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April 29, 2019

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-01-19

Dear Mr. Fields:

Nasdaq, Inc. (“Nasdaq”)¹ appreciates the opportunity to comment on the Commission’s proposed expansion of the availability of the “test the waters” accommodation to all issuers.² We commend the Commission’s consideration of reforms that will improve the environment for public companies and believe this effort is consistent with recent Commission actions such as increasing the threshold for qualification as a smaller reporting company and implementing rule changes to modernize disclosures.³ The U.S. capital markets are powerful engines of economic progress and innovation, and we believe these regulatory efforts are a step in the right direction to promote further growth and public market participation.

Nasdaq is responding to this proposal in our role as a listing venue for issuers and their investors. We operate The Nasdaq Stock Market, which is home to over 3,000 listings that drive the global economy and provide investment opportunities for Main Street investors. Our listed companies reach across all sectors and include five of the largest public companies in the world, hundreds of small companies as well as mature, well-established companies that have recently launched IPOs.

¹ Nasdaq (Nasdaq: NDAQ) is a leading global provider of trading, clearing, exchange technology, listing, information and public company services. Through its diverse portfolio of solutions, Nasdaq enables customers to plan, optimize and execute their business vision with confidence, using proven technologies that provide transparency and insight for navigating today's global capital markets. As the creator of the world's first electronic stock market, its technology powers more than 100 marketplaces in 50 countries. Nasdaq is home to over 4,000 total listings with a market value of approximately \$14 trillion. To learn more, visit business.nasdaq.com/.

² *Solicitations of Interest Prior to a Registered Public Offering*, Securities Act Release No. 33-10607 (February 19, 2019), 84 FR 6713 (February 28, 2019).

³ *Smaller Reporting Company Definition*, Securities Exchange Act Release No. 34-83550 (June 28, 2018), 83 FR 31992 (July 10, 2018); *Disclosure Update and Simplification*, Securities Exchange Act Release No. 34-83875 (August 17, 2018), 83 FR 50148 (October 4, 2018); *FAST Act Modernization and Simplification of Regulation S-K*, Securities Exchange Act Release No. 34-85381 (March 20, 2019), 84 FR 12674 (April 2, 2019).

We receive valuable feedback from our listed companies and their investors about issues that are important to them. While these companies may have different perspectives on many issues, one topic regularly raised by them is a concern about the regulatory framework, and particularly the disclosure regime, applicable to public companies. As explained below, we believe the Commission's proposal is an important step to continue to address this concern.

Background

Two years ago, Nasdaq released a report, entitled "The Promise of Market Reform: Reigniting America's Economic Engine" (the "Revitalize Report"), which noted that the continued strength of U.S. financial markets is far from certain and issued a call to action to revitalize those markets.⁴ The report, which was based on extensive research and insights, is a blueprint for reform designed to create a dialogue and facilitate common sense action steps to help reignite America's economic engine by reconstructing the regulatory framework, modernizing market structure and reorienting to a longer term view.

Among its many recommendations in the report, Nasdaq advocated several types of disclosure reform, including expansion of the "test the waters" accommodation. As we said then and continue to believe, potential public companies are hamstrung by the complexity and cost of navigating the current regulatory framework. It is no secret that the number of IPOs has decreased in recent years.⁵ The dynamics catalyzing the turn away from public markets are complex, ranging from concerns about activists and frivolous shareholder litigation to pressure to prioritize short-term returns over long-term strategic growth and the burdensome costs and headaches of the proxy process. While there is not just one cause for the decrease in IPOs, there also is not just one solution, and we commend the SEC for examining ways to reduce the burdens associated with going public.

The proposal would extend the "test the waters" accommodation that is currently available to emerging growth companies (EGCs) to all issuers. Currently, the "test the waters" accommodation allows EGCs to communicate with qualified institutional buyers and institutional accredited investors prior to or following the confidential or public filing of a registration statement to determine whether such investors might have an interest in a contemplated registered securities offering, including an IPO, by the EGC. Such communications are exempt from the "gun-jumping" restrictions imposed by Section 5 of the Securities Act of 1933, which generally prohibit communications with potential investors prior to filing a registration statement. Under the proposal, issuers that do not qualify as EGCs would be

⁴ "The Promise of Market Reform: Reigniting America's Economic Engine," issued May 2017, available at: <http://business.nasdaq.com/revitalize>; see also "Progress In Process: Update on Nasdaq's Blueprint to Revitalize Capital Markets," issued May 2018, available at: <http://business.nasdaq.com/revitalize>.

⁵ Id.

allowed, similarly to EGCs, to engage in communications with qualified investors prior to filing a registration statement to gauge the market to assess interest in a potential public offering.

Analysis of the Proposal

The SEC's proposal to extend the "test the waters" accommodation to all potential issuers would yield benefits to both issuers and investors.

A. Issuers

First, the proposal would benefit issuers by enabling more of them to discuss IPO plans privately with potential investors in advance of announcing an IPO. As stated above, Nasdaq frequently hears from our listed companies on issues relating to the capital markets, and based on this feedback, we believe the current "test the waters" accommodation for EGCs has been a resounding success.⁶ We understand that in today's markets, most, if not all, companies that are considering an IPO maintain two potential tracks, one for a public offering and the other for a private offering or M&A exit, for much of the process before ultimately deciding which to pursue. That decision depends, among other things, upon the risk profile of each type of offering, the potential valuations and timing. In order to assess, evaluate and ultimately determine which track to pursue, it is essential that companies have one or more conversations with potential institutional investors to understand the costs and benefits of a potential IPO. Expanding "test the waters" reform to a wide range of issuers therefore provides a cost-effective way for companies considering an IPO to evaluate market interest without disclosing their intentions to the broader market.

This flexibility will allow all companies to reduce the risk of disclosing sensitive financial and competitive information and then determining not to proceed with an IPO, which can also cause reputational harm. In addition, companies will benefit by knowing in advance whether or not there is a market for a potential offering so they can avoid the time and expense of such an offering if a market is not available. Public offerings can be expensive endeavors, involving significant accounting, legal and other fees, as well as management time and attention, and it is helpful for companies to know sooner rather than later if they should pursue private financing instead. Finally, the proposal will benefit issuers by allowing them to tailor the size and other terms of their offering to market interest.

In addition to facilitating IPOs, the proposal also will facilitate secondary offerings by companies that have already gone public. The SEC rules currently allow "well-known seasoned issuers" (WKSIs) to engage in "test the waters" communications for secondary offerings, subject to certain legending and filing requirements.⁷ In addition, EGCs retain their ability to engage in "test the waters" communications following their IPO, provided they continue to qualify as an EGC. However, public companies that fall in between these two categories cannot do so and are put at an unnecessary

⁶ See U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, issued October 2017, available at: <https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf>.

⁷ See 17 CFR 230.163.

disadvantage. Leveling the playing field for these companies will enhance their ability to access the public markets for secondary offerings and therefore to continue to grow.

Importantly, the current accommodation for WKSIs to engage in “test the waters” communications does not extend to their underwriters. The proposed rule would extend to underwriters and thereby enhance the ability of all companies to meet with potential sophisticated investors prior to an offering. In addition, the proposal may make secondary offerings slightly simpler for WKSIs because it would allow them to engage in “test the waters” communications without satisfying the legending and filing requirements of Rule 163.

B. Investors

In addition to benefitting issuers, the proposal will benefit investors by providing them more opportunities to invest in public companies, especially companies such as unicorn startups that are too large to rely on the current “test the waters” accommodation, which is available only for EGCs. Encouraging these innovative companies to go public will give all investors, including retail investors, the opportunity to share in the potential financial benefits of these companies’ success. In addition, the proposal may enhance disclosure because “test the market” conversations with potential investors could assist issuers in identifying information of interest to investors before they prepare their registration statement. This will improve the quality of the eventual registration statement for the entire market.

While the proposal will yield potential benefits to investors, we do not believe it raises significant investor protection concerns. Consistent with the current “test the waters” accommodation for EGCs, the expanded accommodation will allow issuers to gauge the market only with qualified institutional buyers or institutional accredited investors, each of whom are presumed to have a level of financial sophistication that qualifies them to assess investment opportunities. These categories of investors do not raise the same degree of investor protection concerns as smaller retail investors. In addition, any investor protection concerns are well mitigated by the application of the antifraud provisions of the federal securities laws, as well as potential liability under Section 12(a)(2) of the Securities Act, to communications made pursuant to the accommodation. Finally, if a company determines to pursue a public offering after testing the waters, all investors, including those who the issuer spoke with while testing the waters, will have the benefit of the disclosures in the company’s registration statement prior to making an investment decision.

Conclusion

As mentioned before, we commend the Commission for its proposed action in this area. In addition, we encourage the Commission to look for other ways to enhance the on-ramp for potential public companies. Examples include further disclosure reform, especially in connection with the Commission’s Request for Comment on Earnings Releases and Quarterly Reports.⁸ Nasdaq submitted a response to that Request that advocated for, among other things, simplification of the quarterly reporting process, evaluation of a semi-annual reporting model, reconsideration of the Extensible Business Reporting Language (XBRL) tagging requirement, expansion and harmonization of

⁸ *Request for Comment on Earnings Releases and Quarterly Reports*, Securities Exchange Act Release No. 34-84842 (December 18, 2018), 83 FR 65601 (December 21, 2018).

classifications for disclosure relief, reform of certain disclosure requirements to emphasize materiality and re-evaluation of politically motivated disclosure requirements.⁹ In addition, our Revitalize Report advocates proxy reform, including measures to address the lack of transparency and conflicts of interest inherent to proxy advisory firms, reform of the resubmission thresholds for proxy items and general reform of the proxy process.¹⁰ Any and all of these items will improve the public markets, yielding significant benefits for both issuers and investors.

Public companies drive innovation, job creation, economic growth and opportunity across the global economy. Issuers, investors and other market participants benefit from healthy capital markets that promote trust and transparency. In furtherance of these principles, Nasdaq is committed to improving the U.S. capital markets for public companies and investors. We strongly support the SEC's proposal to expand the "test the waters" accommodation to allow all companies to communicate with potential investors about their plans for a public offering. The proposal is one additional step toward modernizing the capital markets, and we encourage the Commission to finalize it as soon as possible.

We applaud the Commission's efforts to simplify the offering process and appreciate the opportunity to present our views on this topic.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,



John A. Zecca

⁹ Letter from John A. Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Officer, to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission, dated March 21, 2019, available at: [https://listingcenter.nasdaq.com/assets/Letter%20from%20John%20Zecca%20to%20Ms.%20Vanessa%20Countryman%20re%20File%20No.%20S7-26-18%20\(March%2021,%202019\).pdf](https://listingcenter.nasdaq.com/assets/Letter%20from%20John%20Zecca%20to%20Ms.%20Vanessa%20Countryman%20re%20File%20No.%20S7-26-18%20(March%2021,%202019).pdf).

¹⁰ See n. 4 above.