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September 22, 2020

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

Re: Proposed Rule on Reporting Threshold for Institutional Investment Managers (Release No. 34-89290; File No. S7-08-20)

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq") appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") Reporting Threshold for Institutional Investment Managers proposal (the "Proposal")[1] and to engage productively with the Commission, U.S. publicly traded companies, and other impacted market participants. We feel that it is important to participate in any efforts to improve the landscape of U.S. capital markets and appreciate the Commission's efforts made with the intent to ease the burdens for certain investment managers through the Proposal, which seeks to amend the quarterly disclosure of equity holdings on Form 13F by increasing the disclosure threshold from $100 million to $3.5 billion. However, as a longtime advocate for reforming the U.S. capital markets and, in particular, disclosure transparency, we believe that the reduced transparency resulting from this proposal would be harmful to public companies and investors.

Nasdaq believes that transparency-based initiatives promote stronger investor protections by informing and empowering investors to make more educated investment decisions. We consider transparency as crucial to the foundation of the public markets and vital for both an investor's and issuer's ability to make an informed financial decision. Nasdaq remains committed to support efforts to augment investor protections and to enhance the transparency of the U.S. capital markets.

As outlined below, the Proposal would significantly reduce transparency for public

[1] Reporting Threshold for Institutional Investment Managers, Securities Exchange Act Release No. 89290 (July 10, 2020), 85 FR 46016 (July 31, 2020), available at https://www.sec.gov/rules/proposed/2020/34-89290.pdf.

companies and their investors, would substantially impede engagement by public companies with their stockholders, would aid activist investors to the detriment of U.S. public companies and their investors, and would deny retail investors and issuers critical information they need to make prudent investment decisions. All of these impacts would disproportionally affect small-cap companies.

Loss of Transparency

As we noted in the joint comment letter ("Joint Comment Letter") on the Proposal submitted by Nasdaq on behalf of itself and a number of public companies, the Proposal would significantly reduce the extent of ownership information made available to public companies of all sizes.[2] These companies would suffer from a lack of transparency into their constituents and asset bases, which would lead to increased costs and impede shareholder engagement. We strongly agree with SEC Commissioner Allison Herren Lee's assessment that the proposal decreases transparency and that it lacks sufficient analysis.[3]

The SEC said in its proposal that it would reduce the number of filers by nearly 90%, but would retain disclosure of over 90% of the dollar value of holdings data currently disclosed through Form 13F.[4] However, as we also mentioned in our Joint Comment Letter, Nasdaq estimates that of the approximately 50,000 buy-side institutions, nearly 80% do not currently disclose via Form 13F.[5] SEC Commissioner Lee correctly noted that the Proposal would "eliminate access to information about discretionary accounts managed by more than 4,500 institutional investment managers representing approximately $2.3 trillion in assets"[6] and limit issuers' transparency into their constituents and asset bases.

Additionally, Form 13F reports are often utilized by issuers to get a better sense of their shareholder base. The Proposal would cause a substantial reduction in the transparency and visibility regarding the makeup of the issuer's investor base and changes over time that may hamper their decision-making. This may cause management to waste their limited resources by concentrating on short-term investors rather than more properly focusing on longer-term

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2 See Joint Comment Letter (Sept. 22, 2020).

3 See SEC Commissioner Allison Herren Lee's Statement on the Proposal to Substantially Reduce 13F Reporting (July 10, 2020); available at https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10.

4 Section 13(f) securities include shares of exchange-traded funds, which would result in many sponsors and managers of exchange-traded funds that rely on Form 13F data to have less information available to them as a means to ascertain their shareholder base.

5 According to Refinitiv ownership data via Nasdaq IR Insight (June 30, 2020).

6 Supra note 2; see note 1 at pp. 16-17.

investors and key issues such as long-term company strategy, corporate governance, and executive compensation. Thus, a decrease in 13F reporting could negatively affect public companies that base certain of their decisions on the information they now glean from the 13F data filed by other important market participants. Also, and as a direct result, issuers, market participants, and regulators would have a much narrower view of the holders of a particular issuer.

Small-Cap Companies Would Suffer Largest Impact

The SEC states in its proposal that "Raising the reporting threshold for rule 13f-1 to $3.5 billion… would retain disclosure of 90.8 percent of the dollar value of the Form 13F holdings data currently reported while relieving the reporting burdens from approximately 4,500 Form 13F filers, or approximately 89.2 percent of all current filers."[7] The SEC fails to address, however, that this increase would have an appreciably disproportionate effect on smaller companies and make it very difficult for them to determine their owners. As we stated in the Joint Comment Letter, small-cap companies are the lifeblood of the U.S. economy and would suffer the most. We estimate that managers in the $100 million to $3.5 billion range of reported assets currently allocate 10% of assets to small- and micro-cap companies, equating to 30% of the total assets invested in those companies.

The Proposal does not fundamentally address the negative impact of raising the 13F threshold on retail investors and small asset managers, many of whom rely on 13F data when making investment decisions.[8] Significantly, lessening the disclosure requirements may somewhat lower the costs for some smaller investment managers (e.g., a modest reduction in compliance costs); it would not counterbalance the loss of critical information for retail investors and other market participants.

Undoubtedly, the Proposal would disproportionately affect transparency into smaller companies whose stocks are more likely to be held by the investment managers who would no longer be required to file Form 13Fs. Given that small-caps are often thinly traded, this currently acts as a deterrent for more substantial institutions that may have concerns over the potential negative impact on a stock's price if they were to attempt to purchase or sell a large number of

7 Supra note 1 at pp. 17-18.

8 As of the date of this comment letter**,** retail shareholders had filed close to 2,000 comments in opposition to the Proposal. Investors routinely review data derived from 13Fs prior to making trading decisions, much the same as they examine Form 4 data on stock trades by corporate insiders. The Commission in 2002 proclaimed the benefits of greater transparency when it decreased the Form 4 reporting period to two business days: "Making this information available to all investors on a more timely basis should increase market transparency, which will likely enhance market efficiency and liquidity." Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release Nos. 34-46421; 35-27563; File No. S7-31-02, August 29, 2002.

shares. Also, less substantial institutions can more easily accumulate a significant position in small-cap companies, meaning these institutions with less money at their disposal tend to comprise a larger share of the investor base of small-cap companies.

We believe it is imperative that the SEC must first more thoroughly weigh the potential harm this proposal may cause smaller companies and capital formation prior to adopting such a proposal. Smaller issuers are anxious over potentially losing visibility into their ownership base. The Proposal also provided modest evidence that Form 13F disclosures aid “copycatting” and “front-running.” This seems quite unlikely due to the lengthy lag time between when an investment position is established and the disclosure of the position in a Form 13F, as well as the likelihood of professional investors being able to use other methods to gain access to the same information.

It is an understatement to say that disclosure of ownership is crucial information for U.S. public companies. In particular, small- and micro-cap issuers could be severely impacted by a reduction of transparency into their stockholder base. We believe the negative consequences that would be visited upon such companies have not been thoroughly enough examined by the Commission.

Increased Concerns Regarding Shareholder Visibility and Activist Investors

Issuers and investors alike rely on Form 13F to determine the shareholders of public companies and consider such filings as essential. Specifically, management can analyze these reports to determine who is assembling a position in their stock.[9] The Proposal would increase the vulnerability of issuers to stealthy activist investors who would be able to acquire positions quietly, which may disadvantage companies and their long-term shareholders. Such activist investors may go undetected, unless their investment position in the company surpasses 5% of the total shares outstanding. This would trigger the submission of the Schedule 13D. If the Proposal is adopted, of the frequent or occasional activist investors managing over $100 million, disclosure from only 25% of those investors would be retained (meaning approximately 75% would no longer be required to file a Form 13F).[10]

The names of the investment managers[11] that would fall below the SEC’s proposed $3.5

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9 However, it should be noted that since activists can seek confidential treatment of their holdings, coupled with the length of time between an investment and when it is disclosed in a Form 13F, this might lessen the value in Form 13F reporting.

10 According to Refinitiv ownership data via Nasdaq IR Insight (June 30, 2020).

11 According to data from research service Activist Insight, greater than 60% of activist investors manage assets that currently fall below the SEC’s proposed $3.5 billion threshold and would no longer be required to file quarterly reports. Additionally, according to the investment bank Lazard, the SEC’s newly proposed threshold would effectively allow four of the ten most frequent activists in 2019 to obscure their holdings as they assembled their stock positions.

billion threshold include many familiar hedge fund executives and billionaires because they do not hold on a long-term basis a substantial amount of 13(f) securities.[12] The decrease in transparency resulting from the potential adoption of the Proposal would strike small- and mid-cap issuers particularly hard since they have a higher percentage of these activist investors.[13]

Smaller public companies would face an increased risk of activism, which, in turn, may lead to shorter-term decision-making, which may be at odds with a more beneficial long-term company strategy. It may also result in cutting spending on necessary or important initiatives, prompt downsizing, as well as other actions not in the best interests of the company or long-term investors. Last year was a record year for activism according to Activist Insight. In 2019, 470 U.S. companies were targeted and 95 proxy contests were launched.[14] Numerous corporate advisers are now advising companies to expect another wave of activism in 2021-22 once the pandemic wanes (similar to what occurred following the 2008-09 financial crisis).

Additionally, while we believe that an overhaul of Section 13-related disclosures is indeed needed, this is clearly not the proper moment in time to go in the opposite direction and weaken disclosure transparency.[15] As the SEC stated in its Proposal, a primary goal of the section 13(f) disclosure program is "to increase investor confidence in the integrity of the U.S. securities markets."[16] Bearing this in mind, we strongly recommend that the SEC reconsider its stance on shareholder visibility.

It has been suggested outside the formal rulemaking process that the SEC may have greater flexibility in amending Form 13F because the original purpose of Form 13F reports was not intended to address transparency concerns of public companies and their investors, but rather the rationale was to allow the SEC "to monitor the large positions in the marketplace for integrity."[17] The fact that the Commission may have initially adopted Form 13F to obtain

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12 See, e.g., Bloomberg News (Quint), "Tepper, Einhorn, Soros Stock Holdings Would Go Dark in SEC Plan," July 15, 2020, available at https://www.bloombergquint.com/markets/tepper-einhorn-soros-stock-holdings-would-go-dark-in-sec-plan.

13 According to Refinitiv ownership data via Nasdaq IR Insight (June 30, 2020).

14 See Lisa Silverman, Bloomberg Law, "Insight: Preparing for Post-Pandemic Corporate Activism," May 4, 2020, available at: https://news.bloomberglaw.com/corporate-governance/insight-preparing-for-post-pandemiccorporate-activism.

15 For example, Nasdaq has long advocated that holders of short positions should be required to make disclosure in parity to that currently required under Section 13 by long holders. Nasdaq, Petition for Rulemaking to Require Disclosure of Short Positions in Parity with Required Disclosure of Long Positions, Petition No. 4-691, December 7, 2015, available at https://www.sec.gov/rules/petitions/2015/petn4-691.pdf.

16 Supra note 1 at p.9.

17 Kellie Mejdrich, SEC Chairman Defends Investment Manager Proposal, Politico (July 24, 2020).

information for itself, rather than the public more broadly, does not mean that the SEC can amend Form 13F without discharging its statutorily mandated obligation to consider the impact of its rulemaking on the public based on how the public uses the information today.[18]

Increased Burden on Shareholder Communications

A central and vital role of any investor relations department of a public company is to monitor its shareholder base. Ownership information is the informational foundation relied upon by companies to communicate effectively with their shareholders. As a result, communications between issuers and investors would be adversely impacted by the adoption of the Proposal. The resulting inability of these departments to ascertain the names of many key investors would negatively impact their companies.

Nasdaq believes that this is just another unintended consequence of the Proposal and that both issuers and institutional investors would likely suffer from its effects. The proposed threshold would greatly limit the ability of issuers to engage directly with a segment of its shareholders, which would be to the detriment of both the company and its investors alike.

Additionally, the elimination of this vital source of information for companies would make it much more difficult for them to identify current shareholders, as well as to target potential new investors. Investor relations departments of public companies heavily depend upon the Form 13F disclosures in their efforts to engage with shareholders, as well as in connection with proxy solicitations and other corporate actions. The processes around annual meetings, including preparing and distributing proxies and facilitating and tabulating voting, is already arduos in its current form, so reducing current Form 13F filings obligations would even further increase the burden on public companies in executing that process as effectively and efficiently as possible; particularly for small-cap issuers.

These investor relations departments rely heavily upon data derived from Form 13Fs to determine how best to allocate the limited time of companies' senior management for investors seeking in-person meetings or calls. Simply put, the Proposal's higher threshold would deny

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18 Whenever the SEC is engaged in rulemaking, it is required to take account of the public interest, which is clear from the plain language of the Securities Exchange Act of 1934. See 15 U.S.C. § 78c(f) ("Whenever pursuant to this chapter the Commission is engaged in rulemaking . . . and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider . . . efficiency, competition, and capital formation"). This general requirement for the SEC to consider the public interest is reinforced in this specific setting by 15 U.S.C. § 78mm, which is one of the statutory grounds that the Commission expressly invokes as authority for its proposed amendment to Form 13F. See Proposal at 48; see also 15 U.S.C. § 78mm(a)(1) ("the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors").

these departments with the necessary insight they require to decide which investors should be given access to its' top executives. This is of particular concern for smaller U.S. public companies in their efforts to effectively gain entry into the equity markets and grow their companies.

In sum, the Proposal would significantly dampen the effectiveness of a public company's investor relations program, which we do not believe was the SEC's intent.

Conclusion

Nasdaq appreciates the Commission's efforts to lessen the expense- and regulatory-related burdens for small funds and to protect investment strategies. However, as a longtime advocate for disclosure transparency, we have concerns that the negative consequences of the Proposal would in the end far outweigh the intended benefits. Access to quarterly disclosure of ownership is critical information for public companies and the Proposal would deprive issuers of timely information about activist fund managers that take positions in their companies. The Proposal, if enacted, would also impair issuers' engagement with shareholders and impede the efforts of companies to attract new long-term investors. Taken as a whole, the downside of increasing the disclosure threshold to $3.5 billion would greatly overshadow any potential cost savings for investment managers.

Nasdaq continues to be a passionate advocate for healthy and vibrant U.S. capital markets and looks forward to working closely in the future with both the Commission and the U.S. public company community to develop appropriate investor protections and initiatives. As the complexity of U.S. capital markets continues to grow, Nasdaq calls on the entire U.S. capital markets industry to come together with targeted and effective investor protections around a transparency principle to protect the interests of all investors. To echo what we have previously said, investor confidence in all aspects of the capital markets is paramount and critical to ensuring its long-term viability.

We believe that a decision by the Commission to move forward with the Proposal would controvert the SEC's mission of protecting investors, maintaining fair and orderly markets, and facilitating capital formation. Therefore, we respectfully ask the Commission to withdraw the Proposal.

Sincerely,

John A. Zecca