JOHN A. ZECCA
EXECUTIVE VICE PRESIDENT,
CHIEF LEGAL OFFICER
& CHIEF REGULATORY OFFICER
805 KING FARM BLVD
ROCKVILLE, MD 20850

April 28, 2020

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

Re: File No. S7-01-20

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq")[1] appreciates the opportunity to comment on the Commission's proposed amendments to eliminate, modernize, simplify, and enhance certain financial disclosure requirements in Regulation S-K.[2] The proposed amendments aim to improve the disclosure regime for investors and registrants by eliminating Items 301 (Selected Financial Data) and 302 (Supplementary Financial Information) of Regulation S-K, and modernizing and enhancing certain Item 303 (Management's Discussion & Analysis of Financial Condition and Results of Operations ("MD&A")) disclosures. The changes are intended to reduce duplicative disclosures and focus on providing material information to investors. These proposals are the product of the Commission's ongoing efforts to simplify and update disclosure requirements in a way that reduces costs ultimately borne by shareholders while preserving important investor protections.[3] We believe this review is timely and the Commission has the opportunity to improve the current corporate disclosure process in a thoughtful manner by reducing complexity and duplicative requirements while at the same time maintaining transparency and promoting investor protection.

The Commission recognizes that since the adoption of Regulation S-K in 1977, there have been many changes in the regulatory and business landscape. In 1982, the Commission expanded and

---

[1] Nasdaq (Nasdaq: NDAQ) is a global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute their business vision with confidence. To learn more about the company, technology solutions and career opportunities, visit us on LinkedIn, on Twitter @Nasdaq, or at www.nasdaq.com.

[2] *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, Securities Act Release No. 33-10750 (January 30, 2020), 85 FR 12068 (February 28, 2020) ("Release").

[3] *Statement on Proposed Amendments to Modernize and Enhance Financial Disclosure,* Commissioner Hester M. Peirce (January 30, 2020), available at https://www.sec.gov/news/public-statement/peirce-mda-2020-01-30.

reorganized Regulation S-K to be the central repository for non-financial statement disclosure requirements.[4] In establishing this specific proposal, the Commission carefully evaluated the 2016 Concept Release on Regulation S-K,[5] the Report on Review of Disclosure Requirements in Regulation S-K,[6] and the Disclosure Effectiveness Initiative,[7] with the objective of continuing to advance the goal of integrated disclosure "to revise or eliminate overlapping or unnecessary disclosure requirements wherever possible, thereby reducing burdens on registrants and enhancing readability without affecting the provision of material information to investors."[8]

We commend the Commission both for its thoughtful consideration of Regulation S-K and for its ongoing efforts to modernize the disclosure requirements for public companies while seeking a balance between improving the scope of disclosure provided to investors and easing disclosure costs and obligations for public companies. We believe the Commission's shift to a principles-based disclosure regime in certain sections of Regulation S-K will allow individual registrants to tailor their disclosure in a way that most benefits their investors while still complying with Commission rules.

The Commission posed numerous questions and requests for comment in the Release. Nasdaq will not address all of those in this letter. However, Nasdaq desires to comment on certain matters that may be of particular interest to the more than 3,000 registrants that have chosen to list on The Nasdaq Stock Market. Additionally, as a public company, Nasdaq is itself subject to Regulation S-K and is continually seeking to improve its own disclosure for the benefit of its current stockholders and potential investors.

A. Selected Financial Data (Item 301 of Regulation S-K)

Item 301 of Regulation S-K currently requires certain registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. The purpose of Item 301 is to supply in a convenient and readable format selected financial data that highlights certain significant trends in the registrant's financial condition and results of operation.[9]

The Commission proposes to eliminate Item 301 given that the information required under this item can be readily accessed and compiled through prior filings on EDGAR. Additionally, the Commission notes that the information provided in Item 301 is not necessary for its stated purpose of

---

4 *See Adoption of Integrated Disclosure System*, Release No. 33-6383 (March 3, 1982) 47 FR 11380 (March 16, 1982).

5 *See Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (April 13, 2016) 81 FR 23915 (April 22, 2016) ("2016 Concept Release"). Nasdaq submitted a comment letter in response to the 2016 Comment Release. *See infra* n. 16.

6 *See Report on Review of Disclosure Requirements in Regulation S-K* (December 2013), available at https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

7 *See SEC Spotlight on Disclosure Effectiveness*, available at https://www.sec.gov/spotlight/disclosure-effectiveness.shtml.

8 Release *supra* n. 2, at 12069.

9 17 CFR 229.301 (Instruction 1 to Item 301).

highlighting certain significant trends, given that Item 303 specifically requires disclosure of material trend information.

Nasdaq supports the Commission's effort to simplify and update disclosure requirements in a way that eliminates duplicative and immaterial disclosures, minimizes redundancy, and reduces compliance costs ultimately borne by investors. In light of technological advancements, which allow for review of historical financial data filed with the Commission through EDGAR, eliminating Item 301 will help to simplify disclosure requirements for registrants. As the Commission notes, the current disclosure requirement under Item 301 may result in duplicative disclosure and, under certain circumstances, it can be costly for registrants to provide.[10] We encourage the Commission to proceed with eliminating this requirement.

B. Supplementary Financial Information (Item 302(a) of Regulation S-K)

Currently, Item 302(a) of Regulation S-K requires certain registrants to provide two years of selected quarterly financial data of specified operating results and any variances in these results from amounts previously reported on Form 10-Q.[11] It also requires registrants to describe the effect of any discontinued operations and unusual or infrequently occurring items recognized in each quarter, as well as the aggregate effect and the nature of year-end or other adjustments that are material to the results of that quarter. Lastly, if a registrant's financial statements have been reported on by an accountant, Item 302(a)(4) requires that accountant to follow appropriate professional standards and procedures regarding quarterly financial data of specified operating results.

The Commission proposes to eliminate Item 302(a) because of its duplicative nature. As noted by the Commission, most commenters are in support of eliminating Item 302(a) altogether because it is duplicative of disclosures provided in prior filings.[12] As the Commission rightfully points out, prior to the adoption of Item 302, quarterly data was "reported on an extremely abbreviated basis."[13] Today, most financial data can be found in a registrant's annual reports on Form 10-K and quarterly reports on Form 10-Q, which are publicly available through EDGAR. The Commission believes that the elimination of the prescriptive requirements set forth in Item 302(a) will "encourage registrants to take a more principles-based approach to presenting information called for by Item 302(a) in their filings and specifically, in MD&A."[14] Additionally, any fourth quarter information that some commenters believe may be lost with the elimination of Item 302(a) is, to the extent material, captured by Item 303, which requires registrants to discuss unusual events or transactions that materially affected reported income and other significant revenue or expense components that are necessary to understand the registrant's results of operations.

As discussed above, we support the Commission's position that eliminating certain duplicative disclosure requirements may lessen the likelihood of immaterial disclosures and reduce a registrant's

---

[10] Release *supra* n. 2, at 12098.

[11] 17 CFR 229.302(a).

[12] Release *supra* n. 2, at 12074.

[13] *See Interim Financial Data: Proposals to Increase Disclosure*, Release No. 34-11142 (December 19, 1974) 40 FR 1079, 1080 (January 6, 1975).

[14] Release *supra* n. 2, at 12074.

disclosure burden and associated compliance costs.[15] We believe that removing Item 302(a) will discourage repetitious and immaterial disclosures and thereby reduce compliance cost and litigation risks for registrants. We also support the Commission's encouragement of a more principles-based approach for the disclosures currently required by Item 302(a). Since a principles-based approach gives a registrant the flexibility to provide more tailored information about its specific financial condition, eliminating Item 302(a) could lead to more informative disclosures, which would benefit investors. In Nasdaq's comment letter on the 2016 Concept Release, we expressed our support for principles-based disclosure requirements.[16] As discussed below, by design, principles-based disclosure requirements grounded in materiality target a reasonable shareholder and do not require public companies to incur the expense associated with disclosure simply because one shareholder, or even one group of shareholders, may find it useful. The Commission has previously expressed its belief that a principles-based approach encourages disclosure that is material and fits a particular registrant's circumstances, while also reducing disclosure costs and burdens for registrants.[17] We agree with this view and encourage the Commission to proceed with eliminating Item 302(a) of Regulation S-K.

C. Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303(a) of Regulation S-K)

The Release proposes various updates to Item 303(a) of Regulation S-K that will streamline and clarify the objectives of this Item. Nasdaq will focus its discussion on the proposal's inclusion of an objectives section in Item 303(a) and the proposal's elimination of Item 303(a)(3)(iv) and certain accompanying instructions, as well as Item 303(a)(5).

Currently, the first paragraph of Item 303(a) instructs registrants to, among other things, discuss their financial condition, changes in financial condition and results of operation.[18] It also sets forth which items must be included in the discussion and allows for the combination of certain interrelated discussions. Additionally, registrants are required to discuss business segments and/or subdivisions when the registrant deems it appropriate for understanding its business. Current Item 303(a)(3)(iv) requires registrants to discuss the impact of inflation and changing prices where material, and comply with Instructions 8 and 9 if they elect to discuss. Under existing Item 303(a)(5), certain registrants are required to disclose their known contractual obligations in tabular format.[19] Because this item currently has no materiality threshold, registrants must disclose all contractual obligations falling within the prescribed categories. Item 303(a) also includes numerous instructions.

The proposal would add a new Item 303(a) to state the purposes of MD&A by incorporating the substance of several of the current instructions to Item 303(a) into the Item itself. In addition, the Commission proposes to codify its previous guidance and incorporate language into Item 303(a) that a

---

15 *See* Release *supra* n. 2, at 12097, 12103.

16 Letter from Edward S. Knight, Former Executive Vice President, General Counsel & Chief Regulatory Officer, to Brent J. Fields, Secretary, United States Securities and Exchange Commission, dated September 16, 2016, available at https://www.sec.gov/comments/s7-06-16/s70616-368.pdf.

17 *See Modernization of Regulation S-K Items 101, 103, and 105*, Securities Act Release No. 33-10668 (August 8, 2019), 84 FR 44358, 44360 (August 23, 2019).

18 17 CFR 229.303(a).

19 17 CFR 229.303(a)(5).

registrant should provide a narrative explanation of its financial statements that allows investors to see a registrant through the eyes of management.[20] The proposal also removes current Item 303(a)(3)(iv) and Instructions 8 and 9 to Item 303(a), thereby encouraging registrants to focus on providing material information that is "tailored to [their] businesses, facts, and circumstances."[21] Given that the contractual obligations table required by Item 303(a)(5) overlaps with the disclosure requirements under U.S. GAAP, the Commission also proposes to eliminate Item 303(a)(5) because it is duplicative. One of the objectives of the Commission through these proposals is to facilitate disclosures in MD&A that provide a thoughtful discussion and analysis using a principles-based approach that "underscore[s] materiality as the overarching principle of MD&A."[22]

Nasdaq fully supports the Commission's principles-based approach to its disclosure requirements. Such approach is grounded in materiality and allows reporting companies the degree of flexibility needed to provide investors with the proper amount and mix of information. The materiality construct directs companies to disclose only relevant information, for which "there is a substantial likelihood that a reasonable shareholder would consider it important."[23] Thus, investors are assured that unnecessary detail does not obscure important disclosure, while at the same time, all material information is disclosed.

We acknowledge that principles-based disclosure is not perfect.[24] In particular, as the Commission states, a switch to principles-based disclosure may sacrifice some of the comparability and consistency promoted by more prescriptive requirements, but a reduction in comparability can be mitigated.[25] In addition, companies may have to make more difficult judgments about whether to disclose particular information and may face retroactive scrutiny regarding a matter that, when viewed at a later time, should have been considered material and therefore disclosed. With that said, we believe the materiality standard has served investors, companies and the public markets well, balancing the need to provide investors with the information they need to make informed decisions against overwhelming investors with too much information, without succumbing to a one-size-fits-all answer. We therefore support the proposed revisions to Item 303(a), Item 303(a)(3)(iv) and accompanying Instructions 8 and 9, as well as Item 303(a)(5) of Regulation S-K.

D. Submission of Financial Information using XBRL

Currently, registrants subject to the financial disclosure requirements of Regulation S-K are required to tag their financial statements in the eXtensible Business Reporting Language ("XBRL") data format. In its request for comment, the Commission asked whether current XBRL-tagging requirements

---

20 *See* Release *supra* n. 2, at 12077.

21 *Id.* at 12071.

22 *Id.* at 12077.

23 Basic Inc *v.* Levinson, 485 U.S. 224, 231 (1988) (quoting TSC Industries Inc. *v.* Northway Inc., 426 U.S. at 449).

24 *See "Modernizing" Regulation S-K: Ignoring the Elephant in the Room*, Commissioner Allison Herren Lee (January 30, 2020), available at https://www.sec.gov/news/public-statement/lee-mda-2020-01-30#_ftnref20.

25 *See* Release *supra* n. 2, at 12103.

reliably facilitate compilation and comparison of certain financial information.[26] The Commission also requested comments on whether it should require MD&A to be structured in Inline XBRL format.[27]

As an additional means of lessening administrative costs and burdens for small and medium-sized enterprises, Nasdaq recommends that the Commission make it optional for issuers to disclose their financial information using XBRL format. Although reporting financial information in XBRL can help to improve the accessibility of such information, Nasdaq observes that in practice XBRL data is rarely utilized, while the process of producing it is disproportionality burdensome and expensive for many registrants.[28]

We have previously asserted that advancing technology has created new alternatives that many feel reduce the usefulness of XBRL.[29] Due to concerns with data quality, errors or inconsistent tags in XBRL reporting,[30] many analysts must manually gather relevant data from financial statements and analyze it with their own sophisticated research tools.[31] We believe that XBRL should be reconsidered to ensure that the benefit to investors outweighs the complexity and burden of current XBRL requirements.

***

Public companies, launched by entrepreneurs with great ideas, 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, we support corporate disclosure obligations that ensure the most relevant company information is reported to investors in the most direct and efficient manner, while at the same time minimizing duplication, bureaucracy and unnecessary costs. We applaud the Commission's efforts to eliminate duplicative disclosure requirements in Items 301 and 302(a) of Regulation S-K and to modernize and simplify MD&A by emphasizing a principles-based approach, which we agree will ease disclosure burdens for registrants, without sacrificing the overall quality of information provided to investors. We also encourage the Commission to make it optional for issuers to disclose their financial information using XBRL format.

---

26 *See* Release, *supra* n. 2, at 12073, 12075, and 12085.

27 *Id.* at 12091.

28 A 2019 Nasdaq survey of 151 issuers found that they spend, on average, over $334,000 per firm per quarter to outside vendors, lawyers, and other advisors to address the requirement of quarterly reporting, including $20,000 per firm per quarter in XBRL costs alone. Meanwhile, only eight percent of issuers reported observing active analyst or investor use of XBRL data.

29 *See The Promise of Market Reform: Reigniting America's Economic Engine*, at 9, available at https://www.nasdaq.com/docs/Nasdaq_Blueprint_to_Revitalize_Capital_Markets_April_2018_tcm5044-43175.pdf.

30 *See* Letter from Ernst & Young to Brent J. Fields, "Inline XBRL Filing of Tagged Data (Release Nos. 33-10323, 34-80133; File No. S7-03-17)," dated May 16, 2017. *See also* Letter from TagniFi to Brent J. Fields "Comments on Inline XBRL Filing of Tagged Data", dated April 19, 2017.

31 *See* "An Evaluation of the Current State and Future of XBRL and Interactive Data for Investors and Analysts," Trevor S. Harris and Suzanne Morsfield (December 2012), at 36 and "XBRL Would be Wonderful if it Always Worked", Forbes, November 7, 2013, available at https://www.forbes.com/sites/greatspeculations/2013/11/07/xbrl-would-be-wonderful-if-it-always-worked/#4c084d675bf5.

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

Sincerely yours,

John A. Zecca