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March 18, 2020

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-0609

**Re: File No. S7-25-19 (Amending the “Accredited Investor” Definition)**

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)<sup>1</sup> appreciates the opportunity to comment on the Commission’s proposed rule to amend the definition of “accredited investor” (the “Proposed Rule”),<sup>2</sup> which was originally adopted as a part of Regulation D<sup>3</sup> in 1982. The Commission has proposed amendments to the definition of accredited investor to add methods for individuals to qualify to participate in private capital markets based on new measures intended to serve as a proxy for financial sophistication. These proposals are the product of the Commission’s ongoing, comprehensive evaluation of capital formation in the U.S.

The Proposed Rule is the first significant rulemaking to address the topics raised in the Commission’s 2019 concept release on harmonization of securities offering exemptions (the “Concept Release”).<sup>4</sup> We commend the Commission for its efforts to evaluate the current test for accredited investor status and its thoughtful presentation of the Proposed Rule, and we continue to support the Commission in its broader effort to harmonize and improve the exempt offering framework outlined in the Concept Release. However, we emphasize that expansion of access to private markets for individuals must be balanced with appropriate disclosures regarding specific investment opportunities. We encourage the Commission in its final rulemaking to strike a balance between facilitating investor access to a broader range of investment opportunities and continuing to prioritize strong investor protection measures.

Nasdaq approaches the Proposed Rule from two perspectives. First, we own and operate The Nasdaq Stock Market, which is home to over 3,000 listed companies that drive the global economy and

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<sup>1</sup> 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 and its technology solutions, visit [LinkedIn](#), [Twitter](#), or [www.nasdaq.com](http://www.nasdaq.com).

<sup>2</sup> *Amending the “Accredited Investor” Definition*, Securities Exchange Act Release No. 87784 (December 18, 2019), 85 FR 2574 (January 15, 2020) (the “Proposed Rule”).

<sup>3</sup> Regulation D [17 CFR 230.501 *et seq*] relates to transactions exempted from the registration requirements of Section 5 of the Securities Act under Rule 504, Rule 506(b) and Rule 506(c).

<sup>4</sup> *Concept Release on Harmonization of Securities Offering Exemptions*, Securities Act Release No. 10649 (June 18, 2019), 84 FR 30460 (June 26, 2019) (the “Concept Release”).

provide investment opportunities for Main Street investors. Our listed companies span all sizes and sectors, from microcap, pre-revenue companies to the five largest public companies in the U.S., as well as from recent IPOs to mature, well-established companies.

We also own and operate Nasdaq Private Market (“NPM”),<sup>5</sup> which partners with private companies, law firms, alternative investment fund managers and other stakeholders to customize and deliver effective solutions to address liquidity challenges through NPM’s technology products. NPM was one of the first technology service providers to the private secondary market in 2013 and has worked with over 230 private issuers, many of which have considered reliance on the exemptions available under Regulation D, to facilitate private liquidity events.

With that background, we are pleased to see the Commission evaluate appropriate steps to modernize the U.S. capital formation process. The result will better enable companies to navigate the most efficient path to raise capital, and investors to access growth potential, while preserving appropriate levels of investor protection.<sup>6</sup>

### **1. Importance of Information to Investor Protection**

Since the adoption of the current accredited investor standard, the Regulation D market and landscape for private offerings has dramatically shifted. The rise of the internet and advances in technology have enabled information about issuers and exempt market participants to be readily available to a broader range of market participants than contemplated at the time Regulation D was promulgated.<sup>7</sup>

Information disclosure is a cornerstone of the U.S. public capital markets. In contrast, information currently available to participants in private market transactions is more limited, despite the fact that the private market is an established market. Issuers of securities in exempt offerings generally are not required to disclose information comparable to that included in a registration statement, and Commission Staff does not review any information that may be provided to investors in these offerings.<sup>8</sup> Similarly, secondary sales in private securities in reliance on an exemption from registration (or a similar construct, such as the so-called “Section 4(a)(1½) exemption”) do not typically require information disclosure in connection with the transaction. As a result, investors in these exempt offerings may be subject to investment risks not associated with registered offerings.<sup>9</sup>

We acknowledge that the Section 4(a)(7) exemption does contain substantial information requirements for an issuer of securities that is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, including recent financial statements prepared in accordance with generally accepted accounting principles. However, NPM’s experience and discussions with private issuers and

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<sup>5</sup> Securities in transactions conducted through registered broker-dealer subsidiaries of The NASDAQ Private Market, LLC are not listed or traded on The Nasdaq Stock Market LLC, nor are the securities subject to the same listing or qualification standards applicable to securities listed or traded on The Nasdaq Stock Market LLC.

<sup>6</sup> See the Concept Release, at 30461; see also Final Report of the 2018 SEC Government-Business Forum on Small Business Capital Formation (June 2019), available at <https://www.sec.gov/info/smallbus/gbfor37.pdf>.

<sup>7</sup> See the Proposed Rule, at 2594.

<sup>8</sup> Id. at 2600.

<sup>9</sup> See the Proposed Rule, at 2600.

institutional investors have indicated that market participants are not conducting resales in reliance on this exemption. In the more common scenario where security holders are unable to satisfy the information requirements of Section 4(a)(7) and another exemption is utilized, issuers of private securities provide limited, if any, disclosure to sellers and accredited investor purchasers in a secondary resale. The current lack of information required to be disclosed in the existing exemptive framework can contribute to difficulties in identifying a fair price and further emphasizes the need to limit these investment opportunities to those investors that are sufficiently sophisticated to fend for themselves. We recommend that the Commission evaluate an issuer disclosure requirement in connection with secondary trading of securities initially issued in exempt offerings, particularly in reaction to the Commission's proposal to expand the population of investors that may qualify as accredited investors as described in the Proposed Rule.

In light of the significant information asymmetry between issuers and investors, we caution against broad expansion of the pool of investors eligible to invest in unregistered securities without corresponding protections like disclosure obligations for issuers of those securities. Specifically, the proposed expanded definition of "accredited investor" would include natural persons holding certain professional designations or certifications. We do not believe that most professional designations or certifications alone suffice to establish the financial sophistication and independent judgment required to evaluate private investments that are inherently risky and illiquid. An examination of knowledge, without an additional requirement of industry experience, is not a satisfactory means to determine whether an investor can bear the risk of and evaluate a potential investment in an exempt offering without the benefit of a registration statement or similar disclosure. Investments in private companies are speculative and involve a high degree of risk, and potential investors must be able to withstand a complete loss of investment. Private placements under Regulation D require a wealth and sophistication standard to gatekeep access and ensure potential investors can assess the risk and opportunities of such transactions and protect themselves absent information. Even highly sophisticated investors, such as venture capital firms, which can negotiate to gain access to information in private placements and possess the resources and expertise to evaluate it, may suffer significant losses. Reports indicate that only about 50% of private companies survive after the first 5 years<sup>10</sup> and, as of 2018, the odds of a company reaching "unicorn" status were around 1%.<sup>11</sup>

New rulemaking must ensure that the accredited investor definition – the eligibility standard for investment in private securities – remains rigorous enough to continue to offer the protection of disclosure to those investors who need it. As a result, we urge the Commission to exercise caution in adopting rules that significantly expand the categories of individual investors eligible to invest their

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<sup>10</sup> See *U.S. Small Business Administration Office of Advocacy, Frequently Asked Questions* (September 2019); See also *Startup Failure Post-Mortem*, CB Insights (January 2020) at <https://www.cbinsights.com/research/startup-failure-post-mortem/>.

<sup>11</sup> A "unicorn" is a private issuer that has achieved a valuation of more than \$1 billion. See "Unicorn Startups List" CB Insights (January 2019) at <https://www.cbinsights.com/research/unicorn-startup-market-map/>.

personal assets in private securities without balancing such expansion with disclosure requirements or guidance from a sophisticated registered investment adviser.

## 2. Revitalizing Public Capital Markets

A common refrain in the comment letters filed in response to the Proposed Rule<sup>12</sup> is that “Main Street” investors cannot take advantage of the growth curve available to private companies due to limited access to these investment opportunities. Since the JOBS Act, private companies have enjoyed significantly increased flexibility to remain private longer.<sup>13</sup> And in recent years, a growing number of companies have chosen to remain private indefinitely—or to reverse course and go from public to private, a trend attributable in part to record levels of “dry powder”, or cash, investable by private equity and venture capital.<sup>14</sup> Because companies are staying private longer, by the time a company is ready for an initial public offering – the first time retail investors are eligible to invest directly – the company has often already achieved greater scale by multiple factors, including revenue and market cap. Some market participants argue this phenomenon has a dampening effect on future potential for revenue and growth returns,<sup>15</sup> thereby limiting participation of retail investors in a company’s overall revenue and growth returns. In addition, retail investors may experience other benefits from investing in private companies, such as diversifying their portfolios and receiving returns that are less correlated to the public markets.<sup>16</sup>

Nasdaq has consistently advocated for improving public markets to allow companies to go public sooner and permit investors to get involved earlier in a company’s lifecycle. In becoming a publicly listed company, issuers take on additional responsibilities not required in the private markets, such as information disclosure, that are important for protection of investors. More than two years ago, Nasdaq released a report, entitled *The Promise of Market Reform: Reigniting America's Economic Engine* (the “Revitalize Blueprint”),<sup>17</sup> launching a call to action to revitalize the capital markets and ensure the continued strength of the U.S. financial system. In the Revitalize Blueprint, we provided several proposals to encourage participation in the public markets. We believe that making the public markets more

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<sup>12</sup> See *Comments on Proposed Rule: Amending the “Accredited Investor Definition”*, available at <https://www.sec.gov/comments/s7-25-19/s72519.htm>.

<sup>13</sup> See Final Report of the 2013 SEC Government-Business Forum on Small Business Capital Formation (June 2014), available at <https://www.sec.gov/info/smallbus/gbfor32.pdf>.

<sup>14</sup> See *Private Markets Come of Age*, McKinsey Global Private Markets Review 2019, available at <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/mckinseys-private-markets-annual-review>.

<sup>15</sup> See *Simpson Thacher & Bartlett LLP Registered Funds Alert: SEC Set to Explore Opening Investments in Private Companies to Retail Investors* (January 2019).

<sup>16</sup> See Concept Release, at 84 FR 30512.

<sup>17</sup> Available at <https://www.nasdaq.com/revitalize> (May 2017). See also “Progress In Process: Update on Nasdaq’s Blueprint to Revitalize Capital Markets” (May 2018), available at: <http://business.nasdaq.com/revitalize>.

hospitable to smaller issuers will enable Main Street investors to participate at an earlier stage in the company lifecycle and balance the range of opportunities available to these investors.

### **3. Exposure to Private Issuers through a 40 Act Registered Fund**

We agree with other commenters on the Concept Release that there are alternative methods for investors to gain exposure to private issuers other than through direct investment.<sup>18</sup> For example, professionally managed closed-end funds of funds can enhance a portfolio with potential growth of a private company while enabling the investor to rely on the expertise and experience of SEC-registered investment advisers to make informed and appropriate investment decisions.<sup>19</sup> The ability to rely on an SEC-registered investment adviser may address investor protection concerns with respect to sophistication of retail investors and whether they are able to “fend for themselves.”<sup>20</sup> Further, as the Proposed Rule notes, individual investors may face challenges diversifying risk through private investment due to investment minimums demanded by certain issuers.<sup>21</sup> Professionally managed funds, on the other hand, offer the benefit of diversification of investments in multiple private issuers, which can reduce the concentration risk otherwise facing individual investors in exempt offerings.

Retail investors can gain some indirect exposure to private growth through publicly registered funds; however, these opportunities are limited.<sup>22</sup> As we noted in our comment letter to the Concept Release,<sup>23</sup> Nasdaq also suggests that the Commission consider clarifying the unofficial restriction the Staff has communicated through a number of disclosure comment letters<sup>24</sup> that registered closed-end funds, if offered to non-accredited investors, cannot hold more than 15% of their assets in funds that rely on an exclusion from the definition of “investment company” under Section 3(c)(7) of the 1940 Act or other exempt vehicles that are only eligible to be offered to accredited investors. This restriction has the practical impact of limiting exposure of retail investors to private companies through a registered fund of funds structure. We believe clarifying the policy intent around this restriction and providing transparency to it through rulemaking will ensure uniform application by all registered fund issuers and promote parity among the investment community.

### **Conclusion**

Public companies drive innovation, job creation, economic growth and opportunity across the global economy. Issuers, investors and other market participants benefit from healthy capital markets

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<sup>18</sup> See *Dechert LLP* comment to the Concept Release dated September 24, 2019, at <https://www.sec.gov/comments/s7-08-19/s70819-6193352-192508.pdf>.

<sup>19</sup> See the Proposed Rule, at 2605: “The higher risks of private investments may be mitigated by investing in professionally managed private funds rather than selecting private company investments directly.”

<sup>20</sup> See *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

<sup>21</sup> See the Proposed Rule, at 2607.

<sup>22</sup> *Id.*

<sup>23</sup> See Letter from John A. Zecca, Nasdaq, Inc., to Securities and Exchange Commission, re: File No. S7-08-19, dated September 30, 2019, available at: <https://www.sec.gov/comments/s7-08-19/s70819-6233362-192708.pdf>.

<sup>24</sup> See n.15 above; see also Letter from David Baum, Alston & Bird LLP, to Division of Investment Management, Securities and Exchange Commission, re: File Nos 333-191152 & 811-22888, dated December 17, 2014, available at: <https://www.sec.gov/Archives/edgar/data/1586009/000114420414074464/filename1.htm>.

that promote trust and transparency. In furtherance of these principles, Nasdaq is committed to improving the U.S. capital markets for public companies and investors. Expanding an issuer's access to capital in both the public and private markets, and broadening the range of investment opportunities available to all investors while maintaining robust investor protections, particularly those designed to address information asymmetry through adequate disclosure, is critical to success of the American economy. We support the Commission's efforts to adopt new rules in furtherance of this objective.

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Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,



John A. Zecca

CC:

Jay Clayton, Chairman

Hester M. Peirce, Commissioner

Elad L. Roisman, Commissioner

Allison Herren Lee, Commissioner

William Hinman, Director, Division of Corporation Finance