

*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.<sup>12</sup>

**Eduardo A. Aleman,**  
Assistant Secretary.

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## 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

and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to modify the listing requirements contained in Nasdaq Rule 5635(d) to (1) change the definition of market value for purposes of shareholder approval under Nasdaq Rule 5635(d); (2) eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value; and (3) make other conforming changes. The proposed rule change was published for comment in the **Federal Register** on February 20, 2018.<sup>3</sup> The Commission received three comments on the proposed rule change.<sup>4</sup> On April 4, 2018, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>6</sup> On May 21, 2018, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change.<sup>7</sup> The Commission thereafter received a response to the Order Instituting Proceedings from the Exchange.<sup>8</sup> On August 16, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the proposed rule change.<sup>9</sup> On August 16, 2018, the

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 82702 (February 13, 2018), 83 FR 7269 (February 20, 2018) ("Notice").

<sup>4</sup> See Letters to Brent J. Fields, Secretary, Commission, from Michael A. Adelstein, Partner, Kelley Drye & Warren LLP, dated February 28, 2018 ("Kelley Drye Letter"); Penny Somer-Greif, Chair, and Gregory T. Lawrence, Vice-Chair, Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, dated March 13, 2018 ("MSBA Letter"); and Greg Rodgers, Latham Watkins, dated March 14, 2018 ("Latham Watkins Letter").

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 82994, 83 FR 15441 (April 10, 2018). The Commission designated May 21, 2018, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>7</sup> See Securities Exchange Act Release No. 83294, 83 FR 24379 (May 25, 2018) ("Order Instituting Proceedings"). The Commission designated August 19, 2018, as the date by which the Commission shall approve or disapprove the proposed rule change.

<sup>8</sup> See Letter to Brent J. Fields, Secretary, Commission, from Arnold Golub, Vice President and Deputy General Counsel, Nasdaq, Inc., dated July 18, 2018 ("Nasdaq Response Letter").

<sup>9</sup> See Securities Exchange Act Release No. 83865, 83 FR 42545 (August 22, 2018). The Commission

Exchange filed Amendment No. 1 to the proposed rule change.<sup>10</sup> The Commission is publishing notice of the filing of Amendment No. 1 to solicit comment 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 offering<sup>11</sup>) involving: (1) The sale, issuance, or potential issuance by the company of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which, together with sales by officers, directors, or Substantial Shareholders<sup>12</sup> 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.<sup>13</sup> As

extended the date by which the Commission shall approve or disapprove the proposed rule change to October 18, 2018.

<sup>10</sup> 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/nasdaq2018008-4223952-172984.pdf>.

<sup>11</sup> See Nasdaq Rule IM-5635-3 (Definition of a Public Offering).

<sup>12</sup> 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).

<sup>13</sup> 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.

<sup>12</sup> 17 CFR 200.30-3(a)(12).

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).<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The Exchange also

noted that this use of closing price is consistent with the approach of other exchanges.<sup>18</sup>

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”).<sup>19</sup> 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

more reliable indicator of value than a bid quotation. *See id.*

<sup>18</sup> *See id.* at 7270 & n.3 (citing Section 312.04(i) of the NYSE Listed Company Manual).

<sup>19</sup> 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.

require shareholder approval as long as the issuance occurs at a price greater than the lower of the two measures.<sup>20</sup>

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 whether a transaction is dilutive or should otherwise require shareholder approval.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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

<sup>20</sup> *See id.* at 7270–71.

<sup>21</sup> *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.

<sup>22</sup> *See* proposed Nasdaq Rule 5635(d)(2).

<sup>23</sup> *See* proposed Nasdaq Rule 5635(d)(1)(B).

<sup>14</sup> *See* Nasdaq Rule 5005(a)(23).

<sup>15</sup> *See* proposed Nasdaq Rule 5635(d)(1)(A). *See also* Amendment No. 1, *supra* note 10.

<sup>16</sup> *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.

<sup>17</sup> *See id.* at 7270. According to the Exchange, the price of an executed trade generally is viewed as a

approval, although, as described above, the applicable pricing test will change.<sup>24</sup>

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”<sup>25</sup> to, according to the Exchange, conform the language to that in Nasdaq Rule IM-5635-3, which defines a public offering,<sup>26</sup> and to make other conforming changes to Nasdaq Rules IM-5635-3 and IM-5635-4.<sup>27</sup> In Amendment No. 1, Nasdaq stated that private placements would continue to be considered “transactions other than public offerings” under the proposed rule change.<sup>28</sup>

### III. Summary of Comment Letters

The Commission received three comments on the proposed rule change, all of which supported the proposal,<sup>29</sup> as well as a letter from the Exchange in response to the Order Instituting Proceedings and in support of its proposal.<sup>30</sup> Of the three commenters noted above,<sup>31</sup> 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.<sup>32</sup> 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 inequity of Nasdaq Rule 5635(d).<sup>33</sup>

Two of the commenters in support of the proposal specifically addressed the changes to the definition of market value.<sup>34</sup> 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

current use of closing bid price because it will more accurately reflect the type of price that would occur in an arms-length transaction.<sup>35</sup> This commenter stated that the proposed measure will provide flexibility to account for market fluctuations and events, without incurring the typical adverse consequence of material movements, positive or negative, in a stock price at or near the end of a five-day period.<sup>36</sup>

Another commenter noted that parties often prefer to structure a transaction using an average price to smooth out unusual price fluctuations.<sup>37</sup> This commenter stated that the proposed change to the definition of market value provides listed companies with additional flexibility in structuring their securities transactions, brings the shareholder approval rule more in line with how transactions are structured when the rule is not a consideration, and provides a reasonable indication of market value.<sup>38</sup> This commenter also supported the proposed change to use the Nasdaq Official Closing Price.<sup>39</sup>

In the Nasdaq Response Letter, Nasdaq stated that it believes that the five-day average closing price is a reasonable alternative to use when determining market value for purposes of the shareholder approval requirements under Nasdaq Rule 5635(d) and that the use of the five-day average closing price will provide benefits to companies and their shareholders.<sup>40</sup> Specifically, Nasdaq stated that the five-day average closing price is a reasonable alternative to the closing bid price, as used in the current market value standard and previously approved by the Commission, because it is determined at the most liquid time of day, prices reflecting actual sales are less prone to manipulation than bid prices, and it is more difficult to manipulate a closing price over several days than a single day.<sup>41</sup> Further, Nasdaq stated that the five-day average closing price is a reasonable alternative for measuring market value given the impracticality of assessing market value

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.<sup>42</sup>

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.<sup>43</sup>

As to the proposal to eliminate book value, two of the commenters specifically discussed their support of this change.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> In particular, the Exchange stated that the marketplace determines the fair value of a security based on all

<sup>24</sup> See Notice, *supra* note 3, at 7271.

<sup>25</sup> See proposed Nasdaq Rule 5635 and subsection (d).

<sup>26</sup> See Notice, *supra* note 3, at 7271.

<sup>27</sup> See proposed Nasdaq Rules IM-5635-3 and IM-5635-4.

<sup>28</sup> See Amendment No. 1, *supra* note 10.

<sup>29</sup> See Kelley Drye Letter, MSBA Letter, and Latham Watkins Letter, *supra* note 4. These three commenters previously provided comment letters to the Exchange in response to the 2017 Solicitation. For a summary prepared by the Exchange of these comment letters, see the Notice, *supra* note 3, at 7273-74.

<sup>30</sup> See Nasdaq Response Letter, *supra* note 8.

<sup>31</sup> See *supra*, note 4.

<sup>32</sup> See Latham Watkins Letter, *supra* note 4.

<sup>33</sup> See Kelley Drye Letter, *supra* note 4, at 1-2.

<sup>34</sup> See Kelley Drye Letter and MSBA Letter, *supra* note 4.

<sup>35</sup> See Kelley Drye Letter, *supra* note 4, at 3.

<sup>36</sup> See *id.*

<sup>37</sup> See MSBA Letter, *supra* note 4, at 2.

<sup>38</sup> 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.*

<sup>39</sup> See *id.*

<sup>40</sup> See Nasdaq Response Letter, *supra* note 8, at 2.

<sup>41</sup> 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.

<sup>42</sup> See *id.* at 3.

<sup>43</sup> See *id.*

<sup>44</sup> See Kelley Drye Letter and MSBA Letter, *supra* note 4.

<sup>45</sup> See Kelley Drye Letter, *supra* note 4, at 2.

<sup>46</sup> See *id.* In addition, this commenter stated that book value may exceed market value due to a market correction, burst bubble, or financial crisis, which is a time when an issuer needs to be able to raise sufficient capital. See *id.*

<sup>47</sup> See MSBA Letter, *supra* note 4, at 2.

<sup>48</sup> See Nasdaq Response Letter, *supra* note 8, at 4.

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.<sup>49</sup> 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.<sup>50</sup>

#### 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.<sup>51</sup> 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,<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> In addition, the Commission believes that the Exchange sufficiently responded to the issues highlighted for commenters in the Order Instituting Proceedings in

Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (approving equity compensation shareholder approval rules of both the NYSE and the National Association of Securities Dealers, Inc. n/k/a NASDAQ); and Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (order approving registration of BATS Exchange, Inc. noting that qualitative listing requirements including shareholder approval rules are designed to ensure that companies trading on a national securities exchange will adequately protect the interest of public shareholders).

<sup>54</sup> The Commission also noted in the Order Instituting Proceedings that the Exchange should clarify, for purposes of the definition of Minimum Price, when the closing price would be measured. See Order Instituting Proceedings, *supra* note 7, at 24382 n. 36. As discussed above, Amendment No. 1 to the proposed rule change clarified that the closing price refers to the closing price immediately preceding the signing of a binding agreement. See Amendment No. 1, *supra* note 10.

<sup>55</sup> See Section III, *supra*.

either Amendment No. 1 or the Nasdaq Response Letter.<sup>56</sup>

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.<sup>57</sup> Nasdaq also stated its belief that the closing price is less prone to manipulation than are bid prices.<sup>58</sup> 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.<sup>59</sup> The Commission also notes that the five-day period for establishing the average closing price, according to some of the commenters, is related to the way transactions are actually structured to help smooth out price fluctuations.<sup>60</sup>

The Commission believes that the proposal to eliminate the requirement for shareholder approval of 20% Issuances at a price that is less than book value but above market value is also consistent with the Act. As noted

<sup>56</sup> See *supra* note 10. See also *supra* notes 40–43 and 48–50 and accompanying text.

<sup>57</sup> See Notice, *supra* note 3, at 7272. See also *supra* notes 16–18 and 35–43 and accompanying text. See also *infra* notes 63–65 and accompanying text.

<sup>58</sup> 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.”) See also *supra* note 16.

<sup>59</sup> 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(i). 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.

<sup>60</sup> See *supra* notes 35–39 and accompanying text.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>52</sup> 15 U.S.C. 78f(b)(5).

<sup>53</sup> See, e.g., Securities Exchange Act Release No. 76814 (Dec. 31, 2015), 81 FR 0820 (Jan. 7, 2016) (NYSE–2015–02) (approving amendments to the NYSE Listed Company Manual to exempt early stage companies from having to obtain shareholder approval in certain circumstances). See also

by commenters and the Exchange,<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

#### 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.

<sup>61</sup> See *supra* notes 21 and 45–50 and accompanying text.

<sup>62</sup> For example, as the Exchange stated in the Nasdaq Response Letter, among other things, book value is disclosed in quarterly and annual reports and is just one point of financial data already incorporated in the market value of the security. See Nasdaq Response Letter, *supra* note 8, at 4.

<sup>63</sup> 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.

<sup>64</sup> See Nasdaq Rule 5635(c).

<sup>65</sup> See Nasdaq Rule 5635(a) and (b). The Commission notes that as to the additional proposed changes to the rule text, Nasdaq has indicated that these changes were made to improve the readability of the rule, to conform the language of the rule to the rule text and other rules, and to conform references in other rules to the proposed new standards. Among these changes are the changes that replace the references in Rule 5635 from "private placements" to "transactions other than public offerings." The Commission notes that in Amendment No. 1 the Exchange stated that private placements would continue to be considered "transactions other than public offerings" under Nasdaq Rule 5635(d), as amended by the proposed rule change. See Amendment No. 1, *supra* note 10.

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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR–NASDAQ–2018–008 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR–NASDAQ–2018–008. This file number should be included on the subject line if email 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 website (<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. 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–NASDAQ–2018–008, and should be submitted on or before October 23, 2018.

#### VI. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register**. The Commission notes that Amendment No. 1 clarifies the proposed

rule change. In particular, Amendment No. 1 clarifies 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.<sup>66</sup> The clarifications in Amendment No. 1 should help to avoid any confusion as to the scope or application of the rule changes being adopted herein. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>67</sup> to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

#### VII. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>68</sup> that the proposed rule change (SR–NASDAQ–2018–008), as modified by Amendment No. 1 be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>69</sup>

**Eduardo A. Aleman**,  
Assistant Secretary.

[FR Doc. 2018–21366 Filed 10–1–18; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 2:00 p.m. on Thursday, October 4, 2018.

**PLACE:** The meeting will be held at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

**STATUS:** This meeting will be closed to the public.

#### MATTERS TO BE CONSIDERED:

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

<sup>66</sup> See *supra* note 10.

<sup>67</sup> 15 U.S.C. 78s(b)(2).

<sup>68</sup> *Id.*

<sup>69</sup> 17 CFR 200.30–3(a)(12).