Nasdaq

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Subcommittee on Capital Markets and GSEs

**"The JOBS Act at Four:**
**Examining Its Impact and Proposals to Further Enhance Capital Formation"**

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Chairman Garrett and Ranking Member Maloney,

Thank you for the opportunity to testify on "The JOBS Act at Four: Examining Its Impact and Proposals to Further Enhance Capital Formation." The work of this subcommittee to push forward that legislation is still a great achievement of the 112th session of Congress and a shining example of bipartisanship and statesmanship. Even with the JOBS Act in place, there are issues that remain, and there are dark clouds still affecting the private company view of the public markets.

Capital formation and job creation are in Nasdaq's DNA. Forty-five years ago, Nasdaq introduced the world to the electronic market, which is now the standard for markets worldwide. The creation of Nasdaq introduced sound regulation to over-the-counter trading. Around Nasdaq grew an ecosystem of analysts, brokers, investors and entrepreneurs allowing growth companies to raise capital that was not previously available to them and investors, in turn, to profit from these companies' innovation. Companies like Apple, Microsoft, Gilead, Google, and Intel, all of which are listed on Nasdaq, use the capital they raised to make the cutting edge products that are now integral to our daily lives. As these companies grew, millions of jobs were created along the way.

Nasdaq brought to the capital markets a *trusted* listings venue and the changed view that companies can go public earlier in their growth cycle, dispelling the common Wall Street perception that companies had to be profitable for three or more years before considering going public. Nasdaq recognized that while most companies wanted access to capital, investors also wanted access to these companies at their earlier stages of growth. Today, with 24 markets, three clearing houses, and five central securities depositories, spanning six continents, Nasdaq owns and operates the global infrastructure of our public markets.

In the same vein, since the passage of the JOBS Act in 2012, Nasdaq also added an important offering with the creation of The NASDAQ Private Market, focusing on private companies. Launched in 2014, NASDAQ Private Market was established to meet the unique needs and challenges of today's private companies. In October of last year, NASDAQ Private Market also acquired SecondMarket, a recognized innovator in facilitating liquidity for private company

securities. The combination of the services and industry expertise of SecondMarket with the NASDAQ Private Market team has established NASDAQ Private Market as a leading provider for innovative and efficient solutions to deliver secondary liquidity and equity management services for private companies.

As companies remain private longer, and sometimes permanently, they are using NASDAQ Private Market's services to facilitate shareholder liquidity and manage their equity in a controlled manner and on their terms. In particular, as companies extend their pre-IPO lives, they face increasing pressure to provide liquidity to employees and early investors. NASDAQ Private Market helps companies attract, retain, and reward employees by enabling them to conduct company-controlled, periodic liquidity programs and thus compete more effectively for employee talent with their public peers and competitors. Thus, Nasdaq is uniquely qualified to speak about both the public and the private markets.

## The JOBS ACT IS A SUCCESS STORY FOR PUBLIC POLICY

Four years have now passed and the evidence is clear that the JOBS Act has successfully helped hundreds of companies access capital and go public while also generating new dynamism in the private company sector. Our records indicate that 785 companies have gone public as Emerging Growth Companies (EGCs) under the JOBS Act raising over $103 billion in capital to expand, hire employees and compete on the global stage. In the four years prior to the JOBS Act (2008 – March 2012) there were just 500 IPOs in the U.S. In the four years since the JOBS Act (April 2012 – 2016 YTD) there have been 865 IPOs with 86% being EGCs. Approximately 1,000 registration statements have been filed with the SEC confidentially and to our knowledge every EGC that has gone public since the designation was created by the JOBS Act has used this ability. In April of 2015, the Wall Street Journal reported at the three year mark that they estimated the JOBS Act had added about 82,000 jobs.[1] The JOBS Act also proves that the marketplace works. There are provisions of the JOBS Act that are scarcely used because they run contrary to investor expectations. Other provisions are a resounding success, embraced by investors and companies. From our vantage point, the JOBS Act has not resulted in any trend that diminished investor protection, which has been and will continue to be a focus for us as we operate our Exchange. As SEC Chair Mary Jo White said recently in a speech at Stanford:

> "For the new and evolving markets to be successful, all investors need confidence that they are being treated fairly and that the full range of risks are transparently disclosed. We must work together to ensure that this confidence is well-placed, so that investors feel comfortable providing the capital essential for business development and growth. Only then can we

[1] The Wall Street Journal, http://www.wsj.com/articles/pinning-new-jobs-to-2012-ipo-legislation-proves-a-challenge-1428011862.

> reap the full rewards of the creativity, genius, and innovation for which this Valley is famous."[2]

We couldn't agree more. That is why we originally supported the JOBS Act when it was making its way through Congress and testified in favor of its main provisions both in this Subcommittee and in the U.S. Senate. We joined with a broad coalition that was led by the National Venture Capital Association, Biotechnology Industry Organization (BIO), TechNet, the Chamber of Commerce and so many others.

We also think there are other incremental steps that the Subcommittee should consider that would build on the success of the JOBS Act and remove disincentives for companies considering going public. NASDAQ Private Market recently surveyed 126 representatives of private companies attending the South by Southwest Interactive Festival in Austin, Texas, an incubator of cutting-edge technologies and digital creativity that brings together job creators and innovators from around the country. Of this group, 32 percent were founders or chief executives. We asked them about their outlook on a number of issues affecting entrepreneurs and almost half said they do not intend to go public. As we have seen, 2016 is starting as one of the slowest initial public offering (IPO) years since 2008. So it is timely that we are here today to focus on how public policy can further enhance the ability of entrepreneurs to raise capital and go public. Going public is still our focus and the best public policy outcome in our opinion. As indicated in the IPO Task Force's Report, which was a valuable resource for the development of the JOBS Act, the post- IPO job growth for a company is an amazing 92%.[3]

Without question, we at Nasdaq believe the most successful provision of the JOBS Act has been the ability of companies to file their registration statements on a confidential basis with the SEC. This has been most evident in the IPOs that have increased markedly from the biotech and life sciences sectors over the past four years since the JOBS Act was enacted. Many quality companies have been able to work with the SEC to finalize their registration without disclosure of their competitive, proprietary information and companies can better manage their decision to go public as they evaluate market conditions. And, while the JOBS Act mandated that companies wait at least 21 days after they publicly disclose their registration statements before they can begin their outreach to investors (and that period has been shortened to 15 days by Rep. Fincher's recent legislation), a Latham and Watkins study in 2013 suggested companies were actually waiting about 49 days before they began their road shows.[4]

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[2] SEC Chairman Mary Jo White, March 31, 2016, Keynote Address at the Rock Center for Corporate Governance, "Protecting Investors in an Innovative Financial Marketplace," available at: https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html.

[3] "Rebuilding the IPO On-Ramp," available at: https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf.

[4] Latham and Watkins, The Jobs Act After One Year, available at: www.lw.com/thoughtLeadership/jobs-act-after-one-year-review-of-new-ipo-playbook.

Keeping with the view that confidential filing has improved the IPO process without decreasing investor protection, *we believe Congress should go one step further and allow companies of all sizes to file on a confidential basis and should allow other types of registration statements, besides IPOs, to be initially submitted on a confidential basis.*

We also believe that some enhanced disclosure of short positions that matches the disclosure requirements for long positions is warranted. Currently, certain investors who accumulate long positions are required to publicly disclose their holdings. But there are no corresponding obligations for short sellers to do so. This is so even though the policies that underlie the disclosure requirements applicable to long investors – transparency, fairness and efficiency – apply in equal measure to investors with short positions. From a company perspective, this lack of transparency has a real impact because it deprives the company of insights into trading activity and limits the company's ability to engage with investors and understand their motivation. And we hear some companies complain that this information asymmetry may give rise to possibly abusive trading behavior that could make long term investors wary about providing the capital necessary to fund research and development.

The lack of transparency has other negative consequences too. It limits investors' ability to make informed investment decisions and prevents the market from operating in a fully efficient and fair manner.

To be sure, we are not suggesting limitations or restrictions on short sale activities. There is ample evidence that legitimate short selling enhances liquidity, contributes to efficient price formation and facilitates risk management. But there are no policy or practical reasons to maintain the current disparity in disclosure of long and short positions. Congress recognized this in 2010, in the Dodd-Frank Act, and late last year we petitioned the SEC to act on this.

We also remain concerned that proxy advisory firms do not always balance their standard-setting in a fair and transparent manner. It was in this spirit that we petitioned the SEC to improve these firms' disclosure of how they make recommendations and any relationships they have that may give rise to conflicts of interest.[5] We were pleased that the SEC issued guidance regarding the use by investment advisers of proxy advisory firms but it is apparent that more work needs to be done. Last year Nasdaq partnered with the U.S. Chamber of Commerce Center for Capital Markets Competitiveness on a survey regarding the public company experience in the 2015 proxy season. Over 155 companies responded, and based on those responses it is apparent that companies continue to have difficulty providing input to the advisory firms or even having errors corrected. And almost half of the companies that took steps to verify the nature of proxy advisory firm conflicts of interest reported finding significant conflicts.

[5] Request for Rulemaking to Revise the Commission's Guidance to Proxy Advisory Firms, available at: http://www.sec.gov/rules/petitions/2013/petn4-666.pdf.

Similarly, public companies, especially smaller ones, face increasing auditing costs. While companies do not object to costs that provide a concomitant investor benefit, the companies claim that some of the costs are the result of nonsensical, one-size-fits all application of guidance given in different situations. These companies feel stuck because the auditors claim these additional costs are due to requirements imposed on the auditor by the PCAOB, but the companies have no avenue to discuss the requirements with the PCAOB. For these reasons, we think the PCAOB should be required to establish an "ombudsman" office to consider these complaints and address them, as appropriate, with the auditors and PCAOB staff, serving as a resource for companies who feel their internal controls are being over-audited.

**THIS SUBCOMMITTEE'S CURRENT AGENDA**

I want to commend this Subcommittee for its continued work to help capital formation with the passage late last year of 15 surgically precise bills aimed at further refining regulations to help companies access capital more efficiently. As you know, Nasdaq was an enthusiastic supporter of the RAISE act, authored by Rep. Patrick McHenry, which received bipartisan support from this Committee and was included in the package that became law in late 2015 through its rather unique addition to the Highway bill. Thank you for your continued effective actions in this area.

I also want to thank you Chairman Garrett for your leadership and willingness to offer an important bill, H.R. 4638, the Main Street Growth Act, to foster the creation of Venture Exchanges. We appreciate your efforts to move the discussion forward on how to best design the rules of the road for venture exchanges and the companies they would serve. We believe that a regime that balances the need to have special, lighter-touch standards for smaller companies, and also partners with regulators and exchange surveillance professionals to ensure appropriate investor protections, can one day be a valuable resource in the U.S. capital formation arsenal. We are committed to working with you, your staff and other stakeholders to find that balance.

The Subcommittee has asked that Nasdaq comment on several new legislative proposals also aimed at fostering capital formation.

With respect to the Chairman's bill, H.R. 4852, the Private Placement Improvement Act, the JOBS Act directed the SEC to complete a rulemaking that would lift the ban on issuers being allowed to solicit private offerings of stock under Rule 506 of Regulation D. Prior to the JOBS Act, companies were not allowed to advertise their shares to the general public, and therefore relied on brokers or existing relationships in order to complete an offering. The SEC completed its Title II mandated rulemaking in July 2013, providing private companies with the ability to advertise their shares so long as the ultimate purchasers were "accredited investors". However, the SEC proposed two new regulations that could hamper Reg. D issuers and the ultimate success of the JOBS Act improvements – Reg D issuers would be required to file their Form D 15 days prior to completing an offering (as opposed to the current requirement of within 15 days

after an offering) and companies using general solicitation would have to submit their advertising materials to the SEC prior to their offering. H.R. 4852 states that the SEC may not require issuers to file a Form D prior to each new offering of securities, and issuers shall not be required to submit their advertising materials to the SEC prior to completing an offering.

Your proposed legislation would not remove the SEC's existing requirement that issuers take reasonable steps to verify that investors in Rule 506 offerings are accredited, would not reduce the SEC's existing rules requiring disclosures to investors, and would not limit the SEC's powerful existing authority to prevent and punish fraud and other misconduct under the Federal securities laws. Accordingly, Nasdaq supports this effort to help private companies raise money within an already functioning regulatory framework that protects investors.

We also congratulate the Subcommittee for its creative thinking about other ways to allow entrepreneurs and their companies to raise needed capital, while maintaining appropriate investor protections. We look forward to working with you on these initiatives, including:

- Rep. Tom Emmer's H.R. 4850, the Micro Offering Safe Harbor Act which would create a safe harbor for small securities offerings where there is substantive pre-existing relationship between the investor and issuer, where the issuer has less than 35 purchasers utilizing the exemption or where the total amount raised is less than $500,000;
- Rep. McHenry's H.R. 4854, the Supporting American Innovators Act, aimed at helping venture capital funds by moving the current cap of 100 investors up to 500 investors, and
- Rep. McHenry's H.R. 4855, Fix Crowd Funding Act, which seeks to improve the ecosystem for crowd funding to develop into a workable solution for early startups seeking capital and investor protections that will be so critical in this area of investing.

Thank you again for your invitation to testify on the critical contributions to capital formation that resulted from the JOBS Act and its passage into law four years ago. Nasdaq was a proud supporter of the JOBS Act and believes that its success is evident in the results. We appreciate this Committee's continuing commitment to the start-up agenda. I am happy to answer your questions.