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October 29, 2019

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

Re: File No. S7-11-19

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)¹ appreciates the opportunity to comment on the Commission’s proposed amendments to modernize the description of business, legal proceedings and risk factor disclosures that registrants are required to provide pursuant to Regulation S-K.² The Commission has proposed amendments to Regulation S-K, which was originally adopted in 1977, to improve disclosure for investors and to acknowledge that the disclosure rules must change to account for recent developments in “the mix of businesses that participate in our public markets, changes in the way businesses operate, which may affect the relevance of current disclosure requirements, changes in technology (in particular the availability of information), and changes such as inflation that have occurred simply with the passage of time.”³

The Commission recognizes that since the adoption of Regulation S-K in 1977, the capital markets landscape has dramatically changed. The rise of the internet and the ensuing immediate dissemination of corporate and market data to global investors, and the changing ways that registrants conduct business now, led the Commission to propose these Regulation S-K amendments.

The Commission has proposed to revise Sections 101(a), 101(c) and 105 of Regulation S-K to emphasize a “principles-based” approach to disclosure rather than a “prescriptive approach.” The Commission believes that a principles-based approach to disclosure would lead to enhanced disclosure

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

³ *Id.* at 8-9.

for investors by encouraging disclosure that is material and fits a particular registrant's circumstances, while also reducing disclosure costs and burdens for registrants.⁴

We commend the Commission for its ongoing efforts to modernize the disclosure requirements for public companies and to seek a balance between improving the scope of disclosure provided to investors and easing disclosure and regulatory administrative costs and obligations. The Commission's change to principles-based disclosure in certain sections of Regulation S-K will allow individual registrants to prepare 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. *General Development of Business (Item 101(a) of Regulation S-K)*

Item 101(a) of Regulation S-K currently requires a registrant to describe the general development of its business over the past five years, or the life of the business if shorter. This item lists specific topics that a registrant must include in the description, generally including: the year and form of organization; the nature and results of any insolvency proceedings; the acquisition or disposition of material assets outside the ordinary course of business; and any material changes in the mode of conducting business. The Release proposes updates to these requirements to, among other things, shift to a principles-based approach by providing a non-exclusive list of topics that a registrant may need to disclose, if such information is material to a general understanding of the general development of the registrant's business.

As we stated in our comment letter on the Commission's Concept Release entitled "Business and Financial Disclosure Required by Regulation S-K,"⁵ Nasdaq supports principles-based disclosure requirements grounded in materiality, and we believe such requirements allow reporting companies the degree of flexibility needed to provide investors with the proper amount and mix of information.⁶ 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."⁷ Thus, investors are assured that unnecessary detail does not obscure important disclosure, while at the same time, all material information is disclosed. The materiality standard addresses another important issue: the proper audience for disclosure. 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

⁴ *Id.* at 9.

⁵ *Business and Financial Disclosure Required by Regulation S-K*, Securities Act Release No. 33-10064 (April 13, 2016), 81 FR 23915 (April 22, 2016) (the "Concept Release").

⁶ 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>.

⁷ *Basic v. Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Industries*, 426 U.S. at 449).

disclosure simply because one shareholder, or even one group of shareholders, may find it useful.

We acknowledge that principles-based disclosure is not perfect.⁸ 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.⁹ 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 101(a) of Regulation S-K to revise it to be largely principles-based.

B. Description of Business (Item 101(c) of Regulation S-K)

While the Commission proposed several changes to Item 101(c) of Regulation S-K in the Release, Nasdaq wishes to address the Commission's proposal regarding Item 101(c)(1)(xiii). Currently, Item 101(c)(1)(xiii) requires disclosure only of "the number of persons employed by the registrant."¹⁰

The Commission seeks to replace this item with a requirement to provide "human capital disclosure" to include, to the extent material, a description of any human capital measures or objectives that management focuses on in managing the business. The Commission noted that it had received support from commenters to the Concept Release for greater human capital disclosure, including, among other things: worker recruitment, employment practices and hiring practices; employee benefits and grievance mechanisms; "employee engagement" or investment in employee training; workplace health and safety; strategies and goals related to human capital management and legal or regulatory proceedings related to employee management; whether employees are covered by collective bargaining agreements; and employee compensation or incentive structures.¹¹

Additionally, the Commission received a rulemaking petition from a coalition of large institutional investors requesting that the Commission adopt new rules, or amend existing rules, regarding human capital disclosure.¹² The Release noted that supporters of the Human Capital Rulemaking Petition argued that companies with substantial, well-developed human capital management may realize a "competitive

⁸ See Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K (August 27, 2019), available at <https://www.sec.gov/news/public-statement/statement-jackson-lee-082719>.

⁹ See the Release, at 7.

¹⁰ *Id.* at 44.

¹¹ *Id.* at 46-47.

¹² See Rulemaking Petition, File No. 4-711 (July 6, 2017), available at <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf> (the "Human Capital Rulemaking Petition").

advantage” in the market, while companies with deficient or inadequate human capital management may suffer “operational, legal and reputational risks.”¹³

We agree that requiring human capital disclosure may lead to more meaningful disclosure about a registrant and its business and operations. However, we believe that disclosure requirements for human capital matters, even if principles-based, may be unduly burdensome for certain registrants. We believe that larger registrants may be better positioned to provide substantive disclosure on human capital. These filers are more likely to have sophisticated human resources teams, and are therefore more likely to be able to prepare disclosure addressing, among other things, “measures or objectives that address the attraction, development, and retention of personnel.”¹⁴ On the other hand, smaller registrants are more likely to have limited resources in their human resources organization and may not have, among other things, formal training programs; large, in-house recruiting departments; or extensive career development programs. For these companies, the burden (both in cost and management time) of preparing disclosure, even if principles-based, will be higher than for larger registrants.

Accordingly, we recommend that the human capital disclosure requirement be limited to large accelerated filers for an initial phase-in period, with all other filers to whom the requirement is applicable permitted to delay compliance for at least twelve months. We believe that staggering the effective date for the required human capital resource disclosure strikes the right balance between providing additional information to investors and reducing compliance burdens for smaller registrants. Investors in larger companies would promptly have access to new disclosure regarding a registrant’s human capital programs, to the extent material. At the same time, smaller registrants would have the benefit of additional time to consider their material human capital measures and to then prepare the necessary disclosure. While some smaller registrants may desire to include human capital disclosure voluntarily on an accelerated timeline, possibly due to pressure from their shareholders or proxy advisory firms, these registrants would have the ability to provide the required disclosure at a later date.

C. Legal Proceedings (Item 103 of Regulation S-K)

The Release also proposes updates to Item 103 of Regulation S-K, which requires registrants to disclose material legal proceedings. Specifically, the Proposal would (i) explicitly permit information about material legal proceedings to be provided by including cross-references or hyperlinks to disclosure located elsewhere in the document and (ii) increase the \$100,000 threshold for disclosure of environmental proceedings to which the government is a party to \$300,000 to adjust for inflation. We support the proposal to expressly provide for the use of cross-references or hyperlinks in Item 103 of Regulation S-K. We agree with the Commission that due to overlaps between its disclosure requirements and U.S. GAAP, many registrants feel compelled to repeat, often word-for-word, disclosures about material legal proceedings in one or more places in a disclosure document, including the financial statements, as well as the legal proceedings, risk factors and MD&A sections. Accordingly, we believe this proposed improvement will help reduce duplicative disclosures, thereby making disclosure documents more readable for investors.

While we support increasing the threshold for disclosure of environmental proceedings to which the government is a party from \$100,000 to \$300,000, we respectfully request that the Commission

¹³ See the Release, at 47.

¹⁴ See the Release, at 48.

consider whether this threshold could be eliminated altogether in favor of a materiality standard for such proceedings. While a potential \$300,000 fine in an environmental proceeding would certainly be material to some companies, it may not be for others. As a result, as noted by the 1996 Report of the Task Force on Disclosure Simplification, a “one size fits all” threshold may result in the disclosure of information not material to an investment decision,¹⁵ thereby making disclosure documents longer and more cumbersome for investors. While arguments can certainly be made that environmental proceedings require a special threshold, similar arguments could also be made regarding legal proceedings about other topics, such as cybersecurity, discrimination or corrupt practices. As a result, we believe the Commission should consider eliminating the special threshold for environmental proceedings in favor of the general materiality standard that applies to all other legal proceedings.

D. Risk Factors (Item 105 of Regulation S-K)

Currently, Item 105 of Regulation S-K requires registrants to discuss the most significant risks with respect to an investment in the registrant’s securities or offering.¹⁶ The Commission’s proposed changes to Item 105 aim to provide investors with more helpful disclosure of material risks, organized in a manner that will be concise and useful to an investor, and to reduce the number of “generic, boilerplate risks that could apply to any offering or registrant.”¹⁷ Accordingly, the Commission has proposed to: (i) require summary risk factor disclosure if the risk factor section exceeds fifteen pages; (ii) replace the requirement to disclose the “most significant” risk factors with the “material” risk factors; and (iii) require registrants to organize risk factors under relevant headings.¹⁸ We support the Commission’s efforts to improve risk factor disclosure, and believe that it will yield improved disclosure without being overly burdensome or costly for registrants to implement in their filings.

In response to certain of the questions the Commission posed regarding the proposed summary risk factor disclosure, we believe that a concise, bullet-point list will be effective in summarizing the material risks. Many registrants already include a similar bullet-point summary, or list in paragraph form, regarding forward-looking statements either at the beginning of a filing or immediately prior to the MD&A section. This list often succinctly highlights the material risks regarding the registrant’s business, operations and financial results. Additionally, we do not recommend requiring that each of the items in the bullet-point list include a hyperlink to the relevant risk factor, as this may result in higher costs and filing fees, as well as increased administrative burdens, for smaller filers. Finally, we suggest that such list be located at the beginning of the risk factor section in the applicable filing, as investors reviewing risk factors will already be likely to turn to that section of the document, rather than locating it elsewhere in the filing.

We agree that requiring issuers to include “material” risk factors rather than the “most significant” risk factors may help reduce or eliminate generic risk factors. Registrants may still view the inclusion of such generic risk factors as “insurance” against litigation. Accordingly, to the extent the registrant does not explain why such generic risk factors are specifically relevant to an investor in its

¹⁵ See the Release, at 61, citing the *Report of the Task Force on Disclosure Simplification* (March 5, 1996), available at <https://www.sec.gov/news/studies/smpl.htm>.

¹⁶ See the Release, at 64.

¹⁷ *Id.* at 66.

¹⁸ *Id.* at 67-72.

securities, the registrant will be required to cluster such generic risk factors at the end of the risk factor section under the “General Risk Factors” category that the Commission proposed in the Release. Generally, we believe that this proposed solution will help investors, as they could elect to give such “General Risk Factors” less attention.

Lastly, we agree that requiring registrants to organize risk factors under relevant headings will be beneficial to investors. As the Release notes, many companies are already doing this in their filings.¹⁹ The headings may help investors identify certain risks more quickly and enable them to read all of the risks regarding a particular subject matter (e.g., intellectual property, indebtedness, operations or taxes) affecting the registrant’s business in one place. Therefore, this additional requirement strikes the right balance, as it will improve disclosure for investors in an otherwise lengthy section of a filing while not being costly or burdensome to implement.

As previously noted, we commend the Commission’s efforts to implement principles-based disclosure requirements in certain sections of Regulation S-K, which we agree will ease disclosure burdens for registrants, without sacrificing the overall quality of information provided to investors.

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", with a long horizontal flourish extending to the right.

John A. Zecca

¹⁹ *Id.* at 71.