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July 29, 2019

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

Re: File No. S7-05-19

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)¹ appreciates the opportunity to comment on the Commission’s proposed amendments to its rules and forms to improve the disclosure requirements for financial statements relating to acquisitions and dispositions of businesses.² The proposed amendments are intended to improve disclosures, reduce the complexity and cost associated with these disclosures and facilitate more timely access to capital. These proposals are the product of the SEC’s ongoing, comprehensive evaluation of its disclosure requirements and include feedback received in response to the Commission’s 2015 request for comment on certain financial disclosure requirements.³

We commend the Commission both for its thoughtful consideration of comments received on the financial disclosure requirements and for its ongoing evaluation of reforms that will improve the environment for public companies. We believe this effort is consistent with recent Commission actions such as increasing the threshold for qualification as a smaller reporting company, implementing rule changes to modernize disclosures, proposing to expand the availability of the “test the waters” accommodation to all issuers and proposing to amend the accelerated filer and large accelerated filer

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 <https://new.nasdaq.com>.

² *Amendments to Financial Disclosures about Acquired and Disposed Businesses*, Securities Act Release No. 33-10635 (May 3, 2019), 84 FR 24600 (May 28, 2019) (the “Proposing Release”).

³ *Request for Comment on the Effectiveness of Financial Disclosures About Entities Other Than the Registrant*, Securities Act Release No. 33-9929 (September 25, 2015), 80 FR 59083 (October 1, 2015).

definitions.⁴ 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.

This specific proposal would amend the financial disclosure requirements in Rules 3-05 and 3-14 and Article 11 of Regulation S-X, as well as related rules and forms. Generally, the proposed amendments would update the tests used to determine whether an acquisition or disposition is “significant,”⁵ eliminate the need to include financial statements for certain periods required under the current rules and revise the requirements around pro forma financial information.

Given the highly technical nature of the proposed amendments, Nasdaq does not intend to address all of them in this letter. However, Nasdaq wishes to address certain of the proposed amendments that it believes will positively impact IPO companies or simplify the disclosure framework for issuers that have engaged in acquisitions and dispositions. Nasdaq also echoes other commenters in raising concerns about the proposal to mandate synergy disclosures in pro forma financial information.

A. *Benefits to IPO Companies*

Nasdaq particularly wants to highlight, and applaud the Commission for, certain of the proposed amendments that may positively impact companies seeking to launch an IPO. First, the proposed amendments would allow companies filing an initial registration statement to omit separate audited financial statements of a previously-acquired significant business when those financial statements already have been included in the company’s audited financial statements for a year. Currently, Regulation S-X permits such financial statements to be omitted, except in the case of initial registration statements or where the acquired business is of major significance to the company. The proposed amendments would eliminate these two exceptions. As a result, companies engaging in an IPO would be spared the significant cost and effort required to include in their registration statements the separate audited financial statements of older completed acquisitions. This positive change will hasten the IPO process for certain issuers, without significantly affecting investor protection since the acquired business’s results must have been included in the IPO company’s audited financial statements for a year for the IPO company to rely on this relief.

In addition, the proposed amendments would expand the circumstances in which a company may use pro forma financial information to test the significance of an acquisition. In making a

⁴ *Amendments to Smaller Reporting Company Definition*, Securities Act Release No. 33-10513 (June 28, 2018), 83 FR 31992 (July 10, 2018); *Disclosure Update and Simplification*, Securities Act Release No. 33-10532 (August 17, 2018), 83 FR 50148 (October 4, 2018); *FAST Act Modernization and Simplification of Regulation S-K*, Securities Act Release No. 33-10618 (March 20, 2019), 84 FR 12674 (April 2, 2019); *Solicitations of Interest Prior to a Registered Public Offering*, Securities Act Release No. 33-10607 (February 19, 2019), 84 FR 6713 (February 28, 2019); *Amendments to the Accelerated Filer and Large Accelerated Filer Definitions*, Securities Exchange Act Release No. 34-85814 (May 9, 2019), 84 FR 24876 (May 29, 2019).

⁵ When a registrant acquires a significant business, Regulation S-X generally requires the registrant to disclose separate audited annual and unaudited interim pre-acquisition financial statements of that business. The number of years of financial statements that must be disclosed depends on the relative significance of the acquisition to the registrant. The relevant significance tests include an investment test, income test and asset test.

significance determination, companies must compare the most recent financial statements of an acquired business to those of the company. Companies that are already registered with the SEC may use pro forma, rather than historical, financial information if the company made a significant acquisition after the end of the year and filed certain financial information relating to the acquired business on a Form 8-K. However, there currently is no analogous provision for companies filing initial registration statements. The proposed amendments would allow such companies to test significance using pro forma financial information under certain conditions. This change will provide IPO companies with more flexibility to measure the significance of acquisitions, thereby easing their disclosure burden and potentially facilitating faster access to the public markets without harming investors.

B. Simplification of the Disclosure Framework

In addition to the points discussed above, certain other aspects of the proposed amendments will simplify the disclosure framework for issuers. Specifically, the proposals will reduce from three years to two years the audited financial statements required to be disclosed for an acquired business. Nasdaq concurs with the Commission that older financial statements of acquired businesses provide limited utility to investors; on the other hand, issuers could incur substantial cost reductions and time savings from the elimination of the requirement to provide a third year of audited pre-acquisition financial statements.

The proposals also would permit issuers to prepare financial statements of acquired businesses in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (“IFRS-IASB”) without reconciliation to U.S. generally accepted accounting principles (“GAAP”) if the acquired business would qualify to use IFRS-IASB if it were a registrant. In addition, the proposals would permit foreign private issuers that prepare their financial statements using IFRS-IASB to reconcile financial statements of acquired businesses prepared in accordance with home country GAAP to IFRS-IASB rather than U.S. GAAP. Both of these changes will ease disclosure burdens for registrants that engage in cross-border transactions, and benefit investors by providing financial information about an acquired business comparable to the financial information investors are provided about the registrant.

C. Concerns about Required Synergy Disclosure in Pro Forma Financial Statements

While Nasdaq is supportive of most of the proposed amendments, Nasdaq notes the concerns of some other commenters regarding the proposal to require synergy disclosures in pro forma financial statements.⁶ Currently, Article 11 of Regulation S-X provides that adjustments to a pro forma balance sheet must be directly attributable to the relevant transaction and factually supportable; adjustments to

⁶ Letter from Trevor S. Norwitz, Chair, Committee on Mergers, Acquisitions and Corporate Control Contests, New York City Bar, to Office of the Secretary, Securities and Exchange Commission, dated July 18, 2019, available at: <https://www.sec.gov/comments/s7-05-19/s70519-5825826-187512.pdf>; see also David A. Katz, Trevor Norwitz and Victor Goldfeld, Wachtell, Lipton, Rosen & Katz, *SEC Proposal on Pro Forma Synergy Disclosures*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (July 3, 2019), available at: <https://corpgov.law.harvard.edu/2019/07/03/sec-proposal-on-pro-forma-synergy-disclosures/>; see also Marcel Fausten, Joseph A. Hall and Michael Kaplan, Davis Polk & Wardwell LLP, *Simplified Disclosure for Acquisitions and Dispositions*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 22, 2019), available at: <https://corpgov.law.harvard.edu/2019/05/22/simplified-disclosure-for-acquisitions-and-dispositions/>.

a pro forma income statement also must be expected to have a continuing impact. The proposed amendments would replace these criteria for adjustments to pro forma financial information with two categories of pro forma adjustments: Transaction Accounting Adjustments and Management Adjustments. While the former would reflect required accounting adjustments, the latter would require adjustments for “synergies and other effects of the transaction, such as closing facilities, discontinuing product lines, terminating employees, and executing new or modifying existing agreements, that are both reasonably estimable and have occurred or are reasonably likely to occur.”⁷ In addition, companies must provide qualitative disclosure of synergies and other transaction effects that are not reasonably estimable to the extent necessary to provide a fair and balanced presentation of pro forma financial information.

As the other commenters cited above noted, the requirement to disclose transaction synergies could create liability concerns for issuers, given that synergy information is highly subjective and based on information provided by a target company during due diligence. For these same reasons, required synergy disclosures may actually be misleading for investors. In addition, including the required synergy disclosures may extend the time and cost required for issuers to prepare pro forma financial information. As a result of these concerns, we encourage the Commission to carefully consider whether the proposed mandate for synergy disclosures is consistent with the proposed amendments’ stated purposes of reducing compliance burdens for issuers, improving disclosures for investors and facilitating more timely access to capital.

As mentioned before, we applaud the Commission’s efforts to simplify disclosure burdens for companies undertaking an initial public offering or engaged in acquisitions or dispositions, 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

⁷ [See](#) the Proposing Release, at p. 80.