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September 30, 2019

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

Re: File No. S7-08-19

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)¹ appreciates the opportunity to comment on the Commission’s concept release on harmonization of securities offering exemptions (the “Concept Release”).² The Concept Release covers a number of proposals to simplify, harmonize, and improve the exempt offering framework to promote capital formation and expand investment opportunities while maintaining appropriate investor protections. We commend the Commission for its ongoing, comprehensive evaluation of capital formation in the U.S. and for its thoughtful presentation of the proposals in the Concept Release to harmonize and simplify the existing exemptions. We support the Commission’s efforts to streamline and simplify the exemptive framework to encourage capital formation and liquidity.

Nasdaq approaches the issues in the Concept Release from two perspectives. First, we own and operate Nasdaq Private Market (“NPM”),³ which partners with private companies, law firms, and alternative investment fund managers to customize and deliver effective solutions to address their liquidity challenges through NPM’s technology products. NPM has helped over 170 private issuers facilitate liquidity programs. Leveraging that expertise, NPM’s technology platform has been designed to bring standardization and efficiency to the secondary market for private alternative assets and appeal to

¹ 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 <http://business.nasdaq.com>.

² *Concept Release on Harmonization of Securities Offering Exemptions*, Securities Exchange Act Release No. 33-10649 (June 18, 2019), 84 FR 30460 (June 26, 2019) (the “Concept Release”).

³ 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.

a broad universe of general partners (GPs), limited partners (LPs) and secondary investors in private alternative investment funds.

We also own and 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 all 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.

Through these roles, Nasdaq receives valuable feedback from a wide range of issuers, investors and industry participants. While these parties may have different perspectives on many issues, one topic regularly raised by them is confusion around the existing regulatory regime and a desire to simplify it. Issuers and investors, and their advisors, must navigate a complex web of exemptions, derived from multiple sources, in order to raise capital. This interferes with the ability of companies to raise money to execute their business plans and create jobs and with the ability of investors to participate in exciting growth opportunities.

With that background, we are pleased to see the Commission undertake this review of the existing patchwork framework and its effort to clarify and simplify the available exemptions. The result will better enable companies to navigate the most efficient path to raise capital, while preserving appropriate levels of investor protection,⁴ and Nasdaq believes the Concept Release is an important step forward in that effort. In addition to this general support, below we respond with several specific recommendations

1. Expand Access to Privately Placed RICs

The family of strategies often categorized as “private equity” is a mainstay of sophisticated institutional investors. For example, Wilshire Trust Universe Comparison Service has reported that as of June 30, 2019, the average private equity weight for endowments over \$1 billion was 42.32%. Investors favor these investment styles because, over longer time horizons, they have historically tended to generate higher net returns than public stocks.⁵ However, as a general matter, “Main Street” investors have almost no access to these investments.⁶

Based on NPM’s experience, we believe there is an effective way for the Commission to expand investor access to these opportunities⁷ while simultaneously ensuring that the participating investors

⁴ See the Concept Release, at 84 FR 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> (“2018 Forum Report”).

⁵ See Robert S. Harris, Tim Jenkinson, and Steven N. Kaplan, “Private Equity Performance: What Do We Know?” *Journal of Finance* 6, No. 5 (October 2014) at 1,851–1,882.

⁶ See Concept Release, at 84 FR 30471. The Staff’s research estimates that approximately 13% of U.S. households qualify as accredited investors under the existing criteria.

⁷ Chairman Clayton has noted on multiple occasions, including in his confirmation hearings, that expanding access to investment opportunities available to Main Street investors is a priority. See, e.g., Opening Statement of Jay Clayton, Nominee for Chairman, Securities and Exchange Commission, Senate Committee on Banking, Housing and Urban Affairs, March 23, 2017, available at <https://www.banking.senate.gov/imo/media/doc/Clayton%20Testimony%203-23-17.pdf>; Speech by Commissioner Jay Clayton to Economic Club of New York, September 9, 2019, available at <https://www.sec.gov/news/speech/speech-clayton-2019-09-09>.

remain well protected.⁸ We recommend relaxation of restrictions on private placements of funds that are both registered investment companies under the Investment Company Act of 1940 (the “1940 Act”) (“Registered Funds”) and regulated investment companies under Subchapter M of the Internal Revenue Code of 1986, as amended (“Subchapter M”) (“Tax RICs”) (together, “Privately Placed RICs”) that effectively prohibit such funds from being sold to non-accredited investors. Privately Placed RICs, by definition, have powerful investor protections in place, both in terms of governance and diversification.⁹ We submit that these inherent protections largely obviate the need for the additional requirement that the sale of Privately Placed RICs be effectively limited to accredited investors.¹⁰

Registered Funds and Tax RICs, in their typical publicly-offered forms, are familiar to regulators, financial product “manufacturers” and distributors, and, most importantly, investors. Over the past several years, however, they have been increasingly deployed as privately placed funds. In particular, continuously offered closed end funds that are Privately Placed RICs have become popular vehicles for “packaging” private equity for distribution, especially to high net worth investors.¹¹

These structures have numerous potential advantages for investors in private equity strategies, as compared to traditional limited partnership interests. First, investors can gain exposure to these asset classes with relatively low investment minimums and simultaneously avoid the long-term capital call obligations typical of private equity limited partnership subscriptions. Second, the accredited investors in these vehicles obtain the standard protections of the 1940 Act, including but not limited to rules guarding against self-dealing through affiliate transactions, requirements that a board be primarily comprised of independent directors, and limitations on leverage.¹² Third, the investors benefit from the mandatory diversification and “current pay” requirements of these vehicles’ tax RIC status under Subchapter M. Fourth, the investors have multiple potential avenues for liquidity, through either the traditional standard redemptions and tender offer framework or through reliance on auctions conducted through the platform operated by NPM,¹³ that do not exist in the classic private equity limited partnership format.

As discussed above, “Main Street” investors do not have access to these Privately Placed RICs because private placement rules under the existing regulatory framework limit sales of the relevant securities to “accredited investors.” We believe this result should be viewed, as the Concept Release contemplates, as an accidental convergence of developments in the regulatory landscape. The private placement rules were developed in response to fundamentally different types of offerings – generally, interests in individual assets, or limited partnership interests in unregistered funds – that lack the

⁸ Private placements under Regulation D require a wealth and sophistication standard to gatekeep access and ensure potential investors can “fend for themselves”. See *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

⁹ See Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*); See also Internal Revenue Code of 1986, Subchapter M (26 U.S.C. 851 *et seq.*).

¹⁰ See Regulation D of the Securities Act of 1933 (17 C.F.R. 230.501 *et seq.*). Under Rule 506(b) of Regulation D, up to 35 sophisticated but non-accredited investors may participate in an offering.

¹¹ See McKinsey Private Markets Annual Review (February 2019), available at <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/mckinseys-private-markets-annual-review>.

¹² *Id.*

¹³ See Nelson Griggs, “Auction Funds: A New Option for Liquid Private Investments”, *Investments & Wealth Monitor*, pp. 28-31 (May / June 2018), available at <https://investmentsandwealth.org/getattachment/cfe7c04f-c6ef-4254-be19-711d86e51671/IWM18MayJun-AuctionFunds.pdf>.

protections built in to Privately Placed RICs discussed above. There has not yet been a coherent effort to evaluate Privately Placed RICs and identify a policy reason to support restricting investment in such vehicles by non-accredited investors.

We therefore suggest that one simple, straightforward, and effective response to the concerns expressed in the Concept Release would be to modify the rules regarding the type of investor eligible to invest in Privately Placed RICs. We believe this approach would enhance investor access to the institutional caliber investment strategies while balancing investor protection concerns by ensuring that access is limited to fund structures well designed to protect those investors' interests.

2. Clarify Limit on Public Registered Fund Investment in Private Securities

Based on changes from the JOBS Act, private companies have significantly increased flexibility to remain private longer.¹⁴ In recent years, a growing number of companies have been choosing to remain private—or to reverse course and go from public to private. 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, which some market participants argue has a dampening effect on future potential for revenue and returns growth.¹⁵ This phenomenon has the potential to limit exposure of retail investors who could potentially benefit from diversification and potentially higher returns in their portfolio.¹⁶

Retail investors can gain some indirect exposure to private growth through publicly Registered Funds, but these opportunities are limited.¹⁷ Registered closed-end funds have historically adhered to an unofficial restriction that such 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 (“3(c)(7) funds”) or other exempt vehicles that are only eligible to be offered to accredited investors. This limitation is not an explicit requirement in the 1940 Act, but rather the result of a view the Staff has communicated through a number of disclosure comment letters,¹⁸ and therefore is not uniformly applied by all funds. From a practical perspective, as noted by Ropes and Gray, this unofficial position also generally limits the exposure to private companies (and the potential growth associated with such private companies) through a registered fund of fund structure.¹⁹ Nasdaq requests

¹⁴ 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>.

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

¹⁶ See Concept Release, at 84 FR 30512 (“[Retail investors] who seek a broadly diversified investment portfolio could benefit from the exposure to issuers making exempt offerings, as these securities may have returns that are less correlated to the public markets.”)

¹⁷ *Id.*

¹⁸ 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>.

¹⁹ See *Ropes & Gray Client Alert: SEC Issues Concept Release on Harmonization of Securities Offering Exemptions: Potential Opportunities for Both Private Funds and Registered Funds* (June 28, 2019).

that the Commission consider clarifying this restriction and providing transparency to it through rulemaking to ensure uniform application by all registered fund issuers.

3. Venture Exchanges

Nasdaq also notes that the Commission has asked about efforts to enhance the liquidity of securities that are exempt from registration, such as by allowing trading on venture exchanges.²⁰ Nasdaq fully supports efforts to enhance liquidity and the trading experience for small and medium growth companies, and investors in these companies, which still lags far behind that of larger issuers. In the public markets, relatively small orders can create dramatic price movements in securities of these companies and this increases costs for both the companies and their investors.

More than two years ago, Nasdaq released a report, entitled *The Promise of Market Reform: Reigniting America's Economic Engine* (the "Revitalize Blueprint"),²¹ 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 proposed to allow the creation of markets that smaller issuers could voluntarily join, where their trading would be largely exempt from the UTP obligations—subject to key exclusions—in order to allow liquidity to develop, and for supply and demand to find one another, thereby reducing volatility and improving the trading experience. We reiterated the need for such markets in our blueprint on market structure issues, *Total Markets: A Blueprint for a Better Tomorrow*.²² Nasdaq is pleased to see action to allow the creation of venture exchanges, such as the Main Street Growth Act, introduced by Congressmen Emmer and Gonzalez in the House and Senator Kennedy in the Senate. This legislation, which we support, would permit issuers to choose to trade in an environment with consolidated liquidity.

While it is unclear from the Concept Release how the Commission would implement the concept of allowing exempt securities to trade on venture exchanges, based on our experience we believe that unregistered securities should not trade on exchanges, including on proposed venture exchanges. The registration process helps assure that exchange-listed securities have reached a certain level of maturity in their business plan and that the company is adequately prepared to satisfy the informational needs of investors. Further, the registration process provides for enhanced disclosure to investors. In fact, our own experience with companies that have listed in connection with an offering that is exempt from registration pursuant to Regulation A led us to adopt an additional seasoning requirement for these companies.²³ Nasdaq observed that these companies are generally less mature companies with less developed business plans, and believes that the seasoning requirement will help address concerns that the Regulation A offering process may not adequately prepare companies for the rigors of operating a public company and satisfying the SEC and Nasdaq's reporting and corporate governance requirements.

²⁰ See Question 138 of the Concept Release, at 84 FR page 30522.

²¹ 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>.

²² "Total Markets: A Blueprint for a Better Tomorrow" (April 2019), available at <https://www.nasdaq.com/TotalMarkets>.

²³ See Exchange Act Release No. 86246 (June 28, 2019), 84 FR 32245 (July 5, 2019) (approving SR-NASDAQ-2019-017), which adopts a new initial listing requirement that any company applying to list on Nasdaq in connection with an offering under Regulation A must have a minimum operating history of two years at the time of approval of its initial listing application.

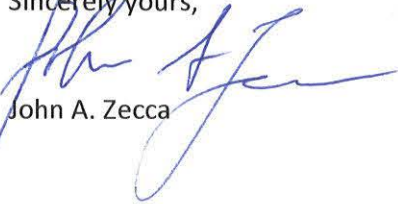
As a result, while Nasdaq fully supports the adoption of venture exchanges for smaller companies that issue registered securities, we do not believe that this concept should be expanded to the trading of securities that are exempt from registration.

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 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 the public and private markets, and increasing investment opportunities for Main Street investors while maintaining robust investor protections, is critical to success of the American economy. We strongly support the Commission's efforts to create parity across the public and private market landscape by reducing the gaps and complexities in the existing regulatory framework to enable companies to choose the structure that fits their specific trajectory for growth.

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

Sincerely yours,

A handwritten signature in blue ink, appearing to read "John A. Zecca", written over the typed name.

John A. Zecca