

leverage. While a Fund may invest in inverse ETFs, a Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the VIIV and quotation and last sale information for the Shares.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

#### *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 that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of additional actively-managed exchange-traded products that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2018-010 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.

All submissions should refer to File Number SR-CboeBZX-2018-010. This file number should be included on the subject line if email 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-CboeBZX-2018-010 and should be submitted on or before March 13, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>46</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-82702; File No. SR-NASDAQ-2018-008]

### **Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Modify the Listing Requirements Contained in Listing Rule 5635(d) To Change the Definition of Market Value for Purposes of the Shareholder Approval Rules and Eliminate the Requirement for Shareholder Approval of Issuances at a Price Less Than Book Value but Greater Than Market Value**

February 13, 2018.

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 30, 2018, The Nasdaq Stock Market LLC ("Nasdaq" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III 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 modify the listing requirements contained in Listing Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

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.

<sup>46</sup> 17 CFR 200.30-3(a)(12).

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

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

## 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 the Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

Nasdaq shareholder approval requirements were adopted in 1990.<sup>3</sup> Among other circumstances, the rule requires shareholder approval for security issuances for less than the greater of book or market value (other than in the context of a public offering) if either (a) the issuance equals 20% of the outstanding stock or voting power or (b) if a smaller issuance coupled with sales by the officers, directors or substantial security holders meets the 20% threshold.<sup>4</sup> This provision has remained substantively unchanged for the last 28 years. On the other hand, the capital markets and securities laws, as well as the nature and type of share issuances, have evolved significantly in that time.

In 2016, Nasdaq requested comments from, and held discussions with, market participants regarding whether, given these changes, Nasdaq could update its shareholder approval rules to enhance the ability for capital formation without sacrificing investor protections. Based on the feedback received, in June 2017, Nasdaq launched a formal comment solicitation on a specific proposal to amend Listing Rule 5635(d) (the "2017 Solicitation"). Based on Nasdaq's experience and the comments received, Nasdaq proposes to amend Rule 5635(d) to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

<sup>3</sup> Securities Exchange Act Release No. 28232 (July 19, 1990), 55 FR 30346 (July 25, 1990) (adopting [sic] the predecessor to Listing Rule 5635(d)).

<sup>4</sup> *Id.*

#### I. Definition of Market Value

Listing Rule 5635(d) requires a Nasdaq-listed company to obtain shareholder approval when issuing common stock or securities convertible into common stock, which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equal to 20% or more of the shares or 20% or more of the voting power outstanding at a price less than the greater of the book value or market value of that stock. Listing Rule 5005 defines "market value" as the closing bid price.

Market participants often express to Nasdaq their concern that bid price may not be transparent to companies and investors and does not always reflect an actual price at which a security has traded. Generally speaking, the price of an executed trade is viewed as a more reliable indicator of value than a bid quotation; and the more shares executed, the more reliable the price is considered. Further, it was noted by commenters in the 2017 Solicitation that in structuring transactions, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price.

Accordingly, Nasdaq proposes to modify the measure of market value for purposes of Listing Rule 5635(d) 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.

#### A. Closing Price

The 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. The Nasdaq closing auction is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction promotes accurate closing prices by offering specialized orders available only during the closing auction and integrating those orders with regular orders submitted during the trading day that are still available at the close. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price

and size of the closing auction. Nasdaq believes its closing auction has proven to be a valuable pricing tool for issuers, traders, and investors alike; and Nasdaq continually works to enhance the experience for those that rely upon it. For these reasons, Nasdaq believes that the closing price reported on *Nasdaq.com* is a better reflection of the market price of a security than the closing bid price. This proposal is consistent with the approach of other exchanges.<sup>5</sup>

In addition, because prices are displayed from numerous data sources on different websites, to provide transparency within the rule to the appropriate price, and assure that companies and investors use the Nasdaq Official Closing Price when pricing transactions, Nasdaq proposes to codify within the rule that *Nasdaq.com* is the appropriate source of the closing price information.<sup>6</sup>

#### B. Five-Day Average Price

Several commenters supported the use of a five-day average in their responses to the 2017 Solicitation. For example, one commenter suggested that "[i]nvestors view a 5 day average as a more fair method of determining 'market value' (in a non-technical sense)" and continued that "[u]sing the closing bid on the closing date is more prone to unanticipated and inequitable results based on market fluctuations."<sup>7</sup> Another commenter stated that they believe that a "five-day trailing average of the closing price is more representative of actual market value than the closing bid price."<sup>8</sup>

While investors and companies sometimes prefer to use an average when pricing transactions, Nasdaq notes that there are potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five-day average price will always be above

<sup>5</sup> See Section 312.04(i) of the NYSE Listed Company Manual ("Market value" of the issuer's common stock means the official closing price on the [NYSE] as reported to the Consolidated Tape immediately preceding the entering into of a binding agreement to issue the securities.).

<sup>6</sup> The closing price is published on *Nasdaq.com* with a 15 minute delay and is available without registration or fee and Nasdaq does not currently intend to charge a fee for access to this data or otherwise restrict availability and, in the event that Nasdaq subsequently determines to do so, it will file a proposed rule change under Section 19(b) of the Act with respect to such change if necessary to address the impact of compliance with this rule.

<sup>7</sup> See Letter from Michael Grunde, Wiggin and Dana LLP, dated June 16, 2017 (Grunde Letter).

<sup>8</sup> Letter from Linda Zwoboda, CPA, CFO, Lightbridge Corporation, dated June 27, 2017 (Lightbridge Letter).

current market price, thus making it difficult for companies to close transactions because investors could buy shares in the market at a price below the five-day average price. Conversely, in a rising market, the five-day average price will appear to be a discount to the closing price. In addition, if material news is announced during the five-day period, the average could be a worse reflection of the market value than the closing price after the news is disclosed. Nonetheless, Nasdaq believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under Nasdaq's rules, such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of price movement during the period to the new investor, the company and its current shareholders, each of which has potential risk and benefit depending on how the price ultimately changes during that period.

Other commenters in the 2017 Solicitation believed that the five-day average price may be inappropriate as a measure of market value of listed securities in certain circumstances and suggested that it therefore should only be used as an optional alternative to closing price. In that regard, one commenter, while agreeing that a five-day trailing average is a useful alternative measure of market price, pointed out that:

[T]he Rule 144A convertible bond market and the related call spread overlay market (whether entered into in connection with a Rule 144A or registered convertible bond) currently benefit from certain synergies that arise from the use of the one-day closing price in light of the complex regulatory, tax and accounting analysis of these transactions and the related hedging activities of market participants.<sup>9</sup>

Other commenters raised similar concerns.<sup>10</sup> Nasdaq believes these concerns are justified and as such, Nasdaq proposes to amend Listing Rule 5635(d) to define market value as the lower of the closing price at the time of the transaction or the five-day average of the closing price as the measure of market value for purposes of the shareholder approval rules. This means that the issuance would not require an

<sup>9</sup> Letter from Greg Rogers, Latham and Watkins LLP, dated July 27, 2017 (Latham Letter).

<sup>10</sup> Letter from Michael Adelstein, Kelley Drye & Warren LLP, dated July 28, 2017 (Kelley Drye Letter); Letter from Michael Nordtvedt, Wilson Sonsini Goodrich & Rosati, P.C., dated July 31, 2017 (Wilson Sonsini Letter); Joseph A. Smith, Ellenoff Grossman & Schole LLP, dated July 31, 2017 (Ellenoff Grossman Letter).

approval by company's shareholders, so long as it is at a price that is greater than the lower of those measures.<sup>11</sup> To improve the readability of the rule, Nasdaq proposes to define this new concept as the "Minimum Price" and eliminate references to book value and market value from Listing Rule 5635(d).

## II. Book Value

Nasdaq proposes to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, market participants have indicated, and Nasdaq agrees, that book value is not an appropriate measure of whether a transaction is dilutive or should otherwise require shareholder approval. Nasdaq has also observed that when the market price is below the book value, the rule becomes a trap for the unwary. In that regard, the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. In these situations companies are often frustrated when they learn that they cannot quickly raise capital on terms that are favorable to the market price. Based on conversations with investors, Nasdaq also believe that book value is not considered by shareholders to be a material factor when they are asked to vote to approve a proposed transaction. Most commenters in the 2017 Solicitation supported the elimination of the book value requirement from the shareholder approval rules.<sup>12</sup> The only support for retaining the book value limitation, came from one commenter who appeared to believe that issuances below book value would result in negative investor perception of the issuer and that book value was an alternative measure not subject to

<sup>11</sup> Issuances below Market Value to officers, directors, employees, or consultants are, and will continue to be, subject to Listing Rule 5635(c). See Nasdaq's FAQ #275 at [https://listingcenter.nasdaq.com/Material\\_Search.aspx?materials=275&mcd=LQ&criteria=2](https://listingcenter.nasdaq.com/Material_Search.aspx?materials=275&mcd=LQ&criteria=2).

<sup>12</sup> Comments supporting the change could be summarized through words of one commenter who suggested that "investors don't view book value as the equivalent (or even a reasonable substitute for) market value." Grundei Letter.

market manipulation.<sup>13</sup> The commenter did not elaborate or provide any evidence of price manipulation surrounding the pricing of transactions (which would be investigated by Nasdaq Regulation and FINRA) and Nasdaq does not believe this hypothetical and unsubstantiated concern justifies retaining the book value requirement in light of the other concerns raised about its arbitrary and disproportionate impact on certain companies and the lack of importance placed on this requirement by investors.

## III. Other Changes

To improve the readability of Listing Rule 5635(d) Nasdaq proposes to define "20% Issuance" 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." This definition combines the situations described in existing Rule 5635(d)(1) and (d)(2) and makes no substantive change but for the change to the pricing tests, as described above, such that shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Listing Rule 5635(d).

Nasdaq also proposes to amend the title of Listing Rule 5635(d) and the preamble to Listing Rule 5635 to replace references to "private placements" to "transactions other than public offerings" to conform the language in the title of Listing Rule 5635(d) and the preamble to the language in the rule text and that of IM-5635-3, which provides the definition of a public offering.

Finally, Nasdaq proposes to amend Listing Rules IM-5635-3 and IM-5635-4, which describe how Nasdaq applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term 20% Issuance.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>14</sup> in general, and furthers the

<sup>13</sup> Letter from Heather Kozjara, Chief Risk Officer, Conifer Holdings Inc., dated June 16, 2017 (Conifer Letter).

<sup>14</sup> 15 U.S.C. 78f(b).

objectives of Section 6(b)(5) of the Act,<sup>15</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. Nasdaq believes that the approach taken in the proposal strikes an appropriate balance between investor protection and impediments upon issuers.

#### Definition of Market Value

The proposed rule change will modify the minimum price at which a 20% Issuance would not need shareholder approval 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.

Nasdaq believes that allowing issuers to price transactions at the closing price (as reflected on *Nasdaq.com*) rather than closing consolidated bid price will perfect the mechanism of a free and open market and protect investors and the public interest because the closing price will represent an actual sale, which generally occurs at the same or greater price than the bid price.<sup>16</sup> Further, the closing price displayed 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 trading day.

Allowing share issuances to be priced at the five-day average of the closing price will further align Nasdaq's requirements with how many transactions are structured, such as transactions where Listing Rule 5635(d) is not implicated because the issuance is for less than 20% of the common stock and the parties rely on the five-day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five-day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Maintaining the allowable average at just a five-day period also protects investors by ensuring the period is not

too long, such that it would result in the price being distorted by ordinary past market movements and other outdated events. In a market that rises each day of the period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. Further, as some commenters indicated, aside from Nasdaq requirements, when selecting the appropriate price for a transaction company officers and directors also have to consider their state law structural safeguards, including fiduciary responsibilities, intended to protect shareholder interests.<sup>17</sup>

In addition, because prices could be displayed from numerous data sources on different websites, to provide certainty about the appropriate price, Nasdaq proposes to codify within the rule that *Nasdaq.com* is the appropriate source of the closing price information, which is available with only 15 minute delay and without registration or fee. Because the closing bid price is not included in many public data feeds, this requirement will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because it will improve the transparency of the rule and provide additional certainty to all market participants about the appropriate price to be used in determining if shareholder approval is required.

Finally, Nasdaq believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. This flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of the Listing Rule 5635(d).

#### Book Value

Nasdaq also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Listing Rule 5635(d). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived

as an inappropriate measure of the current value of a stock. Nasdaq has also observed that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. Because book value is not an appropriate measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing investor protections of Listing Rule 5635(d).

#### Other Changes

To improve the readability of Listing Rule 5635(d) Nasdaq proposes to define "20% Issuance" 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 common stock or 20% or more of the voting power outstanding before the issuance." This definition combines the situations described in existing Rule 5635(d)(1) and (d)(2) but makes no substantive change. Under the proposed rule, but for the separate change to the pricing test, shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Listing Rule 5635(d). Nasdaq believes that the improved readability of the rule will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

Nasdaq also believes that amending the title of Listing Rule 5635(d) and the preamble to Listing Rule 5635 to replace references to "private placements" to "transactions other than public offerings" to conform the language in the title of Listing Rule 5635(d) and the preamble to the language in the rule text and that of IM-5635-3, which provides the definition of a public offering, will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

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

<sup>16</sup> Sales typically take place between the bid and ask prices.

<sup>17</sup> See Wilson Sonsini Letter.

Finally, Nasdaq believes that amending Listing Rules IM-5635-3 and IM-5635-4, which describe how Nasdaq applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term 20% Issuance will perfect the mechanism of a free and open market by eliminating confusion caused by references to a measure that is no longer applicable and by making the rule easier to understand and apply.

#### *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 rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

In the 2017 Solicitation, Nasdaq solicited comments on a specific proposal to amend Listing Rule 5635(d) to:

(1) Change the definition of market value for purposes of the shareholder approval rules from closing bid price to a five-day trailing average;

(2) require that any issuance of 20% or more be approved by the independent directors where shareholder approval is not required; and

(3) eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

In an effort to seek the broadest response, Nasdaq widely distributed the 2017 Solicitation to investors, issuers, legal professionals and other interested parties. In addition, the proposal was posted on the Nasdaq Listing Center™.<sup>18</sup> In total, 12 comments were received. A copy of the 2017 Solicitation is attached to the rule filing as Exhibit 2a. Copies of the comments

received are attached to the rule filing as Exhibit 2b.

With regard to the proposal to change the definition of market value for purposes of the shareholder approval rules from closing bid price to a five-day trailing average, of the 12 commenters, seven supported the change,<sup>19</sup> one expressed no opinion,<sup>20</sup> while the remaining four suggested the five-day average price should be used as an alternative to the closing price rather than being an exclusive measure of value of listed securities.<sup>21</sup> Nasdaq determined to adopt this suggestion and now proposes to amend Listing Rule 5635(d) to allow companies the flexibility [sic] of using either the closing price at the time of the transaction or the five-day average of the closing price when pricing 20% Issuances. Transactions could be structured to use either price knowing that neither the lower price nor the higher one would result in the transaction needing shareholder approval under the proposed rule because each will be at or above the new measure of market value for purposes of the shareholder approval rules, which is now defined as Minimum Price.

Two commenters suggested the use of the volume weighted average price (VWAP) instead of the five-day average price because VWAP includes a broader array of trades, such as trades outside the Nasdaq closing auction that forms the closing price, and because VWAP gives greater weight to the price at which a greater number of shares is traded.<sup>22</sup> However, the commenters acknowledged that VWAP methodology generally requires a paid subscription to providers of financial information, such as Bloomberg, to obtain the VWAP.<sup>23</sup> Given the complexity of the VWAP methodology and the potential resulting lack of transparency among retail investors who do not have access to

financial data that includes VWAP, at this time, Nasdaq is proposing to change the definition of market value for purposes of the shareholder approval [sic], as described above, by incorporating the concept of the five-day average closing price, rather than VWAP, as the alternative to the closing price at the time of the transaction.

Two commenters suggested that the Nasdaq should amend its rules such that shareholder approval is required for any issuance a [sic] price that is below market price and for any 20% Issuance.<sup>24</sup> Nasdaq is concerned that under their proposal even de minimis issuances below market price and 20% Issuances at substantial premium to market price would require shareholder approval. As such, given the expense and delay associated with obtaining shareholder approval, Nasdaq does not propose amending the rule as these commenters requested at this time.

In the 2017 Solicitation, Nasdaq noted some potential negative consequences to using a five-day average as the measure of whether shareholder approval is required and suggested a potential new safeguard that would have required that any transaction of more than 20% of the company's shares outstanding also be approved by either a committee of independent directors (as defined in Listing Rule 5605(a)(2)) or a majority of the independent directors on the board, unless it is approved by the company's shareholders (the "Independent Director Approval Requirement").

The Independent Director Approval Requirement was not embraced by the commenters, many of whom doubted the utility of the Independent Director Approval Requirement.<sup>25</sup> Some commenters saw the Independent Director Approval Requirement as a new burden on listed companies that largely duplicates the existing state corporate law requirements and thus outweighs any offsetting benefits to shareholders.<sup>26</sup> In that regard,

<sup>18</sup> See CALSTERS Letter and CII Letter.

<sup>19</sup> One commenter supported the proposed Independent Director Approval Requirement. See Md Bar Letter ("[W]e believe the [Independent Director Approval Requirement] is reasonable, as it adds an additional protection for investors without unduly burdening Nasdaq-listed companies seeking to raise capital."). Some commenters supported this proposal without discussing the specific burdens and benefit of this proposal. See Lightbridge Letter; Latham Letter. Some commenters did not address this issue. See Kelley Drye Letter, Sichenzia Letter, and Conifer Letter. The remaining six commenters opposed this proposal. See Footnotes 26 and 28 below.

<sup>20</sup> See Wilson Sonsini Letter ("Rather than ensuring adequate consideration of shareholder interests, we respectfully submit that the [Independent Director Approval Requirement]

<sup>19</sup> See Letter from Dickerson Wright, Chairman and CEO of NV5, dated June 15, 2017 (NV5 Letter); Grundel Letter; Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors, dated June 26, 2017 (CII Letter); Lightbridge Letter; Letter from Penny Somer-Greif, et al., Chair, the Committee on Securities Law of the Business Law Section of the Maryland State Bar Association, dated July 31, 2017 (Md Bar Letter); Letter from Harvey Kesner, Sichenzia Ross Ference Kesner LLP, dated July 31, 2017 (Sichenzia Letter); Letter from Anne Sheehan, Director of Corporate Governance, California State Teachers' Retirement System, dated August 1, 2017 (CALSTRS letter).

<sup>20</sup> See Conifer Letter (addressing only the proposal to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value).

<sup>21</sup> See Latham Letter, Kelley Drey Letter, Wilson Sonsini Letter, and Ellenoff Grossman Letter.

<sup>22</sup> See Kelley Drye Letter and Ellenoff Grossman Letter.

<sup>23</sup> Id.

<sup>18</sup> <https://listingcenter.nasdaq.com/assets/Shareholder%20Approval%20Comment%20Solicitation%20June%2014%202017.pdf>.

commenters noted state law protections, such as the fiduciary duties of care and loyalty imposed on management and directors to act in the best interest of the company and its shareholders.<sup>27</sup> Thus, given the cool reception received from investors, who did not believe the addition of this listing requirement would meaningfully add to investor protection,<sup>28</sup> and the belief of commenters that the Independent Director Approval Requirement is “solving the problem that does not exist,”<sup>29</sup> Nasdaq is not proposing to adopt the Independent Director Approval Requirement at this time.

With regard to the proposal to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value, of the 12 commenters, only one specifically opposed the proposed rule change.<sup>30</sup> The commenter that opposed the proposed rule change seemed to have been concerned with potentially negative market perception of issuances below book value and with potential stock price manipulations by suggesting that the “. . . proposed rule change compromises Nasdaq’s commitment to protect investors . . . by allowing companies the potential power to materially affect the stock price without prior approval of current stockholders.”<sup>31</sup> The commenter did not elaborate and did not provide any evidence of price manipulation (which would be investigated by Nasdaq Regulation and FINRA) and Nasdaq does not believe this single hypothetical and unsubstantiated concern justifies retaining the book value requirement in light of the other concerns raised about its arbitrary and disproportionate

would be duplicative of, and already more effectively addressed by, the corporate law requirements of an issuer’s jurisdiction of incorporation in the vast majority of cases.”) *See also*, Grundei Letter (“. . . there are already state law requirements regarding such approvals.”).

<sup>27</sup> *See* Wilson Sonsini Letter.

<sup>28</sup> *See* CALSTERS Letter (“[W]e genuinely believe and appreciate that a majority of independent directors should always screen and vote on any stock issuances . . .”). Yet, CALSTERS Letter suggested removal the Independent Director Approval Requirement for the proposed rule. *See also*, CII Letter (suggesting removal the Independent Director Approval Requirement for the proposed rule and the imposition of shareholder approval requirements for any issuance a price that is below market price and any 20% Issuances). *See also*, Ellenoff Grossman Letter (“[Independent Director Approval Requirement] may not prove helpful to outside shareholders, in practice”). *See also*, NV5 Letter.

<sup>29</sup> Grundei Letter.

<sup>30</sup> One commenter indicated that he disagreed with the proposed change, but did not address the issue directly. *See* NV5 Letter.

<sup>31</sup> Conifer Letter.

impact on certain companies and the lack of importance placed on this requirement by investors.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2018-008 on the subject line.

#### *Paper Comments*

• Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-NASDAQ-2018-008. This file number should be included on the subject line if email 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 such 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-2018-008, and should be submitted on or before March 13, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2018-03311 Filed 2-16-18; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82701; File No. SR-MRX-2018-04]

### Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Memorialize Functionality Designed To Assist Members in the Event That They Lose Communication

February 13, 2018.

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 February 2, 2018, Nasdaq MRX, LLC (“MRX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III 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 a proposal to memorialize functionality which is designed to assist Members in the event that they lose communication with their assigned Specialized Quote Feed (“SQF”),<sup>3</sup> Financial Information

<sup>32</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> SQF is an interface that allows market makers to connect and send quotes, sweeps and auction responses into the Exchange.