

February 12, 2018

## Proposed Changes to Nasdaq Shareholder Approval Requirements

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### **Nasdaq Proposes to Eliminate the Requirement for Shareholder Approval of 20% Stock Issuances at a Price Less Than Book Value but Greater Than Market Value and to Change the Definition of “Market Value”**

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On January 30, 2018, Nasdaq Stock Market LLC (“Nasdaq”) filed notice with the SEC of a proposed rule change to Nasdaq Listing Rule 5635(d).

Rule 5635(d) currently requires listed companies to obtain shareholder approval prior to issuing securities in connection with transactions, other than public offerings. Specifically, Rule 5635(d) currently requires shareholder approval for the sale, issuance or potential issuance 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 certain significant shareholders, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance, or
- 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.

Based on comments Nasdaq received on Rule 5635(d), Nasdaq is now proposing to eliminate Rule 5635(d)’s references to book value and to change the definition of market value.

#### **Elimination of Reference to Book Value**

One proposed change to Rule 5635(d) entails the deletion of references to book value in the threshold price of “less than the greater of book or market value.” Nasdaq received comments that, because book value is an accounting measure based on the historic costs of assets, as opposed to current value, book

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value is not an appropriate measure of the dilutive effect of a potential transaction. As Nasdaq notes, the book value test became a trap for the unwary in the 2008-2009 financial crisis when a number of listed companies had their stock trade below book value. For this reason, Nasdaq is proposing that any reference to price in Rule 5635(d) solely reference market value as discussed below.

### Change in Definition of Market Value

Nasdaq Rule 5005 defines “market value” as the closing bid price. However, Nasdaq received comments that the bid price is not transparent to companies and does not always reflect the actual price at which a security has traded. Nasdaq also received comments that due to various fluctuations in market price a five-day trailing average of the closing price could under certain circumstances be more representative of the actual market price than the closing bid price. Accordingly, Nasdaq is proposing to incorporate both sets of comments and change the definition of “market value” from the closing bid price to “the lower of (i) the closing price (as reflected on Nasdaq.com) or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.” The market value is tested immediately preceding the signing of the binding agreement for the transaction. Of particular note is that Nasdaq intends to codify that the source of the closing price information will be Nasdaq.com.

### Implications

If the proposed changes to Rule 5635(d) are adopted, transactions, other than public offerings, involving the issuance of more than 20% of an issuer’s common stock priced at the closing price will not require shareholder approval, even if the issuance price is below book value.

The text of the proposed rule change is available on the Nasdaq website at <http://nasdaq.cchwallstreet.com>. Public comments on the proposed rule change will be due within 21 days after publication of the proposed rule change in the Federal Register.

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