



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88056; File No. SR-NASDAQ-2020-004]

### **Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Clarify the Term “Closing Price” in Rule 5635(d)(1)(A) Relating to Shareholder Approval for Transactions Other Than Public Offerings**

January 28, 2020

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> notice is hereby given that on January 15, 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 and II 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 clarify Rule 5635(d)(1)(A) without changing its substance. The text of the proposed rule change is set forth below. Proposed new language is in italics; deleted text is in brackets.

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The Nasdaq Stock Market LLC Rules

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

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

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### 5635. Shareholder Approval

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

(a) No change.

(b) No change.

(c) No change.

IM-5635-1. No change.

(d) Transactions other than Public Offerings

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

(A) “Minimum Price” means a price that is the lower of: (i) the Nasdaq Official Closing Price [closing price] (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average Nasdaq Official Closing Price [closing price] of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

(B) No change.

(2) No change.

IM-5635-2. No change.

IM-5635-3. No change.

(e) No change.

(f) No change.

IM-5635-4. No change.

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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

On September 26, 2018, the Exchange amended Rule 5635(d)(1)(A) 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 (the "Amendment").<sup>3</sup> As revised, Rule 5635(d) requires a Nasdaq-listed company to obtain shareholder approval prior to the issuance of securities in connection with a transaction other than a public offering<sup>4</sup> 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

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<sup>3</sup> See Securities Exchange Act Release No. 84287 (September 26, 2018), 83 FR 49599 (October 2, 2018) (approving SR-Nasdaq-2018-008) (the "Approval Order").

<sup>4</sup> See Nasdaq Rule IM-5635-3 (Definition of a Public Offering).

together with sales by officers, directors or Substantial Shareholders<sup>5</sup> of the company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance (a “20% Issuance”) at a price that is less than the Minimum Price. Rule 5635(d)(1)(A) defines “Minimum Price” as a price that is the lower of: (i) the closing price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.

Prior to the Amendment, shareholder approval was required for a 20% Issuance at a price less than the greater of book or market value.<sup>6</sup> In the Exchange’s proposal to use the closing price reported on Nasdaq.com, rather than the market value, the Exchange explained that “[t]he closing price reported on Nasdaq.com is the Nasdaq Official Closing Price, which is derived from the closing auction on Nasdaq and reflects actual sale prices at one of the most liquid times of the day.”<sup>7</sup> At the time, Nasdaq believed that “codify[ing] within the rule that Nasdaq.com is the appropriate source of the closing price information” would “assure that companies and investors use the Nasdaq Official Closing Price when pricing transactions.”<sup>8</sup> However, Rule 5635(d)(1)(A) does not specify that the closing price refers to the Nasdaq Official Closing Price,

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<sup>5</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>6</sup> “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). See Nasdaq Rule 5005(a)(23).

<sup>7</sup> See Securities Exchange Act Release No. 82702 (February 13, 2018), 83 FR 7269 (February 20, 2018) at 7270. See also Approval Order at 49602 (“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>8</sup> Id.

which may create confusion. Nasdaq proposes to amend Rule 5635(d)(1)(A) to revise “closing price (as reflected on Nasdaq.com)” to “Nasdaq Official Closing Price (as reflected on Nasdaq.com).”<sup>9</sup> The Exchange believes that this change will reflect the Exchange’s original intention in adopting the Amendment.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>11</sup> 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, by eliminating potential confusion and enhancing clarity and transparency in its rules. The proposal is consistent with the Exchange’s original intent as approved by the Commission and does not have any substantive effect on the rule.

### B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to more clearly describe the current operation and original intent of an

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<sup>9</sup> See Nasdaq Rule 4754(b)(4) (“All orders executed in the Nasdaq Closing Cross will be executed at the Nasdaq Closing Cross price, trade reported anonymously, and disseminated via the consolidated tape. The Nasdaq Closing Cross price will be the Nasdaq Official Closing Price for stocks that participate in the Nasdaq Closing Cross. Fifteen minutes after the close of trading, Nasdaq will disseminate via the network processor a trade message setting the Nasdaq Official Closing Price as the official Consolidated Last Sale Price in each Nasdaq-listed security in which one round lot or more is executed in the Nasdaq Closing Cross where the closing price differs from the Consolidated Last Sale Price.”).

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

existing rule without changing its substance and, therefore, Nasdaq believes that the proposed change will not impose a burden on competition.

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) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>14</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that Rule 5635(d)(1)(A) may be amended to reflect the Exchange's original intent and reduce potential confusion for companies and investors.

The Commission believes that waiver of the operative delay should, as noted by Nasdaq, help to avoid potential confusion for investors and listed companies. The Commission further

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

notes that the current proposal is consistent with Nasdaq's original proposal to adopt the current rule language.<sup>16</sup> For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal as operative upon filing.<sup>17</sup>

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.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2020-004 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.

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<sup>16</sup> See supra note 7 and accompanying text.

<sup>17</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to File Number SR-NASDAQ-2020-004. 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 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-2020-004 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>18</sup> 17 CFR 200.30-3(a)(12).

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