

Required fields are shown with yellow backgrounds and asterisks.

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| Page 1 of * 85 | SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4 | | File No.* SR - 2018 - * 008 | Amendment No. (req. for Amendments *) |
| Filing by The Nasdaq Stock Market LLC Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 | | | | |
| Initial * <input checked="" type="checkbox"/> | Amendment * <input type="checkbox"/> | Withdrawal <input type="checkbox"/> | Section 19(b)(2) * <input checked="" type="checkbox"/> | Section 19(b)(3)(A) * <input type="checkbox"/> |
| | | | Section 19(b)(3)(B) * <input type="checkbox"/> | |
| Pilot <input type="checkbox"/> | Extension of Time Period for Commission Action * <input type="checkbox"/> | Date Expires * <input type="text"/> | Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6) | |
| Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 | | | Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 | |
| Section 806(e)(1) * <input type="checkbox"/> | Section 806(e)(2) * <input type="checkbox"/> | | Section 3C(b)(2) * <input type="checkbox"/> | |
| Exhibit 2 Sent As Paper Document <input type="checkbox"/> | Exhibit 3 Sent As Paper Document <input type="checkbox"/> | | | |
| Description | | | | |
| Provide a brief description of the action (limit 250 characters, required when Initial is checked *). | | | | |
| <div style="border: 1px solid black; padding: 5px;"> Proposal to modify the listing requirements contained in Listing Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. </div> | | | | |
| Contact Information | | | | |
| Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action. | | | | |
| First Name * | Nikolai | Last Name * | Utochkin | |
| Title * | Counsel, Listing and Governance | | | |
| E-mail * | Nikolai.Utochkin@nasdaq.com | | | |
| Telephone * | (301) 978-8029 | Fax | <input type="text"/> | |
| Signature | | | | |
| Pursuant to the requirements of the Securities Exchange Act of 1934, | | | | |
| has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized. | | | | |
| (Title *) | | | | |
| Date | 01/30/2018 | Executive Vice President and General Counsel | | |
| By | Edward S. Knight | <input type="text"/> | | |
| | | edward.knight@nasdaq.com | | |
| NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed. | | | | |

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

Form 19b-4 Information *

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to modify the listing requirements contained in Listing Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The Exchange’s 2017 comment solicitation about the definition of market value for purposes of shareholder approval rules is attached as Exhibit 2a. Copies of the comments received to the Exchange’s comment solicitation are attached as Exhibit 2b. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on November 8, 2017. No other action is necessary for the filing of the rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Questions and comments on the proposed rule change may be directed to:

Nikolai Utochkin
Counsel – Listing and Governance
Nasdaq, Inc.
(301) 978-8029

or

Arnold Golub
Vice President and Deputy General Counsel
Nasdaq, Inc.
(301) 978-8075

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

Nasdaq shareholder approval requirements were adopted in 1990.³ Among other circumstances, the rule requires shareholder approval for security issuances for less than the greater of book or market value (other than in the context of a public offering) if either (a) the issuance equals 20% of the outstanding stock or voting power or (b) if a smaller issuance coupled with sales by the officers, directors or substantial security holders meets the 20% threshold.⁴ This provision has remained substantively unchanged for the last 28 years. On the other hand, the capital markets and securities laws, as well as the nature and type of share issuances, have evolved significantly in that time.

In 2016, Nasdaq requested comments from, and held discussions with, market participants regarding whether, given these changes, Nasdaq could update its shareholder approval rules to enhance the ability for capital formation without sacrificing investor protections. Based on the feedback received, in June 2017, Nasdaq launched a formal

³ Securities Exchange Act Release No. 28232 (July 19, 1990), 55 FR 30346 (July 25, 1990) (adopting the predecessor to Listing Rule 5635(d)).

⁴ Id.

comment solicitation on a specific proposal to amend Listing Rule 5635(d) (the “2017 Solicitation”). Based on Nasdaq’s experience and the comments received, Nasdaq proposes to amend Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

I. Definition of Market Value

Listing Rule 5635(d) requires a Nasdaq-listed company to obtain shareholder approval when issuing common stock or securities convertible into common stock, which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equal to 20% or more of the shares or 20% or more of the voting power outstanding at a price less than the greater of the book value or market value of that stock. Listing Rule 5005 defines “market value” as the closing bid price.

Market participants often express to Nasdaq their concern that bid price may not be transparent to companies and investors and does not always reflect an actual price at which a security has traded. Generally speaking, the price of an executed trade is viewed as a more reliable indicator of value than a bid quotation; and the more shares executed, the more reliable the price is considered. Further, it was noted by commenters in the 2017 Solicitation that in structuring transactions, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price.

Accordingly, Nasdaq proposes to modify the measure of market value for purposes of Listing Rule 5635(d) from the closing bid price to the lower of: (i) the closing price (as reflected on Nasdaq.com); or (ii) the average closing price of the

common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

A. Closing Price

The closing price reported on Nasdaq.com is the Nasdaq Official Closing Price, which is derived from the closing auction on Nasdaq and reflects actual sale prices at one of the most liquid times of the day. The Nasdaq closing auction is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction promotes accurate closing prices by offering specialized orders available only during the closing auction and integrating those orders with regular orders submitted during the trading day that are still available at the close. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price and size of the closing auction. Nasdaq believes its closing auction has proven to be a valuable pricing tool for issuers, traders, and investors alike; and Nasdaq continually works to enhance the experience for those that rely upon it. For these reasons, Nasdaq believes that the closing price reported on Nasdaq.com is a better reflection of the market price of a security than the closing bid price. This proposal is consistent with the approach of other exchanges.⁵

In addition, because prices are displayed from numerous data sources on different web sites, to provide transparency within the rule to the appropriate price, and assure that companies and investors use the Nasdaq Official Closing Price when pricing transactions,

⁵ See Section 312.04(i) of the NYSE Listed Company Manual (“Market value” of the issuer’s common stock means the official closing price on the [NYSE] as reported to the Consolidated Tape immediately preceding the entering into of a binding agreement to issue the securities.).

Nasdaq proposes to codify within the rule that Nasdaq.com is the appropriate source of the closing price information.⁶

B. Five-day Average Price

Several commenters supported the use of a five-day average in their responses to the 2017 Solicitation. For example, one commenter suggested that “[i]nvestors view a 5 day average as a more fair method of determining ‘market value’ (in a non-technical sense)” and continued that “[u]sing the closing bid on the closing date is more prone to unanticipated and inequitable results based on market fluctuations.”⁷ Another commenter stated that they believe that a “five-day trailing average of the closing price is more representative of actual market value than the closing bid price.”⁸

While investors and companies sometimes prefer to use an average when pricing transactions, Nasdaq notes that there are potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five-day average price will always be above current market price, thus making it difficult for companies to close transactions because investors could buy shares in the market at a price below the five-day average price. Conversely, in a rising market, the five-day average price will appear to be a discount to

⁶ The closing price is published on Nasdaq.com with a 15 minute delay and is available without registration or fee and Nasdaq does not currently intend to charge a fee for access to this data or otherwise restrict availability and, in the event that Nasdaq subsequently determines to do so, it will file a proposed rule change under Section 19(b) of the Act with respect to such change if necessary to address the impact of compliance with this rule.

⁷ See Letter from Michael Grundei, Wiggin and Dana LLP, dated June 16, 2017 (Grundei Letter).

⁸ Letter from Linda Zwobota, CPA, CFO, Lightbridge Corporation, dated June 27, 2017 (Lightbridge Letter).

the closing price. In addition, if material news is announced during the five-day period, the average could be a worse reflection of the market value than the closing price after the news is disclosed. Nonetheless, Nasdaq believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under Nasdaq's rules, such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of price movement during the period to the new investor, the company and its current shareholders, each of which has potential risk and benefit depending on how the price ultimately changes during that period.

Other commenters in the 2017 Solicitation believed that the five-day average price may be inappropriate as a measure of market value of listed securities in certain circumstances and suggested that it therefore should only be used as an optional alternative to closing price. In that regard, one commenter, while agreeing that a five-day trailing average is a useful alternative measure of market price, pointed out that:

[T]he Rule 144A convertible bond market and the related call spread overlay market (whether entered into in connection with a Rule 144A or registered convertible bond) currently benefit from certain synergies that arise from the use of the one-day closing price in light of the complex regulatory, tax and accounting analysis of these transactions and the related hedging activities of market participants.⁹

⁹ Letter from Greg Rogers, Latham and Watkins LLP, dated July 27, 2017 (Latham Letter).

Other commenters raised similar concerns.¹⁰ Nasdaq believes these concerns are justified and as such, Nasdaq proposes to amend Listing Rule 5635(d) to define market value as the lower of the closing price at the time of the transaction or the five-day average of the closing price as the measure of market value for purposes of the shareholder approval rules. This means that the issuance would not require an approval by company's shareholders, so long as it is at a price that is greater than the lower of those measures.¹¹ To improve the readability of the rule, Nasdaq proposes to define this new concept as the "Minimum Price" and eliminate references to book value and market value from Listing Rule 5635(d).

II. Book Value

Nasdaq proposes to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, market participants have indicated, and Nasdaq agrees, that book value is not an appropriate measure of whether a transaction is dilutive or should otherwise require shareholder approval. Nasdaq has also observed that when the market price is below the book value, the rule becomes a trap for the unwary. In that regard, the

¹⁰ Letter from Michael Adelstein, Kelley Drye & Warren LLP, dated July 28, 2017 (Kelley Drey Letter); Letter from Michael Nordtvedt, Wilson Sonsini Goodrich & Rosati, P.C., dated July 31, 2017 (Wilson Sonsini Letter); Joseph A. Smith, Ellenoff Grossman & Schole LLP, dated July 31, 2017 (Ellenoff Grossman Letter).

¹¹ Issuances below Market Value to officers, directors, employees, or consultants are, and will continue to be, subject to Listing Rule 5635(c). See Nasdaq's FAQ #275 at https://listingcenter.nasdaq.com/Material_Search.aspx?materials=275&mcd=LQ&criteria=2.

existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. In these situations companies are often frustrated when they learn that they cannot quickly raise capital on terms that are favorable to the market price. Based on conversations with investors, Nasdaq also believe that book value is not considered by shareholders to be a material factor when they are asked to vote to approve a proposed transaction. Most commenters in the 2017 Solicitation supported the elimination of the book value requirement from the shareholder approval rules.¹² The only support for retaining the book value limitation, came from one commenter who appeared to believe that issuances below book value would result in negative investor perception of the issuer and that book value was an alternative measure not subject to market manipulation.¹³ The commenter did not elaborate or provide any evidence of price manipulation surrounding the pricing of transactions (which would be investigated by Nasdaq Regulation and FINRA) and Nasdaq does not believe this hypothetical and unsubstantiated concern justifies retaining the book value requirement in light of the other concerns raised about its arbitrary and disproportionate impact on certain companies and the lack of importance placed on this requirement by investors.

¹² Comments supporting the change could be summarized through words of one commenter who suggested that “investors don’t view book value as the equivalent (or even a reasonable substitute for) market value.” Grundei Letter.

¹³ Letter from Heather Koziara, Chief Risk Officer, Conifer Holdings Inc., dated June 16, 2017 (Conifer Letter).

III. Other Changes

To improve the readability of Listing Rule 5635(d) Nasdaq proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in IM-5635-3, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 5635(d)(1) and (d)(2) and makes no substantive change but for the change to the pricing tests, as described above, such that shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Listing Rule 5635(d).

Nasdaq also proposes to amend the title of Listing Rule 5635(d) and the preamble to Listing Rule 5635 to replace references to “private placements” to “transactions other than public offerings” to conform the language in the title of Listing Rule 5635(d) and the preamble to the language in the rule text and that of IM-5635-3, which provides the definition of a public offering.

Finally, Nasdaq proposes to amend Listing Rules IM-5635-3 and IM-5635-4, which describe how Nasdaq applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term 20% Issuance.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Nasdaq believes that the approach taken in the proposal strikes an appropriate balance between investor protection and impediments upon issuers.

Definition of Market Value

The proposed rule change will modify the minimum price at which a 20% Issuance would not need shareholder approval from the closing bid price to the lower of: (i) the closing price (as reflected on Nasdaq.com); or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

Nasdaq believes that allowing issuers to price transactions at the closing price (as reflected on Nasdaq.com) rather than closing consolidated bid price will perfect the mechanism of a free and open market and protect investors and the public interest because the closing price will represent an actual sale, which generally occurs at the same or greater price than the bid price.¹⁶ Further, the closing price displayed on Nasdaq.com is the

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ Sales typically take place between the bid and ask prices.

Nasdaq Official Closing Price, which is derived from the closing auction on Nasdaq and reflects actual sale prices at one of the most liquid times of the trading day.

Allowing share issuances to be priced at the five-day average of the closing price will further align Nasdaq's requirements with how many transactions are structured, such as transactions where Listing Rule 5635(d) is not implicated because the issuance is for less than 20% of the common stock and the parties rely on the five-day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five-day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Maintaining the allowable average at just a five-day period also protects investors by ensuring the period is not too long, such that it would result in the price being distorted by ordinary past market movements and other outdated events. In a market that rises each day of the period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. Further, as some commenters indicated, aside from Nasdaq requirements, when selecting the appropriate price for a transaction company officers and directors also have to consider their state law structural safeguards, including fiduciary responsibilities, intended to protect shareholder interests.¹⁷

In addition, because prices could be displayed from numerous data sources on different web sites, to provide certainty about the appropriate price, Nasdaq proposes to

¹⁷ See Wilson Sonsini Letter.

codify within the rule that Nasdaq.com is the appropriate source of the closing price information, which is available with only 15 minute delay and without registration or fee. Because the closing bid price is not included in many public data feeds, this requirement will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because it will improve the transparency of the rule and provide additional certainty to all market participants about the appropriate price to be used in determining if shareholder approval is required.

Finally, Nasdaq believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. This flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of the Listing Rule 5635(d).

Book Value

Nasdaq also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Listing Rule 5635(d). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as an inappropriate measure of the current value of a stock. Nasdaq has also observed that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book

value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. Because book value is not an appropriate measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing investor protections of Listing Rule 5635(d).

Other Changes

To improve the readability of Listing Rule 5635(d) Nasdaq proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in IM-5635-3, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 5635(d)(1) and (d)(2) but makes no substantive change. Under the proposed rule, but for the separate change to the pricing test, shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Listing Rule 5635(d). Nasdaq believes that the improved readability of the rule will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

Nasdaq also believes that amending the title of Listing Rule 5635(d) and the preamble to Listing Rule 5635 to replace references to “private placements” to “transactions other than public offerings” to conform the language in the title of Listing Rule 5635(d) and the preamble to the language in the rule text and that of IM-5635-3,

which provides the definition of a public offering, will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

Finally, Nasdaq believes that amending Listing Rules IM-5635-3 and IM-5635-4, which describe how Nasdaq applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term 20% Issuance will perfect the mechanism of a free and open market by eliminating confusion caused by references to a measure that is no longer applicable and by making the rule easier to understand and apply.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

In the 2017 Solicitation, Nasdaq solicited comments on a specific proposal to amend Listing Rule 5635(d) to:

- 1) change the definition of market value for purposes of the shareholder approval rules from closing bid price to a five-day trailing average;

- 2) require that any issuance of 20% or more be approved by the independent directors where shareholder approval is not required; and
- 3) eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

In an effort to seek the broadest response, Nasdaq widely distributed the 2017 Solicitation to investors, issuers, legal professionals and other interested parties. In addition, the proposal was posted on the Nasdaq Listing Center™.¹⁸ In total, 12 comments were received. A copy of the 2017 Solicitation is attached to the rule filing as Exhibit 2a. Copies of the comments received are attached to the rule filing as Exhibit 2b.

With regard to the proposal to change the definition of market value for purposes of the shareholder approval rules from closing bid price to a five-day trailing average, of the 12 commenters, seven supported the change,¹⁹ one expressed no opinion,²⁰ while the remaining four suggested the five-day average price should be used as an alternative to

¹⁸

<https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf>.

¹⁹ See Letter from Dickerson Wright, Chairman and CEO of NV5, dated June 15, 2017 (NV5 Letter); Grundei Letter; Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, dated June 26, 2017 (CII Letter); Lightbridge Letter; Letter from Penny Somer-Greif, et al., Chair, the Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, dated July 31, 2017 (Md Bar Letter); Letter from Harvey Kesner, Sichenzia Ross Ference Kesner LLP, dated July 31, 2017 (Sichenzia Letter); Letter from Anne Sheehan, Director of Corporate Governance, California State Teachers' Retirement System, dated August 1, 2017 (CALSTRS letter).

²⁰ See Conifer Letter (addressing only the proposal to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value).

the closing price rather than being an exclusive measure of value of listed securities.²¹

Nasdaq determined to adopt this suggestion and now proposes to amend Listing Rule 5635(d) to allow companies the flexibility of using either the closing price at the time of the transaction or the five-day average of the closing price when pricing 20% Issuances. Transactions could be structured to use either price knowing that neither the lower price nor the higher one would result in the transaction needing shareholder approval under the proposed rule because each will be at or above the new measure of market value for purposes of the shareholder approval rules, which is now defined as Minimum Price.

Two commenters suggested the use of the volume weighted average price (VWAP) instead of the five-day average price because VWAP includes a broader array of trades, such as trades outside the Nasdaq closing auction that forms the closing price, and because VWAP gives greater weight to the price at which a greater number of shares is traded.²² However, the commenters acknowledged that VWAP methodology generally requires a paid subscription to providers of financial information, such as Bloomberg, to obtain the VWAP.²³ Given the complexity of the VWAP methodology and the potential resulting lack of transparency among retail investors who do not have access to financial data that includes VWAP, at this time, Nasdaq is proposing to change the definition of market value for purposes of the shareholder approval, as described above, by incorporating the concept of the five-day average closing price, rather than VWAP, as the alternative to the closing price at the time of the transaction.

²¹ See Latham Letter, Kelley Drey Letter, Wilson Sonsini Letter, and Ellenoff Grossman Letter.

²² See Kelley Drey Letter and Ellenoff Grossman Letter.

²³ Id.

Two commenters suggested that the Nasdaq should amend its rules such that shareholder approval is required for any issuance a price that is below market price and for any 20% Issuance.²⁴ Nasdaq is concerned that under their proposal even de minimis issuances below market price and 20% Issuances at substantial premium to market price would require shareholder approval. As such, given the expense and delay associated with obtaining shareholder approval, Nasdaq does not propose amending the rule as these commenters requested at this time.

In the 2017 Solicitation, Nasdaq noted some potential negative consequences to using a five-day average as the measure of whether shareholder approval is required and suggested a potential new safeguard that would have required that any transaction of more than 20% of the company's shares outstanding also be approved by either a committee of independent directors (as defined in Listing Rule 5605(a)(2)) or a majority of the independent directors on the board, unless it is approved by the company's shareholders (the "Independent Director Approval Requirement").

The Independent Director Approval Requirement was not embraced by the commenters, many of whom doubted the utility of the Independent Director Approval Requirement.²⁵ Some commenters saw the Independent Director Approval Requirement

²⁴ See CALSTERS Letter and CII Letter.

²⁵ One commenter supported the proposed Independent Director Approval Requirement. See Md Bar Letter ("[W]e believe the [Independent Director Approval Requirement] is reasonable, as it adds an additional protection for investors without unduly burdening Nasdaq-listed companies seeking to raise capital."). Some commenters supported this proposal without discussing the specific burdens and benefit of this proposal. See Lightbridge Letter; Latham Letter. Some commenters did not address this issue. See Kelley Drye Letter, Sichenzia Letter, and Conifer Letter. The remaining six commenters opposed this proposal. See Footnotes 26 and 28 below.

as a new burden on listed companies that largely duplicates the existing state corporate law requirements and thus outweighs any offsetting benefits to shareholders.²⁶ In that regard, commenters noted state law protections, such as the fiduciary duties of care and loyalty imposed on management and directors to act in the best interest of the company and its shareholders.²⁷ Thus, given the cool reception received from investors, who did not believe the addition of this listing requirement would meaningfully add to investor protection,²⁸ and the belief of commenters that the Independent Director Approval Requirement is “solving the problem that does not exist,”²⁹ Nasdaq is not proposing to adopt the Independent Director Approval Requirement at this time.

With regard to the proposal to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value, of the 12

²⁶ See Wilson Sonsini Letter (“Rather than ensuring adequate consideration of shareholder interests, we respectfully submit that the [Independent Director Approval Requirement] would be duplicative of, and already more effectively addressed by, the corporate law requirements of an issuer’s jurisdiction of incorporation in the vast majority of cases.”). See also, Grundeir Letter (“...there are already state law requirements regarding such approvals.”).

²⁷ See Wilson Sonsini Letter.

²⁸ See CALSTERS Letter (“[W]e genuinely believe and appreciate that a majority of independent directors should always screen and vote on any stock issuances...”). Yet, CALSTERS Letter suggested removal the Independent Director Approval Requirement for the proposed rule. See also, CII Letter (suggesting removal the Independent Director Approval Requirement for the proposed rule and the imposition of shareholder approval requirements for any issuance a price that is below market price and any 20% Issuances). See also, Ellenoff Grossman Letter (“[Independent Director Approval Requirement] may not prove helpful to outside shareholders, in practice”). See also, NV5 Letter.

²⁹ Grundeir Letter.

commenters, only one specifically opposed the proposed rule change.³⁰ The commenter that opposed the proposed rule change seemed to have been concerned with potentially negative market perception of issuances below book value and with potential stock price manipulations by suggesting that the "... proposed rule change compromises Nasdaq's commitment to protect investors... by allowing companies the potential power to materially affect the stock price without prior approval of current stockholders."³¹ The commenter did not elaborate and did not provide any evidence of price manipulation (which would be investigated by Nasdaq Regulation and FINRA) and Nasdaq does not believe this single hypothetical and unsubstantiated concern justifies retaining the book value requirement in light of the other concerns raised about its arbitrary and disproportionate impact on certain companies and the lack of importance placed on this requirement by investors.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

³⁰ One commenter indicated that he disagreed with the proposed change, but did not address the issue directly. See NV5 Letter.

³¹ Conifer Letter.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act
Not applicable.
10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act
Not applicable.
11. Exhibits
 1. Notice of Proposed Rule Change for publication in the Federal Register.
 2. A copy of the 2017 Solicitation is attached to the rule filing as Exhibit 2a.
Copies of the comments received are attached to the rule filing as Exhibit 2b.
 5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. _____ ; File No. SR-NASDAQ-2018-008)

February __, 2018

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify the Listing Requirements Contained in Listing Rule 5635(d) to Change the Definition of Market Value for Purposes of the Shareholder Approval Rules and Eliminate the Requirement for Shareholder Approval of Issuances at a Price Less than Book Value but Greater than Market Value

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on January 30, 2018, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the listing requirements contained in Listing Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq shareholder approval requirements were adopted in 1990.³ Among other circumstances, the rule requires shareholder approval for security issuances for less than the greater of book or market value (other than in the context of a public offering) if either (a) the issuance equals 20% of the outstanding stock or voting power or (b) if a smaller issuance coupled with sales by the officers, directors or substantial security holders meets the 20% threshold.⁴ This provision has remained substantively unchanged for the last 28 years. On the other hand, the capital markets and securities laws, as well as the nature and type of share issuances, have evolved significantly in that time.

³ Securities Exchange Act Release No. 28232 (July 19, 1990), 55 FR 30346 (July 25, 1990) (adopting the predecessor to Listing Rule 5635(d)).

⁴ Id.

In 2016, Nasdaq requested comments from, and held discussions with, market participants regarding whether, given these changes, Nasdaq could update its shareholder approval rules to enhance the ability for capital formation without sacrificing investor protections. Based on the feedback received, in June 2017, Nasdaq launched a formal comment solicitation on a specific proposal to amend Listing Rule 5635(d) (the “2017 Solicitation”). Based on Nasdaq’s experience and the comments received, Nasdaq proposes to amend Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

I. Definition of Market Value

Listing Rule 5635(d) requires a Nasdaq-listed company to obtain shareholder approval when issuing common stock or securities convertible into common stock, which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equal to 20% or more of the shares or 20% or more of the voting power outstanding at a price less than the greater of the book value or market value of that stock. Listing Rule 5005 defines “market value” as the closing bid price.

Market participants often express to Nasdaq their concern that bid price may not be transparent to companies and investors and does not always reflect an actual price at which a security has traded. Generally speaking, the price of an executed trade is viewed as a more reliable indicator of value than a bid quotation; and the more shares executed, the more reliable the price is considered. Further, it was noted by commenters in the 2017 Solicitation that in structuring transactions, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price.

Accordingly, Nasdaq proposes to modify the measure of market value for purposes of Listing Rule 5635(d) from the closing bid price to the lower of: (i) the closing price (as reflected on Nasdaq.com); or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

A. Closing Price

The closing price reported on Nasdaq.com is the Nasdaq Official Closing Price, which is derived from the closing auction on Nasdaq and reflects actual sale prices at one of the most liquid times of the day. The Nasdaq closing auction is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction promotes accurate closing prices by offering specialized orders available only during the closing auction and integrating those orders with regular orders submitted during the trading day that are still available at the close. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price and size of the closing auction. Nasdaq believes its closing auction has proven to be a valuable pricing tool for issuers, traders, and investors alike; and Nasdaq continually works to enhance the experience for those that rely upon it. For these reasons, Nasdaq believes that the closing price reported on Nasdaq.com is a better reflection of the market price of a security than the closing bid price. This proposal is consistent with the approach of other exchanges.⁵

⁵ See Section 312.04(i) of the NYSE Listed Company Manual (“Market value” of the issuer’s common stock means the official closing price on the [NYSE] as reported to the Consolidated Tape immediately preceding the entering into of a binding agreement to issue the securities.).

In addition, because prices are displayed from numerous data sources on different web sites, to provide transparency within the rule to the appropriate price, and assure that companies and investors use the Nasdaq Official Closing Price when pricing transactions, Nasdaq proposes to codify within the rule that Nasdaq.com is the appropriate source of the closing price information.⁶

B. Five-day Average Price

Several commenters supported the use of a five-day average in their responses to the 2017 Solicitation. For example, one commenter suggested that “[i]nvestors view a 5 day average as a more fair method of determining ‘market value’ (in a non-technical sense)” and continued that “[u]sing the closing bid on the closing date is more prone to unanticipated and inequitable results based on market fluctuations.”⁷ Another commenter stated that they believe that a “five-day trailing average of the closing price is more representative of actual market value than the closing bid price.”⁸

While investors and companies sometimes prefer to use an average when pricing transactions, Nasdaq notes that there are potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five-day average price will always be above current

⁶ The closing price is published on Nasdaq.com with a 15 minute delay and is available without registration or fee and Nasdaq does not currently intend to charge a fee for access to this data or otherwise restrict availability and, in the event that Nasdaq subsequently determines to do so, it will file a proposed rule change under Section 19(b) of the Act with respect to such change if necessary to address the impact of compliance with this rule.

⁷ See Letter from Michael Grundei, Wiggin and Dana LLP, dated June 16, 2017 (Grundei Letter).

⁸ Letter from Linda Zwobota, CPA, CFO, Lightbridge Corporation, dated June 27, 2017 (Lightbridge Letter).

market price, thus making it difficult for companies to close transactions because investors could buy shares in the market at a price below the five-day average price. Conversely, in a rising market, the five-day average price will appear to be a discount to the closing price. In addition, if material news is announced during the five-day period, the average could be a worse reflection of the market value than the closing price after the news is disclosed. Nonetheless, Nasdaq believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under Nasdaq's rules, such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of price movement during the period to the new investor, the company and its current shareholders, each of which has potential risk and benefit depending on how the price ultimately changes during that period.

Other commenters in the 2017 Solicitation believed that the five-day average price may be inappropriate as a measure of market value of listed securities in certain circumstances and suggested that it therefore should only be used as an optional alternative to closing price. In that regard, one commenter, while agreeing that a five-day trailing average is a useful alternative measure of market price, pointed out that:

[T]he Rule 144A convertible bond market and the related call spread overlay market (whether entered into in connection with a Rule 144A or registered convertible bond) currently benefit from certain synergies that arise from the use of the one-day closing price in light of the complex regulatory, tax and accounting

analysis of these transactions and the related hedging activities of market participants.⁹

Other commenters raised similar concerns.¹⁰ Nasdaq believes these concerns are justified and as such, Nasdaq proposes to amend Listing Rule 5635(d) to define market value as the lower of the closing price at the time of the transaction or the five-day average of the closing price as the measure of market value for purposes of the shareholder approval rules. This means that the issuance would not require an approval by company's shareholders, so long as it is at a price that is greater than the lower of those measures.¹¹ To improve the readability of the rule, Nasdaq proposes to define this new concept as the "Minimum Price" and eliminate references to book value and market value from Listing Rule 5635(d).

II. Book Value

Nasdaq proposes to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, market participants have indicated, and Nasdaq agrees, that book

⁹ Letter from Greg Rogers, Latham and Watkins LLP, dated July 27, 2017 (Latham Letter).

¹⁰ Letter from Michael Adelstein, Kelley Drye & Warren LLP, dated July 28, 2017 (Kelley Drey Letter); Letter from Michael Nordtvedt, Wilson Sonsini Goodrich & Rosati, P.C., dated July 31, 2017 (Wilson Sonsini Letter); Joseph A. Smith, Ellenoff Grossman & Schole LLP, dated July 31, 2017 (Ellenoff Grossman Letter).

¹¹ Issuances below Market Value to officers, directors, employees, or consultants are, and will continue to be, subject to Listing Rule 5635(c). See Nasdaq's FAQ #275 at https://listingcenter.nasdaq.com/Material_Search.aspx?materials=275&mcd=LQ&criteria=2.

value is not an appropriate measure of whether a transaction is dilutive or should otherwise require shareholder approval. Nasdaq has also observed that when the market price is below the book value, the rule becomes a trap for the unwary. In that regard, the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. In these situations companies are often frustrated when they learn that they cannot quickly raise capital on terms that are favorable to the market price. Based on conversations with investors, Nasdaq also believe that book value is not considered by shareholders to be a material factor when they are asked to vote to approve a proposed transaction. Most commenters in the 2017 Solicitation supported the elimination of the book value requirement from the shareholder approval rules.¹² The only support for retaining the book value limitation, came from one commenter who appeared to believe that issuances below book value would result in negative investor perception of the issuer and that book value was an alternative measure not subject to market manipulation.¹³ The commenter did not elaborate or provide any evidence of price manipulation surrounding the pricing of transactions (which would be investigated by Nasdaq Regulation and FINRA) and Nasdaq does not believe this hypothetical and unsubstantiated concern justifies retaining

¹² Comments supporting the change could be summarized through words of one commenter who suggested that “investors don’t view book value as the equivalent (or even a reasonable substitute for) market value.” Grundei Letter.

¹³ Letter from Heather Koziara, Chief Risk Officer, Conifer Holdings Inc., dated June 16, 2017 (Conifer Letter).

the book value requirement in light of the other concerns raised about its arbitrary and disproportionate impact on certain companies and the lack of importance placed on this requirement by investors.

III. Other Changes

To improve the readability of Listing Rule 5635(d) Nasdaq proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in IM-5635-3, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 5635(d)(1) and (d)(2) and makes no substantive change but for the change to the pricing tests, as described above, such that shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Listing Rule 5635(d).

Nasdaq also proposes to amend the title of Listing Rule 5635(d) and the preamble to Listing Rule 5635 to replace references to “private placements” to “transactions other than public offerings” to conform the language in the title of Listing Rule 5635(d) and the preamble to the language in the rule text and that of IM-5635-3, which provides the definition of a public offering.

Finally, Nasdaq proposes to amend Listing Rules IM-5635-3 and IM-5635-4, which describe how Nasdaq applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term 20% Issuance.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Nasdaq believes that the approach taken in the proposal strikes an appropriate balance between investor protection and impediments upon issuers.

Definition of Market Value

The proposed rule change will modify the minimum price at which a 20% Issuance would not need shareholder approval from the closing bid price to the lower of: (i) the closing price (as reflected on Nasdaq.com); or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

Nasdaq believes that allowing issuers to price transactions at the closing price (as reflected on Nasdaq.com) rather than closing consolidated bid price will perfect the mechanism of a free and open market and protect investors and the public interest because the closing price will represent an actual sale, which generally occurs at the same or greater price than the bid price.¹⁶ Further, the closing price displayed on Nasdaq.com is the

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ Sales typically take place between the bid and ask prices.

Nasdaq Official Closing Price, which is derived from the closing auction on Nasdaq and reflects actual sale prices at one of the most liquid times of the trading day.

Allowing share issuances to be priced at the five-day average of the closing price will further align Nasdaq's requirements with how many transactions are structured, such as transactions where Listing Rule 5635(d) is not implicated because the issuance is for less than 20% of the common stock and the parties rely on the five-day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five-day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Maintaining the allowable average at just a five-day period also protects investors by ensuring the period is not too long, such that it would result in the price being distorted by ordinary past market movements and other outdated events. In a market that rises each day of the period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. Further, as some commenters indicated, aside from Nasdaq requirements, when selecting the appropriate price for a transaction company officers and directors also have to consider their state law structural safeguards, including fiduciary responsibilities, intended to protect shareholder interests.¹⁷

In addition, because prices could be displayed from numerous data sources on different web sites, to provide certainty about the appropriate price, Nasdaq proposes to

¹⁷ See Wilson Sonsini Letter.

codify within the rule that Nasdaq.com is the appropriate source of the closing price information, which is available with only 15 minute delay and without registration or fee. Because the closing bid price is not included in many public data feeds, this requirement will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because it will improve the transparency of the rule and provide additional certainty to all market participants about the appropriate price to be used in determining if shareholder approval is required.

Finally, Nasdaq believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. This flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of the Listing Rule 5635(d).

Book Value

Nasdaq also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Listing Rule 5635(d). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as an inappropriate measure of the current value of a stock. Nasdaq has also observed that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book

value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. Because book value is not an appropriate measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing investor protections of Listing Rule 5635(d).

Other Changes

To improve the readability of Listing Rule 5635(d) Nasdaq proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in IM-5635-3, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 5635(d)(1) and (d)(2) but makes no substantive change. Under the proposed rule, but for the separate change to the pricing test, shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Listing Rule 5635(d). Nasdaq believes that the improved readability of the rule will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

Nasdaq also believes that amending the title of Listing Rule 5635(d) and the preamble to Listing Rule 5635 to replace references to “private placements” to “transactions other than public offerings” to conform the language in the title of Listing Rule 5635(d) and the preamble to the language in the rule text and that of IM-5635-3,

which provides the definition of a public offering, will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

Finally, Nasdaq believes that amending Listing Rules IM-5635-3 and IM-5635-4, which describe how Nasdaq applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term 20% Issuance will perfect the mechanism of a free and open market by eliminating confusion caused by references to a measure that is no longer applicable and by making the rule easier to understand and apply.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

In the 2017 Solicitation, Nasdaq solicited comments on a specific proposal to amend Listing Rule 5635(d) to:

- 1) change the definition of market value for purposes of the shareholder approval rules from closing bid price to a five-day trailing average;

- 2) require that any issuance of 20% or more be approved by the independent directors where shareholder approval is not required; and
- 3) eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

In an effort to seek the broadest response, Nasdaq widely distributed the 2017 Solicitation to investors, issuers, legal professionals and other interested parties. In addition, the proposal was posted on the Nasdaq Listing Center™.¹⁸ In total, 12 comments were received. A copy of the 2017 Solicitation is attached to the rule filing as Exhibit 2a. Copies of the comments received are attached to the rule filing as Exhibit 2b.

With regard to the proposal to change the definition of market value for purposes of the shareholder approval rules from closing bid price to a five-day trailing average, of the 12 commenters, seven supported the change,¹⁹ one expressed no opinion,²⁰ while the remaining four suggested the five-day average price should be used as an alternative to

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<https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf>.

¹⁹ See Letter from Dickerson Wright, Chairman and CEO of NV5, dated June 15, 2017 (NV5 Letter); Grundei Letter; Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, dated June 26, 2017 (CII Letter); Lightbridge Letter; Letter from Penny Somer-Greif, et al., Chair, the Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, dated July 31, 2017 (Md Bar Letter); Letter from Harvey Kesner, Sichenzia Ross Ference Kesner LLP, dated July 31, 2017 (Sichenzia Letter); Letter from Anne Sheehan, Director of Corporate Governance, California State Teachers' Retirement System, dated August 1, 2017 (CALSTRS letter).

²⁰ See Conifer Letter (addressing only the proposal to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value).

the closing price rather than being an exclusive measure of value of listed securities.²¹

Nasdaq determined to adopt this suggestion and now proposes to amend Listing Rule 5635(d) to allow companies the flexibility of using either the closing price at the time of the transaction or the five-day average of the closing price when pricing 20% Issuances. Transactions could be structured to use either price knowing that neither the lower price nor the higher one would result in the transaction needing shareholder approval under the proposed rule because each will be at or above the new measure of market value for purposes of the shareholder approval rules, which is now defined as Minimum Price.

Two commenters suggested the use of the volume weighted average price (VWAP) instead of the five-day average price because VWAP includes a broader array of trades, such as trades outside the Nasdaq closing auction that forms the closing price, and because VWAP gives greater weight to the price at which a greater number of shares is traded.²² However, the commenters acknowledged that VWAP methodology generally requires a paid subscription to providers of financial information, such as Bloomberg, to obtain the VWAP.²³ Given the complexity of the VWAP methodology and the potential resulting lack of transparency among retail investors who do not have access to financial data that includes VWAP, at this time, Nasdaq is proposing to change the definition of market value for purposes of the shareholder approval, as described above, by incorporating the concept of the five-day average closing price, rather than VWAP, as the alternative to the closing price at the time of the transaction.

²¹ See Latham Letter, Kelley Drey Letter, Wilson Sonsini Letter, and Ellenoff Grossman Letter.

²² See Kelley Drey Letter and Ellenoff Grossman Letter.

²³ Id.

Two commenters suggested that the Nasdaq should amend its rules such that shareholder approval is required for any issuance a price that is below market price and for any 20% Issuance.²⁴ Nasdaq is concerned that under their proposal even de minimis issuances below market price and 20% Issuances at substantial premium to market price would require shareholder approval. As such, given the expense and delay associated with obtaining shareholder approval, Nasdaq does not propose amending the rule as these commenters requested at this time.

In the 2017 Solicitation, Nasdaq noted some potential negative consequences to using a five-day average as the measure of whether shareholder approval is required and suggested a potential new safeguard that would have required that any transaction of more than 20% of the company's shares outstanding also be approved by either a committee of independent directors (as defined in Listing Rule 5605(a)(2)) or a majority of the independent directors on the board, unless it is approved by the company's shareholders (the "Independent Director Approval Requirement").

The Independent Director Approval Requirement was not embraced by the commenters, many of whom doubted the utility of the Independent Director Approval Requirement.²⁵ Some commenters saw the Independent Director Approval Requirement

²⁴ See CALSTERS Letter and CII Letter.

²⁵ One commenter supported the proposed Independent Director Approval Requirement. See Md Bar Letter ("[W]e believe the [Independent Director Approval Requirement] is reasonable, as it adds an additional protection for investors without unduly burdening Nasdaq-listed companies seeking to raise capital."). Some commenters supported this proposal without discussing the specific burdens and benefit of this proposal. See Lightbridge Letter; Latham Letter. Some commenters did not address this issue. See Kelley Drye Letter, Sichenzia Letter, and Conifer Letter. The remaining six commenters opposed this proposal. See Footnotes 26 and 28 below.

as a new burden on listed companies that largely duplicates the existing state corporate law requirements and thus outweighs any offsetting benefits to shareholders.²⁶ In that regard, commenters noted state law protections, such as the fiduciary duties of care and loyalty imposed on management and directors to act in the best interest of the company and its shareholders.²⁷ Thus, given the cool reception received from investors, who did not believe the addition of this listing requirement would meaningfully add to investor protection,²⁸ and the belief of commenters that the Independent Director Approval Requirement is “solving the problem that does not exist,”²⁹ Nasdaq is not proposing to adopt the Independent Director Approval Requirement at this time.

With regard to the proposal to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value, of the 12

²⁶ See Wilson Sonsini Letter (“Rather than ensuring adequate consideration of shareholder interests, we respectfully submit that the [Independent Director Approval Requirement] would be duplicative of, and already more effectively addressed by, the corporate law requirements of an issuer’s jurisdiction of incorporation in the vast majority of cases.”). See also, Grundeir Letter (“...there are already state law requirements regarding such approvals.”).

²⁷ See Wilson Sonsini Letter.

²⁸ See CALSTERS Letter (“[W]e genuinely believe and appreciate that a majority of independent directors should always screen and vote on any stock issuances...”). Yet, CALSTERS Letter suggested removal the Independent Director Approval Requirement for the proposed rule. See also, CII Letter (suggesting removal the Independent Director Approval Requirement for the proposed rule and the imposition of shareholder approval requirements for any issuance a price that is below market price and any 20% Issuances). See also, Ellenoff Grossman Letter (“[Independent Director Approval Requirement] may not prove helpful to outside shareholders, in practice”). See also, NV5 Letter.

²⁹ Grundeir Letter.

commenters, only one specifically opposed the proposed rule change.³⁰ The commenter that opposed the proposed rule change seemed to have been concerned with potentially negative market perception of issuances below book value and with potential stock price manipulations by suggesting that the "... proposed rule change compromises Nasdaq's commitment to protect investors... by allowing companies the potential power to materially affect the stock price without prior approval of current stockholders."³¹ The commenter did not elaborate and did not provide any evidence of price manipulation (which would be investigated by Nasdaq Regulation and FINRA) and Nasdaq does not believe this single hypothetical and unsubstantiated concern justifies retaining the book value requirement in light of the other concerns raised about its arbitrary and disproportionate impact on certain companies and the lack of importance placed on this requirement by investors.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

³⁰ One commenter indicated that he disagreed with the proposed change, but did not address the issue directly. See NV5 Letter.

³¹ Conifer Letter.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2018-008 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2018-008. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing

also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2018-008 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Eduardo A. Aleman
Assistant Secretary

³² 17 CFR 200.30-3(a)(12).

**Exhibit 2a**

June 14, 2017

**SOLICITATION OF COMMENTS BY THE NASDAQ LISTING AND
HEARING REVIEW COUNCIL ABOUT
THE DEFINITION OF MARKET VALUE FOR PURPOSES OF
SHAREHOLDER APPROVAL RULES**

Nasdaq recently released its blueprint for revitalizing the U.S. capital markets: [The Promise of Market Reform – Reigniting America’s Economic Engine](#). In this white paper, Nasdaq called upon policy makers, regulators, market participants, companies, and investors to modernize rules and consider new approaches to help reinvigorate the U.S capital markets. Nasdaq recognizes that it also is not immune from the need to consider new approaches and that we must regularly reconsider whether our listing rules operate efficiently to provide meaningful protections to investors.

A year ago, Nasdaq, working with the Nasdaq Listing and Hearing Review Council,¹ solicited comments on potential updates to the shareholder approval rules. These rules were adopted in 1990 and have remained largely unchanged since then. But over the last 25 years, the capital markets and securities laws, as well as the nature and type of share issuances, have evolved significantly. The comment solicitation was designed to elicit views on whether the rules could be updated given these changes, without sacrificing the crucial investor protections they provide. However, neither Nasdaq, nor the Nasdaq Listing and Hearing Review Council, had made any determination that change was necessary or appropriate.

In response to the comment solicitation, Nasdaq received seventeen comment letters from Nasdaq-listed companies, investors and other market participants that expressed a wide range of views. Nasdaq staff also participated at a meeting of the SEC’s Investor Advisory Committee to discuss the comment solicitation and engage in a dialogue about the rules. Nasdaq is grateful to all who took the time to respond and participate in this important matter. We continue to consider whether it is appropriate to enhance the protections provided by these rules and also whether there are ways that would ease compliance and eliminate burdens imposed by the rules that are not valuable to shareholders.

In that regard, it is important to note that the benefit from reducing the burden of compliance, if done with due regard for the public interest, affects not just the company but also its current investors. These burdens could include the costs of obtaining shareholder approval, but also potential lost opportunities from the delay in completing a transaction and higher costs arising from structuring a transaction using less equity, but at a higher overall cost, to avoid the

¹ The Listing Council is a standing independent advisory committee appointed by the Board of Directors of The Nasdaq Stock Market, whose mission is to review the application of Nasdaq’s listing rules and public policy issues related to listing, and, where appropriate, suggest new or modified rules for consideration by the Board. The Listing Council is comprised of individuals with diverse credentials and each Listing Council member is a respected leader in his or her field, committed to working with Nasdaq to enhance investor protection and the integrity of the Nasdaq Stock Market.



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requirement to obtain shareholder approval. To be clear, Nasdaq does not intend to weaken the shareholder approval rules simply to reduce costs; the focus, instead, is on whether the shareholder approval rules provide protections to existing shareholders in circumstances that are important to them, modernize the rules in cases where they do not, and enhance the rules in cases where they could provide greater protections to shareholders.

Many good suggestions were presented during the comment solicitation, some that would increase requirements and some that would relax them. Nasdaq and the Listing Council continue to consider these ideas and intend to engage with interested parties around the country to solicit further feedback.

One theme emerged in the comments received to date as an area for Nasdaq to initially review and consider changes. [Listing Rule 5635\(d\)](#) requires a company to obtain shareholder approval when issuing common stock or securities convertible into common stock equal to 20% or more of the shares outstanding at a price less than the greater of the book value or market value. Listing Rule 5005 defines “market value” as the closing bid price. Many commenters focused on the appropriateness of this definition of market value and the additional requirement for a company to obtain shareholder approval for issuances of common stock at a price less than book value.

In particular, several commenters expressed that bid price may not always be transparent to companies and investors and does not always reflect an actual price at which a security has traded. Generally speaking, the price of an executed trade is viewed as more reliable than a bid quotation; and the more shares executed, the more reliable the price. Further, it was noted by commenters that in structuring transactions, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price.

Nasdaq and the Listing Council believe that a change from a single day’s closing bid price to a five-day average of closing prices, as reflected on Nasdaq.com, may have merit in addressing the concerns raised by commenters, while also enhancing transparency and investor protections provided by the rule. Closing price is generally more transparent to investors and companies because it is reported on financial websites. In addition, Nasdaq notes that closing price will represent an actual sale and is generally at the same or greater price than the bid price because such sales typically take place between the bid and ask prices. Thus, determining whether shareholder approval is required based on the closing price is a more stringent requirement than the current closing bid price requirement.

In addition, because prices are displayed from numerous data sources on different web sites, to provide certainty about the appropriate price, Nasdaq and the Listing Council propose to codify within the rule that Nasdaq.com is the appropriate source of the closing price information. Nasdaq.com displays as a securities closing price the Nasdaq Official Closing Price, which is, typically, derived from the closing auction on Nasdaq and thereby reflects actual sale prices at one of the most liquid times of the day. The Nasdaq closing auction is designed to gather the



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maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction promotes accurate closing prices by offering specialized orders available only during the closing auction and integrating those orders with regular orders submitted during the trading day that are still available at the close. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price and size of the closing auction. The Nasdaq closing auction has proven to be a valuable pricing tool for issuers, traders, and investors alike; and Nasdaq continually works to enhance the experience for those that rely upon it.

Nasdaq and the Listing Council also observe that there are potential negative consequences to using a five-day average as the measure of whether shareholder approval is required. For example, in a declining market, the five-day average price will always be above current market price, thus making it difficult for companies to close transactions because the investors could potentially buy shares in the market rather than from the company at the higher five-day average price. Conversely, in a rising market, the five-day average price will appear to be a discount to the closing price, potentially allowing dilutive transactions without shareholder approval. In addition, if material news is announced during the five-day period, the average could be a worse reflection of the market value than the closing price after the news is disclosed. Nonetheless, Nasdaq and the Listing Council believe that these risks are already accepted in the market, as evidenced by the frequent use of an average price in transactions, notwithstanding the risk both to the new investor and to the company and its current shareholders concerning price movement during the period. Further, there are state law obligations and federal anti-fraud provisions that also protect against some of these concerns. However, as an added safeguard against the misuse of the average price provisions, Nasdaq and the Listing Council are also suggesting that any transaction of more than 20% of the company's shares outstanding also be approved by either a committee of independent directors (as defined in [Listing Rule 5605\(a\)\(2\)](#)) or a majority of the independent directors on the board, unless it is approved by the company's shareholders.²

Many commenters also suggested that it would be appropriate to eliminate the book value requirement from the shareholder approval rules and there was virtually no indication that this test is considered an important protection to existing shareholders. Commenters suggesting the elimination of this part of the rule note that book value is primarily an accounting measure and its calculation is based on historic cost. As such, book value is not an appropriate measure of the current value of a stock. The commenters also noted that book value is rarely, if ever, considered when pricing capital raising transactions, nor is it considered by shareholders when they are asked to vote to approve a proposed transaction. The existing book value test can also have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related

² This requirement could be satisfied, for example, by an independent pricing committee or financing committee.



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companies traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. Thus, even if these companies are able to raise capital on attractive terms above their current trading prices, they would nonetheless be required to obtain shareholder approval under the current rule.

Finally, it has been suggested that Listing Rules 5635(d)(1) and 5635(d)(2) are duplicative in many respects (see attached rule text). As such, Nasdaq is considering combining these two paragraphs, but does not intend for this change to affect the substance of these rules.

For the foregoing reasons, Nasdaq and the Listing Council are considering whether to modify Rule 5635(d) as reflected in Exhibit A. However, given the variety of views reflected in our initial comment solicitation and its broad, non-specific nature, we believe it is appropriate to seek comment on these specific proposed changes. The comment period will run until July 31, 2017. Please send comments by email to comments@nasdaq.com.

Following review of the comments, if Nasdaq determines to proceed with a proposed rule change, that proposal will be subject to public notice and comment as part of the Securities and Exchange Commission's review and approval process. Please note that Nasdaq must include any comments provided in response to this comment solicitation as part of its filing with the SEC and therefore any comments submitted could become publicly available.

Nasdaq and the Listing Council express gratitude for your comments and attention to this important matter.



June 14, 2017

Exhibit AExisting Rule 5635(d)**(d) Private Placements**

Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving:

(1) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

(2) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Draft of Proposed Revised Rule 5635(d)**(d) Private Placements**

Shareholder approval is required prior to the issuance of securities in connection with a transaction, other than a public offering, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which:

(1) alone or together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; and

(2) (A) is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement for the issuance; or

(B) is not approved either by: (i) Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate, or (ii) a committee comprised solely of Independent Directors.



June 14, 2017

Redline Showing Proposed Revisions to Rule 5635(d)**(d) Private Placements**

Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving:

~~(1) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), at a price less than the greater of book or market value which:~~

(1) ~~alone or~~ together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; ~~or~~and

(2) (A) is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement for the issuance; or

(B) is not approved either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors.

~~(2) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.~~

From: Dickerson Wright <Dickerson.Wright@nv5.com>
Sent: Thursday, June 15, 2017 5:17 PM
To: comments
Subject: NVEE

WARNING - External email; exercise caution.

I agree with a moving average of 5days for determining market capitalization.
However I disagree with the other suggested changes.

Dickerson Wright, P.E. | Chairman/CEO | [NV5](#)
P: [954.495.2115](tel:954.495.2115)

Sent from my mobile device

From: Heather Koziara <HKoziara@cnfrh.com>
Sent: Friday, June 16, 2017 8:57 AM
To: comments
Subject: shareholder approval rules - Comments

WARNING - External email; exercise caution.

As the CRO (including oversight of SOX, internal audit) of a Nasdaq publically traded company, with my main focus on protecting shareholder wealth and as the only member of executive management independent from operations, I do not feel that the suggested changes to the shareholder rules put first and foremost their institution and intention- to protect the interest of shareholders. By eliminating the requirement to obtain shareholder approval prior to issuance of common stock below book value, this takes the right of the shareholders away, to ensure their investment is secured as much as possible. As we all know, many events and nonevents have a direct impact on stock price and issuance of additional shares of common stock below book value, regardless of volume, has a substantial impact on investor perception and would surely have a material impact on trading value of the stock. Additionally, removing that requirement would place too much power in the hands of those with an inherent conflict of interest- the reason the rules were enacted in the first place. I feel that this proposed change compromises Nasdaq's commitment to protect investors on their exchange and will tarnish the good name and reputation Nasdaq has built, by allowing companies the potential power to materially affect the stock price without prior approval of current stockholders. Please feel free to reach me for additional questions. It is my sole responsibility to ensure our shareholders are protected and in doing so, I must maintain a working relationship with my fellow executives and appreciate the right to share my opinion in confidence.

Thank you.

Thank you,

Heather Koziara
Chief Risk Officer



Conifer
Holdings
Inc.

550 W. Merrill Street, Suite 200
Birmingham, MI 48009
Direct 248.480.2992
Main 248.559.0840
Fax 248.559.0870
hkoziara@cnfrh.com

From: Grundei, Michael <MGrundei@wiggin.com>
Sent: Friday, June 16, 2017 4:12 PM
To: comments
Subject: Shareholder Approval Reform Proposal

WARNING - External email; exercise caution.

Ladies and Gentlemen:

My brief thoughts on the proposed amendments regarding shareholder approval rules:

- I strongly support the removal of the book value requirement from the shareholder approval rules. In my experience, investors don't view book value as the equivalent (or even a reasonable substitute for) market value. As you note in the proposal, this has unintended consequences for companies that are trading below book value.
- I also strongly support the 5 trailing day average market price and the use of Nasdaq Official Closing Price as the definition of market value. Investors view a 5 day average as a more fair method of determining "market value" (in a non-technical sense). I have often seen this in first drafts of term sheets and have had to correct the parties toward the current Nasdaq definition. Using the closing bid on the closing date is more prone to unanticipated and inequitable results based on market fluctuations. Neither method is perfect, but the 5 day average is better.
- I do not support the addition of an independent director approval requirement for above-market private placements. I don't see any inherent conflict (like CEO compensation) that would drive the need for such a requirement. If there is an insider involved in the private placement, there are already state law requirements regarding such approvals. Requiring approval of a private placement without an employee director (typically the CEO) in the room or via a special committee seems odd. It's solving a problem that does not exist.

Thanks for your consideration and efforts.

Michael Grundei

Wiggin and Dana LLP

Two Stamford Plaza, 281 Tresser Boulevard

Stamford, Connecticut 06901

Direct: 203.363.7630 | mgrundei@wiggin.com

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June 26, 2017

Via e-mail: comments@nasdaq.com

NASDAQ Listing Qualifications
c/o Nikolai Utochkin
805 King Farm Boulevard
Rockville, MD 20850

Dear Mr. Utochkin:

The Council of Institutional Investors (“CII”) writes to provide comment on whether to modify Rule 5635(d) of the Nasdaq Listing Rules.¹ CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit plans, foundations and endowments with combined assets that exceed \$3 trillion. Our associate members include a range of asset managers with more than \$20 trillion in assets under management, many or most also with long-term investment horizons. CII’s policies reflect the principle that shareowners should be permitted to vote on corporate actions that would significantly affect the nature or value of their investment. CII policies state that “an action should not be taken if its purpose is to reduce accountability to shareholders.”²

As you are aware, the existing rule provides that a private placement generally requires shareholder approval if the issuance is less than the greater of book or market value and the shares constitute at least 20 percent of outstanding shares or voting power.³ The proposal contemplates the following test for determining whether shareholder approval is required for a private placement:

Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which:

- 1) alone or together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power of outstanding shares before the issuance; and*
- 2) (A) is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement of the issuance; or*

¹ See

<https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%20017.pdf>.

² See Policies on Corporate Governance, section 1.4 (available at http://www.cii.org/corp_gov_policies#shareowner_rights)

³ See p. 5 Exhibit A at

<https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%20017.pdf>.

(B) is not approved either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors

The revised language effectively would mean that a 20%+ dilutive private placement made at or above market value would require a favorable vote from independent directors in order to avoid a shareholder vote, whereas currently the same private placement does not require an independent director vote to avoid a shareholder vote.

We believe that requiring independent director approval of private placements involving full or premium consideration in order to avoid a shareholder vote would have limited impact. We believe Nasdaq has an opportunity to meaningfully enhance shareholders' ability to evaluate and, where appropriate, reject issuances that could destroy long-term value. Such a safeguard could not only reduce investor risk, but in so doing improve companies' ability to attract new capital investment. We respectfully suggest revising the proposed rule to ensure a shareholder vote on private placements involving 20%+ dilution or a discount to market value, as follows:

Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which:

1) alone or together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power of outstanding shares before the issuance; or ~~and~~

2) ~~(A)~~ is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement of the issuance; ~~or~~

~~(B) is not approved either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors~~

Thank you for considering our views. If we can answer any questions or provide additional information on this important matter, please do not hesitate to contact me at 202.822.0800 or ken@cii.org.

Sincerely,



Kenneth A. Bertsch
Executive Director
Council of Institutional Investors

**Lightbridge Corporation**

11710 Plaza America Drive
Suite 2000
Reston, VA 20190 USA
T: +1.571.730.1200

VIA EMAIL TO COMMENTS@NASDAQ.COM

June 27, 2017

Nasdaq, Inc.
C/O Edward S. Knight
One Liberty Plaza
New York, NY 10006

RE: Comments in support of proposed changes to improve the rules without compromising the commitment to investor protection

Ladies and Gentlemen:

This letter expresses the views of Lightbridge Corporation (“Lightbridge”) regarding Nasdaq’s consideration of a rule amendment to: (i) change the definition of market value for purposes of the shareholder approval rules from the closing bid price to a five-day trailing average of the closing price; and (ii) eliminate the requirement for a company to obtain shareholder approval for issuances of common stock at a price less than book value. As part of these changes, Nasdaq would also require that an issuance of 20% or more of the company’s outstanding securities be approved by the company’s independent directors where shareholder approval is not required.

Lightbridge (NASDAQ: LTBR) is a nuclear fuel technology company based in Reston, Virginia, USA. The Company develops proprietary next generation nuclear fuel technologies for current and future reactors. Lightbridge also provides comprehensive advisory services for established and emerging nuclear programs based on a philosophy of transparency, non-proliferation, safety and operational excellence.

Lightbridge supports the changes to Nasdaq rules, especially as the current rules adversely affect small, innovative companies. Innovative companies face markets that do not reward good ideas unless they provide short term gains. Small companies are disproportionately targeted by short sellers, as it is far easier to manipulate downward spirals of the stock price, especially the closing bid price, in order to trade fast and make quick money. These disadvantages further hamper the ability of small, innovative companies to raise capital on terms that benefit shareholders.

We believe that five-day trailing average of the closing price is more representative of actual market value than the closing bid price. The use of bid price as a determinant of market value is flawed as the bid price may not reflect actual transactions. There may not be any stockholders that are willing to sell at the closing bid price, and the closing bid price may only reflect unfilled bid orders. Closing bid

prices that are significantly below the closing price on a given day raise suspicions of market manipulation.

We do not believe the current requirement for shareholder approval for stock issuances that exceed 20% of the unaffiliated shares of the company offers a small company the flexibility to take advantage of the most advantageous market conditions, without incurring the expense and delay of holding special meetings of shareholders to obtain consent. Raising capital on less favorable terms due to the current restrictions, is not in the best interest of shareholders.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Linda Zwobota". The signature is fluid and cursive, with a large initial "L" and "Z".

Linda Zwobota, CPA
Chief Financial Officer

LATHAM & WATKINS LLP

53rd at Third
 885 Third Avenue
 New York, New York 10022-4834
 Tel: +1.212.906.1200 Fax: +1.212.751.4864
 www.lw.com

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July 27, 2017

VIA ELECTRONIC MAIL (comments@nasdaq.com)

Nasdaq Listing Qualifications Department
 805 King Farm Blvd.
 Rockville, MD 20850

Attn: Nikolai Utochkin, Counsel, Listing and Governance

Re: Solicitation of Comments by the Nasdaq Listing and
 Hearing Review Council About the Definition of Market Value
 For Purposes of Shareholder Approval Rules (the "Solicitation")

Ladies and Gentlemen,

We are writing in response to the above-referenced Solicitation. As noted in our original comment letter dated February 15, 2016 (the "Original Comment Letter") to Nasdaq's initial solicitation regarding its review of its shareholder approval rules, we applaud your reevaluation of the rules in light of changes in market practice and investor protection mechanisms in the time since the adoption of the rules.

As we noted in the Original Comment Letter, we continue to believe that the most intuitive definition of market value for purposes of Rule 5635(d) (the "Rule") for many transactions and capital markets products would be the closing price as reflected on the exchange (Nasdaq.com) on the date of the applicable agreement (or the prior closing price for agreements entered into intra-trading day or on a day that is not a trading day) (the "one-day closing price"). Although we agree that there are certain types of transactions (for example, common stock PIPEs) that could benefit from the ability to use a five-day average, we respectfully disagree with the suggestion in the Solicitation that the use of a five-day average would be beneficial across the entire range of transactions and products to which the Rule applies. In our experience, there are various and significant capital markets transactions, for example offerings of convertible bonds¹

¹ According to Dealogic, in 2016 there were 46 of these transactions done under Rule 144A, generating approximately \$26.8 billion of proceeds. The related equity derivatives transactions that accompany this market and similar transactions that are done apart from a capital markets transaction or in connection with a registered capital markets transaction (the derivative would typically be done privately even though the bond itself is registered and thus able to avail itself of the public offering exception to the Rule) would be similarly disrupted by the implementation of an average. According to Dealogic, in 2016 there were 16 call spread overlay transactions entered into in connection with convertible bond transactions.

and their related equity derivatives transactions, including call spread overlay transactions², that traditionally price off of the one-day closing price on the date of agreement (or, for Nasdaq companies under the current Rule, the closing bid price if higher³).

Moreover, these sorts of transactions frequently have features (for example the make-whole table in standard convertible bond offerings) that result in only a very slight (typically .0001) premium to the one-day closing price. In addition, we note that the Rule 144A convertible bond market and the related call spread overlay market (whether entered into in connection with a Rule 144A or registered convertible bond) currently benefit from certain synergies that arise from the use of the one-day closing price in light of the complex regulatory, tax and accounting analysis of these transactions and the related hedging activities of market participants⁴. These synergies include using a single price on a single day for purposes of determining the Rule 144A eligibility of the convertible bonds, determining whether convertible bonds are issued with a beneficial conversion feature for equity accounting purposes, the hedge identification process to integrate the convertible bonds and the bond hedge transactions for U.S. federal income tax purposes, the establishment of initial hedge positions related to the convertible bonds and call spread overlay transactions and the sequencing of press releases and SEC filings related to the convertible bonds and such other transactions. As the Solicitation notes, requiring the use of a five-day average would, in a declining market, make implementing these standard provisions impossible (at least as traditionally structured) and thus, at a minimum, complicate the execution of an otherwise standard transaction and the related regulatory, tax and accounting analysis⁵.

² In a call spread overlay transaction, the convertible bond issuer purchases a “bond hedge” call option on its shares from one or more financial institutions with a strike price equal to the convertible bond strike price to hedge the warrant embedded in the convertible bond and issues warrants in a private placement transaction to such financial institutions at a higher strike price, effectively increasing the conversion premium of the convertible bonds on an aggregate basis from the issuer’s perspective.

³ We note that, in our experience, these prices are typically the same, that if there is a disparity, it is typically very small so as to be manageable without material disruption and that there is only an issue in complying with the Rule in the manner preferred by standard market practice if the closing bid price is higher than the closing price. In other words, leaving the closing bid price as the definition of market value for purposes of the Rule would be better than implementing a mandatory average concept. However, we also note that the analogous New York Stock Exchange rule, which references the closing price as we suggest in the Original Comment Letter and reiterate in this one, does not present this potential disconnect.

⁴ We understand that many investors in the convertible bond market employ a convertible arbitrage strategy under which they initially sell short a portion of the underlying shares (or enter into equivalent equity derivatives transactions) and adjust their short position over time while they continue to hold the bonds. In addition, financial institutions party to a call spread overlay would initially purchase a portion of the underlying shares (or enter into equivalent equity derivatives transactions) and adjust their hedge positions over time during the term of the call spread overlay transactions.

⁵ As a helpful historical example, we note that convertible bond issuers that otherwise sought to issue convertible bonds with a “flexible settlement provision” prior to the issuance of Nasdaq FAQ 1136 in 2015 were often required as a practical matter to structure the bonds to only be stock settled (often a

Accordingly, unless the Rule permits the parties to price at the lesser of the five-day average closing price and the closing price on the date of the agreement (i.e., it was implemented as an alternative), we believe that the imposition of a five-day average would result in a material disruption to current market practice in a significant portion of the capital markets and related equity derivatives transactions.

As noted in the Original Comment Letter, we strongly agree with the deletion of the book value requirement and do not see an issue with the additional investor protection afforded by the newly proposed independent director approval.

Thank you for your consideration.

Best regards,

/s/ Greg Rodgers
on behalf of Latham & Watkins LLP

Cc: Senet Bischoff
Reza Mojtabaee-Zamani

sub-optimal outcome from an accounting and corporate finance perspective), to implement a share cap (which would typically impair pricing to the convertible bond issuer) and/or introduce cash settlement features addressing the inability to issue the full number of underlying shares (which would typically result in less favorable accounting treatment), with similar constraints applicable to the related call spread overlay transactions. We believe the consequences of imposing additional constraints on the pricing of the convertible bond and call spread overlay market could be more substantial than the historical issue addressed in Nasdaq FAQ 1136 (in that flexible settlement provisions modify the composition of the conversion settlement consideration in an economically neutral manner without impacting the pricing terms of the convertible bonds).

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

**101 PARK AVENUE
NEW YORK, NY 10178**

(212) 808-7800

FACSIMILE

(212) 808-7897

www.kelleydrye.com

MICHAEL A. ADELSTEIN

DIRECT LINE: (212) 808-7540

EMAIL: MAdelstein@KelleyDrye.com

WASHINGTON, DC

LOS ANGELES, CA

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICE

MUMBAI, INDIA

July 28, 2017

Nasdaq Listing Qualifications
c/o Stan Higgins
805 King Farm Blvd.
Rockville, MD 20850

Re: Proposal for Revisions to Rule 5635(d)

Gentlepersons:

We are submitting this comment letter in response to the Solicitation of Comments by the Nasdaq Listing and Hearing Review Council (the “**Listing Council**”) about the Definition of Market Value for Purposes of Shareholder Approval Rules (the “**Solicitation Letter**”) to discuss proposed revisions to Nasdaq Rule 5635(d), which we refer to herein as the “**20 Percent Rule**”.

As we previously disclosed in our prior letter to the Listing Council with respect to the 20 Percent Rule, we believe that the 20 Percent Rule does not take into account factors which are the more accurate indications of the riskiness and control level of a transaction, such as the use of proceeds, size of the public float, when the shares are eligible to be freely resold, the risk in the security, the market volume or volatility or the price of the stock at that time. It is a “one size fits all” broad rule, restricting capital raising without insight or understanding, shackling an issuer’s ability to timely respond to market changes, capital needs and opportunities. At the same time, it provides a disincentive to the financial institutions which typically invest in these entities, raising concerns that if the size of their investment is severely limited, they may not be able to provide the issuer with sufficient capital to achieve its goals on a timely basis, thus raising the risk of running out of funds before achieving the stated goals.

While we appreciate any efforts to improve the 20 Percent Rule, we are concerned that some of the efforts of the Listing Council with this proposal will unfortunately have an adverse effect on the market place, complicating and delaying many offerings and overall reducing the ability of many issuers to timely obtain capital in the marketplace. For your convenience, we will separately discuss the “book value” and “market value” proposals:

KELLEY DRYE & WARREN LLP

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July 28, 2017
Page Two

I. Proposal #1 – Elimination of “Book Value” from Rule 5635(d)

As referenced in the Solicitation Letter, we agree with the opinions of other practitioners that “book value” is an antiquated measurement of the value of a security for purposes of the 20 Percent Rule. In our experience, based on numerous discussions with placement agents, underwriters, issuers and investors, we have yet to find anyone who relies on the book value of an issuer in connection with an investment decision and we believe the market price of the common stock of an issuer represents the market’s consensus on the value of a security. In those rare situations where book value exceeds the market price, the difference is primarily a result of historical accounting peculiarities that have little or nothing to do with the actual value of the securities of the issuer. Consequently, we applaud the Nasdaq Listing and Listing Council for considering eliminating it from the 20 Percent Rule.

II. Proposal #2 – Determination of Market Value

Listing Rule 5005 currently defines “market value” as the closing bid price of a security. In the proposed revisions, the Listing Council would change the definition of “market value” to a five-day average of closing bid prices. While we appreciate the Listing Council’s desire to find a more accurate measurement of market value, we believe that a five-day average of closing bid prices will not typically give an accurate picture of the health of an issuer due to the failure to address the impact of volume on trading.

For example, let’s assume in a five day period a stock trades one million shares on each of days 1, 4 and 5 with a closing bid price and volume weighted average price (or “VWAP”) of \$3.00 per share on each day, but only trades 25,000 shares on each of day 2 and 3 at a closing bid price and VWAP of \$2.00 per share. The 5-day average of the closing bid prices would be \$2.60. However, the VWAP for the 5-day period would be \$2.98. Is it fair to weigh days 2 and 3, which had minimal volume, on an equal footing with days 1, 4 and 5? What if days 2 and 3 were the two days before a long weekend, two days before the release of a market measurement or days with partial trading due to halts in the stock of the issuer? As noted in the above example, volatility of the volume of a stock may have a significant impact on the appropriateness of a five-day average of closing bid prices for determining actual market value of a security.

Meanwhile, moving from a one day to a 5-day average may significantly reduce the availability of capital to small and mid-sized issuers when facing declining market prices or significant price volatility. For example, assume an issuer is contemplating an offering of common stock “at market”. If the stock price of an issuer declines in the last few days of the 5-day period, investors may be unwilling to consummate the deal at the higher 5-day average pricing. They may ask to delay the offering to see if the market settles at the higher price or even cancel the offering. A one day price offers certainty to investors. At the time of the deal they will know that they are either “at market” or at some percentage above market to avoid triggering

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the 20 Percent Rule. When adding the complexity of a five day measuring period, you are adding uncertainty to transactions. A transaction size may need to be reduced if the market premium is higher (due to a drop in prices) or even delayed until such time as the 5-day pricing is more favorable.

On the other hand, if prices are rising, the five-day period is essentially an invitation for investors, underwriters and placement agents to game the system. They will primarily close deals when prices are on the rise to lock in below market transactions without needing to obtain stockholder approval. We believe that the potential for significant dilution at a below “one day” market price, but above “5-day” market price without stockholder approval will potentially harm stockholders in the marketplace.

In concept, a multi-day pricing period is better suited for a large issuer with high volume, less volatility and a more stable market price. Meanwhile, these larger issuers are not the primary target of the 20 Percent Rule as their large capitalization permits significant capital raising without triggering the 20 Percent Rule. Smaller issuers, however, often face the hurdles created by the 20 Percent Rule, tend to have more volatility in their stock prices and may be disproportionately and adversely effected by an uneven or unfair multi-day measurement.

III. Alternative to “Market Value” Proposal

As noted in our discussion of Proposal #2, we do not believe switching from a one day to a 5-day period will result in better valuations and we expect adverse unintended consequences. We do, however, acknowledge that there are times when a 5-day period could be beneficial to an issuer and, consequently, we recommend a revision to Listing Rule 5005 to permit the independent directors of the board of directors of an issuer to have the flexibility to elect to either use a 5-day period or the closing bid price to determine the appropriate market price. It is impossible for anyone to determine in advance whether a 5-day average or a closing bid price would best determine the “true” market value of the stock an issuer. We believe the independent directors of the board of directors of an issuer are best suited to determine the best measurement of market value of the stock of an issuer at any given moment in time. They have the ability, sophistication and knowledge of the facts and circumstance to properly weigh all factors and to determine whether a 5-day or one day pricing is most appropriate for its particular issuer. Each independent director of the board of directors has access to management and likely will have significant experience analyzing the historical stock prices and volatility of the stock of the issuer. Each independent director also has a fiduciary duty to diligently research and evaluate the appropriateness of such pricing.

Additionally, if the Listing Council desires to use an average measurement (either under our alternate proposal or in the original proposal), we also believe the more appropriate measurement is the 5-day dollar-volume weighted average price for such stock on the applicable Nasdaq market. The 5-day dollar-volume weighted average price is generally accepted by the

KELLEY DRYE & WARREN LLP

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Page Four

markets as the most accurate measurement of market value as it properly adjusts for variations in volume. The dollar volume weighted average price can also be reliability and consistently obtained by Bloomberg, LP through its “HP” function (set to weighted average).

V. Conclusion

As stated earlier in this letter, although we recognize the importance of improving the accuracy of the market price provisions of the 20 Percent Rule and applaud the removal of “book value” from the rule, we believe that more flexibility is warranted to obtain the best valuation for the particular circumstances of an issuer.

We appreciate the invitation to submit this comment and would be pleased to discuss it further with the Listing Council.

Best regards,



Michael A. Adelstein
Partner
Kelley Drye & Warren LLP

**Committee on Securities Law
of the Business Law Section of the
Maryland State Bar Association**

July 31, 2017

VIA EMAIL TO COMMENTS@NASDAQ.COM

Nasdaq Listing and Hearing Review Council
Nasdaq Stock Market LLC
805 King Farm Blv.
Rockville, MD 20850

Re: The Definition of Market Value for Purposes of Shareholder Approval Rules; Proposed Amendments to Nasdaq Listing Rule 5635(d)

Ladies and Gentlemen:

This letter expresses the views of the Committee on Securities Laws (the "Committee") of the Business Law Section of the Maryland State Bar Association ("MSBA"). The membership of the Committee consists of securities practitioners who are members of the MSBA, and includes lawyers in private practice, business and government. The Business Law Section and the Board of Governors of the MSBA have not taken a position on the matters discussed herein, and individual members of the MSBA and their associated firms or companies may not necessarily concur with the views expressed in this letter.

We are sending this letter in response to the June 14, 2017 solicitation of comments by the Nasdaq Listing and Hearing Review Council regarding the definition of market value for purposes of the shareholder approval rules (the "Solicitation for Comment"). The Committee wishes to express its support for the proposed revised definition of market value as well as the other proposed changes to Nasdaq Listing Rule 5635(d) (the "Rule") as set forth in the Solicitation for Comment, for the following reasons.

1. As we discussed in our February 15, 2016 comment letter (the "Prior Letter") responding to the Nasdaq Stock Market LLC's ("Nasdaq") Solicitation of Comments by the Nasdaq Listing and Hearing Review Council About Nasdaq's Shareholder Approval Rules, we believe that the Nasdaq Official Closing Price is the best representative of market value as opposed to the bid price, which among other things may not reflect actual transactions.

In addition, we believe the clarification that Nasdaq.com as the source of closing price information will reduce uncertainty and eliminate inconsistency with respect to how market value is calculated for purposes of the Rule.

Nasdaq Listing and Hearing Review Council
Nasdaq Stock Market LLC
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2. We strongly support the proposed elimination of book value as a consideration as to whether stockholder approval is required for securities issuances. We agree with the sentiments expressed in the Solicitation for Comment that book value is not an appropriate measure of current value.
3. Finally, we believe the proposed new requirement that any issuance above 20% that is not approved by stockholders be approved by a majority of the Independent Directors or a committee of Independent Directors is reasonable, as it adds an additional protection for investors without unduly burdening Nasdaq-listed companies seeking to raise capital.

As we had discussed several additional suggestions in our Prior Letter that are not addressed in the Solicitation for Comment, we appreciate that Nasdaq and the Listing Council are continuing to consider the ideas received during the prior comment solicitation, and look forward to reviewing further proposed amendments to improve the operation of the Rule.

Very truly yours,

*Committee on Securities Law of the Business
Law Section of the Maryland State Bar
Association*



Penny Somer-Greif, Chair



Gregory T. Lawrence, Vice-Chair



July 31, 2017

Via E-mail

NASDAQ Listing and Hearing Review Council
One Liberty Plaza
165 Broadway
New York, New York 10006

Re: Shareholder Approval Rules Request for Comment dated June 14, 2017

On June 14, 2017 Nasdaq invited comments on potential updates to its shareholder approval rules. As a New York based law firm representing both issuers and investors, we routinely navigate regulatory requirements our clients face when they seek to obtain or deploy capital. We believe that the Nasdaq review of Rule 5635(d) (“shareholder approval rules”) is both timely and necessary but should be more encompassing than the limited changes proposed.

In our experience, we find that the shareholder approval rules (as well as similar restrictions placed on smaller companies by the SEC such as the “baby-shelf” limitations) hurt more than help issuers, their shareholders and investors in many circumstances, suffering from the *law of unintended consequences*. Adopted as a means to promote investor protection, these measures backfire as public policy measures because they impede and place burdens on capital formation which would be better left to the discipline of pure negotiation of commercial terms by interested parties leaving the burdens and benefits to emerge from the interactions of the parties best able to evaluate such matters. Any limitations being subject to the realm of the fiduciary duties of directors, as interpreted by courts under applicable state law principles taking into account the specific facts and circumstances surrounding particular decisions. The infinite variables that face public companies, each with their existing capital structure, investor character, financing opportunities, burn rates and business prospects are not well suited to generalizations about what should or should not be done in the interest of “investors,” according to an exchange’s ideals of what investor protection means. What Nasdaq seems to mean by investor protection is how can the existing public shareholders gain a seat at the negotiating table when management wants to take action it deems in the best interest (sometimes meaning survival) of a company and all of its shareholders and other constituencies. Unhappy public shareholders have an alternative management does not – they can liquidate their positions and leave the investment which is the fundamental right of an investor in a liquid market.

The need to obtain a vote under the circumstances listed by Rule 5635(d) delays or prevents companies often in dire straits from consummation of a financing. Our investment banking clients are often stymied by these rules and decline to pursue a financing as do private investors thereby limiting the universe of potential resources when a company engages in a capital raise. If prior approval has not been obtained through the work-arounds that have evolved around the shareholder approval rules, the choices become even more limited. We find that few investors are willing to put funds in a company only to become subject to a 3-4 months

61 Broadway | New York, NY | 10006

T (212) 930 9700 | F (212) 930 9725 | WWW.SRFKLLP.COM

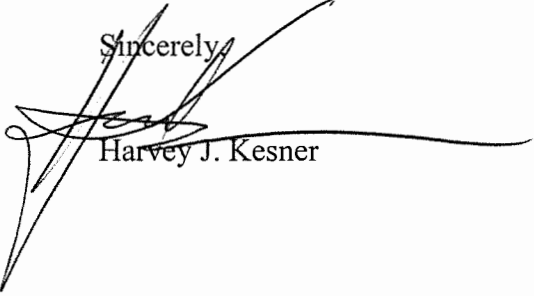
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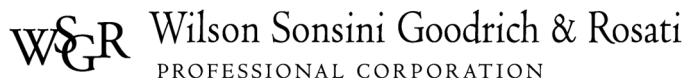
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hiatus imposed by the timeline for record dates and broker searches, months of preparation and SEC review, while 19.99% “Nasdaq blockers” create uncertainty for investors and companies alike. A myriad of ancillary issues have evolved around these processes as the regulations have evolved to address how to modulate the impact of the rules, such as the bar on “alternative outcome” voting. Nasdaq also shows preference in its exempting of a “public offering” that requires involvement of fee-based investment bankers for another popular exemption, without showing how this is more beneficial to “investors” than “registered direct” or “private placement” offerings. As interpreted by Nasdaq, the often used “pre-approval” work arounds only provide options for a brief period (6 months) of delay after approval, and at discounts to market (as defined by Nasdaq) or book value that won’t exceed Nasdaq’s self-determined imposed framework for fairness. Market and book value are the realm of regulations that also need updating to reflect more than a simple snapshot of the prior date closing bid price. This tinkering with market free will does not serve an investor protection purpose where a company can’t raise capital or runs out of runway to survive, investors impose more stringent or burdensome terms than if these rules didn’t require steps be taken, or a company fails entirely as the result. In other words, a little rulemaking tinkering opens a can of worms versus moving away entirely from the notion that shareholder approvals are in many cases not serving investor protection goals and should not be imposed. In general, we support the changes proposed as a step in the right direction.

Sincerely,



Harvey J. Kesner



701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
PHONE 206.883.2500
FAX 206.883.2699
www.wsgr.com

July 31, 2017

Via Electronic Mail

Nasdaq Listing and Hearing Review Council
805 King Farm Blvd.
Rockville, MD 20850
Attn: comments@nasdaq.com

**Re: Solicitation of Comments by the Nasdaq Listing and Hearing Review Council
About the Definition of Market Value for Purposes of Shareholder Approval
Rules**

Ladies and Gentlemen:

On June 14, 2017, the Nasdaq Listing and Hearing Review Council (“Nasdaq”) issued a solicitation of comments (the “Solicitation”) regarding certain proposed revisions to Listing Rule 5635(d) (as set forth in Exhibit A of the Solicitation, the “Proposed Revised Rule”) concerning, among other things, the definition of market value for purposes of shareholder approval rules. Wilson Sonsini Goodrich & Rosati appreciates the opportunity to submit this letter in response to the Solicitation.

We are a legal advisor to technology, life sciences and other growth enterprises worldwide and represent companies at every stage of development, from entrepreneurial start-ups to multibillion-dollar global corporations. Among our clients are over 300 public companies, to whom we provide advice on a wide range of areas, including corporate finance, corporate governance and securities litigation matters. Many of our public company clients are listed on The NASDAQ Stock Market and a significant number of our private companies are contemplating listing on an exchange in the next 12 to 24 months.

Elimination of Book Value Requirement

As an initial matter, we agree with the Proposed Revised Rule’s proposed elimination of the book value requirement from the shareholder approval rules. For the reasons stated in our letter to Nasdaq dated February 15, 2016 (“Prior Comment Letter”), as well as the reasons cited in the Solicitation, we believe eliminating the book value requirement will help streamline the shareholder approval rules with no negative impact on shareholder protections.

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Defining “Market Value” as Closing Price instead of Closing Bid Price

We also support Nasdaq changing the definition of market value to refer to the closing price instead of referencing the closing bid price. As noted in the Solicitation, we believe the closing price is a more transparent reference price than the closing bid price for both the company and investors. In addition, the closing price is a more reliable indicator of the price of a company’s stock since actual executed trades have been made at that price, versus a closing bid price that may never actually have resulted in a trade in the company’s stock. We further support using the Nasdaq Official Closing Price as the reference in the definition of market value under the shareholder approval rules so long as it references the closing auction on Nasdaq in the manner described in the Solicitation and is an accurate reflection of the actual sale prices for a company’s stock at a time of sufficiently high levels of liquidity. Investors want a high level of transparency as to how the Nasdaq Official Closing Price is calculated, including providing sufficient information about the results of the auctions that determine such price along with adequate disclosure about the stock trading results that are the basis for determining the Nasdaq Official Closing Price. Moreover, we believe that the closing price is more readily accessible to the company and investors (and the market in general) when used as the reference price for purposes of pricing a securities offering compared to the consolidated bid price.

Determining Market Value Using a Five-Day Average Price

Section (d)(2)(A) of the Proposed Revised Rule (the “Average Price Provision”) provides that shareholder approval is required if a non-public transaction of 20% or more of a corporation’s common stock will be issued and such transaction “is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement for the issuance.” While we support the use of a five-day average price (in lieu of using the Nasdaq Official Closing Price determined on a particular trading day) to determine market value under Nasdaq rules for certain types of private placements, such as in the PIPE market where companies issue equity or equity-linked instruments directly to investors through agents, there are other types of transactions where we believe such an average price mechanism could be problematic. For example, in offerings relying on Rule 144A, including offerings of convertible notes done on a firm-commitment basis using investment banks as the initial purchasers, determining market value based on a five-day average price would be in conflict with market practice of pricing the transaction based on the closing price of the stock on the pricing date. As noted in the Solicitation, the use of a five-day average price in a declining market could result in a transaction price greater than the market price, which while favorable to the issuer may make the feasibility of completing the private placement economically unfeasible from the investor’s perspective. Conversely, the use of a five-day average price in rising markets could result in a transaction price less than the market

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price, which while favorable to the investor may make the feasibility of completing the private placement problematic from the company's perspective, and could be problematic for certain Rule 144A equity-linked securities offerings that require a 10% conversion or exercise premium to the common stock closing price for the offering to be Rule 144A eligible. In our experience, the five-day average price request is typically demanded by PIPE investors in transactions where the company has limited financing alternatives and is used only when favorable to the investor.

Given these issues, our suggestion is to permit the company to elect, at its option, the market price based on either (1) the Nasdaq Official Closing Price on the date of execution of the transaction documentation for the private placement or (2) the five-day average Nasdaq Official Closing Price, with the last day in the averaging period being the date of execution of the transaction documentation for the private placement. This would provide the company flexibility to use either pricing method for determining the market price based on the type of transaction being undertaken (PIPE or Rule 144A equity or equity-linked offerings) or the need to reach agreement on the pricing method for the private placement in light of the overall mix of issues being negotiated by the company in connection with the proposed private placement.

Independent Approval Requirement

Section (d)(2)(B) of the Proposed Revised Rule (the "Independent Approval Provision") provides that shareholder approval is required if a non-public transaction of 20% or more of a corporation's common stock will be issued even if the non-public transaction meets the required market value test for offerings greater than 20% unless such transaction is approved "either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors." As discussed in the Solicitation, this proposed requirement is intended to mitigate misuse of the Average Price Provision by restricting a company from authorizing dilutive transactions without adequately considering shareholder interests. Rather than ensuring adequate consideration of shareholder interests, we respectfully submit that the Independent Approval Provision would be duplicative of, and already more effectively addressed by, the corporate law requirements of an issuer's jurisdiction of incorporation in the vast majority of cases. For the reasons discussed below, we propose that the Independent Approval Provision be eliminated from the Proposed Revised Rule or altered to reflect the more tailored independent approval concepts of state corporate law.

Protections Provided by State Corporate Law

As discussed in our Prior Comment Letter, Delaware is recognized as the leading U.S. jurisdiction for matters of corporate law and hundreds of companies listed on Nasdaq are

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incorporated in Delaware. Even though a number of Nasdaq-listed companies are incorporated in states other than Delaware, these states will often look to Delaware's robust jurisprudence on topics such as director fiduciary duties when interpreting novel questions of law. Furthermore, states with corporate statutes based on the Model Business Corporations Act still include minimum requirements for director fiduciary duties and cleansing of potential interested party transactions.

Delaware corporate law provides structural safeguards intended to protect shareholder interests. At the core of such safeguards is the principle that the business and affairs of a corporation are managed by or at the direction of the corporation's board of directors and that the directors serving on the board owe fiduciary duties of due care and loyalty to the corporation and its shareholders. The duty of care requires directors to be informed of all material information reasonably available to them and to consider all alternatives reasonably available to them prior to making a business decision. The duty of loyalty requires a director to promote the interests of the corporation and the shareholders before a director's personal interests or any other person's personal interests. The duty of loyalty also requires directors to act in good faith and with an honesty of purpose and to take proper steps to cause the corporation to comply with its legal obligations.

If a question is raised as to whether directors have failed to satisfy their fiduciary duties, Delaware case law provides a number of pro-shareholder safeguards. Delaware courts will apply a plaintiff-friendly, rigorous level of scrutiny, known as the entire fairness standard, in instances where a majority of the board is not disinterested and independent with respect to a decision and the board fails to use certain procedural devices. Under this standard, directors must show that their decision both was the result of a fair process and had fair terms. The purpose of this rule is to ensure that an independent decision-making body has approved a decision before a court will defer to that decision. If a conflict taints a transaction or a board does not comply with its fiduciary duties, a number of remedies can be imposed against corporations and directors, ranging from an injunction against a transaction to the award of damages. The stakes for directors are high and directors that breach their duty of loyalty can be held personally liable for resulting damages and, generally, cannot be indemnified for such damages. Section 144 of the Delaware General Corporation Law provides an additional statutory mechanism to protect shareholder interests where a director or officer has an interest in a transaction. In such circumstances, the transaction is void or voidable, unless: (1) the disinterested directors, with all material information, approve the transaction, (2) the shareholders approve the transaction, or (3) the transaction is entirely fair, under the entire fairness standard. Thus, even if only one director or officer has an interest in a transaction, Section 144 ensures that certain meaningful protections apply, or else a transaction could be voided. Many other states have adopted such statutes.

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Proposed Independent Approval Provision

Section (d)(2)(B) of the Proposed Revised Rule, the Independent Approval Provision requires approval “either by Independent Directors constituting a majority of the Board’s Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors.” As discussed in the Solicitation, an Independent Director is defined in Listing Rule 5605(a)(2) and means “a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.” In addition to this affirmative requirement, Listing Rule 5605(a)(2) enumerates certain relationships that would preclude a determination that a particular director is independent (the “Disqualifying Factors”). An issuer’s board of directors must monitor the status of its directors to ensure that the board of directors is composed of a majority of Independent Directors. However, barring the existence of a Disqualifying Factor, directors are determined to be independent because they lack “a relationship which . . . would interfere with the exercise of independent judgment.” This lack of a potentially interfering relationship considers all relevant facts and circumstances for a particular director; however, even though a director may be considered independent pursuant to Listing Rule 5605(a)(2), this determination does not mean that in every circumstance such director will not have a potential conflict of interest.

Since an Independent Director may have a conflict of interest with respect to a particular transaction, we respectfully submit that the better safeguard for protection of shareholder interests is to defer to applicable state corporate law, which contains more robust procedural and substantive protections for shareholders in the context of transactions where directors have potential conflicts of interest. U.S. corporate issuers listed on Nasdaq are already subject to state corporate law in the jurisdiction of their incorporation, thus, adding the Independent Approval Provision would be repetitive and without additional benefit to shareholders for such companies. If Nasdaq determines that retaining some form of the Independent Approval Provision is advisable, we respectfully submit that such provision focus on approval by directors that do not have a conflict of interest with respect to the particular transaction, rather than approval by Independent Directors, which, as noted above, may be independent for purposes of Listing Rule 5605(a)(2) but may also be conflicted with respect to a particular transaction. Without this change, we believe that the Independent Approval Provision does not provide meaningful protection for shareholder interests.

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

Nasdaq Listing and Hearing Review Council
July 31, 2017
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Conclusion

We appreciate the opportunity to respond to the Solicitation and thank you for considering our views on this important topic. We would be pleased to discuss our comments with you and answer any questions you may have. Please do not hesitate to contact Michael Nordtvedt or Bryan King at (206) 883-2500.

Very truly yours,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation



Michael Nordtvedt

cc: Steve Bochner
Michael Occhiolini
Erik Franks
Amy Simmerman
Michael Rosati

VIA EMAIL (comments@nasdaq.com)

July 31, 2017

Nasdaq Listing Qualifications
805 King Farm Blvd. Rockville, MD 20850
Attention: Mr. Stan Higgins, Senior Director-Listing Qualifications

Re: Response to Comment Solicitation re: Nasdaq Stockholder Approval Rule 5635(d)

Dear Mr. Higgins:

Ellenoff Grossman & Schole LLP is pleased to offer the below responses to the solicitation for public comment (the "Solicitation") provided by The Nasdaq Listing and Hearing Review Council ("Nasdaq") regarding the proposed amendments to Nasdaq's Rule 5635(d) with respect to private placements of greater than 20% of the issuer's outstanding common stock or voting power (the "Shareholder Approval Rule"). In particular, we write in the context of our firm's significant experience representing public companies, investment banks and investors in the small to mid-cap sector. In light of the significant protections in place for the benefit of shareholders pursuant to state corporate and fiduciary laws, the federal securities laws and the related rules and regulations of the U.S. Securities and Exchange Commission (the "SEC") and other corporate governance rules of Nasdaq, including rules concerning independent boards, we believe the proposed amendments to the Shareholder Approval Rule will encourage capital formation and strategic flexibility while maintaining appropriate protections for shareholders of public companies.

Book Value

We are glad that Nasdaq has come to the conclusion that book value bears little, if any, relation to market price, and thus cannot serve as a guide for the pricing of financing transactions (whether public offerings or private placements). In our practice, book value is never utilized by investors or investment banks in pricing a transaction, other than for purposes of confirming that a proposed transaction will not fall afoul of the current rule. Book value is often far from a valid snapshot of a company's worth, particularly in the current era of "derivative accounting", which has a disparate negative impact on smaller issuers with complicated capital structures. While the practical shortcomings of derivative accounting are not immediately relevant to Nasdaq's decision to delete this criterion, the end result is that modern financial accounting hinders rather than clarifies the actual value of a company. The market price is the consensus value placed on a company by investors, and no investor should be expected to, or would, pay above market price for a company with a supposed book value in excess of that market price. To preclude listed companies from raising money because of this valuation anomaly is often a corporate death sentence.

Market Price

Existing Rule 5635(d) has, without question, imposed a much heavier burden on smaller listed companies and their shareholders, which have been largely undercapitalized because of the inability to raise sufficient capital to execute on their business plan. In our practice, our clients find themselves too frequently limited, not by market acceptance of new financing, but by the requirements of Rule 5635(d). As such,

issuers have been forced to either engage in smaller financings that are not sufficient to properly capitalize the company, or engage in financings structured in part to avoid the impact of Rule 5635(d) that are substantially more costly for the issuer, and ultimately hurt the existing shareholders that Nasdaq intends to protect by means of this rule.

We agree that the closing price is a better metric (and more readily ascertained) than the current benchmark of the closing bid price. However, as noted in the Solicitation, mandating a five-day average of closing prices may seriously interfere with offerings of volatile stocks (as with book value, investors are rarely agreeable to paying above the market spot price to purchase a security directly from the issuer, when the same share can be purchased more cheaply on the open market). We believe that issuers should be allowed to utilize the lesser of (i) the prior trading day's closing price OR (ii) the average of the five prior trading days' closing prices, as agreed with the new investors, as a "market" price for purposes of the rule. Nasdaq should also seriously consider allowing the use of either the one day or five day averages of the volume weighted average price (VWAP) in place of the closing price. The VWAP encompasses an even broader array of actual trades during the period in question than the closing price (with due respect to the Nasdaq closing auction) and is a well-respected trading valuation objective for market-neutral institutional investors. We also note that the Toronto Stock Exchange has long accepted a one-to-five day VWAP as a "market" price for its equivalent rule to 5635(d). While obtaining the VWAP does require access to a Bloomberg terminal, all investment banks and virtually all institutional investors have access to the same.

We also note that the proposed text change set forth in the Solicitation does not appear to correctly state Nasdaq's intentions here: as proposed, a majority of the Independent Directors could approve ANY non-public offering without further shareholder approval. We believe the intent was to have the Independent Directors approve the use of any price OTHER THAN the 5-day average of the closing prices. If Nasdaq accepts our alternative market-prices proposal above, this branch of the proposed rule could be eliminated in its entirety. In support of simplifying capital raising transactions, we note that the "inside" directors of a listed company typically have much more equity in the issuer than the Independent Directors, and thus personally have more to lose from a poorly structured or poorly priced deal than do the Independent Directors. Thus, a separate approval by Independent Directors may not prove helpful to outside shareholders, in practice. If Nasdaq intends to maintain approval by the Independent Directors as a requirement for any non-public offering in excess of 20%, then it should clarify the proposed language in the amendment to make clear that any below-market offering of greater than 20% (with the new definition of "market price") requires Independent Director approval.

Conclusion

In summary, private placement transactions are an important capital raising mechanism for small and mid-size companies. We respectfully submit that the proposed amendment to the Rule 5635(d) will increase the capacity of all companies to meet their financing needs at the best possible terms.

We sincerely appreciate the opportunity to offer our firm's thoughts on the foregoing, and we welcome both the Nasdaq's initiative in this regard and the opportunity engage in any discussions with the Nasdaq staff on these matters. Should you desire to discuss this matter further, please contact any of our firm's partners at (212) 370-1300.

Very truly yours,
ELLENOFF GROSSMAN & SCHOLE LLP



August 1, 2017

California State Teachers'
Retirement System
Anne Sheehan, Director
Corporate Governance, Investment Office
100 Waterfront Place, MS-04
West Sacramento, CA 95605-2807
916-414-7410
Asheehan@calstrs.com

NASDAQ Listing and
Hearing Review Council
C/o Nicolai Utochkin
805 King Farm Blvd.
Rockville, MD 20850

Via email: comments@nasdaq.com

Dear Mr. Utochkin:

RE: Solicitation of Comments about the Definition of Market Value
For Purposes of Shareholder Approval Rules – Nasdaq Rule 5635(d)

I am writing on behalf of the California State Teachers' Retirement System (CalSTRS) to the comment solicitation request on the *Definition of Market Value for Purposes of Shareholder Approval Rules* by the Nasdaq Listing and Hearing Review Council.¹ CalSTRS also responded to the 2016 comment solicitation on the utility of the listing standards that require shareholder approval to an issuance of securities in connection with acquisitions, equity-based compensation, and change of control and private placements. Thank you for this additional opportunity to respond to your inquiry on whether to modify Rule 5635(d) as reflected in Exhibit A in your request for comment. Additionally, we are aware that Nasdaq recently released a blueprint for revitalizing the U.S. capital markets and its commitment to “regularly reconsider whether Nasdaq’s listing rules operate efficiently to provide meaningful protections to investors.”²

CalSTRS’ mission is to secure the financial future and sustain the trust of California’s educators. We serve the investment and retirement interests of approximately 914,454 plan participants.³ CalSTRS is the largest educator only pension fund in the world with a global investment portfolio valued at approximately \$208.7 billion as of June 30, 2017.⁴ We have investments that list on the Nasdaq stock exchange which include 329 million shares with a market value of \$19.7

¹ Nasdaq Solicitation of Comments, June 14, 2017.

<https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf>

² Nasdaq – At a Glance: The Promise of Market Reform May 2017.

http://business.nasdaq.com/media/Revitalize%20Overview%20_tcm5044-45204.pdf

http://business.nasdaq.com/media/Nasdaq%20Blueprint%20to%20Revitalize%20Capital%20Markets_tcm5044-43175.pdf

³ CalSTRS Fast Facts, June 30, 2016. https://www.calstrs.com/sites/main/files/file-attachments/fastfacts_2016.pdf

⁴ CalSTRS Current Investment Portfolio for the period ending June 30, 2017. <http://www.calstrs.com/current-investment-portfolio>

Nicolai Utochkin
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billion as of June 30, 2017.⁵ The long-term nature of CalSTRS' liabilities, its overall stewardship of the fund and the CalSTRS Board's fiduciary responsibility to act in the best interest of our members, makes the fund keenly interested in governance issues. We have a vested interest in ensuring shareholder protections are safeguarded.

We appreciate the Nasdaq's continued efforts to ensure shareholder protections and provide market-leading technology solutions and intelligence to help business and investors succeed in today's global capital markets.⁶ CalSTRS agrees that robust public markets and growth companies play a critical role in economic development, but believe that long-term investment is required to achieve that growth. CalSTRS is a long-term shareholder which allows us to be a patient capital provider. We agree with the OECD report to the G20 that in order to gain access to public equity markets, corporations need to meet investor expectations with respect to corporate governance practices.⁷ We also believe that stock exchanges play an important role by establishing listing standards to not only facilitate company growth, but to foster good standards of corporate governance.

As cited in numerous empirical data, companies that invest in improving governance produce substantially better operational and market results. Though, having good governance is not a substitute for shareholders' right to weigh in on substantive financial transactions as prescribed by current shareholder approval rules. CalSTRS' principles reflect that shareholders' essential rights should not only include the ability to vote on companies' governing structures but also on any financial transactions that could affect the value of our investments or seriously dilute the value of our ownership. A shareholder vote is an important check and balance in the investor – issuer relationship. CalSTRS fundamentally believes shareholders should have a say in transactions that materially affect their investments.

CalSTRS fully concurs with Nasdaq's statement in its recently issued blueprint in market reform, "There is no question that companies that choose to participate in equities markets and make their shares available to the public take on a greater obligation for transparency and responsible corporate practices."⁸ While we understand there is a need to balance regulations and seeming obstacles to emerging growth companies, CalSTRS believes stock exchanges should ensure public issuers provide shareholders a vote on transactions that may materially impact them as current shareholders. Nasdaq's proposed rule on stock issuance would not require shareholder approval if independent directors approve either the issuance that equals 20% or more of common stock or 20% or more of the voting power outstanding, or is at a price less than average closing market price. While we genuinely believe and appreciate that a majority of independent

⁵ FactSet, Screening of CalSTRS holdings at Stock Exchange Level, June 30, 2016.

⁶ Nasdaq's Mission/Cultural Values <http://business.nasdaq.com/discover/careers/cultural-values/Index.html>

⁷ See (OECD, 2015b), OECD Report to G20: G20/OECD Principles of Corporate Governance, page 4, September 2015. <https://www.oecd.org/g20/topics/framework-strong-sustainable-balanced-growth/OECD-Growth-Companies-Access-to-Capital-Markets-and-Corporate-Governance.pdf>

⁸ Nasdaq, *The Promise of Market Reform, Reigniting American's Economic Engine*, May 2017. http://business.nasdaq.com/media/Nasdaq%20Blueprint%20to%20Revitalize%20Capital%20Markets_tcm5044-43175.pdf

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directors should always screen and vote on any stock issuances; we firmly believe if a majority of the independent board of directors supports a transaction, then asking shareholders to ratify a transaction is not only integral but also important to the clarity and transparency of the proposed securities issuance.

CalSTRS agrees with the Council of Institutional Investors' (CII) recommendation that "the Nasdaq has an opportunity to meaningfully enhance shareholders' ability to evaluate and, where appropriate, reject issuances that could destroy long-term value."⁹ With this in mind, and as members, CII policies reflect the principle that shareowners should be permitted to vote on corporate actions that would significantly affect the nature or value of their investment. CII policies state that "an action should not be taken if its purpose is to reduce accountability to shareowners."¹⁰ CalSTRS supports Nasdaq's current Listing Rule 5635(d) which requires a company to obtain shareholder approval when issuing common stock or securities convertible into common stock equal to 20% or more of the shares outstanding at a price less than the greater of the book value or market value. Specifically, we also affirm the importance of ensuring the need for companies to seek shareholder approval in issuance of any level of stock when the price is less than the greater of book value or market value as this materially impacts current shareholders.

Respectfully, CalSTRS recommends similar edits as outlined in CII's letter to the Nasdaq on Rule 5635(d). In summary, we are asking that shareholders retain the right to approve any stock issuance above 20% (and/or 20% of voting power outstanding) or when issuance of shares is at a price less than current market price. Proposed changes to this Rule should read:

Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which:

1) alone or together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power of outstanding shares before the issuance; or ~~and~~

2)(A) is at a price less than the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement of the issuance.; ~~or~~

(B) is not approved either by Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate or by a committee comprised solely of Independent Directors

⁹ See Council of Institutional Investors' letter in response to the Nasdaq, dated June 26, 2017.

¹⁰ Council of Institutional Investors Policies on Corporate Governance, Section 1.4 *Accountability to Shareowners*, September 30, 2016. http://www.cii.org/corp_gov_policies#shareowner_rights

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We recommend the Nasdaq approach shareholder approval rights more on the importance of disclosure, transparency and the substance of the transactions to embed its commitment to “operate efficiently to provide meaningful protections to investors.”¹¹ Thank you again for soliciting comments on this important shareholder rule. If you have any questions, please do not hesitate to contact me at 916-414-7410, ASheehan@calstrs.com, or Mary Hartman Morris, Investment Officer at 916-414-7412, MMorris@calstrs.com.

Sincerely,



Anne Sheehan
Director of Corporate Governance
California State Teachers' Retirement System

Cc: Aisha Mastagni, Portfolio Manager, Corporate Governance

¹¹ Nasdaq, Solicitation of Comments by the Nasdaq Listing and Hearing Review Council About the Definition of Market Value for Purposes of Shareholder Approval Rules, June 14, 2017.

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market Rules

* * * * *

5635. Shareholder Approval

This Rule sets forth the circumstances under which shareholder approval is required prior to an issuance of securities in connection with: (i) the acquisition of the stock or assets of another company; (ii) equity-based compensation of officers, directors, employees or consultants; (iii) a change of control; and (iv) [private placements] transactions other than public offerings. General provisions relating to shareholder approval are set forth in Rule 5635(e), and the financial viability exception to the shareholder approval requirement is set forth in Rule 5635(f). Nasdaq-listed Companies and their representatives are encouraged to use the interpretative letter process described in Rule 5602.

(a) – (c) No change.

IM-5635-1. Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements

No change.

(d) [~~Private Placements~~]Transactions other than Public Offerings

[Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving:

(1) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

(2) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.]

(1) For purposes of this Rule 5635(d):

(A) “Minimum Price” means a price that is the lower of: (i) the closing price (as reflected on Nasdaq.com); or (ii) the average closing price of the common stock

(as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

(B) "20% Issuance" means a transaction, other than a public offering as defined in IM-5635-3, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.

(2) Shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price.

IM-5635-2. Interpretative Material Regarding the Use of Share Caps to Comply with Rule 5635

No change.

IM-5635-3. Definition of a Public Offering

Rule 5635(d) provides that shareholder approval is required for [the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock] a 20% Issuance at a price that is less than the Minimum Price. Under this rule, however, shareholder approval is not required for a "public offering."

Companies are encouraged to consult with Nasdaq staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Nasdaq staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Nasdaq staff will consider all relevant factors, including but not limited to:

- (i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the Company);

- (ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);
 - (iii) the extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the Company and those investors);
 - (iv) the offering price (including the extent of any discount to the market price of the securities offered); and
 - (v) the extent to which the Company controls the offering and its distribution.
- (e) – (f) No change.

IM-5635-4. Interpretive Material Regarding Future Priced Securities and Other Securities with Variable Conversion Terms

Summary

Provisions of this IM-5635-4 would apply to any security with variable conversion terms. For example, Future Priced Securities are private financing instruments which were created as an alternative means of quickly raising capital for Companies. The security is generally structured in the form of a convertible security and is often issued via a private placement. Companies will typically receive all capital proceeds at the closing. The conversion price of the Future Priced Security is generally linked to a percentage discount to the market price of the underlying common stock at the time of conversion and accordingly the conversion rate for Future Priced Securities floats with the market price of the common stock. As such, the lower the price of the Company's common stock at the time of conversion, the more shares into which the Future Priced Security is convertible. The delay in setting the conversion price is appealing to Companies who believe that their stock will achieve greater value after the financing is received. However, the issuance of Future Priced Securities may be followed by a decline in the common stock price, creating additional dilution to the existing holders of the common stock. Such a price decline allows holders to convert the Future Priced Security into large amounts of the Company's common stock. As these shares are issued upon conversion of the Future Priced Security, the common stock price may tend to decline further.

For example, a Company may issue \$10 million of convertible preferred stock (the Future Priced Security), which is convertible by the holder or holders into \$10 million of common stock based on a conversion price of 80% of the closing price of the common stock on the date of conversion. If the closing price is \$5 on the date of conversion, the Future Priced Security holders would receive 2,500,000 shares of common stock. If, on the other hand, the closing price is \$1 on the date of conversion, the Future Priced Security holders would receive 12,500,000 shares of common stock.

Unless the Company carefully considers the terms of the securities in connection with several Nasdaq Rules, the issuance of Future Priced Securities could result in a failure to comply with Nasdaq listing standards and the concomitant delisting of the Company's securities from Nasdaq. Nasdaq's experience has been that Companies do not always appreciate this potential consequence. Nasdaq Rules that bear upon the continued listing qualification of a Company and that must be considered when issuing Future Priced Securities include:

1. the shareholder approval rules {see Rule 5635}
2. the voting rights rules {see Rule 5640}
3. the bid price requirement {see Rules 5450(a)(1) and 5555(b)(1)}
4. the listing of additional shares rules {see Rule 5250(e)(2)}
5. the change in control rules {see Rule 5635(b) and 5110(a)}
6. Nasdaq's discretionary authority rules {see the Rule 5100 Series}

It is important for Companies to clearly understand that failure to comply with any of these rules could result in the delisting of the Company's securities.

This notice is intended to be of assistance to Companies considering financings involving Future Priced Securities. By adhering to the above requirements, Companies can avoid unintended listing qualifications problems. Companies having any questions about this notice should contact the Nasdaq Office of General Counsel at (301) 978-8400 or Listing Qualifications Department at (301) 978-8008. Nasdaq will provide a Company with a written interpretation of the application of Nasdaq Rules to a specific transaction, upon request of the Company.

How the Rules Apply

Shareholder Approval

Rule 5635(d) [provides, in part:]requires shareholder approval prior to a 20% Issuance at a price that is less than the Minimum Price.

[Each Company shall require shareholder approval prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.]

(Nasdaq may make exceptions to this requirement when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and reliance by the Company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors.)

When Nasdaq staff is unable to determine the number of shares to be issued in a transaction, it looks to the maximum potential issuance of shares to determine whether there will be an issuance of 20 percent or more of the common stock outstanding. In the case of Future Priced Securities, the actual conversion price is dependent on the market price at the time of conversion and so the number of shares that will be issued is uncertain until the conversion occurs. Accordingly, staff will look to the maximum potential issuance of common shares at the time the Future Priced Security is issued. Typically, with a Future Priced Security, the maximum potential issuance will exceed 20 percent of the common stock outstanding because the Future Priced Security could, potentially, be converted into common stock based on a share price of one cent per share, or less. Further, for purposes of this calculation, the lowest possible conversion price is below the [book or market value]Minimum Price of the stock for purposes of Rule 5635(d) at the time of issuance of the Future Priced Security. Therefore, shareholder approval must be obtained prior to the issuance of the Future Priced Security. Companies should also be cautioned that obtaining shareholder ratification of the transaction after the issuance of a Future Priced Security does not satisfy the shareholder approval requirements.

Some Future Priced Securities may contain features to obviate the need for shareholder approval by: (1) placing a cap on the number of shares that can be issued upon conversion, such that the holders of the Future Priced Security cannot, without prior shareholder approval, convert the security into 20% or more of the common stock or voting power outstanding before the issuance of the Future Priced Security (See IM-5635-2, Interpretative Material Regarding the Use of Share Caps to Comply with Rule 5635), or (2) placing a floor on the conversion price, such that the conversion price will always be at least as high as the [greater of book or market value of the common stock]Minimum Price prior to the issuance of the Future Priced Securities. Even when a Future Priced Security contains these features, however, shareholder approval is still required under Rule 5635(b) if the issuance will result in a change of control. Additionally, discounted issuances of common stock to officers, directors, employees or consultants require shareholder approval pursuant to 5635(c).

Voting Rights

Rule 5640 provides:

Voting rights of existing Shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

IM-5640 also provides rules relating to voting rights of Nasdaq Companies.

Under the voting rights rules, a Company cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities. The voting rights rules are typically implicated when the holders of the Future Priced Security are entitled to vote on an as-converted basis or when the holders of the Future Priced Security are entitled to representation on the Board of Directors. The percentage of the overall vote attributable to the Future Priced Security holders and the Future Priced Security holders' representation on the board of directors must not exceed their relative contribution to the Company based on the [Company's overall book or market value]Minimum Price at the time of the issuance of the Future Priced Security. Staff will consider whether a voting rights violation exists by comparing the Future Priced Security holders' voting rights to their relative contribution to the Company based on the [Company's overall book or market value]Minimum Price at the time of the issuance of the Future Priced Security. If the voting power or the board percentage exceeds that percentage interest, a violation exists because a new class of securities has been created that votes at a higher rate than an already existing class. Future Priced Securities that vote on an as-converted basis also raise voting rights concerns because of the possibility that, due to a decline in the price of the underlying common stock, the Future Priced Security holder will have voting rights disproportionate to its investment in the Company.

It is important to note that compliance with the shareholder approval rules prior to the issuance of a Future Priced Security does not affect whether the transaction is in violation of the voting rights rule. Furthermore, Shareholders can not otherwise agree to permit a voting rights violation by the Company. Because a violation of the voting rights requirement can result in delisting of the Company's securities from Nasdaq, careful attention must be given to this issue to prevent a violation of the rule.

The Bid Price Requirement

No change.

Listing of Additional Shares

No change.

Public Interest Concerns

No change.

Business Combinations with non-Nasdaq Entities Resulting in a Change of Control

No change.

* * * *