Nasdaq

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

Re: **File No. S7-08-22, Short Position and Short Activity Reporting by Institutional Investment Managers**

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq") appreciates the opportunity to comment on a recent proposal by the Securities and Exchange Commission ("Commission") intended to enhance transparency to investors and regulators by increasing publicly available short sale related data ("Proposal").[1] As a global exchange operator and listings venue for over 4,000 companies, Nasdaq has been a strong advocate for transparency, including around short selling activity, because it is necessary for public markets to achieve efficient price discovery, fairness, and investor protection.[2] Accordingly, we applaud the Proposal as a constructive step towards these goals.

To be clear, Nasdaq is not suggesting limitations or restrictions on short sale activities. As we noted in the Nasdaq Petition, legitimate short selling contributes to efficient price formation, enhances liquidity, and facilitates risk management. Evidence also shows that short sellers benefit the market and investors in other important ways, including by identifying and ferreting out instances of fraud and other misconduct at public companies. Indeed, in a recent blog post, Nasdaq's Chief Economist amplified these points:

> "[o]verwhelmingly, research into short selling proves that it makes markets more efficient. Not only does it reduce the trading costs and mispricing of derivatives, it also adds liquidity and improves

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1 See Securities Exchange Act Release No. 34-94313 (February 25, 2022), 87 FR 14950 (March 16, 2022) (File No. S7-08-22) (Short Position and Short Activity Reporting by Institutional Investment Managers).

2 See, e.g., Petition for Rulemaking to Require Disclosure of Short Positions in Parity with Required Disclosure of Long Positions submitted by Edward Knight (December 7, 2015), available at https://www.sec.gov/rules/petitions/2015/petn4-691.pdf (advocating for parity in disclosure requirements for long and short positions)("Nasdaq Petition"); Nasdaq, "The Promise of Market Reform: Reigniting America's Economic Engine," available at https://www.nasdaq.com/revitalize. See Letter from Jeffrey Davis, Senior Vice President, Nasdaq, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA (October, 13, 2021), at https://www.finra.org/sites/default/files/NoticeComment/NASDAQ_Jeffrey%20Davis_21-19_10.13.2021%20-%20Letter%20to%20FINRA%20re%20Short%20Interest%20Proposal%20%2810.13.21%29.pdf (commenting on FINRA proposal on short interest position and other charges to short sale reporting)("Nasdaq Letter").

> price discovery on single stocks. Interestingly, research also suggests that long sellers impact stocks more than short sellers.

The blog post concludes: "[y]ou might not like it when they're selling your stock, but for investors, short selling is an important part of the market ecosystem."

Mindful of the concerns that disclosure could have a chilling effect on short selling,[3] we believe there are discrete circumstances where mandating targeted, limited additional disclosure around short selling activity is important for investor protection. Specifically, where market participants establish a short position in a company and concurrently publish, finance or otherwise commission negative research reports on that company without disclosing short positions that benefit from that report. As we noted in the Nasdaq Petition and the Nasdaq Letter, the absence of disclosure around such short positions has allowed some market participants with short positions to profit from spreading inaccurate or misleading information about the underlying company.

In a 2019 commentary in Pensions & Investments, executives from Nasdaq and Biotechnology Innovation Organization explained the importance of increased transparency under these circumstances:

> "[W]hen unscrupulous short sellers make false claims about biotech firms in order to profit financially, they divert investment from potentially life-saving research and development and unfairly harm the investors who make that research possible. The fact that these trading strategies take place in the dark erodes investor confidence in the fairness and integrity of our capital markets. Market participants deserve to know if someone making negative claims about a company has a large short position against the company. That critical information gives other investors the ability to evaluate the validity of claims being made as is required when entities take a significant long position."

The Commission has recently taken enforcement action where an investor established a short position in a company on behalf of a market participant and then allegedly engaged in a scheme to spread false information about the company in order to depress its stock price and increase the value of the pre-established short position. Press reports highlight that the Department of Justice is criminally investigating the trading activity of certain short selling funds and their links with research firms, scrutinizing their "symbiotic relationships" and pursuing evidence they improperly coordinated trades or otherwise engaged in illegal conduct to profit. The investigation is reportedly focusing on how funds tap into research and establish short positions, especially in the run-up to publication of research reports.

Companies have also taken action, suing the authors of short reports and the funds allegedly behind them.

In a similar regard, the Proposal argues it enhances the Commission's ability to take action, noting that the activity and positions data in Proposed Form SHO would make it easier than using current data for the Commission to detect stock price manipulation, including "short and distort" campaigns.[4] Such improved

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[3] Proposal at 15-16.

[4] See Proposal at 120-121 ("[I]f "short and distort" type behavior were to be suspected, then the Commission would be more likely to identify individuals with large short positions and could thus quickly focus any inquiries on entities in an economic position to potentially profit from manipulation. Then regulators could match buy to cover trading on individual days to statements or other actions of the investor which may indicate that the investor was engaging in such behavior.")

detection capacity, the Proposal asserts, may also lead to decreased fraud as would be manipulators chose not to engage in manipulative behavior due to increased fear of detection.[5]

Market participants including issuers would certainly benefit from this outcome. But investor protection and market integrity cannot be fully preserved through enforcement activity alone, whether governmental or private actions. Accordingly, we believe the Proposal should require market participants to publicly disclose their short positions in the discrete circumstance when they have also issued, financed or otherwise commissioned research reports designed to impact the stock price of companies whose shares they have shorted.

In conjunction with this disclosure, we urge the Commission to consider corresponding amendments to the rules related to research analyst registration and disclosures. These rules include, among others, FINRA Rules 1220(b)(6)(requiring equity research analysts to be registered with FINRA and pass a qualification exam or obtain a waiver) and 2241 (governing conflicts of interest in connection with publication of equity research reports and public appearances). For example, the application of FINRA Rule 2241 - which requires research analysts to disclose in research reports their financial interest in the securities of the subject company, including options, rights, warrants, futures, long or short positions - could be broadened to encompass other market participants who finance or otherwise commission research reports to benefit short positions.

Finally, in the discrete circumstances described above, we believe disclosure should encompass short positions established through derivative instruments because they can have the same direct and material impact on trading in securities as any other short position.[6] Indeed, as we noted in the Nasdaq Petition, "short sellers can amass short positions secretly, abetted by increased use of derivatives and other synthetic instruments."[7] We believe including synthetic short positions in disclosure in these distinct circumstances minimizes the opportunity for some market participants to engage in potentially manipulative or abusive conduct enabled by large, undisclosed short interest.

Nasdaq appreciates the opportunity to respond to the Proposal. Thank you for considering our comments.

Sincerely,

Jeffrey S. Davis
Senior Deputy General Counsel
Nasdaq Office of General Counsel

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5 Id.

6 As noted in the Proposal, academic research shows that investors use options as an alternative means to obtain short-like economic exposure when standard short selling is restricted and that there is "significant risk" that there would be some attempt to circumvent the proposed rule using derivatives, particularly in stocks with liquid options markets. Proposal at 103, 147.

7 Nasdaq Petition at 3.