Nasdaq

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July 18, 2018

Brent J. Fields
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-NASDAQ-2018-008 (the "Proposal")

Dear Mr. Fields:

The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") is pleased to respond to the Securities and Exchange Commission ("Commission") solicitation of comments in its Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposal (the "Order").[1]

In the Proposal,[2] Nasdaq proposes to modify the circumstances in which shareholder approval is required for certain issuances of securities. Currently, under Nasdaq Rule 5635(d), Nasdaq requires listed companies to obtain shareholder approval prior to the issuance of securities in connection with a transaction other than a public offering, as defined in IM 5635-3, 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[3] 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 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.

"Market value" is currently defined in Nasdaq Rule 5005(a)(23) as the consolidated closing bid price multiplied by the measure to be valued. This definition applies to the shareholder approval rules as well as other listing rules. In the Proposal, Nasdaq has proposed to apply a different test for purposes of Nasdaq Rule 5635(d).[4] The new definition, to be known as the "Minimum Price," is defined as the price

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1 Securities Exchange Act Release No. 83294 (May 21, 2018), 83 FR 24379 (May 25, 2018).

2 Securities Exchange Act Release No. 82702 (February 13, 2018), 83 FR 7269 (February 20, 2018).

3 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).

4 The current definition of market value would continue to apply to all other rules, including Nasdaq Rule 5635(c), which relates to the shareholder approval of equity compensation.

that is the lower of: (1) the closing price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement[5]; 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 transactions other than a public offering that are priced below the Minimum Price, even if the Minimum Price is below the book value.

In the Order the Commission requested comments from interested persons, including on any concerns they may have regarding the Proposal. Notably, as of the date of this letter, no one has raised any concerns about the Proposal.[6] In addition the Commission sought comments on two specific questions. Nasdaq addresses these specific questions, as well as one additional issue raised in the Order below.

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Question 1. *Is the five-day average closing price a reasonable alternative to determining market value for purposes of shareholder approval requirements under Nasdaq Rule 5635(d)? If so, what are the benefits and/or risks to companies and their shareholders? Do the benefits and risks to companies and shareholders change under certain market conditions, such as rising markets, and if so how?*

Answer: Nasdaq believes that the five-day average closing price is a reasonable alternative to determining market value for purposes of shareholder approval requirements under Nasdaq Rule 5635(d) and that the proposed change to allow such a five-day average of the closing price will provide benefits to companies and their shareholders.

First, as noted in the rule filing, Nasdaq believes that the current closing bid price standard does not necessarily reflect the price at which a security has traded. Further, prices reflecting actual sales are less prone to manipulation than are bid prices, and it is more difficult to manipulate a closing price over several days than it would be to do so over a single day. As such, the Proposal would provide a value that is more indicative of the value of the security as determined at the most liquid time of day and that would be less subject to manipulation, and, thus, it is a reasonable alternative to the closing bid price.

Second, other market regulators have recognized that a five-day average is a reasonable alternative for determining market value. Like Nasdaq, the Toronto Stock Exchange (TSX) requires shareholder approval for certain private placements. However, shareholder approval is not required if the private placement is at or above market price, which generally is defined as the volume weighted average trading price for the five trading days immediately preceding the relevant date.[7]

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[5] As described below, Nasdaq intends to file an amendment to the Proposal to clarify its intent that the applicable closing price is the closing price immediately preceding the signing of the binding agreement.

[6] As noted in the Proposal, Nasdaq had twice solicited comments on potential changes to the shareholder approval rules and received comments from companies, investors, and their advisors. The Proposal sought to address concerns raised in these prior comments.

[7] See Part I of the TSX Company Manual (defining "market value") and Section 607, describing the requirements for shareholder approval of "Private Placements."

Further, in assessing the risks associated with the Proposal, it is important to analyze the Proposal in the context of existing Nasdaq Rule 5635(d) (the "Existing Rule"). Under the Existing Rule a listed company and potential investors currently can review almost an entire day of trading after the closing bid, and thus the market value of the security is determined before they decide whether to sell or buy shares at such value. For example if Company X's common stock's closing bid price on Thursday is $10.00, the company and potential investors have until just before Friday's close to sign a binding agreement to sell 20% or more of its outstanding shares at $10.00 without shareholder approval. Thus, the Existing Rule provides an issuer with almost an entire subsequent trading day, until just before closing, to determine whether to sell its shares based on the previous day's closing price.

Nonetheless, considering the impracticability of structuring transactions and enforcing a rule based on the price as of the moment of the agreement, the Existing Rule, as previously approved by the Commission, treats the closing consolidated bid price immediately preceding the signing of the binding agreement as a reasonable estimate of the current market value of listed companies' common stock for purposes of the Existing Rule.[8]

The Proposal similarly recognizes that it is impractical to assess market value as of a specific time and recognizes the five day average of the closing price as another reasonable alternative, which, as noted in the Proposal, investors may view as a more fair indicator of the value of the securities, in part because the closing bid price is prone to unanticipated market fluctuations that could cause inequitable results.[9] The ability to use this potentially better indicator to price transactions is a benefit to listed companies, their shareholders and potential investors.

Finally, the Commission asks whether the risks and benefits change under certain market conditions. As noted in the Proposal, in a declining market the five-day average price will more likely be above the final day's closing price and in a rising market the five-day average price will more likely be below the closing price. Of course markets don't tend to move exclusively in a single direction over time, so the actual results are less predictable. In each case, however, the Proposal allows 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 definitive agreement or the most recent closing price before the signing of a definitive agreement.

In view of the above, Nasdaq believes that the five-day average closing price is a reasonable alternative to determining market value for purposes of the shareholder approval requirements under Nasdaq Rule 5635(d).

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Question 2. *Are there benefits and/or risks to listed companies and shareholders by permitting sales in private placements that are above market value but below book value? Could there be any potential*

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8 See Securities Exchange Act Release No. 28232 (July 19, 1990), 55 FR 30346 (July 25, 1990) (approving the predecessor to Listing Rule 5635(d)).

9 See text accompanying footnotes 7 and 8 in the Proposal.

impact on share price? Would the assessment of any potential impact, if any, change depending on the reason why a stock is trading above market price but below book value (i.e., market conditions, accounting issues)?

Answer: As stated in the Proposal, Nasdaq believes that book value is not an appropriate measure of whether a transaction is dilutive or should otherwise require shareholder approval. The forces of a free and open marketplace determine the fair market value of a security based on all publicly available information regarding the issuer of the security, including, and in large part, the issuer's financial position. Book value is but one point in a myriad of financial data points; and is, therefore, already incorporated in the market value of the security. This is true regardless of the market conditions or accounting issues. Listed companies disclose their book value through filing quarterly and annual reports with the Commission and such information is, therefore, quickly incorporated into the market price of the listed security. Book value is also an outdated measurement as even at the time of filing such reports balance sheet information is anywhere from 30 to 90 days old. As such, Nasdaq believes that removing the prohibition on selling shares at a price above market value, but below book value, will benefit the marketplace by allowing companies to quickly raise money on terms that are favorable to shareholders and that this change will not introduce any significant risks to investor protection.

Further, Nasdaq believes that any assessment of why a stock is trading below book value is a subjective exercise and that a stock price reflects many factors at any given moment. Nasdaq does not believe that it would be appropriate to assess the impact of allowing a particular sale to occur without shareholder approval at a price below book value based on such a subjective determination.

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Separately in the Order the Commission notes that:

> the [P]roposal stated that the "closing price" used is the closing price (as reflected on Nasdasq.com [sic]) at the time of the transaction. The Exchange should address in its rule proposal if "at the time of the transaction" would use the previous day's close or the close on the day of the transaction and should clarify this in the rule text. Unlike the closing price reference, the five-day average closing price provision, as proposed, currently makes clear it is based on the five days immediately preceding the signing of a binding agreement.[10]

To address this comment, Nasdaq intends to file an amendment to the Proposal to clarify its intent that the closing price, as used in the new definition of the Minimum Price, refers to the closing price immediately preceding the signing of a binding agreement.

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In view of the above, Nasdaq believes that the Proposal is consistent with Section 6(b) of the Act and furthers the objectives of Section 6(b)(5) of the Act, in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, to protect investors and the public interest. Nasdaq asks that the Commission approve the Proposal

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[10] Footnote 36 of the Order.

without delay. If you have any questions or need additional information, please contact me at [redacted].

Sincerely,

Arnold Golub
Vice President, Listing Qualifications
Deputy General Counsel