

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88805; File No. SR-NASDAQ-2020-025)

May 4, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide Listed Companies With a Temporary Limited Exception From Certain Shareholder Approval Requirements in Nasdaq Rules 5635(c) and (d)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 1, 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 adopt a rule, operative through, and including, June 30, 2020, to provide listed companies with a temporary exception from certain shareholder approval requirements, as described below.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Given current market conditions, Nasdaq proposes to provide listed companies with a temporary exception, limited in scope and time, from certain shareholder approval requirements, as described below.

In December 2019, COVID-19 began to spread and disrupt company operations and supply chains and impact consumers and investors, resulting in a dramatic slowdown in production and spending.³ By March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic.⁴ To slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel and closed non-essential businesses.

³ See, e.g., Chairman Jay Clayton, Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020), *available at* <https://www.sec.gov/news/public-statement/clayton-md-a-2020-01-30>. (“Yesterday, I asked the staff to monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of the coronavirus. We recognize that such effects may be difficult to assess or predict with meaningful precision both generally and as an industry- or issuer-specific basis. This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers.”).

⁴ See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (March 11, 2020), *available at* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

These necessary measures also have affected equity markets, which have seen significant declines.⁵ In response, governments around the world have acted swiftly and decisively to provide relief to regulated entities and are undertaking efforts to stabilize the economy and assist affected companies and their employees.⁶ The Commission, in particular, has recognized the importance of functioning markets in this environment⁷ and has granted issuers and broker-dealers relief and extensions from existing deadlines, in order to allow these entities, as well as the Commission itself, to focus on fighting the deadly virus and preserving functioning capital markets.⁸

⁵ In the United States, Level 1 market wide circuit breaker halts were triggered on March 9, March 12, March 16, and March 18, 2020. See also Phil Mackintosh, *Putting the Recent Volatility in Perspective*, available at <https://www.nasdaq.com/articles/putting-the-recent-volatility-in-perspective-2020-03-05> (“Analysts showed that we saw the fastest ‘correction’ in history (down 10% from a high), occurring in a matter of days. In the last week of February, the Dow fell 12.36% with notional trading of \$3.6 trillion.”)

⁶ See, e.g., the list of actions undertaken by the Board of Governors of the Federal Reserve System at <https://www.federalreserve.gov/covid-19.htm>. See also Families First Coronavirus Response Act, Public Law No. 116-127 and Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136.

⁷ See, e.g., Chairman Jay Clayton, *The Deep and Essential Connections Among Markets, Businesses, and Workers and the Importance of Maintaining those Connections in our Fight Against COVID-19* (March 24, 2020) available at <https://www.sec.gov/news/public-statement/statement-clayton-covid-19-2020-03-24> (“The Securities and Exchange Commission and other financial regulators are focused on two overriding and interrelated issues. First, we are facing an unprecedented national challenge — a health and safety crisis that requires all Americans, for the sake of all Americans, to significantly change their daily behavior and, for many, to make difficult personal sacrifices. Second, the recognition that the continuing, orderly operation of our markets is an essential component of our national response to, and recovery from, COVID-19. The interrelationship between these issues cannot be overstated. Our health care, pharmaceutical, manufacturing, transportation, telecommunications and many other private-sector industries are critical to our collective response to COVID-19. The thousands of firms and entrepreneurs in these industries — and the millions of employees and contractors — that are working around the clock to fight COVID-19 depend on continued access to payments and credit.”).

⁸ See *SEC Coronavirus (COVID-19) Response* available at <https://www.sec.gov/sec-coronavirus-covid-19-response>, which is being updated regularly with additional actions

Amidst this market uncertainty, Nasdaq proposes to temporarily modify certain of its rules in an effort to streamline listed companies' access to capital. Specifically, Nasdaq proposes to adopt Listing Rule 5636T to provide a limited temporary exception to the shareholder approval requirements in Listing Rule 5635(d) (Transactions other than Public Offerings)⁹ and, in certain narrow circumstances, a limited attendant exception to Listing Rule 5635(c)(Equity Compensation).¹⁰

taken by the Commission. As of April 14, 2020, the Commission response includes (but is not limited to): providing conditional relief for certain publicly traded company filing and proxy delivery obligations (March 4 and 25, 2020); granting relief to reporting deadlines and in-person meeting requirements for investment companies (March 13, 2020); extending the industry compliance period for Consolidated Audit Trail reporting due to the fact that “disruptions as a result of COVID-19 have placed new stresses and competing priorities on the infrastructure and staff required to implement the Consolidated Audit Trail” (March 16, 2020); extending filing deadlines for certain reports required under Regulation A and Regulation Crowdfunding (March 26, 2020); and providing temporary relief for Business Development Companies investing in small and medium-sized businesses (April 8, 2020).

⁹ Listing Rule 5635(d) states that shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price. The “Minimum Price” is defined in Rule 5635(d)(1)(A) as the lower of: (i) the Nasdaq Official Closing Price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average Nasdaq Official Closing Price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement. A “20% Issuance” is defined in Rule 5635(d)(1)(B) 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.

¹⁰ Listing Rule 5635(c) requires shareholder approval, with certain exceptions, prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

Shareholder Approval Requirements

The Nasdaq shareholder approval rules generally require companies to obtain approval from shareholders prior to issuing securities in connection with: (i) certain acquisitions of the stock or assets of another company;¹¹ (ii) equity-based compensation of officers, directors, employees or consultants;¹² (iii) a change of control;¹³ and (iv) a 20% Issuance at a price less than the Minimum Price.¹⁴

One unavoidable consequence of the actions being taken to reduce the spread of COVID-19 is a reduction, or complete interruption, in revenue for many companies. For example, many communities have mandated that all restaurants and entertainment facilities close for a period of time. Similarly, companies in the travel sector have seen significant declines in bookings even if they are allowed to continue to operate. Thus, these businesses will have no or greatly reduced revenue to offset the operating costs or increased costs associated with the crisis. As such, investors may be reluctant to enter into new equity transactions, unless they are compensated for the risk through discounts to the trading price of a security, and companies may be forced by current circumstances to raise money through equity financings that require shareholder approval under Nasdaq's rules. At the same time, other companies have sudden, unexpected cash needs as they undertake new or accelerated initiatives designed to address the loss of business and supply shortages caused by COVID-19.

While an exception is currently available within Nasdaq's rules for companies in financial distress where the delay in securing stockholder approval would seriously jeopardize

¹¹ See Listing Rule 5635(a)(Acquisition of Stock or Assets of Another Company).

¹² See Listing Rule 5635(c)(Equity Compensation).

¹³ See Listing Rule 5635(b)(Change of Control).

¹⁴ See Listing Rule 5635(d)(Transactions other than Public Offerings). See also footnote 9 above.

the financial viability of the company,¹⁵ that exception is not helpful in most situations arising from the COVID-19 pandemic. For example, while a company may need additional cash so that it can continue to pay employees during a period of decreased or no revenue, the company's viability may not otherwise be in jeopardy.¹⁶ Further, the accelerated need for funds, as well as the significantly curtailed operations of many businesses, may make impractical the requirement to mail notice to all shareholders ten days prior to issuing securities. As such, Nasdaq is concerned that this exception does not adequately address the capital raising needs of listed companies under current conditions.

Proposed COVID-19 Exception

In view of the above, Nasdaq proposes to create a new temporary exception from the shareholder approval requirements in Listing Rule 5635(d), accompanied by a limited exception from Listing Rule 5635(c) by adopting Listing Rule 5636T. This proposed exception would be available until and including June 30, 2020. Nasdaq notes that to rely on this exception, the company must execute a binding agreement governing the issuance of the securities, submit the notices required by Listing Rules 5636T(b)(5)(A) and (e), and obtain the required approval from Nasdaq under Listing Rule 5636T(b)(5)(B)(ii) (if applicable), as described below, no later than June 30, 2020. The issuance of the securities governed by such agreement in reliance on the

¹⁵ See Listing Rule 5635(f). Reliance by the company on a financial viability exception must expressly be approved by the company's audit committee, or a comparable body of the board of directors comprised solely of independent, disinterested directors, and the company must obtain Nasdaq's approval prior to proceeding with the transaction. In addition, companies are required to mail a letter (as opposed to relying solely on a press release or Form 8-K, which are also required, or a website posting) at least ten days prior to issuing securities in the exempted transaction alerting shareholders to the company's omission to seek the shareholder approval that would otherwise be required.

¹⁶ Similarly a company that needs capital to undertake, for example, a new initiative designed to test for COVID-19 or to develop a vaccine may not otherwise be facing a threat to its viability.

exception in Listing Rule 5636T may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement. If the company does not issue securities within 30 calendar days, as described above, it may no longer rely on the exception in Listing Rule 5636T.

Under proposed Listing Rule 5636T(b), the exception is limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. In addition to demonstrating that the transaction meets one of the foregoing requirements, in order to rely on the exception, the company would also have to demonstrate to Nasdaq that the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. Nasdaq also proposes, similar to the requirement for the financial viability exception, to require that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception. Nasdaq also proposes to require such committee or a comparable body of the board of directors comprised solely of independent, disinterested directors to determine that the transaction is in the best interest of shareholders.

Unlike the requirement for the financial viability exception, no prior approval of the exception by Nasdaq would be required if the maximum issuance of common stock (or securities convertible into common stock) issuable in the transaction is less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the

maximum discount to the Minimum Price at which shares could be issued is 15% (the “Safe Harbor Provision”). Nasdaq notes that transactions that involve issuance of warrants exercisable for shares of common stock are not eligible for the Safe Harbor Provision.

For transactions that do not fall within the Safe Harbor Provision, the Nasdaq Listing Qualifications Department must approve the company’s reliance on the exception before the company can issue any securities in the transaction. This approval will be based on a review of whether the company has established that it complies with the requirements of Listing Rule 5636T(b) (and Listing Rule 5636T(c) if applicable). Upon completion of the review of the company’s submission, the Nasdaq Listing Qualifications Department will notify the company in writing whether the company’s reliance on the exception was approved.

To provide shareholders with advance notice of the transaction, Nasdaq proposes to adopt Listing Rule 5636T(d), which would require a company relying on the proposed exception to make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing as promptly as possible, but no later than two business days before the issuance of the securities:

- the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
- that shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the Company is relying on an exception to the shareholder approval rules; and
- that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the

exception and determined that the transaction is in the best interest of shareholders.¹⁷

In addition, Nasdaq has long interpreted Listing Rule 5635(c) to require shareholder approval for certain sales to officers, directors, employees, or consultants when such issuances could be considered a form of “equity compensation.” Nasdaq has heard from market participants that investors often require a company’s senior management to put their personal capital at risk and participate in a capital raising transaction alongside the unaffiliated investors. Nasdaq believes that as a result of uncertainty related to the ongoing spread of the COVID-19 virus, listed companies seeking to raise capital may face such requests. Accordingly, Nasdaq proposes that the temporary exception allow such investments under limited circumstances.

To that end, Nasdaq proposes to adopt Listing Rule 5636T(c), which would provide for an exception from shareholder approval under Listing Rule 5635(c) for an affiliate’s participation in the transaction described in Listing Rule 5636T(b) provided the affiliate’s participation in the transaction was specifically required by unaffiliated investors. In addition, to further protect against self-dealing, the proposed Listing Rule 5636T(c) would limit such participation to a de-minimis level – each affiliate’s participation must be less than 5% of the transaction and all affiliates’ participation collectively must be less than 10% of the transaction.¹⁸ Finally, any affiliate investing in the transaction must not have participated in negotiating the economic terms of the transaction.

¹⁷ See Listing Rule 5635(f) requiring similar disclosure, for a transaction for which a company relied on the financial viability exception, alerting shareholders to the omission to seek the shareholder approval that would otherwise be required.

¹⁸ Cf. Listing Rule IM-5405-1(a)(3) similarly limiting affiliates’ participation in certain pre-listing transactions in order for such transactions to constitute compelling evidence of the company’s value.

Listing Rule 5250(e)(2) requires a company to notify Nasdaq at least 15 calendar days prior to certain events, including when the company issues any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis (the “Notification”). The Notification allows Nasdaq additional time to review the proposed transaction and assure that it complies with the shareholder approval requirements, including those in Listing Rules 5635(c) and (d). Absent a rule change, transactions described in proposed Listing Rules 5636T(b) and (c) would require such advance notification. Because a transaction satisfying the proposed temporary rule will be excepted from certain provisions of the shareholder approval rules, Nasdaq believes that notification 15 days prior to issuance is unnecessary. Accordingly, Nasdaq proposes to adopt Listing Rule 5636T(e) to provide that a company that relies on the exception in this Rule 5636T is not subject to the 15 day prior notification requirement described in Rule 5250(e)(2) but must still provide notification required by that rule to Nasdaq, along with a supplement, as required by Listing Rule 5636T(b)(5)(A), certifying in writing that the company complied with all requirements of Listing Rule 5636T(b), and Listing Rule 5636T(c) if applicable. Such submissions must be made, as promptly as possible, but no later than the time of the public announcement required by Listing Rule 5636T(d) and in no event later than June 30, 2020, in accordance with Listing Rule 5636T(a). In such certification, Nasdaq expects the company to describe with specificity how it complies with Listing Rule 5636T(b), and Listing Rule 5636T(c) if applicable. For transactions described in Listing Rule 5636T(b)(5)(B)(ii) that require approval of the Nasdaq Listing Qualifications Department before the company can issue any securities in reliance on Listing Rule 5636T,

Nasdaq expects companies to submit the Notification, and a supplement required by Listing Rule 5636T(b)(5)(A), with enough time to allow Nasdaq to complete its review of the submissions.¹⁹ The proposed rule also will remind companies that a transaction that violates other Nasdaq rules could subject the company to delisting and Nasdaq Staff would review transactions covered by proposed Listing Rule 5636T for compliance with all other Nasdaq listing requirements. As noted below, the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Finally, Nasdaq proposes to aggregate issuances of securities in reliance on the exception in proposed Listing Rule 5636T with any subsequent issuance by the company, other than a public offering under IM-5635-3, at a discount to the Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. Accordingly, if following the subsequent issuance, the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required under Rule 5635(d) prior to the subsequent issuance.

Nasdaq believes that this temporary suspension will permit companies to raise capital quickly to continue running their businesses and address the immediate health crisis caused by the COVID-19 pandemic, including its impact on their employees, customers, and communities.

¹⁹ Nasdaq notes that in such cases the company may not issue any securities until it receives the approval from the Nasdaq Listing Qualifications Department, which may take more than two days. Of course, if the Nasdaq Listing Qualifications Department does not approve reliance on the exception, any issuance of securities must comply with the shareholder approval requirements in Listing Rule 5635.

Nasdaq notes that the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,²¹ 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. As a result of uncertainty related to the ongoing spread of the COVID-19 virus, the prices of securities listed on U.S. exchanges are experiencing significant volatility. Nasdaq believes that the proposed rule change is designed to remove an impediment to companies addressing certain immediate capital needs as a result of the COVID-19 pandemic and reduce uncertainty regarding the ability of companies to raise money quickly through equity financings during the current highly unusual market conditions and general economic disruptions. Nasdaq believes that in this way, the proposed rule change will protect investors, facilitate transactions in securities, and remove an impediment to a free and open market. All companies listed on the Exchange would be eligible to take advantage of the proposed suspension.

In addition, Nasdaq believes the proposed rule change is designed to protect investors by limiting the exception from the shareholder approval requirements to situations where the need for the transaction is due to circumstances related to COVID-19 and that the company undertook

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

a process designed to ensure that the proposed transaction represents the best terms available to the company. The exception is also limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. Further, the proposed rule requires that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception and determine that the transaction is in the best interest of shareholders.

Nasdaq also notes that to the extent the company relies on the Safe Harbor Provision instead of Nasdaq's review and approval of the company's reliance on the exception, as described above, the maximum issuance of common stock (or securities convertible into common stock) issuable in the transaction must be less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and the maximum discount to the Minimum Price at which shares could be issued is 15%.

Notwithstanding the proposed exception from certain shareholder approval requirements, as described above, important investor protections will remain as the proposed exception would not be available for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

Finally, Nasdaq notes that the proposed rule is a temporary exception from certain shareholder approval requirements, as described above, operative through, and including, June 30, 2020.

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. All companies listed on the Exchange would be eligible to take advantage of the proposed suspension. In addition, the proposed rule change is not designed to have any effect on intermarket competition but instead seeks to address concerns Nasdaq has observed surrounding the application of the shareholder approval requirements, as described above, to companies listed on Nasdaq. Other exchanges can craft relief based on their own rules and observations.

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 Act²² and Rule 19b-4(f)(6) thereunder.²³

²² 15 U.S.C. 78s(b)(3)(A).

²³ 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.

A proposed rule change filed under Rule 19b-4(f)(6)²⁴ normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁵ the Commission may 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 the proposed rule change may become operative immediately upon filing. The Exchange stated that waiver of the operative delay would allow companies to quickly raise money through equity financings to maintain operations or financial viability, compensate its workforce, or undertake new initiatives in response to COVID-19 during the current highly unusual market and economic conditions and ongoing uncertainty relating to the global spread of the COVID-19 virus. In addition, the Exchange stated that the proposed exception from the shareholder approval requirements is limited to situations where the need for the transaction is due to circumstances related to COVID-19 and the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. The Exchange stated that the proposed exception is further limited to circumstances where the delay in securing shareholder approval would (i) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise. The Exchange also noted that the proposed rule requires that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on this exception and determine that the transaction is in the best interest of shareholders. Finally, the Exchange stated that the proposed exception would not be available

²⁴ 17 CFR 240.19b-4(f)(6).

²⁵ 17 CFR 240.19b-4(f)(6)(iii).

for the shareholder approval requirements related to equity compensation in Listing Rule 5635(c) (except for the limited circumstances described above for insider participation in transactions covered by the proposed exception), acquisitions in Listing Rule 5635(a) and a change of control in Listing Rule 5635(b).

The Commission notes that while the proposed rule change would provide a temporary exception to certain shareholder approval requirements, it is limited to situations where the need for the transaction is related to COVID-19 circumstances and only where the delay in obtaining shareholder approval meets one of the four specified conditions for the transaction set forth in the temporary rule and described above. In addition, the Commission notes that there are important investor protections built into the proposed temporary rule. For example, the exception from the shareholder approval requirements is limited to situations where the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company. In addition, the proposed rule change requires that the company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approve reliance on the exception and determine that the transaction is in the best interest of shareholders. Companies that are using the Safe Harbor Provision, and therefore do not need prior Exchange approval, will also be limited to a maximum issuance of less than 25% of the total shares outstanding and voting power outstanding before the transaction and a maximum discount to the Minimum Price of no more than 15%. Further, the Commission notes that shareholder approval would continue to be required for transactions that do not qualify for the proposed temporary exception, such as for acquisitions of stock or assets of another company (Nasdaq Rule 5635(a)), for changes of control (Nasdaq Rule 5635(c)), and for equity compensation (Nasdaq Rule 5635(c)), except in the limited circumstances provided for in

Rule 5636T(c)). The Commission also notes that the proposal is a temporary measure designed to allow companies to raise necessary capital quickly in response to current, unusual market conditions. 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. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.²⁶

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²⁷ of the Act to determine whether the proposed rule change should be approved or disapproved.

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. Please include File Number SR-NASDAQ-2020-025 on the subject line.

²⁶ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁷ 15 U.S.C. 78s(b)(2)(B).

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-2020-025. 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-2020-025 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

J. Matthew DeLesDernier
Assistant Secretary

²⁸ 17 CFR 200.30-3(a)(12).