysis. Ironically, the Division rejected any consideration of proposed alternatives because they were "not part of Nasdaq's proposal," Order 36, even as the Division itself relied on data and analysis that were equally not "part of Nasdaq's proposal."

II. THE APPROVAL ORDER PRESENTS IMPORTANT QUESTIONS THAT WARRANT THE COMMISSION'S REVIEW

Even apart from the defects discussed above, the Approval Order "embodies" an "exercise of discretion or decision of law or policy that is important and that the Commission should review." 17 C.F.R. §201.411(b)(2)(C); *see id.* §201.431(b)(2).

The Order approves the first ever automatic, no-cure, no-stay continued-listing trigger in Nasdaq's listing framework. In doing so, it establishes three propositions of general application: that an exchange may concede its rule captures companies that should remain listed and still carry its burden under Section 19(b); that a requalification process demanding compliance with standards the issuer never failed can satisfy Section 6(b)(7) as a substitute for a cure directed to the deficiency; and that an exchange need not evaluate narrower alternatives (including a mechanism in its own rulebook addressed to the same deficiency) so long as the Division concludes the rule is consistent with the Act.

If the Order is allowed to stand, each of these propositions will surely be invoked in subsequent listing-standard filings, beginning with the parallel NYSE American proposals currently pending. Principles that reach this far should be established by the Commission after comprehensive consideration on the merits, not merely through delegated authority.

The consequences for capital formation are substantial and went unanalyzed. The rule reaches every issuer that could plausibly approach the threshold, not only those that cross it. Investors will inevitably discount the shares of companies trading within range to account for the possibility of forced suspension; lenders will price additional risk or decline to lend; and traders will aggressively target companies as they get close to the cutoff. Professor Lewis identified and explained these market dynamics, but Nasdaq (and the Division) brushed them aside. Those effects fall directly within the Commission's obligation to consider efficiency, competition, and capital formation. 15 U.S.C. §78c(f).

Finally, the legal and factual deficiencies described in Part I underscore the need for review. If the Commission declines review, the Approval Order becomes final agency action subject to judicial review under the Administrative Procedure Act, on a record containing omissions that could not survive judicial scrutiny. Commission review should address and correct these glaring errors now, before suspension has displaced issuers to the over-the-counter market and the resulting harms to liquidity, coverage, and financing access have become irreversible.

CONCLUSION

The Commission should grant this petition, confirm that the Approval Order remains stayed under Rule 431(e), set a briefing schedule, and ultimately set aside the Division's order approving the proposed rule change. Should the Commission approve any version of the proposal, it should at least require a delayed effective date of not less than twelve months and preservation of the ordinary stay of suspension pending Hearings Panel review.

Dated: August 5, 2026

Respectfully submitted,

/s/ Jeffrey M. Harris

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2026, I caused a copy of this Petition for Review to be filed with the Secretary of the Securities and Exchange Commission by electronic mail to Secretarys-Office@sec.gov, as directed by the Commission's website.

Dated: August 5, 2026

/s/ Jeffrey M. Harris

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the word count limitation in 17 C.F.R. §201.154(c). Excluding the tables of contents and authorities, as provided by 17 C.F.R. §201.154(c), and excluding the cover page and signature blocks, the petition contains 6,983 words. The undersigned relied on the word count of the word-processing system used to prepare this petition.

Dated: August 5, 2026

/s/ Jeffrey M. Harris