

**Committee on Securities Law  
of the Business Law Section of the  
Maryland State Bar Association**

March 13, 2018

**VIA EMAIL TO RULE-COMMENTS@SEC.GOV**

Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Proposed Rule Change to Modify Nasdaq Rule 5635(d) to Change the Definition of Market Value and Eliminate References to Book Value for Purposes of the Shareholder Approval Rules, File No. SR-NASDAQ-2018-008.

Ladies and Gentlemen:

This letter expresses the views of the Committee on Securities Laws (the "Committee") of the Business Law Section of the Maryland State Bar Association ("MSBA"), with respect to the above-referenced Notice of Filing of Proposed Rule Change, SEC Release No. 34-82702; File No. SR-NASDAQ-2018-008 (sometimes referred to herein as the "Notice"), relating to the Securities and Exchange Commission's (the "Commission") solicitation of comments on the proposed rule change to the Nasdaq Stock Market, LLC's ("Nasdaq") Listing Rule 5635(d) (the "Rule") to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of security issuances at a price less than book value but greater than market value. The membership of the Committee consists of securities practitioners who are members of the MSBA, and includes lawyers in private practice, business and government. The Business Law Section and the Board of Governors of the MSBA have not taken a position on the matters discussed herein, and individual members of the MSBA and their associated firms or companies may not necessarily concur with the views expressed in this letter.

The Committee wishes to express its support for the proposed modifications to the Rule for the following reasons, which include the reasons set forth in our July 31, 2017 letter to Nasdaq's Listing and Hearing Review Council in response to its June 14, 2017 solicitation of comments regarding the definition of market value for purposes of the shareholder approval rule ("prior letter"), some of which are reiterated below.

1. We support the proposed amendment to the Rule to define market value as the lower of the closing price at the time of the transaction or the average of the closing prices for the five-day period preceding the execution of a binding agreement as the measure for market value for purposes of the shareholder approval requirement, such that shareholder approval would be required only if the issuance price is less than both of these measures (assuming the 20%

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threshold was met). As discussed in the Notice, parties often prefer to structure a transaction using an average price to smooth out unusual price fluctuations. This proposed change provides additional flexibility to listed companies in structuring their securities transactions and brings the provisions of the Rule more in line with how transactions are structured when the Rule is not a consideration. Because a five-day average closing price is also a reasonable indication of market value, providing listed companies with this alternative does not harm stockholders and is in line with the spirit and purpose of the Rule.

2. As noted in our prior letter, we agree with Nasdaq's position, as set forth in the Notice, that the Nasdaq Official Closing Price is the better representative of market value as compared to the bid price, which among other things may not reflect actual transactions. In addition, we believe that the clarification of Nasdaq.com as the appropriate source of closing price information will reduce uncertainty and eliminate inconsistency with respect to how market value is calculated for purposes of the Rule.
3. As discussed in our prior letter, we strongly support the proposed elimination of book value as a consideration as to whether stockholder approval is required for securities issuances. We agree with the sentiments expressed in the Notice that book value is not an appropriate measure of current value and, therefore, not an appropriate measure as to whether a transaction is dilutive or should require shareholder approval.

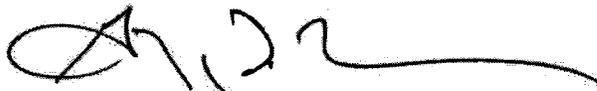
We appreciate the Commission's consideration of the foregoing comments.

Very truly yours,

*Committee on Securities Law* of the Business Law  
Section of the Maryland State Bar Association



Penny Somer-Greif, Chair



Gregory T. Lawrence, Vice-Chair