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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. S7-06-19**

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)<sup>1</sup> appreciates the opportunity to comment on the Commission’s proposed amendments to exclude certain smaller reporting companies from the definitions of accelerated and large accelerated filers (the “Proposal”).<sup>2</sup> The primary result of this change would be to relieve eligible companies from the SOX 404(b) requirement to obtain an independent auditor’s attestation of management’s assessment of the effectiveness of internal control over financial reporting (“ICFR”).

We applaud the Commission for its continued consideration of reforms to reduce regulatory burdens for public companies while maintaining important investor protections and believe that the Proposal is consistent with recent Commission actions such as implementing rule changes to streamline redundant disclosures and proposing the extension of the test-the-waters rule to non-emerging growth companies.<sup>3</sup> The U.S. capital markets are powerful engines of economic progress and innovation, and

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<sup>1</sup> 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>.

<sup>2</sup> *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).

<sup>3</sup> *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); *Solicitations of Interest Prior to a Registered Public Offering*, Securities Act Release No. 33-10607 (February 19, 2019), 84 FR 6713 (February 28, 2019).

we believe these regulatory efforts are a step in the right direction to promote further growth and public market participation.

Nasdaq is responding to the 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 span across all sectors, including biotechnology, biopharmaceutical, technology, and community banking, among many others, and range from microcap, pre-revenue companies to the five largest public companies in the U.S., as well as mature, well-established companies that have recently launched IPOs.

We receive valuable feedback from our listed companies, companies considering accessing the public markets 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 increasing compliance costs and regulatory burdens faced by public companies. Companies increasingly question whether these burdens are outweighed by the benefits of public ownership. In recent years, a growing number of companies have been choosing to remain private—and some public companies are reversing course and going private.<sup>4</sup> We believe the Commission’s Proposal is an important step forward to promote further growth and public market participation.

### **The Previous Amendment Created Complexity**

In June 2018, the Commission expanded the public float threshold for a company to qualify as a smaller reporting company (“SRC”) with the laudable goal of promoting capital formation.<sup>5</sup> Nasdaq supported this change and asked the Commission to consider simultaneously increasing the threshold for accelerated filers.<sup>6</sup> Prior to the June 2018 amendment, an SRC was generally considered a non-accelerated filer and benefited from scaled disclosure requirements, extended filing deadlines and relief from the SOX 404(b) requirement to obtain an independent auditor’s attestation of management’s assessment of the effectiveness of ICFR. Unfortunately, the amendments introduced complexity and overlap by classifying certain SRCs as accelerated or large accelerated filers, which precluded them from taking advantage of these benefits. Nasdaq applauds the Commission for its efforts now to realign its rules and reduce unnecessary overlap by excluding from the definitions of accelerated and large

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<sup>4</sup> “The Promise of Market Reform: Reigniting America’s Economic Engine,” issued May 2017 (the “Revitalize Blueprint”), 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>. The Commission also observed that “Over the past two decades, the number of issuers listed on major exchanges has decreased by about 40%, but the decline has been concentrated among smaller size issuers.” See Proposal at 24895.

<sup>5</sup> *Smaller Reporting Company Definition*, Securities Exchange Act Release No. 34-83550 (June 28, 2018), 83 FR 31992 (July 10, 2018).

<sup>6</sup> Letter from Joan Conley to Brent J. Fields dated August 30, 2016.

accelerated filers SRCs with public float of less than \$700 million and annual revenues of less than \$100 million in the most recent fiscal year for which audited financial statements are available.

### **The Proposal Will Benefit Smaller Companies**

In the Proposal, the Commission recognized that “[p]ermitting these issuers to avoid the burdens of being an accelerated or large accelerated filer may enhance their ability to preserve capital without significantly affecting the ability of investors to make informed investment decisions based on the financial reporting of those issuers.”<sup>7</sup> We strongly agree with the Commission’s belief. Nasdaq is home to approximately 220 companies considered SRCs<sup>8</sup> and we estimate that at least 399 Nasdaq-listed companies may be affected by the Proposal.<sup>9</sup> A third of these SRCs operate in the biotechnology and pharmaceutical industries—the very industries which the Commission estimates would benefit the most from the Proposal—and depend on the capital markets to fund medical break-throughs and life-saving research.<sup>10</sup> Some of them are emerging growth companies (“EGCs”) that will lose their status this year and will therefore need to obtain a SOX 404(b) auditor’s attestation of ICFR unless the Commission adopts this rule.<sup>11</sup> One Nasdaq-listed company estimates that it will spend \$1.5 million on initial implementation costs in its first year of complying with SOX 404(b) that would otherwise be spent on research and development.<sup>12</sup> Further, the Commission estimates that SOX 404(b) compliance will increase yearly audit fees and other costs by \$210,000.<sup>13</sup> As a result of the proposed amendments, these and many other lower-revenue companies, which the Commission observed typically have less complex financial systems and controls,<sup>14</sup> would no longer be burdened by the requirement to obtain a SOX 404(b) auditor’s attestation of ICFR and can re-direct capital previously used for compliance costs into innovation and job creation.

### **Important Investor Protections Will Be Maintained**

While the Proposal will yield potential benefits to lower-revenue SRCs, we do not believe it raises significant investor protection concerns. As the Commission noted, auditors would still be

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<sup>7</sup> See Proposal at 24880.

<sup>8</sup> As of July 17, 2019. Excludes SPACs, closed end funds, and REITS.

<sup>9</sup> Our estimate of affected companies include non-EGC and non-SRC operating companies with less than \$700 million public float as of June 30, 2019 and revenues of less than \$100 million for the fiscal year ended December 31, 2018, excluding RICs, BDCs, subsidiaries of non-SRCs who are not eligible to become SRCs under the proposed amendments, SPACs, closed end funds and REITS. The actual number of affected companies may be larger because this estimate excludes companies that have non-calendar fiscal years.

<sup>10</sup> See Proposal at 24883 and 24897.

<sup>11</sup> Letter from Concert Pharmaceuticals, Inc. to Ms. Vanessa Countryman dated July 1, 2019; Letter from Xenon Pharmaceuticals Inc. to Ms. Vanessa Countryman dated June 19, 2019.

<sup>12</sup> Letter from Pieris Pharmaceuticals, Inc. to Ms. Vanessa Countryman dated July 11, 2019.

<sup>13</sup> See Proposal at 24883.

<sup>14</sup> Id at 24907.

required to consider ICFR when performing a financial statement audit of an SRC because “the risk assessment requirement in a financial statement audit is similar to that in an ICFR attestation audit.”<sup>15</sup> Auditors also remain obligated to evaluate and communicate any significant deficiencies and material weaknesses in ICFR to management and the audit committee and may test the operating effectiveness of ICFR when the auditor relies on those controls to reduce substantive testing.<sup>16</sup> Further, as Chairman Clayton reminded attendees at the open meeting held in connection with the proposed amendments, an SRC remains subject to the requirements to establish, maintain, and assess the effectiveness of its ICFR and file CEO and CFO certifications with its financial reports.<sup>17</sup> In addition, companies listed on Nasdaq and other national securities exchanges must have an independent audit committee. Lastly, an SRC that is exempt from the SOX 404(b) auditor’s attestation may choose to voluntarily comply with the requirement if it determines that the benefits to its investors outweigh the costs.

At least with respect to SRCs listed on Nasdaq and other national stock exchanges, other strong investor protections will continue to apply. For example, SRCs listed on Nasdaq will remain subject to Nasdaq’s listing standards, surveillance and enforcement. In fulfilling our mandate to protect investors and the public interest as a self-regulatory organization, Nasdaq staff reviewed 3,034 annual reports during 2018. This review includes, among other things, confirming compliance with the requirements to include CEO and CFO certifications, an auditor’s report and a SOX 404(b) auditor’s attestation (unless the company is exempt by virtue of SRC or EGC status). If a company fails to include any of these required elements in a filing, Nasdaq will promptly inform the company and initiate the deficiency process. The company must notify the market by issuing a press release and, if the company is a domestic filer, filing a Form 8-K, and must submit a plan to Nasdaq within 60 days explaining how it intends to regain compliance with these requirements. Nasdaq believes that this robust process should provide investors and the Commission with confidence that compliance with these important investor protections will be surveilled and enforced.

For these reasons, Nasdaq supports the Commission’s proposal to exclude from the definitions of accelerated and large accelerated filers an issuer that is eligible to be an SRC with public float of less than \$700 million and annual revenues of less than \$100 million. Nasdaq is also supportive of the proposals to increase the transition thresholds for accelerated and large accelerated filers becoming non-accelerated filers (from \$50 million to \$60 million) and for exiting large accelerated filer status (from \$500 million to \$560 million) and the proposal to add a revenue test to the transition thresholds for exiting both accelerated and large accelerated filer status.

### **Additional Reforms Should Be Considered**

Notwithstanding the Commission’s commendable efforts in this area, Nasdaq urges the Commission to consider further reforms and harmonization of the regulatory framework for smaller companies. The proposed changes do not eliminate complexity entirely as some SRCs will still be

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<sup>15</sup> Id. at 24882.

<sup>16</sup> Id.

<sup>17</sup> See “Statement at Open Meeting on Proposed Amendments to Sarbanes Oxley 404(b) Accelerated Filer Definition” (May 9, 2019) available at <https://www.sec.gov/news/public-statement/statement-clayton-050919>.

considered accelerated or large accelerated filers. Commissioner Peirce voiced concern that “[t]he complexity remains; there still will be many SRCs that are also accelerated filers. The process of determining whether a company is an SRC and a non-accelerated filer, or an SRC and an accelerated filer, or outside of both categories is so complicated that even we at the SEC need diagrams to figure it out.”<sup>18</sup> In our Revitalize Blueprint,<sup>19</sup> Nasdaq noted that fewer companies benefit from the relief provided to SRCs, EGCs and non-accelerated filers because the definitions are narrow, sometimes limited in duration and difficult to navigate. Among our many recommendations in the Revitalize Report, we advocated for harmonizing the definitions to reduce inconsistency and overlap, raising the revenue cap to qualify as an EGC from \$1 billion (subject to inflation adjustment every five years) to \$1.5 billion and deleting the current EGC phase-out five years after the IPO. Nasdaq repeated that call in its response to the Commission’s Request for Comment on Earnings Releases and Quarterly Reports<sup>20</sup> and reiterates that request today.

## **Conclusion**

Public companies drive innovation, job creation, economic growth and opportunity across the global economy. Many smaller, lower-revenue companies that will benefit from the proposed amendments depend on the capital markets to fund ground-breaking research and technological advancements. In furtherance of these principles, Nasdaq is committed to improving the U.S. capital markets for public companies and investors in order to keep our capital markets the envy of the world. We strongly support the Commission’s proposal to exclude lower-revenue SRCs from the definitions of accelerated and large accelerated filers. The proposal is one additional step toward modernizing the capital markets, and we encourage the Commission to finalize it as soon as possible.

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<sup>18</sup> See “Statement at Open Meeting on Proposed Amendments to Sarbanes Oxley 404(b) Accelerated Filer Definition” (May 9, 2019) available at <https://www.sec.gov/news/public-statement/peirce-proposed-amendments-sox-404b-accelerated-filer-definition>.

<sup>19</sup> See n. 4 above.

<sup>20</sup> 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); see also Letter from John Zecca to Ms. Vanessa Countryman dated March 21, 2019.

We applaud the Commission's efforts to reduce compliance costs and maintain uniformity across rules 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,

A handwritten signature in black ink, appearing to read "John A. Zecca". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John A. Zecca