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Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. CLL-16, Comments on Modernizing the Initial Public Offering Process and Removing Regulatory Barriers to Non-Traditional Paths to Going Public

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq") appreciates the opportunity to comment on Chairman Paul S. Atkins's call for bold ideas to modernize the initial public offering ("IPO") process and remove regulatory barriers to non-traditional paths to going public.[1] Nasdaq operates in a unique position in both the financial ecosystem and in the landscape of SEC regulation. We own and operate securities exchanges in the United States, Canada, the Nordics and Baltics, including The Nasdaq Stock Market, which is home to more than 4,650 listings, including exchange traded products, with a market value of over $45 trillion that drive the global economy and provide investment opportunities for Main Street investors.[2] We are also an Exchange Act registrant and public company (Nasdaq: NDAQ) subject to the same capital markets regulations as other public companies, including the laws and rules that are the subject of this comment letter. As a result, we bring a unique and multidimensional perspective to these issues.

Nasdaq shares Chairman Atkins's conviction that revitalizing America's public markets is among the most consequential economic policy priorities of our time. The public company model is the foundation of American capital formation. It provides millions of ordinary investors with a pathway to participate in the growth of the economy through publicly traded stocks and derivative exchange traded products. When fewer companies go public, or go public later in their lifecycle, after the most consequential stages of their growth have already occurred, it is Main Street investors who are left behind. Companies now tend not to access the public markets until they are

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1 *See* Paul S. Atkins, Remarks at the Stanford Rock Center for Corporate Governance (May 26, 2026), File No. CLL-16.

2 As reported in Nasdaq, Inc.'s Form 10-Q for the period ended June 30, 2026.

significantly more mature, having raised multiple rounds of private capital, whereas thirty years ago, companies routinely went public at an earlier stage of development.[3]

The regulatory costs of maintaining public company status compound the problem. A June 2025 report by the Government Accountability Office found that Sarbanes-Oxley Act ("SOX") compliance costs fall disproportionately on smaller companies, the very companies the public markets most need to attract.[4] Research by the National Bureau of Economic Research estimates that disclosure and governance compliance costs represents 4.1% of the median public firm's equity value.[5] KPMG reported that average annual SOX program costs rose to $2.3 million in 2025, an increase of more than 40% from two years earlier, with 45% percent of organizations reporting year-over-year cost increases driven by expanding control requirements, evolving PCAOB standards, and inflationary pressure on personnel and outsourced service provider fees.[6] These figures do not capture the full cost of public company status, which also includes directors' and officers' liability insurance, investor relations, proxy solicitation and compliance, securities litigation exposure, and the diversion of senior management attention from operations to regulatory compliance. When the cost of being public is this high, and rising, it is unsurprising that the number of large private companies has grown sixfold since the enactment of SOX even as the number of public companies has fallen by roughly forty percent.[7]

Nasdaq has a long track record of leadership and sustained advocacy for policies that strengthen and expand the public company model, including our March 2025 policy white paper, *Advancing the U.S. Public Markets: Unlocking Capital Formation for a Stronger American Economy* (the "Nasdaq White Paper"). We support the Commission's ongoing efforts to make public markets more accessible and more attractive to private companies, including the Commission's proposals regarding Registered Offering Reform, Scaled Disclosure, and

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3 *See*, *e.g.*, Nasdaq Newsroom, *SpaceX Makes History, Raising $85.7 Billion through Nasdaq Listing*, Nasdaq (June 16, 2026), https://www.nasdaq.com/newsroom/spacex-makes-history-raising-85-billion-through-nasdaq-listing. ("The first day's trading session pinned SpaceX's market capitalization at $2.1 trillion, ranking it among the largest corporate entities globally."); *see* Robert Frank, Startups are staying private longer thanks to alternative capital, October 7, 2025, *available at* https://www.cnbc.com/2025/10/07/ipo-market-startups-staying-private-longer-alternative-capital.html ("In 1980, the median revenue for IPO companies was $16 million, or $64 million in inflation-adjusted 2024 dollars. By 2024, their median revenue had soared to $218 million"); Crunchbase, How Many Rounds of Funding Do Companies Raise Before Exiting, November 12, 2025, *available at* https://about.crunchbase.com/blog/how-many-rounds-of-funding-do-companies-raise-before-exiting; Jay R. Ritter, Initial Public Offerings: Median Age of IPOs Through 2025, December 31, 2025, *available at* https://site.warrington.ufl.edu/ritter/files/IPOs-Age-of-Companies-Going-Public.pdf.

4 U.S. Government Accountability Office, *Sarbanes-Oxley Act: Compliance Costs Are Higher for Larger Companies but More Burdensome for Smaller Ones*, GAO-25-107500 (June 2025). (GAO's analysis found a median increase of $219,000 (13%) in audit fees in the year a company became nonexempt).

5 Michael Ewens, Kairong Xiao & Ting Xu, *Regulatory Costs of Being Public: Evidence from Bunching Estimation*, NBER Working Paper No. 29143 (Aug. 2021; revised 2024).

6 KPMG, *The 2025 SOX Survey* (2025).

7 The number of large private companies has grown from approximately 2,000 at the time of the Sarbanes-Oxley Act's enactment to approximately 12,000 today. *See* Testimony of Lawrence A. Cunningham, Director, John L. Weinberg Center for Corporate Governance, University of Delaware, Before the Subcommittee on Capital Markets, U.S. House Committee on Financial Services (June 25, 2025) (citing Citizens Bank data (Dec. 2024)).

semiannual reporting, as well as its initiatives to reform Regulation S-K ("Reg. S-K"). This comment letter focuses on the specific areas in which Chairman Atkins invited public comment in connection with File No. CLL-16: reforms to the IPO process and removing regulatory barriers to non-traditional methods of going public.

Executive Summary

Nasdaq recommends that the Commission pursue the following reforms in its efforts to modernize the IPO process and remove regulatory barriers to non-traditional paths to going public:

- Consolidate the fragmented pre-offering communications rules into a single rule with a three-tier framework organized by offering nexus, audience sophistication, and format neutrality.
- Eliminate or raise the disclosure threshold for naming selling securityholders, permitting aggregate disclosure for holders below one percent.
- Narrowly amend Rule 144 to remove the volume and manner of sale restrictions for affiliates to enable Exchange Act-only direct listings without a Securities Act resale registration statement.
- Review and revise the requirements of Form S-1 for their tendency to generate duplicative disclosure.
- Study the Staff's internal registration statement review processes and identify efficiencies and other process improvements to reduce delays.

I. IPO Communications Rules Reform

A. Complexity as a Communications Deterrent

Companies considering an IPO face a complex regulatory framework for communications shaped by layers of constraint that, in combination, deter legitimate communications far beyond what investor protection requires. The first layer is the statutory liability framework. Sections 11, 12(a)(1), 12(a)(2), and 17(a) of the Securities Act of 1933 (hereinafter the "Securities Act"), together with Section 10(b) and Rule 10b-5 under the Securities and Exchange Act of 1934 (hereinafter the "Exchange Act"), create a regime of strict, negligence-based, and scienter-based liability for material misstatements and omissions in connection with a securities offering and other public company disclosures. This layer is due for reform, as it, in combination with other regulatory and compliance burdens, deter companies from going public, as discussed in further detail in the Nasdaq White Paper.

The second layer is the Commission's body of rules governing when, how, and to whom an issuer may communicate during the offering process. Developed over decades of incremental rulemaking, and most recently reformed comprehensively by the Commission in 2005, these rules address a genuine investor protection concern: preventing issuers from conditioning the market through publicity that circumvents the prospectus delivery framework. However, the rules have accumulated into a patchwork of overlapping safe harbors, exclusions, and exemptions, each with its own conditions, content restrictions, audience limitations, timing requirements, and eligibility criteria. The rules were also designed for a communications environment of printed prospectuses and in-person roadshows. The result is a tangled web of rules that issuers find difficult to navigate, that applies different standards depending on the issuer's reporting history and public float rather than on the nature of the communication itself, that draws dispositive distinctions based on communication format rather than communication substance, and that is not flexible with ever-changing communications mediums, formats, and standards.

The third layer is the systemic deterrent effect created by the interaction of the first two. The background liability framework makes the consequences of a misstep severe, even when there may have been no measurable investor harm. The complexity of the rules makes it difficult for issuers and their counsel to determine with confidence whether a particular communication is permitted. When the cost of being wrong is high and the rules are hard to parse, the rational response is to say nothing, or to say as little as possible. The result is effectively a communications blackout that goes well beyond what the rules require, driven not by any specific prohibition but by an inability to determine what is and is not prohibited. This is the chilling effect that Chairman Atkins has identified, and it is a problem that rulemaking can address. While the Commission cannot unilaterally change the statutory liability framework, it can substantially reduce the deterrent effect by simplifying the rules that sit on top of it. A clearer, better defined ruleset lowers the compliance cost of communicating, narrows the gap between what is actually prohibited and what companies avoid out of uncertainty, and thereby allow companies to speak more freely, including to provide important information to existing and potential new investors, as well as to business stakeholders, all towards the goal of encouraging IPOs and capital formation.

B. <u>Consolidate Fragmented Communications Rules into a Single Tiered Rule</u>

We propose that the Commission consolidate the principal pre-offering communications rules and safe harbors (*i.e.*, Securities Act Rules 134, 135, 163, 163A, 163B, 164, 168, 169, and 433) into a single, comprehensive rule that serves as a one-stop reference for all issuer communications issues in connection with a registered offering. Rather than requiring practitioners to navigate across multiple rules adopted at different times, for different issuer categories, with different conditions, we propose adopting a consolidated single rule that organizes the full range of permissible and impermissible communications into a simplified three-tier structure that issuers can understand and apply. Such rule could be named "Regulation P-OC" or other similarly mnemonic title.

The three tiers we propose would be structured around two variables that are directly relevant to investor protection:

(i) the relationship between the communication and the offering, and

(ii) the sophistication of the audience.

A third design principle cuts across all tiers: format neutrality. Every tier applies to any communication regardless of format, including: oral, written, recorded, broadcast, posted, streamed, or any other medium, format, or standard. Format neutrality is advisable for several reasons. First, it recognizes that investors have many different characteristics and accordingly different preferences with respect to how they receive important information. Second, markets and the economy are extremely dynamic, with significant developments occurring so frequently that often the most effective communication is via non-traditional formats that are designed for expedient publication and dissemination, such as social media or other digitally recorded formats.

The result is that regulatory treatment is determined by offering nexus and audience, never by whether the communication is spoken or printed, live or recorded, analog or digital. This eliminates the arbitrary oral/written distinctions that pervade the current rules and ensures that the framework does not need to be updated each time a new communications technology emerges.[8] A communication that does not reference the offering and is directed at a non-investor audience poses a different risk than a communication that discusses the offering's terms with retail investors and the regulatory treatment should reflect that difference. The proposed framework organizes regulatory treatment along a communication-type axis, so that what matters is what is being said and to whom, not who is saying it or in what.

Within this structure, Nasdaq proposes a framework that would organize communications into three tiers:

- **Tier 1** would protect ordinary-course communications that do not reference the offering and are not part of the selling effort. For all issuers, Tier 1 would cover factual business communications: product announcements, customer communications, and similar routine disclosures, so long as they are not part of an effort to condition the market for the offering. This standard would intentionally replace the more restrictive audience-limitation condition in current Rule 169, which requires that factual business information by non-reporting issuers be directed at persons "other than in their capacities as investors or potential investors." We believe the anti-conditioning standard provides equivalent investor protection while avoiding the artificial result of disqualifying a communication solely because some of its recipients may also be investors. For reporting issuers, Tier 1 would also preserve the existing ability to continue ordinary-course forward-looking communications, such as regularly released earnings guidance, during a registered offering. This tier functionally consolidates and simplifies the ordinary-course communication safe harbors currently addressed by Rules 168 and 169. Communications currently protected by Rule 163A's 30-day bright-line safe harbor would be subsumed into Tier 1 to the extent the communication qualifies as ordinary-course, and into Tier 3 to the extent it is an offering-related communication protected solely by the 30-day timing condition.
- **Tier 2** would permit offering-specific communications with sophisticated investors at any time, in any format, without content restrictions.[9] Where an offering occurs following such communications, existing antifraud and prospectus liability provisions provide a robust investor protection framework for this audience; and where no offering occurs following such communications, there is no investor harm. No filing of these test-the-waters ("TTW")-style materials would be required; however, such materials should be retained for a sufficient period of time to allow discovery in the case of subsequent litigation. This tier functionally consolidates and expands the TTW framework currently addressed in Rule 163B, and would supersede the need for reliance on the statutory accommodation for

8 *See* Securities Act §§ 2(a)(10) (defining "prospectus" as a communication that is "written or by radio or television," thereby excluding oral communications from prospectus-delivery and filing requirements under Section 5(b)(1)). While we recognize that the Securities Act draws oral/written distinctions at the statutory level, we believe the Commission can achieve functional format neutrality within the existing statutory framework by exercising its exemptive authority under Section 28 of the Securities Act to exempt communications under each tier from the format-dependent provisions of Sections 2(a)(10) and 5(b)(1), to the extent consistent with the public interest and the protection of investors.

9 Sophisticated investors currently includes qualified institutional buyers (QIBs) and institutional accredited investors (IAIs). Rule 163B(c). The Commission should also consider expanding the eligible audience to non-institutional accredited investors.

emerging growth companies under Section 5(d) of the Securities Act, which would remain available as an independent basis for test-the-waters communications.

- **Tier 3** would govern offering-specific communications to any audience, including retail investors. After the registration statement is publicly filed, Tier 3 permits public offering communications by all issuers regardless of format, subject to legend and filing or retention conditions. Before the registration statement is filed, Tier 3 is available only to Eligible Listed Issuers, as defined in the Commission's Registered Offering Reform proposal (Release No. 33-11418) ("ELIs", *i.e.*, Form S-3-eligible issuers with at least one class of common equity securities listed on a national securities exchange) consistent with the Commission's proposed framework.[10] Non-ELI issuers and non-reporting issuers may not use Tier 3 for public offering communications before filing, except for the narrow factual notice described below. The content of the communication could be limited by either the existing no-conflict concept from Rule 433, or a more stringent "consistent with the issuer's Exchange Act filings and registration statement" standard if the Commission deems a higher content standard necessary for investor protection. Where no registration statement has been filed and the issuer is not an ELI, Tier 3 would permit only a limited factual public notice that an offering is contemplated. This is the most restrictive application of the tier, reflecting the highest conditioning risk. Tier 3 replaces the current FWP framework under Rule 433, the Rule 134 identifying-statement safe harbor, Rule 163's well-known seasoned issuer ("WKSI") pre-filing privilege, and Rule 135's narrow notice safe harbor with a single, format-neutral rule that extends Rule 163's pre-filing privilege to all ELIs, which as proposed consists of a broader set of issuers than WKSIs alone.

The result is a pragmatic four-question decision tree that practitioners and issuers alike can comprehend and easily apply:

1. Does the communication reference the offering or function as part of the selling effort? If no, Tier 1 applies.
2. If the communication is offering-related, is it limited to sophisticated investors? If yes, Tier 2 applies.
3. If the communication is offering-related and public, has a registration statement been filed? If yes, Tier 3 permits the communication subject to its conditions.
4. If the communication is offering-related and public, no registration statement has been filed, and the issuer is an ELI, Tier 3 permits the communication subject to its conditions. If the issuer is not an ELI, only a narrow factual notice is permitted.

All tiers would preserve the full antifraud liability framework. Section 12(a)(2) prospectus liability would attach where the communication is treated as an FWP. Communications that fall outside every tier would remain prohibited under Section 5.

[10] Registered Offering Reform, Release No. 33-11418 (May 19, 2026) (the "Registered Offering Reform Proposal").

C. Clarifying Key Concepts

1. Conditioning the Market

Part of the complexity of the current framework is that the Commission's communications guidance, while individually well-reasoned, has accumulated across multiple rulemaking actions spanning nearly seven decades.[11] The Commission's 2005 Securities Offering Reform release consolidated then-existing interpretive guidance on pre-offering communications into a coherent safe harbor framework under Rules 163A, 168, and 169.[12] Since then, however, the addition of Section 5(d) by the JOBS Act, the adoption of Rule 163B in 2019, the modernization of Regulation A's testing-the-waters provisions, and the 2020 overhaul of the integration framework under Rule 152 have each introduced new communications accommodations in separate releases with distinct conditions and scope.[13] The result is that the central concept animating all of these provisions—whether a communication has the purpose or effect of conditioning the market for an offering—must again be assembled by practitioners from dispersed sources rather than understood from a single, current reference.[14]

We recommend that the Commission use any future rulemaking in this area as an opportunity to issue a consolidated restatement of its existing guidance on pre-offering communications, integrating the principles already reflected in Rules 134, 135, 163A, 163B, 164, 168, 169, Section 5(d), and the Commission's longstanding interpretive releases into a single adopting release discussion. We are not proposing a new or fixed definition of "conditioning the market"; we recognize the Commission's well-established view that this determination is inherently contextual and that different considerations apply across the issuer spectrum, from seasoned issuers to non-reporting issuers approaching their first registered offering.[15] Rather, we believe the Commission can meaningfully reduce uncertainty by restating, in one place, the illustrative, non-exclusive factors that its own rules and releases already treat as relevant to an ordinary-course determination. These factors include, for example, consistency with an issuer's past communication practices in timing, manner, and form; dissemination through ordinary business channels to audiences such as customers, employees, and suppliers rather than in their capacity as investors; and the absence of content directed to the merits, pricing, or terms of a contemplated offering. A consolidated restatement of this kind would not change the substantive

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11 *See*, *e.g.*, Release No. 33-3844.

12 *See* Release No. 33-8591.

13 Section 105(c) of the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306, 310 (2012) (adding Section 5(d) to the Securities Act of 1933, 15 U.S.C. § 77e(d)); Release No. 33-10699 (Sept. 26, 2019); Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Release No. 33-9741 (Mar. 25, 2015); Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10884 (Nov. 2, 2020).

14 *See* Publication of Information Prior to or After the Effective Date of a Registration Statement, Release No. 33-3844 (Oct. 8, 1957); Offers and Sales by Underwriters and Dealers, Release No. 33-4697 (May 28, 1964); Publication of Information Prior to or After the Filing and Effective Date of a Registration Statement, Release No. 33-5009 (Oct. 7, 1969); Guidelines for the Release of Information by Issuers Whose Securities are in Registration, Release No. 33-5180 (Aug. 16, 1971); Securities Offering Reform, Release No. 33-8591 (Aug. 3, 2005); Solicitations of Interest Prior to a Registered Public Offering, Release No. 33-10699 (Sept. 26, 2019); Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Release No. 33-10884 (Nov. 2, 2020).

15 *See* Release No. 33-8591A, Section III.C (Overview of Communications Rules).

standard, but it would allow issuers and their counsel across all issuer categories to evaluate their communications against the Commission's own longstanding formulations without reconstructing them from releases issued between 1957 and 2020.

D. Other Targeted Improvements Under the Three Tier Framework

While the framework is primarily a reorganization and simplification of existing rules, we believe greater reform progress can be made with additional targeted changes that would improve the functioning of the IPO communications regime without weakening investor protection. Listed below, each suggested improvement is designed to expand the ability of companies to communicate with investors and of investors to participate in the offering process, while preserving the liability architecture that protects investors.

1. Replace WKSI with ELI

Under the existing framework, the ability to make certain pre-filing offering communications to any audience depends on whether the issuer is a WKSI, which definitionally includes a quantitative test based on public float and debt issuance thresholds and is unavailable to companies in the IPO process that have not yet established a public reporting history. This creates a cliff: issuers that narrowly miss the threshold face a dramatically more restrictive communications environment, even though the underlying investor protection concern is the same. We commend the Commission's proposed ELI/SELI framework for eliminating this cliff by replacing the public float and debt issuance thresholds with a simpler, more directly relevant criterion: whether the issuer is a Form S-3-eligible reporting company with at least one class of common equity listed on a national securities exchange.[16] By decoupling pre-filing communication eligibility from issuer size and tying it instead to reporting compliance and exchange listing, the proposed framework extends the Rule 163 pre-filing privilege to all exchange-listed, Form S-3-eligible reporting issuers while retaining the SELI seasoning requirement for automatic shelf registration, where the Commission's interest in monitoring reporting compliance before granting unsupervised market access has independent justification. Our proposed Tier 3 adopts this approach: ELIs may make offering-specific communications to any audience at any time, including before filing a registration statement, while non-ELI issuers and non-reporting IPO candidates remain subject to more restrictive communication rules.

2. Remove Temporal Limitations on Ordinary-Course Communications

We propose that the Commission eliminate both the 30-day communications restriction and the reasonable-steps to avoid dissemination condition in Rule 163A in the consolidation of rules for our proposed Tier 1. The content safeguards in Tier 1 (analogous to Rule 168 and Rule 169) already calibrate the permissible scope of pre-filing communications to the risk profile of reporting companies and non-reporting companies with respect to regularly released factual business and forward-looking information. These content restrictions, together with the prohibition on offering-related information and the continuing application of statutory and rule-based antifraud provisions, are the operative guardrails against conditioning the market. Adding a temporal blackout on top of these substantive restrictions does not provide incremental investor protection; it simply deters ordinary-course communications by issuers approaching a registered offering and creates compliance traps when filing dates shift.

16 *See* Registered Offering Reform Proposal.

II. Eliminate Requirement to Name Selling Securityholders

Reg. S-K Item 507 requires an issuer registering securities for the account of selling securityholders to name each seller, describe any material relationship with the issuer within the past three years, and disclose the amount of securities owned before the offering, the amount offered, and the amount and percentage owned after the offering. At the *de minimis* level, this disclosure burden has no clear investor protection rationale. For issuers; however, conditioning the information such that it is presentable in a registration statement can take significant effort and resources due to the expansion of records related to employee equity grants and initial investors over time in the company's pre-filing lifecycle. Nasdaq has previously recommended that the Commission eliminate Item 507 in its entirety, and we reiterate that recommendation here.[17] Nasdaq is aware that the Staff have not objected to this aggregate disclosure approach in several instances for IPO registration statements in which case this recommendation would serve to eliminate the residual uncertainty surrounding the permitted disclosure.

As a targeted alternative, we recommend that the Commission adopt a *de minimis* threshold permitting issuers to identify in aggregate, rather than individually, any selling securityholder who does not beneficially own more than one percent of the issuer's outstanding securities on a pro forma fully diluted basis. Aggregate disclosure stating the total number of such sellers, the aggregate shares offered, the aggregate post-offering beneficial ownership percentage, and applicable relationship and affiliate-status information would satisfy any residual disclosure interest without requiring individual identification. Because Item 507 is a Reg. S-K disclosure requirement whose amendment may require a separate rulemaking, the Commission should also act in parallel by amending Rules 430B(b) and 424(b)(7) to provide that no prospectus supplement is required solely to individually identify any sub-one-percent selling securityholder, provided the issuer discloses such holders in aggregate.

Pending formal amendment, Nasdaq recommends that the Commission issue interpretive guidance confirming that issuers may satisfy the selling-securityholder disclosure obligation for sub-one-percent holders through aggregate disclosure where individual identification would not provide material information to investors. Such guidance would reduce unnecessary updating burdens for resale shelf programs without depriving investors of decision-useful information.

III. Simplify Direct Listings

Under current rules, a company seeking to go public through a direct listing generally must file an effective Securities Act registration statement, such as Form S-1, as a condition of listing on a national exchange. In a direct listing without a primary capital raise, that registration statement is filed principally to register resales by existing shareholders who acquired shares in earlier exempt offerings. We understand that the Securities Act registration statement requirement was intended, at least in part, to provide investor protection through Securities Act disclosure and Section 11 liability.

The Supreme Court's unanimous decision in *Slack Technologies, LLC v. Pirani*, 598 U.S. 759 (2023), calls into question the Section 11 liability assumption. The Court held that Section 11

[17] *See* Letter from John A. Zecca, Exec. Vice President & Global Chief Legal, Risk & Regulatory Officer, Nasdaq, Inc., to Vanessa A. Countryman, Sec'y, Sec. & Exch. Comm'n, Re: File No. CLL-15, Statement on Reforming Regulation S-K (Apr. 13, 2026), https://www.sec.gov/comments/CLL-15/cll15-749628-2316395.pdf (proposal 33).

requires a plaintiff to plead and prove that the shares acquired are traceable to the allegedly defective registration statement. In a direct listing, registered and unregistered shares may trade together from the first day. As a result, many open-market purchasers may be unable to establish that the shares they purchased were registered under the challenged registration statement. The practical result is that the Securities Act registration statement in a direct listing retains substantial cost and complexity while providing reduced practical Section 11 protection for many secondary market purchasers.

Nasdaq recommends that the Commission create a targeted Exchange Act-only direct listing pathway for companies that are not raising primary capital. The Commission could establish this pathway through a formal rulemaking adopting a targeted amendment to Rule 144, specifically a new subsection providing that the volume limitations of Rule 144(e) and the manner-of-sale requirements of Rule 144(f) do not apply to resales of restricted securities in connection with a direct listing where the issuer has filed an effective Exchange Act registration statement, together with an adopting release or formal Commission statement directing national securities exchanges to file conforming amendments to their listing standards under Section 19(b) of the Exchange Act. Alternatively, if the Commission determines that formal rulemaking is not the appropriate mechanism, the Division of Corporation Finance could accomplish the core elements of this pathway on an expedited basis through no-action relief issued in reliance on its delegated authority, confirming that the staff will not recommend enforcement action against selling shareholders who resell restricted securities without complying with Rule 144(e) and Rule 144(f) in connection with a direct listing where the issuer has filed an effective Exchange Act registration statement and sellers satisfy the applicable holding period and current public information conditions of Rule 144. National securities exchanges could then file conforming amendments to their listing standards in reliance on the Commission's rulemaking or the staff's no-action position, as applicable. Together, those reforms would allow a company to list a class of securities on an exchange based on an effective Exchange Act registration statement and a sufficient pool of shares eligible for resale under the modified Rule 144 framework, without requiring a concurrent Securities Act resale registration statement solely to facilitate selling-shareholder liquidity.

A. Amend Rule 144

Nasdaq recommends that the Commission add a new subsection to Rule 144 for qualifying Exchange Act-only direct listings. The new subsection would provide that, in connection with a direct listing of a class of equity securities on a national securities exchange, the volume limitations of Rule 144(e) and the manner-of-sale requirements of Rule 144(f) do not apply to resales of restricted securities by persons other than the issuer, if the conditions below are satisfied.[18] Those requirements are designed to minimize affiliate resales. A direct listing, by contrast, requires sufficient supply, demand, and public price discovery to establish a fair opening market.

(i) *Current public information and Exchange Act registration*. The issuer must have filed an Exchange Act registration statement, such as Form 10, covering the class of securities to be listed; the registration statement must be effective; and the issuer must be current in all Exchange Act reports required as of the date of sale. This condition

18 Rule 144(e) limits the volume of securities an affiliate may sell in any three-month period. Rule 144(f) requires affiliate sales to be effected through brokers' transactions, market-maker transactions, or riskless principal transactions. These restrictions apply only to affiliates; the Commission eliminated them for non-affiliates in 2007. *See* 17 C.F.R. §§ 230.144(e), (f); Release No. 33-8869 (Dec. 6, 2007).

ensures that the market has access to company-level disclosure before unrestricted resales begin and gives the Staff a meaningful opportunity to review the issuer's disclosure.

(ii) *Holding period*. The selling shareholder must satisfy the applicable Rule 144(d) holding period without modification. Preserving the holding period maintains the most important protection against using a private placement as a short-term conduit for an immediate public distribution.

(iii) *Exchange listing and market structure*. The securities must be listed, or approved for listing subject only to notice of issuance and commencement of trading, on a national securities exchange. The exchange must determine that the issuer satisfies all applicable initial listing standards and that a sufficient pool of shares is eligible for resale under the amended Rule 144 pathway to support a fair and orderly opening market. This condition ties the modified safe harbor to exchange infrastructure, including listing standards, market surveillance, auction procedures, and public price transparency.

(iv) *Affiliate notice.* Affiliates selling in reliance on the new subsection must continue to satisfy the Form 144 notice requirement of Rule 144(h), without modification. The Commission should preserve this notice requirement because it provides a practical transparency mechanism for affiliate resales while avoiding the liquidity constraints created by the volume and manner-of-sale limits.

(v) *No primary offering or issuer proceeds*. The new subsection should be unavailable for any sale by or on behalf of the issuer and unavailable for any direct listing that includes a concurrent primary capital raise. If the company sells newly issued shares in connection with the direct listing, that sale remains subject to the Securities Act registration requirements. The purpose of the new subsection is to facilitate secondary liquidity for existing shareholders where no issuer capital is being raised; it should not be used to conduct an unregistered primary distribution.

(vi) *Anti-evasion protection.* The rule should make clear that the safe harbor is unavailable where the securities were acquired, or the resale is being conducted, as part of a plan or scheme to evade Securities Act registration. This anti-evasion language would prevent the new subsection from being used as a substitute for a primary offering while preserving the intended pathway for companies that seek exchange trading and selling-shareholder liquidity without a capital raise.

The proposed new subsection of Rule 144 should capture the conditions articulated above: an effective Exchange Act registration statement, satisfaction of the applicable holding period, exchange listing with a determination that sufficient shares are eligible for resale to support a fair and orderly opening market, continued Form 144 compliance for affiliates, express unavailability for issuer sales or concurrent primary offerings, and anti-evasion protection.

Additionally, the amendment to Rule 144 should explicitly provide that resales satisfying the proposed subsection's conditions are deemed not to constitute a "distribution" within the meaning of Section 2(a)(11). This determination is a supportable interpretation because the combination of the holding period, Exchange Act registration and ongoing reporting, exchange listing standards, affiliate notice, and anti-evasion protections, in the context of a direct listing, collectively ensure that qualifying resales are similar in character to secondary trading rather than public distribution. Alternatively, the Commission could include detailed analysis in the adopting release explaining its conclusion that qualifying direct listing resales are not distributions, with emphasis on the holding period negating the "with a view to distribution" statutory text, the absence of issuer proceeds, and the anti-evasion provision.

B. Nasdaq Commits to Parallel Reform to Exchange Listing Standards

A Rule 144 amendment alone would not create a workable Exchange Act-only direct listing pathway. Rule 144 provides a safe harbor under which selling shareholders may resell restricted securities without being deemed underwriters, but it does not address whether the issuer's class of securities may be admitted to trading on a national securities exchange. Absent a conforming change to exchange listing standards, selling shareholders would have a modified resale pathway under Rule 144 while the issuer remained subject to listing standards that require an effective Securities Act resale registration statement as a condition of listing. The Rule 144 amendment and the listing standard reform address distinct regulatory requirements, and both are necessary to create a practical Exchange Act-only direct listing pathway. The Securities Act Registration statement requirement that is itself a recent addition to exchange listing standards, adopted in 2019 when Nasdaq formalized its direct listing rules under Listing Rule IM-5315-1.[19]

Nasdaq commits to filing a proposed rule change under Section 19(b) of the Exchange Act to amend the Nasdaq Exchange Listing Rules to permit a company to list in connection with a direct listing without a concurrent Securities Act resale registration statement, provided the following requirements are satisfied: (1) the class of securities is registered under the Exchange Act pursuant to an effective Form 10; (2) the issuer is current in required Exchange Act reporting; (3) the issuer satisfies all ordinary Nasdaq initial listing standards, including applicable market value, bid price, public-holder, round-lot holder, corporate governance, and market-maker requirements; (4) the opening auction or initial pricing process is conducted under Nasdaq rules designed to support transparent price discovery; and (5) the issuer is not conducting a concurrent primary offering or receiving proceeds from the direct listing.

Investor protection is preserved through a robust, multi-layered framework suited to the direct listing context. The issuer must file an Exchange Act registration statement (*e.g.*, Form 10) and become subject to ongoing reporting, ensuring adequate public information before resales occur. Rule 144's holding-period and current-public-information requirements remain in place, affiliates remain subject to Form 144 notice obligations, and trading occurs on a national securities exchange with full listing standards, surveillance, and price transparency. Antifraud liability under the federal securities laws continues to apply. This framework directly addresses the core regulatory concerns in a direct listing (issuer transparency, share seasoning, affiliate disclosure, and fair and orderly trading) without imposing the full Securities Act registration costs of a resale S-1, which are designed for primary capital raises and which, after *Slack*, may offer limited practical Section 11 traceability to public-market purchasers.

C. Create Formal Pathway for Direct Listings with Capital Raises and Financial Advisor Involvement

The Exchange Act-only pathway addresses the needs of companies seeking secondary liquidity without a capital raise. However, companies that wish to raise primary capital while going public

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19 *See* Securities Exchange Act Release No. 85156 (Feb. 15, 2019), 84 Fed. Reg. 5787 (Feb. 22, 2019).

currently face a choice between a traditional underwritten IPO with firm-commitment pricing, or a selling-shareholder direct listing that provides no mechanism for the company itself to raise proceeds. The Commission approved Nasdaq's rules for Direct Listings with a Capital Raise in December 2022, establishing the exchange-level mechanics for a company to sell newly issued shares through the opening auction while simultaneously facilitating secondary resales by existing shareholders.[20] That framework has never been used, in significant part because the regulatory framework has not provided sufficient clarity regarding the role that financial advisors and underwriters may play in the process.[21] At the same time, issuers have identified a related shortcoming in the selling-shareholder direct listing model: the limited role played by financial advisors means that investors do not benefit from the organized due diligence, investor education, and valuation discussion that characterize a traditional IPO.

Nasdaq recommends that the Commission take steps to make a listing pathway viable that combines the investor-protection infrastructure of a traditional IPO with the transparent, auction-based pricing of a direct listing (hereinafter, the "Hybrid Direct Listing"). First, we recommend the Commission issue interpretive or no-action guidance confirming that financial advisors who acknowledge potential statutory underwriter status, accept the corresponding liability, and subject themselves to FINRA Rule 5110 review and clearance may perform expanded activities (*e.g.*, the activities customarily performed by underwriters in a traditional IPO, including assisting in the preparation of the registration statement, conducting due diligence, organizing and actively participating in testing-the-waters and roadshow meetings, discussing valuation with potential investors, and collecting indications of interest from both potential purchasers and sellers) without triggering regulatory consequences that would render the Hybrid Direct Listing impracticable. Additionally, we recommend that the Commission initiate a formal rulemaking to recognize the Hybrid Direct Listing as a permanent, codified going-public pathway, defining the permitted scope of financial advisor activities, the applicable Reg. M treatment, and the conditions under which the process may include a concurrent capital raise. Together with the Exchange Act-only pathway, formal recognition of the Hybrid Direct Listing model would give companies a complete menu of direct listing alternatives.

IV. Streamline Form S-1 Disclosure

Nasdaq recommends that the Commission undertake a systematic review of Form S-1 in parallel with its Reg. S-K reform process to identify and reduce duplicative disclosure that adds preparation cost and document length without providing incremental information to investors. The current Form S-1 framework requires issuers to present substantially similar information across multiple sections of the registration statement, with the result that the same material facts are restated in different formats rather than disclosed once and cross-referenced. This duplication increases the time, cost, and complexity of preparing a registration statement without a corresponding benefit to investors, who must navigate an unnecessarily lengthy document to identify the information most relevant to their investment decision. The prospectus summary is a clear example: in practice, the summary required by Item 503(a) of Reg. S-K has become a near-complete reproduction of disclosures that appear in full elsewhere in the registration statement, including risk factors, business description, use of proceeds, and management discussion. A reasonable page cap of ten to fifteen pages on the prospectus summary would serve the same

[20] *See* Securities Exchange Act Release No. 91947 (May 19, 2021), 86 Fed. Reg. 28169 (May 25, 2021).

[21] 17 CFR §§ 242.100-105.

disciplining function as the Commission's recent amendments to Reg. S-K Item 105 limiting risk factor disclosure. More broadly, the Commission should review Form S-1's disclosure architecture with a view toward eliminating required repetition across sections, permitting cross-referencing in place of restatement where appropriate, and ensuring that each disclosure requirement generates information that is additive rather than duplicative.

V. Streamline Registration Statement Review

Companies that have recently completed or actively pursued an IPO have described to Nasdaq inefficiencies in the Commission's registration statement review process that have contributed to delays in declaring registration statements effective, imposed additional legal and advisory costs, and created management burdens during a period when companies can least afford distraction from their core business operations. Nasdaq recognizes the tremendous value of the Commission's registration statement review process, which serves a critical investor protection function by facilitating full and fair disclosure before securities are offered to the public. At the same time, we encourage the Commission to undertake a systematic review of its internal processes with respect to registration statement review to determine whether operational efficiencies can be achieved, including whether establishing internal response deadlines, standardizing staff comment procedures, or adopting other structured review frameworks would be appropriate to reduce the time and friction associated with the review process without compromising the quality and rigor of staff review. For example, certain issuers and practitioners have described to Nasdaq different and varied practices and experiences between industry office groups in the Division of Corporation Finance. Additionally, accelerated internal deadlines would be particularly helpful in the final stages of the review where issuers have officially launched their IPO and are most in need of resolving lingering disclosure questions. To the extent that process improvements can shorten the overall timeline from initial filing to effectiveness, they would directly reduce the costs and uncertainty that companies have identified as meaningful deterrents to pursuing a public offering.

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Nasdaq appreciates the Commission's commitment to making public markets more accessible and more attractive to innovative companies across all industries and stages of development. We look forward to continuing to engage with Commission staff on these and related proposals and welcome the opportunity to provide additional information or technical input as the Commission considers these reforms. If you have any questions regarding the matters discussed in this letter, please do not hesitate to contact us.

Respectfully submitted,

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