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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2018–59 and should be submitted on or before October 23, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.12
Eduardo A. Alemán,
Assistant Secretary.

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BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION
[Release No. 34–84287; File No. SR–
NASDAQ–2018–008]

Self-Regulatory Organizations: The
Nasdaq Stock Market LLC; Notice of
Filing of Amendment No. 1 and Order
Granting Accelerated Approval of
a Proposed Rule Change, as Modified
by Amendment No. 1, To Modify
the Listing Requirements Contained
in Listing Rule 5635(d) To Change
the Definition of Market Value for
Purposes of the Shareholder Approval
Rule and Eliminate the Requirement
for Shareholder Approval of Issuances
at a Price Less Than Book Value but
Greater Than Market Value

September 26, 2018.
I. Introduction

On January 30, 2018, The Nasdaq
Stock Market LLC ("Nasdaq" or the
"Exchange") filed with the Securities

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rule change. The Commission is publishing notice of the filing of Amendment No. 1 to solicit comments from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal, as
Modified by Amendment No. 1

The Exchange has proposed to amend Nasdaq Rule 5635(d) to modify the circumstances in which shareholder approval is required for issuances of securities in private placement transactions. Currently, under Nasdaq Rule 5635(d), the Exchange requires a Nasdaq-listed company to obtain shareholder approval prior to the issuance of securities in connection with a private placement transaction (i.e., a transaction other than a public offering11) 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 Shareholders12 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 for 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.13 As extended the date by which the Commission shall approve or disapprove the proposed rule change to October 18, 2018.

10 In Amendment No. 1, the Exchange clarified that: (i) in the new definition of “Minimum Price,” the closing price (as reflected on Nasdaq.com) is measured immediately preceding the signing of the binding agreement, and; (ii) a private placement is a transaction other than a public offering. Amendment No. 1 is available at https://www.sec.gov/comments/sr-nasdaq-2018-008/nasdaq20180909-4223952-172098.pdf.
11 See Nasdaq Rule IM–5635–3 (Definition of a Public Offering).
12 An interest consisting of less than either 5% of the number of shares of common stock or 5% of the voting power outstanding of a Company or party will not be considered a substantial interest or cause the holder of such interest to be regarded as a “Substantial Shareholder.” See Nasdaq Rule 5635(e)(3).
13 See Nasdaq Rule 5635(d). The Commission notes that Nasdaq Rule 5635 also requires shareholder approval under Nasdaq Rules 5635(a), (b), and (c) for issuances involving an acquisition of stock or assets of another company, a change of control, and equity compensation. Nasdaq is not proposing to amend these other shareholder approval provisions in its proposal.
described in more detail below, the Exchange is proposing to combine these two sections into one definitional section and make changes to the pricing test for triggering shareholder approval.

“Market value” is defined in Nasdaq Rule 5005(a)(23) as the consolidated closing bid price multiplied by the measure to be valued (e.g., a company’s market value of publicly held shares is equal to the consolidated closing bid price multiplied by a company’s publicly held shares). This definition applies to the shareholder approval rules as well as other listing rules. The Exchange has proposed to amend the definition of market value only for purposes of Nasdaq Rule 5635(d). The new definition, to be known as the “Minimum Price,” is defined as the price that is the lower of (1) the closing price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement or (2) 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. Under the proposal, shareholder approval will only be required for private placement transactions that are priced below the Minimum Price as described above.

In proposing to use the closing price on Nasdaq, rather than the Nasdaq bid price as under the current rule, the Exchange explained, in its proposal, that the closing price reported on Nasdaq.com is the Nasdaq Official Closing Price, which is derived from the closing auction on Nasdaq, reflects actual sale prices at one of the most liquid times of the day, and is highly transparent to investors. According to the Exchange, the closing price reported on Nasdaq.com is a better reflection of the market price of the security than the closing bid price. The Exchange also noted that this use of closing price is consistent with the approach of other exchanges.

Further, in proposing to also use a five-day average closing price to determine if a shareholder vote is required under Nasdaq Rule 5635(d), the Exchange noted that while investors and companies sometimes prefer to use an average when pricing transactions, 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 Exchange noted that the five-day average closing price will be above the current market price, which, according to the Exchange, could make it difficult for companies to close transactions because investors could buy shares at a lower price in the market. The Exchange also noted concerns with using a five-day average in a rising market, in that the five-day average closing price will appear to be at a discount to the closing current market price. Further, according to the Exchange, if material news is announced during the five-day period, the average price could be a worse reflection of market value than the closing price after the news is disclosed. The Exchange stated, however, that it believed that these risks of using the five-day average closing price are already accepted by the market, as evidenced by the use of an average price in transactions that do not require shareholder approval, such as those transactions where less than 20% of the outstanding shares are being issued. In its rule filing, the Exchange also noted that several commenters raised concerns regarding a 2017 solicitation of comments by the Exchange on a proposal to use the five-day average closing price as the sole measure of market value (“2017 Solicitation”). The Exchange stated that it believed these concerns were justified and, as such, proposed to define market value as the lower of the closing price or five-day average closing price. As the Exchange noted, this means that, under its proposal, an issuance would not require shareholder approval as long as the issuance occurs at a price greater than the lower of the two measures.

The Exchange also proposed, in conjunction with its proposal to redefine market value for purposes of determining when a shareholder vote is triggered under Rule 5635(d), to eliminate its current requirement for shareholder approval of private placement issuances at a price that is less than book value. Currently, as noted above, the Exchange’s rules require shareholder approval of a private placement transaction if it is priced below market or book value. Accordingly, under the proposal, private placement transactions that are priced below book value but above market value, as defined by the Minimum Price, would not require shareholder approval. In its proposal, the Exchange stated that book value is an accounting measure that is based on the historic cost of assets rather than their current value. According to the Exchange, book value is not an appropriate measure of value for a transaction is dilutive or should otherwise require shareholder approval.

Further, the Exchange proposed to revise Nasdaq Rule 5635(d) to provide that shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price. Under the proposal, the Exchange would define “20% Issuance” for purposes of Rule 5635(d) 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 existing provisions of Nasdaq Rule 5635(d)(1) and (d)(2) into one provision. According to the Exchange, this proposed revision does not make any substantive change to the threshold for quantity or voting power of shares being sold that would give rise to the need for shareholder approval.

14 See Nasdaq Rule 5005(a)(23).
15 See proposed Nasdaq Rule 5635(d)(1)(A). See also Amendment No. 1, supra note 10.
16 See Notice, supra note 3, at 7270, which discusses the Nasdaq Official Closing Price and notes, among other things, that the closing auction is 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 Exchange stated that the closing price is published on Nasdaq.com with a 15 minute delay and is available without registration or fee. According to the Exchange, Nasdaq does not currently intend to charge a fee for access to this data or otherwise restrict availability of this data. The Exchange further stated that it would file a proposed rule change under Section 19(b) of the Act before implementing any such change and, in such filing, address the impact of the proposed rule change on compliance with this rule. See id. at 7270 n.6.
17 See id. at 7270. According to the Exchange, the price of an executed trade generally is viewed as a more reliable indicator of value than a bid or ask quotation. See id.
18 See id. at 7270 & n.3 (citing Section 312.04(i) of the NYSE Listed Company Manual).
19 As the Exchange stated in the Notice, in 2017, the Exchange solicited comments on a proposal to amend Nasdaq Rule 5635(d) and the Exchange based its current proposal on its experience and comments received during that process. See id. at 7270. The Commission notes that, in its rule filing, the Exchange stated that it received support for this proposal in its 2017 Solicitation, but four commenters raised concerns about reliance on the five-day average closing price to measure market value in certain circumstances. See id. at 7271.
20 See id. at 7270–71.
21 See id. at 7271. The Commission notes that, in its rule filing, the Exchange stated that it received support for this change in its 2017 Solicitation, but also received comments opposing the change, one of which raised specific concerns that the Exchange acknowledged in its proposal. See id. at 7271, 7274.
22 See proposed Nasdaq Rule 5635(d)(2).
23 See proposed Nasdaq Rule 5635(d)(1)(B).
approval, although, as described above, the applicable pricing test will change.24

In addition, the Exchange proposed to amend the preamble to Nasdaq Rule 5635 and the title of Nasdaq Rule 5635(d) to replace references to “private placements” with “transactions other than public offerings” 25 to, according to the Exchange, conform the language to that in Nasdaq Rule IM–5635–3, which defines a public offering,26 and to make other conforming changes to Nasdaq Rules IM–5635–3 and IM–5635–4.27 In Amendment No. 1, Nasdaq stated that private placements would continue to be considered “transactions other than public offerings” under the proposed rule change.28

III. Summary of Comment Letters

The Commission received three comments on the proposed rule change, all of which supported the proposal,29 as well as a letter from the Exchange in response to the Order Instituting Proceedings and Order of Support of its proposal.30 Of the three commenters noted above,31 one stated it supported the proposed rule change without reservation and the Exchange’s reevaluation of its shareholder approval rules in light of changes in market practice and investor protection mechanisms that have taken place since the adoption of these rules.32 Another commenter stated that, while it supported more significant changes to Nasdaq Rule 5635(d), the proposed rule change would be a strong first step in correcting the inadequacies and inequitabilities of Nasdaq Rule 5635(d).33

Two of the commenters in support of the proposal specifically addressed the changes to the definition of market value.34 One commenter stated that the proposed method to determine market value using the lower of the Nasdaq closing price and five-day average of Nasdaq closing prices is a better determination of market value than the

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as of a specific time and could be a more fair indicator of value of the securities than closing bid prices, which are prone to unanticipated market fluctuations.42

Nasdaq also stated that the five-day average closing price will more likely be above the final day’s closing price in a declining market and below the final day’s closing price in a rising market, but that actual results are less predictable because markets usually do not move exclusively in a single direction over time. Nasdaq noted that, in either a rising or a falling market, the proposal would allow companies to be able to complete transactions by accepting the lower of the average of the closing prices for each of the five days immediately preceding the signing of a binding agreement or the most recent closing price before the signing of a binding agreement.43

As to the proposal to eliminate book value, two of the commenters specifically discussed their support of this change.44 One commenter stated that book value does not reflect the actual value of securities and is not relied upon in connection with investment decisions, whereas market price of an issuer’s common stock represents the market’s consensus on the value of the security.45 This commenter also stated that in the rare instances where book value exceeds market value, this usually occurs due to the accounting treatment of certain types of capital investments by the issuer and should not impact the issuer’s ability to raise capital at market prices.46 Another commenter strongly supported the proposed elimination of book value and stated it agreed with statements in the Notice that book value is not an appropriate measure of current value and, therefore, whether a transaction is dilutive or should require shareholder approval.47

The Nasdaq Response Letter also stated that book value is just one point in a myriad of financial data points that is already incorporated into the market value of the security regardless of market conditions or accounting issues.48 In particular, the Exchange stated that the marketplace determines the fair value of a security based on all

24 See Notice, supra note 3, at 7271.

25 See proposed Nasdaq Rule 5635 and subsection (d).

26 See Notice, supra note 3, at 7271.


28 See Amendment No. 1, supra note 10.


31 See supra, note 4.


33 See Kelley Drye Letter, supra note 4, at 1–2.

34 See Kelley Drye Letter and MSBA Letter, supra note 4.

35 See Kelley Drye Letter, supra note 4, at 3.

36 See id.

37 See MSBA Letter, supra note 4, at 2.

38 See id. This commenter also stated that providing listed companies with the alternative of using the five-day average closing price “does not harm stockholders and is in line with the spirit and purpose of the Rule.” See id.

39 See id.

40 See Nasdaq Response Letter, supra note 8, at 2.

41 See id. Nasdaq also noted that the Toronto Stock Exchange uses a volume weighted average trading price for the five trading days immediately preceding the relevant date in requiring shareholder approval of certain private placements that are not at or above market price.
publicly available information about the issuers’ securities, including, in large part, the issuers’ financial position, and that through disclosure of book value in quarterly and annual reports such information is quickly incorporated into the market price of a listed security.49 As a result, the Exchange stated its belief that the change to eliminate book value will not introduce any significant risks to investor protection and will provide benefits to companies trying to raise money quickly.50

IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.51 In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of substantial importance to financial markets and the investing public, especially given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing standards of national securities exchanges, in particular, play an important role in assuring that exchange-listed companies observe good governance practices including safeguarding the interests of shareholders with respect to certain potentially dilutive transactions.53

As discussed above, the proposal would modify Nasdaq Rule 5635(d) to change the definition of market value for purposes of shareholder approval of private placement transactions such that (1) shareholder approval would be required prior to an issuance of 20% or more at a price that is less than the lower of the closing price or the five-day average closing price; and (2) shareholder approval would not be required prior to an issuance of 20% or more at a price that is less than book value but greater than market value. In response to the Exchange’s 2017 Solicitation, as noted above, some commenters had raised questions and concerns about the use of a five-day average closing price as a measure of market value under certain market conditions, such as the potential that the five-day average would permit the sale of discounted stock in rising markets, and the elimination of the book value standard. Accordingly, in the Order Instituting Proceedings, the Commission specifically requested additional comment on these two aspects of the Exchange’s proposal in light of the questions raised in connection with the Exchange’s 2017 Solicitation.54 Other than the Nasdaq Response Letter, the Commission received no additional comment letters following publication of the Order Instituting Proceedings.

The Commission has carefully considered the proposal and finds that the proposed rule change is consistent with the Act. The Commission notes that it received three comment letters on the proposal, all of which were supportive of the proposal, as well as the Nasdaq Response Letter.55 In addition, the Commission believes that the Exchange sufficiently responded to the issues highlighted for commenters in the Order Instituting Proceedings in either Amendment No. 1 or the Nasdaq Response Letter.56

The Commission believes that the proposed change to the definition of market value for purposes of shareholder approval under Nasdaq Rule 5635(d) to use the lower of the closing price or five-day average closing price on Nasdaq.com is consistent with the Act. As noted by commenters and the Exchange, the proposed method to determine market value has the potential to provide a better indication of actual market value than the current use of closing bid price under certain market conditions.57 Nasdaq also stated its belief that the closing price is less prone to manipulation than are bid prices.58 In addition, the proposal to use the Nasdaq Official Closing Price for purposes of market value should help to ensure transparency to investors in calculating market value for purposes of the rule.59 The Commission also notes that the five-day period for establishing the average closing price, among others, is how the Exchange generally structures its actions in response to the Exchange, the proposed method 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,” and “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.” In addition, the Exchange states that the 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 Commission notes that using closing prices for determining whether shareholder approval is needed for certain stock issuances is consistent with the rules of another exchange. See NYSE Listed Company Manual Rule 312.04(b). The Commission also notes that the Exchange has stated that Nasdaq does not currently intend to charge a fee for access to this data or otherwise restrict availability of this data and that the Exchange would file a proposed rule change under Section 19(b) of the Act before implementing any such change, and, in such filing, address the impact of the proposed rule change on compliance with this rule. See supra note 16.

49 See supra note 10. See also supra notes 40–43 and 48–50 and accompanying text.
50 See Notice, supra note 3, at 7272. See also supra notes 16–18 and 35 and accompanying text. See also infra notes 63–65 and accompanying text.
55 See Notice, supra note 3, at 7270 (describing the closing auction on the Exchange, which is how the Nasdaq Official Closing Price is derived. The Exchange states that the 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,” and “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.” In addition, the Exchange states that the closing auction “is made highly transparent to all investors.”)
56 See supra note 16.
57 See supra notes 57–58. The Commission notes that using closing prices for determining whether shareholder approval is needed for certain stock issuances is consistent with the rules of another exchange. See NYSE Listed Company Manual Rule 312.04(b). The Commission also notes that the Exchange has stated that Nasdaq does not currently intend to charge a fee for access to this data or otherwise restrict availability of this data and that the Exchange would file a proposed rule change under Section 19(b) of the Act before implementing any such change, and, in such filing, address the impact of the proposed rule change on compliance with this rule. See supra note 16.

See supra notes 35–39 and accompanying text.
by commenters and the Exchange.\textsuperscript{61} Market value (as determined pursuant to the proposal) may be a more appropriate indicator of whether a transaction is dilutive than book value for purposes of Nasdaq's shareholder approval rule.\textsuperscript{62}

The Commission notes, in approving the changes to measure market value as the lower of the closing price and five-day average closing price and eliminate the book value requirement, that the ability of listed companies to issue securities in private placements without shareholder approval continues to remain limited by other important Exchange rules.\textsuperscript{63} For example, the Commission notes that any discounted issuance of stock to a company’s officers, directors, employees, or consultants would require shareholder approval under the Exchange’s equity compensation rules.\textsuperscript{64} In addition, shareholder approval would be required if the issuance resulted in a change of control and for the acquisition of stock or assets of another company, including where an issuance increases voting power or common shares by 5% or more and an officer or director or substantial security holder has a 5% direct or indirect interest (or collectively 10%) in the company or assets to be acquired.\textsuperscript{65}

V. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 to the proposed rule change is consistent with the Act.

\textsuperscript{61}See supra notes 21 and 45–50 and accompanying text.

\textsuperscript{62}See note 10.

\textsuperscript{63}See supra note 8, at 4.

\textsuperscript{64}See, e.g., Nasdaq Rule 5635(a), (b) and (c). The Commission notes that, under Nasdaq rules, if shareholder approval was not required under the private placement requirements in Rule 5635(d) it could still be required under one of the other shareholder approval provisions in Rule 5635 since these provisions apply independently of each other.

\textsuperscript{65}See supra note 10.

\textsuperscript{66}See note 10.

\textsuperscript{67}See supra note 8, at 4.

\textsuperscript{68}See supra note 21 and 45–50 and accompanying text.

\textsuperscript{69}See supra note 8, at 4.