

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 43	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2020 - * 025	Amendment No. (req. for Amendments *)
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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 type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<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 checked="" 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"/>
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Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

A proposal to adopt a rule, operative through, and including, June 30, 2020, to provide listed companies with a temporary exception from certain shareholder approval requirements.

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 * Arnold Last Name * Golub

Title * Deputy General Counsel

E-mail * Arnold.Golub@nasdaq.com

Telephone * (301) 978-8075 Fax

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 05/01/2020 EVP and Chief Legal Officer

By John A. Zecca

(Name *)

john.zecca@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 EFFS 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 adopt a rule, operative through, and including, June 30, 2020, to provide listed companies with a temporary exception from certain shareholder approval requirements, as described below. Nasdaq has filed this proposal under Exchange Act Rule 19b-4(f)(6)³ and requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b-4(f)(6)(iii).⁴

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange (the “Board”) on September 25, 2019. Exchange staff will advise the Board of any action taken pursuant to delegated authority. 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.

³ 17 CFR 240.19b-4(f)(6).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

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

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

or

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

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

a. Purpose

Given current market conditions, Nasdaq proposes to provide listed companies with a temporary exception, limited in scope and time, from certain shareholder approval requirements, as described below.

In December 2019, COVID-19 began to spread and disrupt company operations and supply chains and impact consumers and investors, resulting in a dramatic slowdown in production and spending.⁵ By March 11, 2020, the World Health Organization

⁵ See, e.g., Chairman Jay Clayton, Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), available at <https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30>. (“Yesterday, I asked the staff to monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus. We recognize that such effects may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis. This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers.”).

characterized COVID-19 as a pandemic.⁶ To slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel and closed non-essential businesses.

These necessary measures also have affected equity markets, which have seen significant declines.⁷ In response, governments around the world have acted swiftly and decisively to provide relief to regulated entities and are undertaking efforts to stabilize the economy and assist affected companies and their employees.⁸ The Commission, in particular, has recognized the importance of functioning markets in this environment⁹ and

⁶ See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (March 11, 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁷ In the United States, Level 1 market wide circuit breaker halts were triggered on March 9, March 12, March 16, and March 18, 2020. See also Phil Mackintosh, *Putting the Recent Volatility in Perspective*, available at <https://www.nasdaq.com/articles/putting-the-recent-volatility-in-perspective-2020-03-05> (“Analysts showed that we saw the fastest ‘correction’ in history (down 10% from a high), occurring in a matter of days. In the last week of February, the Dow fell 12.36% with notional trading of \$3.6 trillion.”)

⁸ See, e.g., the list of actions undertaken by the Board of Governors of the Federal Reserve System at <https://www.federalreserve.gov/covid-19.htm>. See also Families First Coronavirus Response Act, Public Law No. 116-127 and Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136.

⁹ See, e.g., Chairman Jay Clayton, *The Deep and Essential Connections Among Markets, Businesses, and Workers and the Importance of Maintaining those Connections in our Fight Against COVID-19* (March 24, 2020) available at <https://www.sec.gov/news/public-statement/statement-clayton-covid-19-2020-03-24> (“The Securities and Exchange Commission and other financial regulators are focused on two overriding and interrelated issues. First, we are facing an unprecedented national challenge — a health and safety crisis that requires all Americans, for the sake of all Americans, to significantly change their daily behavior and, for many, to make difficult personal sacrifices. Second, the recognition that the continuing, orderly operation of our markets is an essential component of our national response to, and recovery from, COVID-19. The

has granted issuers and broker-dealers relief and extensions from existing deadlines, in order to allow these entities, as well as the Commission itself, to focus on fighting the deadly virus and preserving functioning capital markets.¹⁰

Amidst this market uncertainty, Nasdaq proposes to temporarily modify certain of its rules in an effort to streamline listed companies' access to capital. Specifically, Nasdaq proposes to adopt Listing Rule 5636T to provide a limited temporary exception to the shareholder approval requirements in Listing Rule 5635(d) (Transactions other than Public Offerings)¹¹ and, in certain narrow circumstances, a limited attendant exception to Listing Rule 5635(c)(Equity Compensation).¹²

interrelationship between these issues cannot be overstated. Our health care, pharmaceutical, manufacturing, transportation, telecommunications and many other private-sector industries are critical to our collective response to COVID-19. The thousands of firms and entrepreneurs in these industries — and the millions of employees and contractors — that are working around the clock to fight COVID-19 depend on continued access to payments and credit.”).

¹⁰ See *SEC Coronavirus (COVID-19) Response* available at <https://www.sec.gov/sec-coronavirus-covid-19-response>, which is being updated regularly with additional actions taken by the Commission. As of April 14, 2020, the Commission response includes (but is not limited to): providing conditional relief for certain publicly traded company filing and proxy delivery obligations (March 4 and 25, 2020); granting relief to reporting deadlines and in-person meeting requirements for investment companies (March 13, 2020); extending the industry compliance period for Consolidated Audit Trail reporting due to the fact that “disruptions as a result of COVID-19 have placed new stresses and competing priorities on the infrastructure and staff required to implement the Consolidated Audit Trail” (March 16, 2020); extending filing deadlines for certain reports required under Regulation A and Regulation Crowdfunding (March 26, 2020); and providing temporary relief for Business Development Companies investing in small and medium-sized businesses (April 8, 2020).

¹¹ Listing Rule 5635(d) states that shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price. The “Minimum Price” is defined in Rule 5635(d)(1)(A) as the lower of: (i) the Nasdaq Official Closing Price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average Nasdaq Official Closing Price of the

Shareholder Approval Requirements

The Nasdaq shareholder approval rules generally require companies to obtain approval from shareholders prior to issuing securities in connection with: (i) certain acquisitions of the stock or assets of another company;¹³ (ii) equity-based compensation of officers, directors, employees or consultants;¹⁴ (iii) a change of control;¹⁵ and (iv) a 20% Issuance at a price less than the Minimum Price.¹⁶

One unavoidable consequence of the actions being taken to reduce the spread of COVID-19 is a reduction, or complete interruption, in revenue for many companies. For example, many communities have mandated that all restaurants and entertainment facilities close for a period of time. Similarly, companies in the travel sector have seen significant declines in bookings even if they are allowed to continue to operate. Thus,

common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement. A “20% Issuance” is defined in Rule 5635(d)(1)(B) 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.

¹² Listing Rule 5635(c) requires shareholder approval, with certain exceptions, prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

¹³ See Listing Rule 5635(a)(Acquisition of Stock or Assets of Another Company).

¹⁴ See Listing Rule 5635(c)(Equity Compensation).

¹⁵ See Listing Rule 5635(b)(Change of Control).

¹⁶ See Listing Rule 5635(d)(Transactions other than Public Offerings). See also footnote 11 above.

these businesses will have no or greatly reduced revenue to offset the operating costs or increased costs associated with the crisis. As such, investors may be reluctant to enter into new equity transactions, unless they are compensated for the risk through discounts to the trading price of a security, and companies may be forced by current circumstances to raise money through equity financings that require shareholder approval under Nasdaq's rules. At the same time, other companies have sudden, unexpected cash needs as they undertake new or accelerated initiatives designed to address the loss of business and supply shortages caused by COVID-19.

While an exception is currently available within Nasdaq's rules for companies in financial distress where the delay in securing stockholder approval would seriously jeopardize the financial viability of the company,¹⁷ that exception is not helpful in most situations arising from the COVID-19 pandemic. For example, while a company may need additional cash so that it can continue to pay employees during a period of decreased or no revenue, the company's viability may not otherwise be in jeopardy.¹⁸ Further, the accelerated need for funds, as well as the significantly curtailed operations of many businesses, may make impractical the requirement to mail notice to all shareholders

¹⁷ See Listing Rule 5635(f). Reliance by the company on a financial viability exception must expressly be approved by the company's audit committee, or a comparable body of the board of directors comprised solely of independent, disinterested directors, and the company must obtain Nasdaq's approval prior to proceeding with the transaction. In addition, companies are required to mail a letter (as opposed to relying solely on a press release or Form 8-K, which are also required, or a website posting) at least ten days prior to issuing securities in the exempted transaction alerting shareholders to the company's omission to seek the shareholder approval that would otherwise be required.

¹⁸ Similarly a company that needs capital to undertake, for example, a new initiative designed to test for COVID-19 or to develop a vaccine may not otherwise be facing a threat to its viability.

ten days prior to issuing securities. As such, Nasdaq is concerned that this exception does not adequately address the capital raising needs of listed companies under current conditions.

Proposed COVID-19 Exception

In view of the above, Nasdaq proposes to create a new temporary exception from the shareholder approval requirements in Listing Rule 5635(d), accompanied by a limited exception from Listing Rule 5635(c) by adopting Listing Rule 5636T. This proposed exception would be available until and including June 30, 2020. Nasdaq notes that to rely on this exception, the company must execute a binding agreement governing the issuance of the securities, submit the notices required by Listing Rules 5636T(b)(5)(A) and (e), and obtain the required approval from Nasdaq under Listing Rule 5636T(b)(5)(B)(ii) (if applicable), as described below, no later than June 30, 2020. The issuance of the securities governed by such agreement in reliance on the exception in Listing Rule 5636T may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement. If the company does not issue securities within 30 calendar days, as described above, it may no longer rely on the exception in Listing Rule 5636T.

Under proposed Listing Rule 5636T(b), the exception is limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. In addition to demonstrating that the transaction

meets one of the foregoing requirements, in order to rely on the exception, the company would also have to demonstrate to Nasdaq that the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. Nasdaq also proposes, similar to the requirement for the financial viability exception, to require that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception. Nasdaq also proposes to require such committee or a comparable body of the board of directors comprised solely of independent, disinterested directors to determine that the transaction is in the best interest of shareholders.

Unlike the requirement for the financial viability exception, no prior approval of the exception by Nasdaq would be required if the maximum issuance of common stock (or securities convertible into common stock) issuable in the transaction is less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the maximum discount to the Minimum Price at which shares could be issued is 15% (the "Safe Harbor Provision"). Nasdaq notes that transactions that involve issuance of warrants exercisable for shares of common stock are not eligible for the Safe Harbor Provision.

For transactions that do not fall within the Safe Harbor Provision, the Nasdaq Listing Qualifications Department must approve the company's reliance on the exception before the company can issue any securities in the transaction. This approval will be based on a review of whether the company has established that it complies with the requirements of Listing Rule 5636T(b) (and Listing Rule 5636T(c) if applicable). Upon

completion of the review of the company's submission, the Nasdaq Listing Qualifications Department will notify the company in writing whether the company's reliance on the exception was approved.

To provide shareholders with advance notice of the transaction, Nasdaq proposes to adopt Listing Rule 5636T(d), which would require a company relying on the proposed exception to make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing as promptly as possible, but no later than two business days before the issuance of the securities:

- the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
- that shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the Company is relying on an exception to the shareholder approval rules; and
- that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.¹⁹

In addition, Nasdaq has long interpreted Listing Rule 5635(c) to require shareholder approval for certain sales to officers, directors, employees, or consultants when such issuances could be considered a form of "equity compensation." Nasdaq has

¹⁹ See Listing Rule 5635(f) requiring similar disclosure, for a transaction for which a company relied on the financial viability exception, alerting shareholders to the omission to seek the shareholder approval that would otherwise be required.

heard from market participants that investors often require a company's senior management to put their personal capital at risk and participate in a capital raising transaction alongside the unaffiliated investors. Nasdaq believes that as a result of uncertainty related to the ongoing spread of the COVID-19 virus, listed companies seeking to raise capital may face such requests. Accordingly, Nasdaq proposes that the temporary exception allow such investments under limited circumstances.

To that end, Nasdaq proposes to adopt Listing Rule 5636T(c), which would provide for an exception from shareholder approval under Listing Rule 5635(c) for an affiliate's participation in the transaction described in Listing Rule 5636T(b) provided the affiliate's participation in the transaction was specifically required by unaffiliated investors. In addition, to further protect against self-dealing, the proposed Listing Rule 5636T(c) would limit such participation to a de-minimis level – each affiliate's participation must be less than 5% of the transaction and all affiliates' participation collectively must be less than 10% of the transaction.²⁰ Finally, any affiliate investing in the transaction must not have participated in negotiating the economic terms of the transaction.

Listing Rule 5250(e)(2) requires a company to notify Nasdaq at least 15 calendar days prior to certain events, including when the company issues any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-

²⁰ Cf. Listing Rule IM-5405-1(a)(3) similarly limiting affiliates' participation in certain pre-listing transactions in order for such transactions to constitute compelling evidence of the company's value.

transaction basis (the “Notification”). The Notification allows Nasdaq additional time to review the proposed transaction and assure that it complies with the shareholder approval requirements, including those in Listing Rules 5635(c) and (d). Absent a rule change, transactions described in proposed Listing Rules 5636T(b) and (c) would require such advance notification. Because a transaction satisfying the proposed temporary rule will be excepted from certain provisions of the shareholder approval rules, Nasdaq believes that notification 15 days prior to issuance is unnecessary. Accordingly, Nasdaq proposes to adopt Listing Rule 5636T(e) to provide that a company that relies on the exception in this Rule 5636T is not subject to the 15 day prior notification requirement described in Rule 5250(e)(2) but must still provide notification required by that rule to Nasdaq, along with a supplement, as required by Listing Rule 5636T(b)(5)(A), certifying in writing that the company complied with all requirements of Listing Rule 5636T(b), and Listing Rule 5636T(c) if applicable. Such submissions must be made, as promptly as possible, but no later than the time of the public announcement required by Listing Rule 5636T(d) and in no event later than June 30, 2020, in accordance with Listing Rule 5636T(a). In such certification, Nasdaq expects the company to describe with specificity how it complies with Listing Rule 5636T(b), and Listing Rule 5636T(c) if applicable. For transactions described in Listing Rule 5636T(b)(5)(B)(ii) that require approval of the Nasdaq Listing Qualifications Department before the company can issue any securities in reliance on Listing Rule 5636T, Nasdaq expects companies to submit the Notification, and a supplement required by Listing Rule 5636T(b)(5)(A), with enough time to allow Nasdaq to complete its review of the submissions.²¹ The proposed rule also will remind

²¹ Nasdaq notes that in such cases the company may not issue any securities until it

companies that a transaction that violates other Nasdaq rules could subject the company to delisting and Nasdaq Staff would review transactions covered by proposed Listing Rule 5636T for compliance with all other Nasdaq listing requirements. As noted below, the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Finally, Nasdaq proposes to aggregate issuances of securities in reliance on the exception in proposed Listing Rule 5636T with any subsequent issuance by the company, other than a public offering under IM-5635-3, at a discount to the Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. Accordingly, if following the subsequent issuance, the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required under Rule 5635(d) prior to the subsequent issuance.

Nasdaq believes that this temporary suspension will permit companies to raise capital quickly to continue running their businesses and address the immediate health crisis caused by the COVID-19 pandemic, including its impact on their employees, customers, and communities. Nasdaq notes that the proposed exception would not be available for the shareholder approval requirements related to equity compensation in

receives the approval from the Nasdaq Listing Qualifications Department, which may take more than two days. Of course, if the Nasdaq Listing Qualifications Department does not approve reliance on the exception, any issuance of securities must comply with the shareholder approval requirements in Listing Rule 5635.

Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²² in general, and furthers the objectives of Section 6(b)(5) of the Act,²³ 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. As a result of uncertainty related to the ongoing spread of the COVID-19 virus, the prices of securities listed on U.S. exchanges are experiencing significant volatility. Nasdaq believes that the proposed rule change is designed to remove an impediment to companies addressing certain immediate capital needs as a result of the COVID-19 pandemic and reduce uncertainty regarding the ability of companies to raise money quickly through equity financings during the current highly unusual market conditions and general economic disruptions. Nasdaq believes that in this way, the proposed rule change will protect investors, facilitate transactions in securities, and remove an impediment to a free and open market. All companies listed on the Exchange would be eligible to take advantage of the proposed suspension.

In addition, Nasdaq believes the proposed rule change is designed to protect investors by limiting the exception from the shareholder approval requirements to

²² 15 U.S.C. 78f(b).

²³ 15 U.S.C. 78f(b)(5).

situations where the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. The exception is also limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. Further, the proposed rule requires that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception and determine that the transaction is in the best interest of shareholders.

Nasdaq also notes that to the extent the company relies on the Safe Harbor Provision instead of Nasdaq's review and approval of the company's reliance on the exception, as described above, the maximum issuance of common stock (or securities convertible into common stock) issuable in the transaction must be less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the maximum discount to the Minimum Price at which shares could be issued is 15%.

Notwithstanding the proposed exception from certain shareholder approval requirements, as described above, important investor protections will remain as the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the

proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Finally, Nasdaq notes that the proposed rule is a temporary exception from certain shareholder approval requirements, as described above, operative through, and including, June 30, 2020.

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. All companies listed on the Exchange would be eligible to take advantage of the proposed suspension. In addition, the proposed rule change is not designed to have any effect on intermarket competition but instead seeks to address concerns Nasdaq has observed surrounding the application of the shareholder approval requirements, as described above, to companies listed on Nasdaq. Other exchanges can craft relief based on their own rules and observations.

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

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

Not applicable.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)²⁴ of the Act and Rule 19b-4(f)(6) thereunder²⁵ in that it effects a change

²⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

Nasdaq believes that the proposed rule change will not significantly affect the protection of investors or the public interest because it is designed to reduce uncertainty for certain companies and their shareholders regarding the ability of the companies to raise necessary capital quickly during the current highly unusual market and economic conditions. The proposed change is designed to respond to the unprecedented uncertainty and ongoing revenue disruptions some companies are experiencing as well as the resulting market decline related to the global spread of the COVID-19 virus.

In addition, Nasdaq believes the proposed rule change is designed to protect investors by limiting the exception from the shareholder approval requirements to situations where the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. The exception is also limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. Further, the proposed rule requires

²⁵ 17 CFR 240.19b-4(f)(6).

that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception and determine that the transaction is in the best interest of shareholders.

Nasdaq also notes that the proposed rule is a temporary exception from certain shareholder approval requirements, as described above, operative through, and including, June 30, 2020.

Notwithstanding the proposed exception from certain shareholder approval requirements, as described above, important investor protections will remain as the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Nasdaq believes that the proposed rule change will not impose any significant burden on competition because it is designed to reduce uncertainty for certain companies and their shareholders regarding the ability of the companies to raise necessary capital quickly during the current highly unusual market and economic conditions. The proposed change is designed to respond to the unprecedented uncertainty and ongoing revenue disruptions some companies are experiencing as well as the resulting market decline related to the global spread of the COVID-19 virus.

In addition, the proposed rule change is not designed to have any effect on intermarket competition but instead seeks to address concerns Nasdaq has observed surrounding the application of the shareholder approval requirements, as described above,

to companies listed on Nasdaq. Other exchanges can craft relief based on their own rules and observations.

Furthermore, Rule 19b-4(f)(6)(iii)²⁶ requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. Rule 19b-4(f)(6)(iii), however, permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii), as well as the five business days' prior notice requirement, so that this temporary rule can take effect immediately, removing any uncertainty for listed companies and their investors that would benefit from the relief so that companies can raise capital quickly in view of their reduced revenue.

The waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the exception from the shareholder approval

²⁶ 17 CFR 240.19b-4(f)(6)(iii).

requirements is limited to situations where the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. The exception is also limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. Further, the proposed rule requires that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception and determine that the transaction is in the best interest of shareholders.

Nasdaq also notes that the proposed rule is a temporary exception from certain shareholder approval requirements, as described above, operative through, and including, June 30, 2020.

Notwithstanding the proposed exception from certain shareholder approval requirements, as described above, important investor protections will remain as the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

The Exchange believes that waiver of both the operative delay and the

requirement to provide five-days' written notice of the proposed rule change would be consistent with the protection of investors and the public interest because it would allow companies to quickly raise money through equity financings to maintain operations, avoid jeopardizing its financial viability, compensate its workforce, or undertake new initiatives in response to COVID-19 during the current highly unusual market and economic conditions, and given the ongoing uncertainty relating to the global spread of the COVID-19 virus.

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

Not applicable.

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.
5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-NASDAQ-2020-025)

May __, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to provide listed companies with a temporary exception from certain shareholder approval requirements

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 May 1, 2020, 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 adopt a rule, operative through, and including, June 30, 2020, to provide listed companies with a temporary exception from certain shareholder approval requirements, as described below.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Given current market conditions, Nasdaq proposes to provide listed companies with a temporary exception, limited in scope and time, from certain shareholder approval requirements, as described below.

In December 2019, COVID-19 began to spread and disrupt company operations and supply chains and impact consumers and investors, resulting in a dramatic slowdown in production and spending.³ By March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic.⁴ To slow the spread of the disease, federal and

³ See, e.g., Chairman Jay Clayton, Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), available at <https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30>. (“Yesterday, I asked the staff to monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus. We recognize that such effects may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis. This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers.”).

⁴ See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (March 11, 2020), available at

state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel and closed non-essential businesses.

These necessary measures also have affected equity markets, which have seen significant declines.⁵ In response, governments around the world have acted swiftly and decisively to provide relief to regulated entities and are undertaking efforts to stabilize the economy and assist affected companies and their employees.⁶ The Commission, in particular, has recognized the importance of functioning markets in this environment⁷ and

<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

- ⁵ In the United States, Level 1 market wide circuit breaker halts were triggered on March 9, March 12, March 16, and March 18, 2020. See also Phil Mackintosh, *Putting the Recent Volatility in Perspective*, available at <https://www.nasdaq.com/articles/putting-the-recent-volatility-in-perspective-2020-03-05> (“Analysts showed that we saw the fastest ‘correction’ in history (down 10% from a high), occurring in a matter of days. In the last week of February, the Dow fell 12.36% with notional trading of \$3.6 trillion.”)
- ⁶ See, e.g., the list of actions undertaken by the Board of Governors of the Federal Reserve System at <https://www.federalreserve.gov/covid-19.htm>. See also Families First Coronavirus Response Act, Public Law No. 116-127 and Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136.
- ⁷ See, e.g., Chairman Jay Clayton, *The Deep and Essential Connections Among Markets, Businesses, and Workers and the Importance of Maintaining those Connections in our Fight Against COVID-19* (March 24, 2020) available at <https://www.sec.gov/news/public-statement/statement-clayton-covid-19-2020-03-24> (“The Securities and Exchange Commission and other financial regulators are focused on two overriding and interrelated issues. First, we are facing an unprecedented national challenge — a health and safety crisis that requires all Americans, for the sake of all Americans, to significantly change their daily behavior and, for many, to make difficult personal sacrifices. Second, the recognition that the continuing, orderly operation of our markets is an essential component of our national response to, and recovery from, COVID-19. The interrelationship between these issues cannot be overstated. Our health care, pharmaceutical, manufacturing, transportation, telecommunications and many other private-sector industries are critical to our collective response to COVID-19. The thousands of firms and entrepreneurs in these industries — and the millions

has granted issuers and broker-dealers relief and extensions from existing deadlines, in order to allow these entities, as well as the Commission itself, to focus on fighting the deadly virus and preserving functioning capital markets.⁸

Amidst this market uncertainty, Nasdaq proposes to temporarily modify certain of its rules in an effort to streamline listed companies' access to capital. Specifically, Nasdaq proposes to adopt Listing Rule 5636T to provide a limited temporary exception to the shareholder approval requirements in Listing Rule 5635(d) (Transactions other than Public Offerings)⁹ and, in certain narrow circumstances, a limited attendant exception to Listing Rule 5635(c)(Equity Compensation).¹⁰

of employees and contractors — that are working around the clock to fight COVID-19 depend on continued access to payments and credit.”).

⁸ See *SEC Coronavirus (COVID-19) Response* available at <https://www.sec.gov/sec-coronavirus-covid-19-response>, which is being updated regularly with additional actions taken by the Commission. As of April 14, 2020, the Commission response includes (but is not limited to): providing conditional relief for certain publicly traded company filing and proxy delivery obligations (March 4 and 25, 2020); granting relief to reporting deadlines and in-person meeting requirements for investment companies (March 13, 2020); extending the industry compliance period for Consolidated Audit Trail reporting due to the fact that “disruptions as a result of COVID-19 have placed new stresses and competing priorities on the infrastructure and staff required to implement the Consolidated Audit Trail” (March 16, 2020); extending filing deadlines for certain reports required under Regulation A and Regulation Crowdfunding (March 26, 2020); and providing temporary relief for Business Development Companies investing in small and medium-sized businesses (April 8, 2020).

⁹ Listing Rule 5635(d) states that shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price. The “Minimum Price” is defined in Rule 5635(d)(1)(A) as the lower of: (i) the Nasdaq Official Closing Price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average Nasdaq Official 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 “20% Issuance” is defined in Rule 5635(d)(1)(B) 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

Shareholder Approval Requirements

The Nasdaq shareholder approval rules generally require companies to obtain approval from shareholders prior to issuing securities in connection with: (i) certain acquisitions of the stock or assets of another company;¹¹ (ii) equity-based compensation of officers, directors, employees or consultants;¹² (iii) a change of control;¹³ and (iv) a 20% Issuance at a price less than the Minimum Price.¹⁴

One unavoidable consequence of the actions being taken to reduce the spread of COVID-19 is a reduction, or complete interruption, in revenue for many companies. For example, many communities have mandated that all restaurants and entertainment facilities close for a period of time. Similarly, companies in the travel sector have seen significant declines in bookings even if they are allowed to continue to operate. Thus, these businesses will have no or greatly reduced revenue to offset the operating costs or increased costs associated with the crisis. As such, investors may be reluctant to enter

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.

¹⁰ Listing Rule 5635(c) requires shareholder approval, with certain exceptions, prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

¹¹ See Listing Rule 5635(a)(Acquisition of Stock or Assets of Another Company).

¹² See Listing Rule 5635(c)(Equity Compensation).

¹³ See Listing Rule 5635(b)(Change of Control).

¹⁴ See Listing Rule 5635(d)(Transactions other than Public Offerings). See also footnote 9 above.

into new equity transactions, unless they are compensated for the risk through discounts to the trading price of a security, and companies may be forced by current circumstances to raise money through equity financings that require shareholder approval under Nasdaq's rules. At the same time, other companies have sudden, unexpected cash needs as they undertake new or accelerated initiatives designed to address the loss of business and supply shortages caused by COVID-19.

While an exception is currently available within Nasdaq's rules for companies in financial distress where the delay in securing stockholder approval would seriously jeopardize the financial viability of the company,¹⁵ that exception is not helpful in most situations arising from the COVID-19 pandemic. For example, while a company may need additional cash so that it can continue to pay employees during a period of decreased or no revenue, the company's viability may not otherwise be in jeopardy.¹⁶ Further, the accelerated need for funds, as well as the significantly curtailed operations of many businesses, may make impractical the requirement to mail notice to all shareholders ten days prior to issuing securities. As such, Nasdaq is concerned that this exception does

¹⁵ See Listing Rule 5635(f). Reliance by the company on a financial viability exception must expressly be approved by the company's audit committee, or a comparable body of the board of directors comprised solely of independent, disinterested directors, and the company must obtain Nasdaq's approval prior to proceeding with the transaction. In addition, companies are required to mail a letter (as opposed to relying solely on a press release or Form 8-K, which are also required, or a website posting) at least ten days prior to issuing securities in the exempted transaction alerting shareholders to the company's omission to seek the shareholder approval that would otherwise be required.

¹⁶ Similarly a company that needs capital to undertake, for example, a new initiative designed to test for COVID-19 or to develop a vaccine may not otherwise be facing a threat to its viability.

not adequately address the capital raising needs of listed companies under current conditions.

Proposed COVID-19 Exception

In view of the above, Nasdaq proposes to create a new temporary exception from the shareholder approval requirements in Listing Rule 5635(d), accompanied by a limited exception from Listing Rule 5635(c) by adopting Listing Rule 5636T. This proposed exception would be available until and including June 30, 2020. Nasdaq notes that to rely on this exception, the company must execute a binding agreement governing the issuance of the securities, submit the notices required by Listing Rules 5636T(b)(5)(A) and (e), and obtain the required approval from Nasdaq under Listing Rule 5636T(b)(5)(B)(ii) (if applicable), as described below, no later than June 30, 2020. The issuance of the securities governed by such agreement in reliance on the exception in Listing Rule 5636T may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement. If the company does not issue securities within 30 calendar days, as described above, it may no longer rely on the exception in Listing Rule 5636T.

Under proposed Listing Rule 5636T(b), the exception is limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. In addition to demonstrating that the transaction meets one of the foregoing requirements, in order to rely on the exception, the company

would also have to demonstrate to Nasdaq that the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. Nasdaq also proposes, similar to the requirement for the financial viability exception, to require that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception. Nasdaq also proposes to require such committee or a comparable body of the board of directors comprised solely of independent, disinterested directors to determine that the transaction is in the best interest of shareholders.

Unlike the requirement for the financial viability exception, no prior approval of the exception by Nasdaq would be required if the maximum issuance of common stock (or securities convertible into common stock) issuable in the transaction is less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the maximum discount to the Minimum Price at which shares could be issued is 15% (the "Safe Harbor Provision"). Nasdaq notes that transactions that involve issuance of warrants exercisable for shares of common stock are not eligible for the Safe Harbor Provision.

For transactions that do not fall within the Safe Harbor Provision, the Nasdaq Listing Qualifications Department must approve the company's reliance on the exception before the company can issue any securities in the transaction. This approval will be based on a review of whether the company has established that it complies with the requirements of Listing Rule 5636T(b) (and Listing Rule 5636T(c) if applicable). Upon completion of the review of the company's submission, the Nasdaq Listing Qualifications

Department will notify the company in writing whether the company's reliance on the exception was approved.

To provide shareholders with advance notice of the transaction, Nasdaq proposes to adopt Listing Rule 5636T(d), which would require a company relying on the proposed exception to make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing as promptly as possible, but no later than two business days before the issuance of the securities:

- the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
- that shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the Company is relying on an exception to the shareholder approval rules; and
- that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.¹⁷

In addition, Nasdaq has long interpreted Listing Rule 5635(c) to require shareholder approval for certain sales to officers, directors, employees, or consultants when such issuances could be considered a form of "equity compensation." Nasdaq has heard from market participants that investors often require a company's senior

¹⁷ See Listing Rule 5635(f) requiring similar disclosure, for a transaction for which a company relied on the financial viability exception, alerting shareholders to the omission to seek the shareholder approval that would otherwise be required.

management to put their personal capital at risk and participate in a capital raising transaction alongside the unaffiliated investors. Nasdaq believes that as a result of uncertainty related to the ongoing spread of the COVID-19 virus, listed companies seeking to raise capital may face such requests. Accordingly, Nasdaq proposes that the temporary exception allow such investments under limited circumstances.

To that end, Nasdaq proposes to adopt Listing Rule 5636T(c), which would provide for an exception from shareholder approval under Listing Rule 5635(c) for an affiliate's participation in the transaction described in Listing Rule 5636T(b) provided the affiliate's participation in the transaction was specifically required by unaffiliated investors. In addition, to further protect against self-dealing, the proposed Listing Rule 5636T(c) would limit such participation to a de-minimis level – each affiliate's participation must be less than 5% of the transaction and all affiliates' participation collectively must be less than 10% of the transaction.¹⁸ Finally, any affiliate investing in the transaction must not have participated in negotiating the economic terms of the transaction.

Listing Rule 5250(e)(2) requires a company to notify Nasdaq at least 15 calendar days prior to certain events, including when the company issues any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis (the "Notification"). The Notification allows Nasdaq additional time to

¹⁸ Cf. Listing Rule IM-5405-1(a)(3) similarly limiting affiliates' participation in certain pre-listing transactions in order for such transactions to constitute compelling evidence of the company's value.

review the proposed transaction and assure that it complies with the shareholder approval requirements, including those in Listing Rules 5635(c) and (d). Absent a rule change, transactions described in proposed Listing Rules 5636T(b) and (c) would require such advance notification. Because a transaction satisfying the proposed temporary rule will be excepted from certain provisions of the shareholder approval rules, Nasdaq believes that notification 15 days prior to issuance is unnecessary. Accordingly, Nasdaq proposes to adopt Listing Rule 5636T(e) to provide that a company that relies on the exception in this Rule 5636T is not subject to the 15 day prior notification requirement described in Rule 5250(e)(2) but must still provide notification required by that rule to Nasdaq, along with a supplement, as required by Listing Rule 5636T(b)(5)(A), certifying in writing that the company complied with all requirements of Listing Rule 5636T(b), and Listing Rule 5636T(c) if applicable. Such submissions must be made, as promptly as possible, but no later than the time of the public announcement required by Listing Rule 5636T(d) and in no event later than June 30, 2020, in accordance with Listing Rule 5636T(a). In such certification, Nasdaq expects the company to describe with specificity how it complies with Listing Rule 5636T(b), and Listing Rule 5636T(c) if applicable. For transactions described in Listing Rule 5636T(b)(5)(B)(ii) that require approval of the Nasdaq Listing Qualifications Department before the company can issue any securities in reliance on Listing Rule 5636T, Nasdaq expects companies to submit the Notification, and a supplement required by Listing Rule 5636T(b)(5)(A), with enough time to allow Nasdaq to complete its review of the submissions.¹⁹ The proposed rule also will remind

¹⁹ Nasdaq notes that in such cases the company may not issue any securities until it receives the approval from the Nasdaq Listing Qualifications Department, which may take more than two days. Of course, if the Nasdaq Listing Qualifications

companies that a transaction that violates other Nasdaq rules could subject the company to delisting and Nasdaq Staff would review transactions covered by proposed Listing Rule 5636T for compliance with all other Nasdaq listing requirements. As noted below, the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Finally, Nasdaq proposes to aggregate issuances of securities in reliance on the exception in proposed Listing Rule 5636T with any subsequent issuance by the company, other than a public offering under IM-5635-3, at a discount to the Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. Accordingly, if following the subsequent issuance, the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required under Rule 5635(d) prior to the subsequent issuance.

Nasdaq believes that this temporary suspension will permit companies to raise capital quickly to continue running their businesses and address the immediate health crisis caused by the COVID-19 pandemic, including its impact on their employees, customers, and communities. Nasdaq notes that the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider

Department does not approve reliance on the exception, any issuance of securities must comply with the shareholder approval requirements in Listing Rule 5635.

participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,²¹ 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. As a result of uncertainty related to the ongoing spread of the COVID-19 virus, the prices of securities listed on U.S. exchanges are experiencing significant volatility. Nasdaq believes that the proposed rule change is designed to remove an impediment to companies addressing certain immediate capital needs as a result of the COVID-19 pandemic and reduce uncertainty regarding the ability of companies to raise money quickly through equity financings during the current highly unusual market conditions and general economic disruptions. Nasdaq believes that in this way, the proposed rule change will protect investors, facilitate transactions in securities, and remove an impediment to a free and open market. All companies listed on the Exchange would be eligible to take advantage of the proposed suspension.

In addition, Nasdaq believes the proposed rule change is designed to protect investors by limiting the exception from the shareholder approval requirements to situations where the need for the transaction is due to circumstances related to COVID-19

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. The exception is also limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. Further, the proposed rule requires that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception and determine that the transaction is in the best interest of shareholders.

Nasdaq also notes that to the extent the company relies on the Safe Harbor Provision instead of Nasdaq's review and approval of the company's reliance on the exception, as described above, the maximum issuance of common stock (or securities convertible into common stock) issuable in the transaction must be less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the maximum discount to the Minimum Price at which shares could be issued is 15%.

Notwithstanding the proposed exception from certain shareholder approval requirements, as described above, important investor protections will remain as the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the

proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Finally, Nasdaq notes that the proposed rule is a temporary exception from certain shareholder approval requirements, as described above, operative through, and including, June 30, 2020.

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. All companies listed on the Exchange would be eligible to take advantage of the proposed suspension. In addition, the proposed rule change is not designed to have any effect on intermarket competition but instead seeks to address concerns Nasdaq has observed surrounding the application of the shareholder approval requirements, as described above, to companies listed on Nasdaq. Other exchanges can craft relief based on their own rules and observations.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant

to Section 19(b)(3)(A)(iii) of the Act²² and subparagraph (f)(6) of Rule 19b-4 thereunder.²³

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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-2020-025 on the subject line.

²² 15 U.S.C. 78s(b)(3)(A)(iii).

²³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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-2020-025. 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-2020-025 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.²⁴

J. Matthew DeLesDernier
Assistant Secretary

²⁴ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

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

The Nasdaq Stock Market LLC Rules

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5635. Shareholder Approval

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5636T Temporary COVID-19 Exception

- (a) This Rule 5636T is operative until, and including, June 30, 2020. To rely on this rule, the Company must execute a binding agreement governing the issuance of the securities, submit the notices required by paragraphs (b)(5)(A) and (e), and obtain the approval under paragraph (b)(5)(B)(ii) (if applicable) no later than June 30, 2020. The issuance of the securities governed by such agreement may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement.
- (b) Notwithstanding the requirements of Rule 5635(d), a Company may issue securities without shareholder approval upon application to Nasdaq's Listing Qualifications Department demonstrating that the transaction satisfies the following requirements:
- (1) the need for the transaction is due to circumstances related to COVID-19;
 - (2) the delay in securing shareholder approval would:
 - (A) have a material adverse impact on the Company's ability to maintain operations under its pre-COVID-19 business plan;
 - (B) result in workforce reductions;
 - (C) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or
 - (D) seriously jeopardize the financial viability of the enterprise;
 - (3) the Company undertook a process designed to ensure that the proposed transaction represents the best terms available to the Company;
 - (4) the Company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has:

(A) expressly approved reliance on this exception; and

(B) determined that the transaction is in the best interest of shareholders.

(5) (A) The Company must submit a supplement to the Listing of Additional Shares notification form, in accordance with and in the same timeframe set forth in paragraph (e) below, certifying to Nasdaq that it complies with all requirements of this Rule 5636T(b) (and Rule 5636T(c) if applicable) and describing how it complies;

(B) (i) After submitting the information described in paragraph (A) above, a Company does not need to obtain approval from Nasdaq prior to issuing shares in the transaction if the maximum issuance of common stock (or securities convertible into common stock) is less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the maximum discount to the Minimum Price at which shares could be issued is 15%.

(ii) In all other cases, the Nasdaq Listing Qualifications Department must approve the Company's reliance on this exception before the Company can issue any securities in the transaction. This approval will be based on a review of whether the Company has established that it complies with the requirements of Rule 5636T(b) (and Rule 5636T(c) if applicable).

(c) A transaction described in Rule 5636T(b) shall not require shareholder approval under Rule 5635(c) for an affiliate's participation in the transaction, provided that the transaction satisfies the following requirements:

(1) any affiliate's participation must be less than 5% of the transaction;

(2) all affiliates' participation collectively must be less than 10% of the transaction;

(3) any affiliate's participation must have been specifically required by unaffiliated investors; and

(4) the affiliates must not have participated in negotiating the economic terms of the transaction.

(d) A Company that relies on the exception in this Rule 5636T must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:

(1) the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);

(2) that shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the Company is relying on this temporary exception to the shareholder approval rules; and

(3) that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

(e) Notification Requirement

A Company that relies on the exception in this Rule 5636T is not subject to the 15 day prior notification requirement described in Rule 5250(e)(2) (related to the listing of additional shares), but must provide the notification required by that rule, and paragraph (b)(5)(A) of this rule, as promptly as possible, but no later than the time of the public announcement required by paragraph (d) of this rule and in no event later than June 30, 2020, in accordance with paragraph (a) of this rule. Companies are reminded that issuances must comply with all other requirements of the Nasdaq Listing Rules, except as provided for herein.

(f) Aggregation

Securities issued in reliance on the exception in this Rule 5636T will be aggregated with any subsequent issuance, other than a public offering under IM-5635-3, at a discount to the Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. If following the subsequent issuance, the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required under Rule 5635(d) prior to the subsequent issuance.

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