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September 15, 2022

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

Re: File No. S7-20-22

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)¹ appreciates the opportunity to comment on the Commission’s proposed amendments to certain substantive bases for exclusion of shareholder proposals under Exchange Act Rule 14a-8.² Nasdaq operates regulated entities in the United States, Canada, the Nordics, and Baltics, which are home to over 5,400 listings worldwide that drive the global economy and provide investment opportunities for institutional and Main Street investors. We are a self-regulatory organization mandated to protect investors and the public interest. Additionally, as a public company, Nasdaq is itself subject to the proxy rules, and it has experience addressing shareholder proposals submitted for its own proxy statement. Thus, Nasdaq brings a unique, global perspective to these issues.

If the Commission proceeds with adopting final rules, Nasdaq respectfully requests that the Commission consider our concerns below, along with our suggestions to include in the final rule provisions that:

1. Clarify what Staff will consider to be the essential elements of a proposal under; require all shareholder proponents to clearly identify the objectives or elements of a proposal; or require that a proponent explain how these elements differ from the company’s existing program, plan or initiative.

¹ Nasdaq (Nasdaq: NDAQ) is a S&P 500 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.

² *Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8*, Securities Exchange Act Release No. 34-95267 (July 13, 2022), 87 FR 45052 (July 27, 2022) (the “Release”).

2. Adopt a numerical limit on the number of substantially duplicate proposals submitted for the same shareholders meeting.
3. Adopt a momentum requirement to the resubmission thresholds, which would allow a company to exclude a proposal that shareholders have voted on three or more times in the past five years, but would not otherwise be excludable under the 25% threshold, if the proposal did not receive a majority of votes and support declined by 10% or more compared to the immediately preceding shareholder vote.

A. Proposed Amendments

Rule 14a-8 requires companies filing a proxy statement to include in that document proposals submitted by shareholders, subject to certain procedural and substantive requirements, unless the proposal falls within a specified exclusion. The proposed amendments are intended to modernize the shareholder proposal process to account for Staff's observations during the no-action letter process, and to "facilitate shareholder suffrage and communication between shareholders and the companies they own, as well as among a company's shareholders, on important issues."³

The proposed amendments are part of the Commission's ongoing focus on proxy plumbing. As part of this effort, the Commission adopted amendments to Rule 14a-8 on September 23, 2020 to recalibrate the resubmission and ownership thresholds required for a shareholder to be eligible to submit a proposal.⁴ These amendments went into effect for shareholder proposals submitted for meetings held on or after January 1, 2022 (the "2020 Amendments").

The 2020 Amendments were an important step forward after a decades-long effort by the Commission to collect extensive feedback on the proxy process generally and on shareholder proposals specifically. For example, on November 15, 2018, the Commission's staff held a Roundtable on the Proxy Process, which included a panel on shareholder proposals that was comprised of representatives from issuers and investors. Following the Roundtable, the staff collected further input from members of the public via an invitation to provide written comments. Nasdaq participated in the Roundtable and submitted two separate comment letters, one on our own behalf on November 14, 2018, and the other as a co-signatory with over 300 other public companies on February 4, 2019.⁵ In each of these forums and others, we urged the Commission to update Rule 14a-8, as it did in the 2020 Amendments.

³ See the Release at 6.

⁴ The amendments raised the previous resubmission thresholds of 3, 6, and 10 percent to 5, 15, and 25 percent, respectively, and recalibrated the ownership threshold to require a shareholder to continuously hold the following amounts of a company's voting securities before submitting a proposal: (i) \$2,000 for at least three years; (ii) \$15,000 for at least two years; or (iii) \$25,000 for at least one year. See *Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8*, Securities Exchange Act Release No. 34-89964 (September 23, 2020), 85 FR 70240 (November 4, 2020).

⁵ See Transcript of the Roundtable on the Proxy Process (November 15, 2018), available at <https://www.sec.gov/files/proxy-round-table-transcript-111518.pdf>, comments of John A. Zecca; see also Letter from John A. Zecca, to Brett J. Fields, Secretary, Securities and Exchange Commission, dated November 14, 2018, available at: <https://www.sec.gov/comments/4-725/4725-4649196-176472.pdf>; see also Letter from Nasdaq et. al., to The Honorable Jay Clayton, Chairman, Securities and Exchange

Nasdaq also submitted a comment letter in support of the 2020 Amendments, and we commended the Commission's efforts to modernize the shareholder proposal process.⁶ At the time, we believed the 2020 Amendments achieved the right balance between facilitating the ability for shareholders to include their own proposals in a company's proxy statement and reducing the drain on company resources from including proposals that are not likely to win majority support. We also believed the changes would improve engagement between companies and the proponents of shareholder proposals, for the benefit of all other shareholders in the relevant company.

Unfortunately, we believe the changes contemplated by the Release could be a step backwards in the Commission's efforts to modernize the shareholder proposal process, and appears to be part of a broader trend to narrow the bases for excluding shareholder proposals.⁷ The proposal also follows recent efforts to reverse significant amendments to the proxy plumbing process, with the Commission rescinding new requirements related to proxy advisors in July 2022 that were only finalized in July 2020.⁸ The Commission's abrupt reversals in the proxy process have introduced volatility and uncertainty into the regulation of U.S. capital markets, which is harmful to issuers, capital formation and ultimately investors. Nasdaq discourages the Commission from adopting the proposed amendments, and instead recommends that the Commission continue to evaluate the impact of the 2020 Amendments, which have been effective for less than a year, before proposing further rulemaking.

Nasdaq is also concerned that the Commission's economic analysis has not established a sufficient baseline because the practices of companies and shareholder proponents continue to evolve under the 2020 Amendments. The Commission largely relies on an analysis of 392 shareholder proposals included in proxy statements for meetings held between January 1, 2022 and May 20, 2022, which disregards proposals included for meetings occurring after that date. The Commission itself notes that "the 2022 proxy season is ongoing and, as a result, the information on current practices related to shareholder proposals is incomplete."⁹ The Commission also notes that "the current practices around shareholder proposals are likely to differ from prior years because the 2020 amendments to Rule 14a-8, which relate

Commission, dated February 4, 2019, available at: <https://www.sec.gov/comments/4-725/4725-4872519-177389.pdf>.

⁶ See Letter from John A. Zecca to Ms. Vanessa A. Countryman, dated February 3, 2020, available at: <https://www.sec.gov/comments/s7-23-19/s72319-6744342-207927.pdf>.

⁷ In November 2021, the Division of Corporation Finance issued new guidance on shareholder proposals under Staff Legal Bulletin No. 14L, which rescinded three Staff Legal Bulletins relating to shareholder proposals. Under the previous Staff Legal Bulletins, shareholder proposals could be excluded if they fell under exceptions for ordinary business or economic relevance. This included proposals that raised broad policy issues that were not significant for the company, and those relating to micromanagement. Under the new guidance, Staff will focus on the significance of the social policy issue itself, rather than the significance for the company, and will assess "whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company" in determining whether a proposal is excludable under the ordinary business exception. See Division of Corporation Finance, Securities and Exchange Commission, *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)* (November 3, 2021), available at: <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>.

⁸ See *Proxy Voting Advice*, Securities Exchange Act Release No. 34- 95266 (July 13, 2022), 87 FR 43168 (July 19, 2022).

⁹ See the Release at 42.

to certain procedural requirements and the resubmission exclusion under Rule 14a-8(i)(12), became effective for proposals submitted for annual or special meetings to be held on or after January 1, 2022.”¹⁰ Nasdaq strongly encourages the Commission to give companies additional time to operate under the 2020 Amendments, which only became effective this year, and then review whether further changes are warranted.

It is notable that 868 shareholder proposals were submitted in 2022—the highest number since 2016—which indicates that the current rules have helped to facilitate, rather than stifle, shareholder engagement.¹¹ If the Commission proceeds with adopting final rules, Nasdaq respectfully requests that the Commission consider our concerns described below, along with our suggestions to improve the dialogue between investors and companies without eroding the significant strides in shareholder engagement we have seen under the current rule.

B. Rule 14a-8(i)(10) – Proposed Amendments to the Substantial Implementation Exclusion

The first aspect of the Commission’s proposal addresses the substantial implementation exclusion, which currently allows a company to exclude a proposal that the company has already substantially implemented. The exclusion is intended to avoid shareholders having to consider proposals on matters that have already been favorably acted upon by a company.

Prior to 1983, a company could only exclude a proposal if it had taken every action requested by the proposal. Under the current rule, Staff generally considers whether the company’s policies, practices and procedures generally already aligned with the shareholder proposal, as well as “whether the company has addressed a proposal’s underlying concerns and whether the essential objectives of a proposal have been met.”¹² As a result, a proposal can be excluded on this basis even if the company has not implemented all of the proposal’s requested elements. In practice, Staff may divide a proposal into its elements and evaluate which of them have been implemented, which has led to concerns by the Commission and commenters that the rule is applied inconsistently and unpredictably.¹³

The amendments would allow a proposal to be excluded if the company has already implemented the “essential elements” of the proposal. Staff would instead consider the specific actions requested by the proponent, rather than the general purpose of the shareholder proposal, to determine if the company’s previous actions are sufficiently responsive. As a result, a company would need to show that it has already implemented every essential element of a shareholder proposal in order to exclude it, which Nasdaq believes is likely to lead to the exclusion of fewer proposals.

While the Commission believes the proposed amendments would provide more consistent and predictable determinations for shareholders and companies, Nasdaq is concerned that the proposed amendments are a step backwards to the more formalistic determinations under the rule prior to 1983. It could require a company to include proposals for initiatives that it has already implemented if the

¹⁰ See the Release at 38.

¹¹ See Gibson Dunn, *Shareholder Proposal Developments During the 2022 Proxy Season* (July 11, 2022), available at: <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season/>.

¹² See the Release at 12.

¹³ See the Release at 12-13.

shareholder proponent simply describes the essential elements in a different or more detailed manner, which could waste company resources by requiring companies to implement initiatives that largely mirror existing practices.

The Commission also believes that the proposed amendments would provide a “more objective and specific framework” for the exclusion,¹⁴ however, the Release does not clearly define the “essential elements” of a proposal. The Commission concedes that Staff will still be required to exercise “a degree of substantive analysis” and suggests that the essential elements will be obvious to Staff on the face of the proposal, noting that “[p]roponents sometimes attempt to identify the primary objectives, elements, or features of a proposal. We expect that the more objectives, elements, or features a proponent identifies, the less essential the staff would view each of them.”¹⁵ Nasdaq is concerned that deferring to shareholder proponents to identify the essential elements of a proposal could lead to inconsistent and unpredictable determinations, rather than provide additional transparency and consistency to companies and shareholders. Staff may conclude that similar proposals have different essential elements, merely because they are identified differently by the shareholder proponent. We recommend that the Commission include a provision in the final rules to clarify what Staff will consider to be the essential elements of a proposal; require all shareholder proponents to clearly identify the objectives or elements of a proposal; or require that a proponent explain how these elements differ from the company's existing program, plan or initiative.

C. Rule 14a-8(i)(11) – Proposed Amendments to the Duplication Exclusion

The second aspect of the Commission’s proposal addresses the duplication exclusion, which currently allows a company to exclude a proposal if it substantially duplicates another proposal that is already included in the proxy statement for the same meeting. This exclusion is intended to avoid substantially identical proposals, and Staff currently considers the “principal focus” or “principal thrust” of the proposal to determine whether they are the same. In practice, Staff’s analysis requires “fact-intensive, case-by-case judgements” and has been applied inconsistently and unpredictably.¹⁶ It also only permits the exclusion of the later proposal, which the Commission believes could incentivize a shareholder to submit a proposal quickly because the rule “enables a shareholder who is first to submit a proposal for a company’s meeting to preempt the consideration of later-received proposals, even though a later proposal (if it had been voted on) may have received more shareholder support.”¹⁷

Under the proposed amendments, a shareholder proposal would only be considered substantially duplicative if it “addresses the same subject matter and seeks the same objective by the same means.”¹⁸ As a result, multiple proposals could be included in a proxy statement even if they address the same objective, so long as they seek to do so by different means. While the Commission believes that the proposal will provide greater consistency, transparency and predictability, the Commission aptly notes that this approach could also “cause shareholder confusion and may lead to conflicting or inconsistent results and implementation challenges for companies if shareholders approve multiple similar, although

¹⁴ See Release at 16.

¹⁵ See the Release at 14.

¹⁶ See the Release at 18.

¹⁷ Id.

¹⁸ Id.

not duplicative, proposals.”¹⁹ The Commission seeks comment on whether there are potential measures it should consider to mitigate this impact, such as adopting a numerical limit on the number of shareholder proposals that address the same subject matter to be included in the proxy statement, or adopting alternatives to the first-in-time standard, such as the number of shares owned or the number of co-proponents.

Nasdaq agrees that the proposed amendments could cause investor confusion. Companies could be faced with almost identical proposals on similar topics each year, and shareholders may find it difficult to distinguish between such proposals when voting. Further, multiple competing proposals could create complexity for companies if each receive sufficient shareholder support. For example, two proposals permitting shareholders to call a special meeting could both be submitted to shareholders if there is a one percent difference in the percentage of shareholders necessary to call a special meeting.²⁰ If both proposals receive sufficient shareholder support, which one should the company implement?

For these reasons, Nasdaq encourages the Commission to adopt a numerical limit on the number of substantially duplicate proposals submitted for the same shareholders meeting. Rule 14a-8 allows shareholders to have their proposals included in a company’s proxy statement and to be voted upon with little cost to the proponent.²¹ While this provides significant benefits to an individual proponent, the cost of a company’s proposal response, which can range from \$20,000 to \$150,000 per proposal by the Commission’s own estimates,²² is borne by all of a company’s shareholders, and the no-action letter process can be the “most substantial cost companies incur related to shareholder proposals.”²³ It is therefore reasonable to limit each the number of substantially identical proposals that can be submitted to the same shareholders’ meeting so that companies are not required to submit several no-action requests for identical proposals, or devote substantial time and resources to responding to multiple proposals that are similar in nature. This approach would also be consistent with the Commission’s 2020 Amendments, which clarified that a person may submit no more than one proposal, directly or indirectly, for the same shareholders’ meeting.

D. Rule 14a-8(i)(12) – Proposed Amendments to the Resubmission Exclusion

The third aspect of the proposed updates to Rule 14a-8 addresses the resubmission exclusion. Currently, a shareholder proposal is excludable if it addressed substantially the same subject matter as a proposal that was included in the company’s proxy in the last five years, and if it was voted on at least once in the last three years and didn’t receive enough support to pass the thresholds.²⁴ In practice, Staff considers whether the proposals share the same “substantive concerns,” and does not focus on the

¹⁹ See the Release at 20.

²⁰ See Sullivan & Cromwell LLP, *SEC Proposes to Significantly Narrow Bases for Excluding Shareholder Proposals Under Rule 14a-8* (July 21, 2022), available at: <https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-to-narrow-bases-for-excluding-shareholder-proposals.pdf>.

²¹ See Statement of Chairman Jay Clayton on Proposals to Enhance the Accuracy, Transparency and Effectiveness of Our Proxy Voting System, November 5, 2019, available at: <https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting>.

²² See the 2020 Amendments at 121.

²³ See the Release at 51.

²⁴ See *supra* note 4.

“specific language or actions proposed to deal with those concerns.”²⁵ According to the Commission, this can require fact-intensive, case-by-case judgments and “be used to exclude proposals that have only a vague relation, or are not sufficiently similar, to earlier proposals that failed to receive the necessary shareholder support.”²⁶

Under the proposed amendments, a shareholder proposal would have to “substantially duplicate” a prior proposal to be excluded, meaning it would have to address the same subject matter and seek the same objective by the same means, similar to the duplication test. This would reverse the Staff’s current approach by requiring Staff to focus on the specific language or actions proposed to deal with the proposals concerns, rather than the substantive concerns. The Commission believes this would enable proponents to build broader support and offer different ways to address the same issue, and provide greater consistency, predictability and transparency for companies and shareholders.

Nasdaq is concerned that the proposed amendments represent a step backwards to the Commission’s pre-1983 interpretation, where a proposal was only be excludable if it was “virtually identical (in form as well as substance).”²⁷ Under that approach, commenters were concerned that proponents could simply make minor changes to the wording of a proposal to evade exclusion, and Nasdaq believes that similar concerns are warranted here.

The amendments would also undermine the Commission’s efforts to reduce the number of zombie proposals through the 2020 Amendments, by allowing shareholder proponents who failed to receive sufficient support to resubmit their proposal with minor changes in an effort to garner more support.²⁸ We believe that companies should not be burdened year after year with proposals that the majority of their shareholders have not supported at prior annual meetings. According to a study conducted by FTI Consulting, “zombie” proposals made up 32% of all failed proposals from 2001 to 2018.²⁹ These proposals create a significant drain on company time, attention and resources, and after multiple failed votes, are not in the interests of a company’s broader shareholder base. If the proposed amendment is adopted, zombie proposals could effectively linger around indefinitely, as long as the resubmissions are slightly modified each year to describe different objectives or offer different means of addressing the same matter. This will require companies to continue to expend resources, including considerable management time and legal costs, addressing proposals that fail year after year and which shareholders have clearly expressed their wishes against such proposal. Moreover, the “zombie

²⁵ See the Release at 26.

²⁶ Id.

²⁷ See the Release at 22.

²⁸ A study by the U.S. Chamber’s Center for Capital Markets Competitiveness referred to such proposals as “zombie” proposals, which it defined as proposals that are submitted three or more times without garnering majority support. See U.S. Chamber’s Center for Capital Markets Competitiveness, *Raising the SEC’s Resubmission Proposals: “Zombie” Proposals and the Need to Modernize an Outdated System*, October 9, 2018, available at: https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/10/CCMC_ZombieProposal_Digital.pdf.

²⁹ FTI Consulting, *2018 Proxy Season Trends*, August 27, 2018, available at: <https://fticomunications.com/2018/08/2018-proxy-season-trends/>.

proposals” risk distraction of a company’s board of directors and management from their primary focus of growing the business and enhancing shareholder value.

The Commission also notes that while it is not currently proposing changes to the revised thresholds in the 2020 Amendments, it is continuing “to assess the impact of these amendments.”³⁰ Nasdaq has long advocated for an increase to the resubmission thresholds in Rule 14a-8 and wholeheartedly supports the 2020 Amendments in this regard.³¹ As we have previously stated, we believe that shareholders should have a meaningful, long-term investment in a company before they are given access to the proxy statement.³² This would help ensure that companies’ boards of directors and management spend their scarce time focused on shareholder proposals submitted by shareholders who are aligned with other shareholders in the long-term success of the company. We believe that the current tiered approach much improves upon the previous \$2,000 threshold in ensuring that a shareholder has a meaningful economic stake in a company before the shareholder is eligible to submit a proposal for inclusion in the proxy. It also is reasonable to require shareholders who own lower amounts of securities to hold those securities for longer periods of time.

We also note that the SEC’s current standards of 5%, 15% and 25% are very close to the standards we and our co-signatories suggested in 2019, when Nasdaq, along with over 300 other publicly traded companies, sent a letter to the SEC thanking it for conducting the Roundtable on the Proxy Process and urging it to take action on certain critical items discussed during the Roundtable.³³ Among other things, that letter advocated that the SEC adopt reasonable standards for resubmission of shareholder proposals and suggested that standards of 6%, 15% and 30% would be appropriate. These suggested standards were based upon an SEC rule proposal from 1997 that the Commission ultimately decided not to adopt.³⁴

While we encouraged the Commission to consider implementing the 6%, 15% and 30% thresholds, we believe that the 5%, 15% and 25% thresholds are reasonable and go a long way toward improving the shareholder proposal process for the benefit of all stakeholders. This view was based, in part, on the proposed momentum requirement to the resubmission thresholds, which would allow a company to exclude a proposal that shareholders have voted on three or more times in the past five years, but would not otherwise be excludable under the 25% threshold, if the proposal did not receive a majority of votes and support declined by 10% or more compared to the immediately preceding shareholder vote. While this proposed amendment was ultimately not adopted, we continue to believe that this requirement would relieve companies, and their investors, from the burden of considering proposals for

³⁰ See the Release at 25.

³¹ See *supra* note 5.

³² See Edward S. Knight, *The SEC’s Corporate Proxy Rules Need a Rewrite*, THE WALL STREET JOURNAL, March 26, 2014, available at: <https://www.wsj.com/articles/edward-s-knight-why-the-sec-should-rewrite-the-rules-on-proxy-proposals-1395861527?tesla=y>; see also Nasdaq, *The Promise of Market Reform: Reigniting America’s Economic Engine*, May 2017, available at: <http://business.nasdaq.com/revitalize>.

³³ See *supra* note 5.

³⁴ See *Amendments to Rules on Shareholder Proposals*, Securities Exchange Act Release No. 34-39093 (September 18, 1997) 62 FR 50682 (September 26, 1997). Since the SEC did not adopt this proposal, the resubmission thresholds have remained unchanged since 1954.

which shareholder support has declined significantly, especially considering the proposed amendments to the resubmission exclusion.

E. Conclusion

Although some commenters expressed concern that the 2020 Amendments could stifle communication between companies and their shareholders, the rules have in fact had the opposite effect.³⁵ While the 2020 Amendments have helped to improve the discourse between companies and shareholders, Nasdaq is concerned that the proposed amendments would, taken together, require companies to consider more granular proposals on similar topics each year and likely result in fewer omissions of shareholder proposals. As a result, the level of meaningful engagement between companies and their shareholders would decrease, and companies would face undue costs, ultimately borne by shareholders. While some of these concerns could be remedied by the changes proposed in this letter, it would be more prudent for the Commission to give companies additional time to operate under the 2020 Amendments, which only became effective this year, and then review whether further changes are warranted.

³⁵ See supra note 11.

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". The signature is written in a cursive style with a prominent initial "J" and a long, sweeping underline.

John A. Zecca