

## 5600. CORPORATE GOVERNANCE REQUIREMENTS

### 5601. Preamble to the Corporate Governance Requirements

In addition to meeting the quantitative requirements in the Rule 5200, 5300, 5400 and 5500 Series, Companies applying to list and listed on Nasdaq must meet the qualitative requirements outlined in this Rule 5600 Series. These requirements include rules relating to a Company's board of directors, including audit committees and Independent Director oversight of executive compensation and the director nomination process; code of conduct; shareholder meetings, including proxy solicitation and quorum; review of related party transactions; and shareholder approval, including voting rights. Exemptions to these rules, including phase-in schedules, are set forth in Rule 5615.

Nasdaq maintains a website that provides guidance on the applicability of the corporate governance requirements by FAQs and published summaries of anonymous versions of previously issued staff interpretative letters. Companies are encouraged to contact Listing Qualifications to discuss any complex issues or transactions. Companies can also submit a request for a written interpretation pursuant to Rule 5602.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040); amended June 16, 2009 (SR-NASDAQ-2009-052).

### 5602. Written Interpretations of Nasdaq Listing Rules

(a) A Company, as defined in Rule 5005(a)(6), and a company that has a class of securities that has been suspended or delisted from the Nasdaq Capital Market or the Nasdaq Global Market, but the suspension or delisting decision is under review pursuant to the Rule 5800 Series, may request from Nasdaq a written interpretation of the Rules contained in the Rule 5000 through 5900 Series. A response to such a request generally will be provided within four weeks from the date Nasdaq receives all information necessary to respond to the request.

(b) Nasdaq shall publish on its website a summary of each interpretation within 90 days from the date such interpretation is issued.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040); amended June 16, 2009 (SR-NASDAQ-2009-052); amended Mar. 5, 2010 (SR-NASDAQ-2009-081); amended Jan. 13, 2012 (SR-NASDAQ-2012-012); amended Nov. 7, 2014 (SR-NASDAQ-2014-087), operative Jan. 1, 2015; amended Nov. 13, 2018 (SR-NASDAQ-2018-092).

### 5605. Board of Directors and Committees

#### (a) Definitions

(1) "Executive Officer" means those officers covered in Rule 16a-1(f) under the Act.

(2) "Independent Director" means a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. For purposes of this rule, "Family Member" means a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. The following persons shall not be considered independent:

(A) a director who is, or at any time during the past three years was, employed by the Company;

(B) a director who accepted or who has a Family Member who accepted any compensation from the Company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following:

(i) compensation for board or board committee service;

(ii) compensation paid to a Family Member who is an employee (other than an Executive Officer) of the Company; or

(iii) benefits under a tax-qualified retirement plan, or non-discretionary compensation.

Provided, however, that in addition to the requirements contained in this paragraph (B), audit committee members are also subject to additional, more stringent requirements under Rule 5605(c)(2).

(C) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the Company as an Executive Officer;

(D) a director who is, or has a Family Member who is, a partner in, or a controlling Shareholder or an Executive Officer of, any organization to which the Company made, or from which the Company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following:

(i) payments arising solely from investments in the Company's securities; or

(ii) payments under non-discretionary charitable contribution matching programs.

(E) a director of the Company who is, or has a Family Member who is, employed as an Executive Officer of another entity where at any time during the past three years any of the Executive Officers of the Company serve on the compensation committee of such other entity; or

(F) a director who is, or has a Family Member who is, a current partner of the Company's outside auditor, or was a partner or employee of the Company's outside auditor who worked on the Company's audit at any time during any of the past three years.

(G) in the case of an investment company, in lieu of paragraphs (A)-(F), a director who is an "interested person" of the Company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

Amended Feb. 13, 2020 (SR-NASDAQ-2019-049).

#### **IM-5605. Definition of Independence — Rule 5605(a)(2)**

It is important for investors to have confidence that individuals serving as Independent Directors do not have a relationship with the listed Company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 5605(a)(2). Rule 5605(a)(2) also provides a list of certain relationships that preclude a board finding of independence. These objective measures provide transparency to investors and Companies, facilitate uniform application of the rules, and ease administration. Because Nasdaq does not believe that ownership of Company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors. It should be noted that there are additional, more stringent requirements that apply to directors serving on audit committees, as specified in Rule 5605(c).

The Rule's reference to the "Company" includes any parent or subsidiary of the Company. The term "parent or subsidiary" is intended to cover entities the Company controls and consolidates with the Company's financial statements as filed with the Commission (but not if the Company reflects such entity solely as an investment in its financial statements). The reference to Executive Officer means those officers covered in Rule 16a-1(f) under the Act. In the context of the definition of Family Member under Rule 5605(a)(2), the reference to marriage is intended to capture relationships specified in the Rule (parents, children and siblings) that arise as a result of marriage, such as "in-law" relationships.

The three year look-back periods referenced in paragraphs (A), (C), (E) and (F) of the Rule commence on the date the relationship ceases. For example, a director employed by the Company is not independent until three years after such employment terminates.

For purposes of paragraph (A) of the Rule, employment by a director as an Executive Officer on an interim basis shall not disqualify that director from being considered independent following such employment, provided the interim employment did not last longer than one year. A director would not be considered independent while serving as an interim officer. Similarly, for purposes of paragraph (B) of the Rule, compensation received by a director for former service as an interim Executive Officer need not be considered as compensation in determining independence after such service, provided such interim employment did not last longer than one year. Nonetheless, the Company's board of directors still must consider whether such former employment and any compensation received would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director. In addition, if the director participated in the preparation of the Company's financial statements while serving as an interim Executive Officer, Rule 5605(c)(2)(A)(iii) would preclude service on the audit committee for three years.

Paragraph (B) of the Rule is generally intended to capture situations where a compensation is made directly to (or for the benefit of) the director or a Family Member of the director. For example, consulting or personal service contracts with a director or Family Member of the director would be analyzed under paragraph (B) of the Rule. In addition, political contributions to the campaign of a director or a Family Member of the director would be considered indirect compensation under paragraph (B). Non-preferential payments made in the ordinary course of providing business services (such as payments of interest or proceeds related to banking services or loans by a Company that is a financial institution or payment of claims on a policy by a Company that is an insurance company), payments arising solely from investments in the Company's securities and loans permitted under Section 13(k) of the Act will not preclude a finding of director independence as long as the payments are non-compensatory in nature. Depending on the circumstances, a loan or payment could be compensatory if, for example, it is not on terms generally available to the public.

Paragraph (D) of the Rule is generally intended to capture payments to an entity with which the director or Family Member of the

director is affiliated by serving as a partner, controlling Shareholder or Executive Officer of such entity. Under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in paragraph (D), rather than the individual measurements of paragraph (B). Issuers should contact Nasdaq if they wish to apply the Rule in this manner. The reference to a partner in paragraph (D) is not intended to include limited partners. It should be noted that the independence requirements of paragraph (D) of the Rule are broader than Rule 10A-3(e)(8) under the Act.

Under paragraph (D), a director who is, or who has a Family Member who is, an Executive Officer of a charitable organization may not be considered independent if the Company makes payments to the charity in excess of the greater of 5% of the charity's revenues or \$200,000. However, Nasdaq encourages Companies to consider other situations where a director or their Family Member and the Company each have a relationship with the same charity when assessing director independence.

For purposes of determining whether a lawyer is eligible to serve on an audit committee, Rule 10A-3 under the Act generally provides that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee. In determining whether a director may be considered independent for purposes other than the audit committee, payments to a law firm would generally be considered under Rule 5605(a)(2), which looks to whether the payment exceeds the greater of 5% of the recipient's gross revenues or \$200,000; however, if the firm is a sole proprietorship, Rule 5605(a)(2)(B), which looks to whether the payment exceeds \$120,000, applies.

Paragraph (G) of the Rule provides a different measurement for independence for investment companies in order to harmonize with the Investment Company Act of 1940. In particular, in lieu of paragraphs (A)-(F), a director who is an "interested person" of the Company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee, shall not be considered independent.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended June 16, 2009 (SR-NASDAQ-2009-052); amended Jan. 11, 2013 (SR-NASDAQ-2012-109).

## **(b) Independent Directors**

### **(1) Majority Independent Board**

A majority of the board of directors must be comprised of Independent Directors as defined in Rule 5605(a)(2). The Company, other than a Foreign Private Issuer, must comply with the disclosure requirements set forth in Item 407(a) of Regulation S-K. A Foreign Private Issuer must disclose in its next annual report (e.g., Form 20-F or 40-F) those directors that the board of directors has determined to be independent under Rule 5605(a)(2).

#### **(A) Cure Period for Majority Independent Board**

If a Company fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond their reasonable control, the Company shall regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the Company shall instead have 180 days from such event to regain compliance. A Company relying on this provision shall provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

## **IM-5605-1. Majority Independent Board**

**Majority Independent Board.** Independent Directors (as defined in Rule 5605(a)(2)) play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in the Companies they oversee and guard against conflicts of interest. Requiring that the board be comprised of a majority of Independent Directors empowers such directors to carry out more effectively these responsibilities.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

### **(2) Executive Sessions**

Independent Directors must have regularly scheduled meetings at which only Independent Directors are present ("executive sessions").

## **IM-5605-2. Executive Sessions of Independent Directors**

Regularly scheduled executive sessions encourage and enhance communication among Independent Directors. It is contemplated that executive sessions will occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

## **(c) Audit Committee Requirements**

### **(1) Audit Committee Charter**

Each Company must certify that it has adopted a formal written audit committee charter and that the audit committee will review and reassess the adequacy of the formal written charter on an annual basis. The charter must specify:

- (A) the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;
- (B) the audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the Company, actively engaging in a dialogue with the auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor;
- (C) the committee's purpose of overseeing the accounting and financial reporting processes of the Company and the audits of the financial statements of the Company; and
- (D) the specific audit committee responsibilities and authority set forth in Rule 5605(c)(3).

### **IM-5605-3. Audit Committee Charter**

Each Company is required to adopt a formal written charter that specifies the scope of its responsibilities and the means by which it carries out those responsibilities; the outside auditor's accountability to the audit committee; and the audit committee's responsibility to ensure the independence of the outside auditor. Consistent with this, the charter must specify all audit committee responsibilities set forth in Rule 10A-3(b)(2), (3), (4) and (5) under the Act. Rule 10A-3(b)(3)(ii) under the Act requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed Company of concerns regarding questionable accounting or auditing matters. The rights and responsibilities as articulated in the audit committee charter empower the audit committee and enhance its effectiveness in carrying out its responsibilities.

Rule 5605(c)(3) imposes additional requirements for investment company audit committees that must also be set forth in audit committee charters for these Companies.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

### **(2) Audit Committee Composition**

(A) Each Company must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must: (i) be an Independent Director as defined under Rule 5605(a)(2); (ii) meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act); (iii) not have participated in the preparation of the financial statements of the Company or any current subsidiary of the Company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a Company's balance sheet, income statement, and cash flow statement. Additionally, each Company must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

#### **(B) Non-Independent Director for Exceptional and Limited Circumstances**

Notwithstanding paragraph (2)(A)(i), one director who: (i) is not an Independent Director as defined in Rule 5605(a)(2); (ii) meets the criteria set forth in Section 10A(m)(3) under the Act and the rules thereunder; and (iii) is not currently an Executive Officer or employee or a Family Member of an Executive Officer, may be appointed to the audit committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the Company and its Shareholders. A Company, other than a Foreign Private Issuer, that relies on this exception must comply with the disclosure requirements set forth in Item 407(d)(2) of Regulation S-K. A Foreign Private Issuer that relies on this exception must disclose in its next annual report (e.g., Form 20-F or 40-F) the nature of the relationship that makes the individual not independent and the reasons for the board's determination. A member appointed under this exception may not serve longer than two years and may not chair the audit committee.

Amended July 22, 2010 (SR-NASDAQ-2008-014); amended Jan. 11, 2013 (SR-NASDAQ-2012-109).

### **IM-5605-4. Audit Committee Composition**

Audit committees are required to have a minimum of three members and be comprised only of Independent Directors. In addition to satisfying the Independent Director requirements under Rule 5605(a)(2), audit committee members must meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act): they must not accept any consulting, advisory, or other compensatory fee from the Company other than for board service, and they must

not be an affiliated person of the Company. As described in Rule 10A-3(d)(1) and (2), a Company must disclose reliance on certain exceptions from Rule 10A-3 and disclose an assessment of whether, and if so, how, such reliance would materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of Rule 10A-3. It is recommended also that a Company disclose in its annual proxy (or, if the Company does not file a proxy, in its Form 10-K or 20-F) if any director is deemed eligible to serve on the audit committee but falls outside the safe harbor provisions of Rule 10A-3(e)(1)(ii) under the Act. A director who qualifies as an audit committee financial expert under Item 407(d)(5)(ii) and (iii) of Regulation S-K is presumed to qualify as a financially sophisticated audit committee member under Rule 5605(c)(2)(A).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended May 20, 2009 (SR-NASDAQ-2009-049); amended July 22, 2010 (SR-NASDAQ-2008-014).

### **(3) Audit Committee Responsibilities and Authority**

The audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act), concerning responsibilities relating to: (i) registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing matters, (iii) authority to engage advisers, and (iv) funding as determined by the audit committee. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

### **IM-5605-5. The Audit Committee Responsibilities and Authority**

Audit committees must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act), concerning responsibilities relating to registered public accounting firms; complaints relating to accounting; internal accounting controls or auditing matters; authority to engage advisers; and funding. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Jan. 11, 2013 (SR-NASDAQ-2012-109).

### **(4) Cure Periods for Audit Committee**

(A) If a Company fails to comply with the audit committee composition requirement under Rule 10A-3(b)(1) under the Act and Rule 5605(c)(2)(A) because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement. A Company relying on this provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

(B) If a Company fails to comply with the audit committee composition requirement under Rule 5605(c)(2)(A) due to one vacancy on the audit committee, and the cure period in paragraph (A) is not otherwise being relied upon for another member, the Company will have until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the vacancy, the Company shall instead have 180 days from such event to regain compliance. A Company relying on this provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

### **(5) Exception**

At any time when a Company has a class of common equity securities (or similar securities') that is listed on another national securities exchange or national securities association subject to the requirements of Rule 10A-3 under the Act, the listing of classes of securities of a direct or indirect consolidated subsidiary or an at least 50% beneficially owned subsidiary of the Company (except classes of equity securities, other than non-convertible, non-participating preferred securities, of such subsidiary) shall not be subject to the requirements of Rule 5605(c).

### **(d) Compensation Committee Requirements**

#### **(1) Compensation Committee Charter**

Each Company must certify that it has adopted a formal written compensation committee charter and that the compensation committee will review and reassess the adequacy of the formal written charter on an annual basis. The charter must specify:

(A) the scope of the compensation committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;



(B) the compensation committee's responsibility for determining, or recommending to the board for determination, the compensation of the chief executive officer and all other Executive Officers of the Company;

(C) that the chief executive officer may not be present during voting or deliberations on his or her compensation; and

(D) the specific compensation committee responsibilities and authority set forth in Rule 5605(d)(3).

## **(2) Compensation Committee Composition**

(A) Each Company must have, and certify that it has and will continue to have, a compensation committee of at least two members. Each committee member must be an Independent Director as defined under Rule 5605(a)(2). In addition, in affirmatively determining the independence of any director who will serve on the compensation committee of a board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the Company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:

(i) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the Company to such director; and

(ii) whether such director is affiliated with the Company, a subsidiary of the Company or an affiliate of a subsidiary of the Company.

## **(B) Non-Independent Committee Member under Exceptional and Limited Circumstances**

Notwithstanding paragraph 5605(d)(2)(A) above, if the compensation committee is comprised of at least three members, one director who does not meet the requirements of paragraph 5605(d)(2)(A) and is not currently an Executive Officer or employee or a Family Member of an Executive Officer, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the Company and its Shareholders. A Company that relies on this exception must disclose either on or through the Company's website or in the proxy statement for the next annual meeting subsequent to such determination (or, if the Company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. In addition, the Company must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception. A member appointed under this exception may not serve longer than two years.

## **(3) Compensation Committee Responsibilities and Authority**

As required by Rule 10C-1(b)(2), (3) and (4)(i)-(vi) under the Act, the compensation committee must have the following specific responsibilities and authority.

(A) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, legal counsel or other adviser.

(B) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, legal counsel and other adviser retained by the compensation committee.

(C) The Company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the compensation committee.

(D) The compensation committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the following factors:

(i) the provision of other services to the Company by the person that employs the compensation consultant, legal counsel or other adviser;

(ii) the amount of fees received from the Company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;

(iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;

(iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;

(v) any stock of the Company owned by the compensation consultant, legal counsel or other adviser; and

(vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an Executive Officer of the Company.

Nothing in this Rule shall be construed: (i) to require the compensation committee to implement or act consistently with the

advice or recommendations of the compensation consultant, legal counsel or other adviser to the compensation committee; or (ii) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

The compensation committee is required to conduct the independence assessment outlined in this Rule with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house legal counsel. However, nothing in this Rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting, or receiving advice from, a compensation adviser. Compensation committees may select, or receive advice from, any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors outlined above.

For purposes of this Rule, the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e) (3)(iii) of Regulation S-K: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of Executive Officers or directors of the Company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice.

#### **(4) Cure Period for Compensation Committee**

If a Company fails to comply with the compensation committee composition requirement under Rule 5605(d)(2)(A) due to one vacancy, or one compensation committee member ceases to be independent due to circumstances beyond the member's reasonable control, the Company shall regain compliance with the requirement by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement; provided, however, that if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the Company shall instead have 180 days from such event to regain compliance. A Company relying on this provision shall provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

#### **(5) Smaller Reporting Companies**

A Smaller Reporting Company, as defined in Rule 12b-2 under the Act, is not subject to the requirements of Rule 5605(d), except that a Smaller Reporting Company must have, and certify that it has and will continue to have, a compensation committee of at least two members, each of whom must be an Independent Director as defined under Rule 5605(a)(2). A Smaller Reporting Company may rely on the exception in Rule 5605(d)(2)(B) and the cure period in Rule 5605(d)(4). In addition, a Smaller Reporting Company must certify that it has adopted a formal written compensation committee charter or board resolution that specifies the content set forth in Rule 5605(d)(1)(A)-(C). A Smaller Reporting Company does not need to include in its formal written compensation committee charter or board resolution the specific compensation committee responsibilities and authority set forth in Rule 5605(d)(3).

Amended July 22, 2010 (SR-NASDAQ-2008-014); amended Jan. 11, 2013 (SR-NASDAQ-2012-109); amended Nov. 26, 2013 (SR-NASDAQ-2013-147), operative Dec. 26, 2013; amended Dec. 27, 2017 (SR-NASDAQ-2017-133), operative Jan. 26, 2018.

### **IM-5605-6. Independent Director Oversight of Executive Compensation**

Independent oversight of executive officer compensation helps assure that appropriate incentives are in place, consistent with the board's responsibility to act in the best interests of the corporation. Compensation committees are required to have a minimum of two members and be comprised only of Independent Directors as defined under Rule 5605(a)(2).

In addition, Rule 5605(d)(2)(A) includes an additional independence test for compensation committee members. When considering the sources of a director's compensation for this purpose, the board should consider whether the director receives compensation from any person or entity that would impair the director's ability to make independent judgments about the Company's executive compensation. Similarly, when considering any affiliate relationship a director has with the Company, a subsidiary of the Company, or an affiliate of a subsidiary of the Company, in determining independence for purposes of compensation committee service, the board should consider whether the affiliate relationship places the director under the direct or indirect control of the Company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair the director's ability to make independent judgments about the Company's executive compensation. In that regard, while a board may conclude differently with respect to individual facts and circumstances, Nasdaq does not believe that ownership of Company stock by itself, or possession of a controlling interest through ownership of Company stock by itself, precludes a board finding that it is appropriate for a director to serve on the compensation committee. In fact, it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.

For purposes of the additional independence test for compensation committee members described in Rule 5605(d)(2)(A), any reference to the "Company" includes any parent or subsidiary of the Company. The term "parent or subsidiary" is intended to cover entities the Company controls and consolidates with the Company's financial statements as filed with the Commission (but not if the Company reflects such entity solely as an investment in its financial statements).

A Smaller Reporting Company must have a compensation committee with a minimum of two members. Each compensation committee member must be an Independent Director as defined under Rule 5605(a)(2). In addition, each Smaller Reporting Company must have a formal written compensation committee charter or board resolution that specifies the committee's responsibilities and authority set forth in Rule 5605(d)(1)(A)-(C). However, in recognition of the fact that Smaller Reporting Companies may have fewer resources than larger Companies, Smaller Reporting Companies are not required to adhere to the additional compensation committee eligibility requirements in Rule 5605(d)(2)(A), or to incorporate into their formal written compensation committee charter or board resolution the specific compensation committee responsibilities and authority set forth in Rule 5605(d)(3).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Jan. 11, 2013 (SR-NASDAQ-2012-109); amended Nov. 26, 2013 (SR-NASDAQ-2013-147), operative Dec. 26, 2013.

#### **(e) Independent Director Oversight of Director Nominations**

(1) Director nominees must either be selected, or recommended for the Board's selection, either by:

(A) Independent Directors constituting a majority of the Board's Independent Directors in a vote in which only Independent Directors participate, or

(B) a nominations committee comprised solely of Independent Directors.

(2) Each Company must certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the federal securities laws.

#### **(3) Non-Independent Committee Member under Exceptional and Limited Circumstances**

Notwithstanding paragraph 5605(e)(1)(B) above, if the nominations committee is comprised of at least three members, one director, who is not an Independent Director as defined in Rule 5605(a)(2) and is not currently an Executive Officer or employee or a Family Member of an Executive Officer, may be appointed to the nominations committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the Company and its Shareholders. A Company that relies on this exception must disclose either on or through the Company's website or in the proxy statement for next annual meeting subsequent to such determination (or, if the Company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. In addition, the Company must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception. A member appointed under this exception may not serve longer than two years.

(4) Independent Director oversight of director nominations shall not apply in cases where the right to nominate a director legally belongs to a third party. However, this does not relieve a Company's obligation to comply with the committee composition requirements under Rules 5605(c), (d) and (e).

(5) This Rule 5605(e) is not applicable to a Company if the Company is subject to a binding obligation that requires a director nomination structure inconsistent with this rule and such obligation pre-dates the approval date of this rule.

#### **IM-5605-7. Independent Director Oversight of Director Nominations**

Independent Director oversight of nominations enhances investor confidence in the selection of well-qualified director nominees, as well as independent nominees as required by the rules. This rule is also intended to provide flexibility for a Company to choose an appropriate board structure and reduce resource burdens, while ensuring that Independent Directors approve all nominations.

This rule does not apply in cases where the right to nominate a director legally belongs to a third party. For example, investors may negotiate the right to nominate directors in connection with an investment in the Company, holders of preferred stock may be permitted to nominate or appoint directors upon certain defaults, or the Company may be a party to a shareholder's agreement that allocates the right to nominate some directors. Because the right to nominate directors in these cases does not reside with the Company, Independent Director approval would not be required. This rule is not applicable if the Company is subject to a binding obligation that requires a director nomination structure inconsistent with the rule and such obligation pre-dates the approval date of this rule.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Mar. 15, 2010 (SR-NASDAQ-2010-037), operative Apr. 14, 2010; amended June 9, 2011 (SR-NASDAQ-2011-082), operative July 9, 2011; amended July 19, 2012 (SR-NASDAQ-2012-062).

#### **(f) Diverse Board Representation**

##### **(1) Definitions**

For purposes of this Rule 5605(f):

"Diverse" means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+.



“Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

“Foreign Issuer” means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)); or (b) a company that (i) is considered a “foreign issuer” under Rule 3b-4(b) under the Act and (ii) has its principal executive offices located outside of the United States.

“LGBTQ+” means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community.

“Approval Date” means the date that the Commission issues an order granting the approval of this proposed Rule 5605(f).

“Smaller Reporting Company” has the definition set forth in Rule 12b-2 under the Act.

“Underrepresented Minority” means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.

“Two or More Races or Ethnicities” means a person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander.

## **(2) Diversity Objective**

### **(A) General Objective**

Each Company, except as described below in (B), (C) or (D), must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+.

### **(B) Foreign Issuers**

(i) For purposes of this Rule 5605(f)(2)(B), (a) “Diverse” means an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Company’s principal executive offices (as reported on the Company’s Form F-1, 10-K, 20-F or 40-F); and (b) “board of directors” means, in the case of a Foreign Issuer with a two-tier board system, the Company’s supervisory or non-management board.

(ii) Subject to subparagraph (D) below, each Foreign Issuer must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the Company’s principal executive offices.

### **(C) Smaller Reporting Companies**

Subject to subparagraph (D) below, each Smaller Reporting Company must have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one Diverse director who self-identifies as Female. For greater clarity, the second Diverse director may include an individual who self-identifies as one or more of the following: Female, LGBTQ+, or an Underrepresented Minority.

### **(D) Companies with Smaller Boards**

Each Company with a board of directors of five or fewer members must have, or explain why it does not have, at least one member of its board of directors who is Diverse. If a Company has five members on its board of directors before becoming subject to this Rule 5605(f), it shall not become subject to the requirement of subparagraphs (A), (B) or (C) to have at least two members of its board of directors who are Diverse if it adds one director to satisfy this subparagraph (D), thereby becoming a six member board. However, a company would become subject to Rule 5605(f)(2)(A), (B) or (C) if it subsequently expands its board.

## **(3) Alternative Public Disclosure**

If a Company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not meet the applicable diversity objectives of Rule 5605(f)(2), the Company must: (i) specify the requirements of Rule 5605(f)(2) that are applicable; and (ii) explain the reasons why it does not have two Diverse directors (or one Diverse director for Companies subject to Rule 5606(f)(2)(D)). Such disclosure must be provided in advance of the Company’s next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company’s website. If the Company provides such disclosure on its website, then the Company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

## **(4) Exempt Companies**

The following types of companies are exempt from the requirements of this Rule 5605(f) (“Exempt Companies”): acquisition companies listed under IM-5101-2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives

(as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)) that do not have equity securities listed on Nasdaq; and issuers of securities listed under the Rule 5700 Series.

#### **(5) Phase-in Period**

(A) Any Company newly listing on The Nasdaq Global Select Market or The Nasdaq Global Market that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have: (i) at least one Diverse director by the later of: (a) one year from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's first annual meeting of shareholders subsequent to the Company's listing; and (ii) at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(B) Any Company newly listing on The Nasdaq Capital Market that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have at least two Diverse directors by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

(C) Any Company that ceases to be a Foreign Issuer, a Smaller Reporting Company, or an Exempt Company shall be permitted to satisfy the requirements of Rule 5605(f) by the later of: (i) one year from the date that the Company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively; or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's first annual meeting of shareholders subsequent to such event.

(D) Any Company newly listing on The Nasdaq Global Select Market, The Nasdaq Global Market and The Nasdaq Capital Market that has a board of five or fewer members and was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, shall be permitted to satisfy the requirement of Rule 5605(f)(2) to have, or explain why it does not have at least one Diverse director by the later of: (a) two years from the date of listing; or (b) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's second annual meeting of shareholders subsequent to the Company's listing.

#### **(6) Cure Period and Grace Period**

(A) If a Company (i) does not meet the applicable diversity objectives set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule 5605(f)(3), or (ii) fails to hold an annual meeting of shareholders during the applicable periods in Rule 5605(f)(5) or (7) and therefore fails to meet, or explain why it does not meet, the diversity objectives of Rule 5605(f)(2), the Listing Qualifications Department will promptly notify the Company and inform it that it has until the later of its next annual shareholders meeting or 180 days from the event that caused the deficiency to cure the deficiency.

(B) A Company that satisfied the diversity objectives of Rule 5605(f)(2) within the timeframes set forth in Rule 5605(f)(7), but ceases to meet the diversity objectives of Rule 5605(f)(2) due to a vacancy on its board of directors, shall have until the later of: (i) one year from the date of vacancy; or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) in the calendar year following the year of the date of vacancy, to satisfy Rule 5605(f)(2) or (3). In lieu of providing the disclosure required by Rule 5605(f)(3), a Company relying on this provision may publicly disclose that it is relying on the grace period provided by this Rule 5605(f)(6)(B). Such disclosure must be provided in advance of the Company's next annual meeting of shareholders: (a) in any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company's website. If the Company provides such disclosure on its website, then the Company must submit such disclosure concurrently with the filing made pursuant to (a) and submit a URL link to the disclosure through the Nasdaq Listing Center, within one business day after such posting.

#### **(7) Effective Dates/Transition**

(A) Each Company listed on The Nasdaq Global Select Market, The Nasdaq Global Market, and The Nasdaq Capital Market (including a Company with a smaller board under Rule 5606(f)(2)(D)) must have, or explain why it does not have, at least one Diverse director by the later of: (i) two calendar years after the Approval Date (the "First Effective Date"); or (ii) the

date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the First Effective Date.

(B) Each Company listed on The Nasdaq Global Select Market or The Nasdaq Global Market must have, or explain why it does not have, at least two Diverse directors by the later of: (i) four calendar years after the Approval Date (the "Second NGS/NGM Effective Date"); or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NGS/NGM Effective Date.

(C) Each Company listed on The Nasdaq Capital Market must have, or explain why it does not have, at least two Diverse directors by the later of: (i) five calendar years after the Approval Date (the "Second NCM Effective Date") or (ii) the date the Company files its proxy statement or its information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F) for the Company's annual shareholders meeting during the calendar year of the Second NCM Effective Date.

(D) Notwithstanding the foregoing, a Company is not required to comply with the requirements of this Rule 5605(f) prior to the end of the phase-in periods described in Rule 5605(f)(5), if applicable.

(E) A company listing after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must fully satisfy the requirements of this Rule 5605(f) by the later of the periods set forth in this subparagraph (7) or the two year phase-in periods set forth in Rule 5605(f)(5).

(F) A company listed on The Nasdaq Capital Market that transfers to The Nasdaq Global Select Market or The Nasdaq Global Market after the Approval Date, but prior to the end of the periods set forth in this subparagraph (7), must satisfy the requirements of this Rule 5605(f) by the later of: (i) the periods set forth in this subparagraph (7)(C); or (ii) one year from the date of transfer.

Amended July 22, 2010 (SR-NASDAQ-2008-014); amended Jan. 11, 2013 (SR-NASDAQ-2012-109); amended Aug. 6, 2021 (SR-NASDAQ-2020-081).

#### 5606. Board Diversity Disclosure

(a) Each Company must annually disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified characteristics in a substantially similar format below. Following the first year of disclosure, all companies must disclose the current year and immediately prior year diversity statistics using the Board Diversity Matrix.

##### Board Diversity Matrix (As of [DATE])

Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
<b>Part I: Gender Identity</b>				
Directors	#	#	#	#
<b>Part II: Demographic Background</b>				
African American or Black	#	#	#	#
Alaskan Native or Native American	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+			#	
Did Not Disclose Demographic Background			#	

However, a Company that qualifies as a Foreign Issuer under Rule 5605(f)(1) may elect to use the format below:

##### Board Diversity Matrix (As of [DATE])

To be completed by Foreign Issuers (with principal executive offices outside of the U.S.) and Foreign Private Issuers

Country of Principal Executive Offices	[Insert Country Name]
Foreign Private Issuer	Yes/No

Disclosure Prohibited under Home Country Law	Yes/No			
Total Number of Directors	#			
	Female	Male	Non-Binary	Did Not Disclose Gender
<b>Part I: Gender Identity</b>				
Directors	#	#	#	#
<b>Part II: Demographic Background</b>				
Underrepresented Individual in Home Country Jurisdiction			#	
LGBTQ+			#	
Did Not Disclose Demographic Background			#	

(b) The disclosure required by this Rule 5606 must be provided in the same manner as, and concurrently with, the disclosure required by Rule 5605(f)(3).

(c) This Rule 5606 shall not apply to Exempt Companies as defined in Rule 5605(f)(4).

(d) A Company newly listing on Nasdaq that was not previously subject to a substantially similar requirement of another national securities exchange, including through an initial public offering, direct listing, transfer from the over-the-counter market or another exchange, in connection with a spin-off or carve-out from a company listed on Nasdaq or another exchange, or through a merger with an acquisition company listed under IM-5101-2, must satisfy the requirement of this Rule 5606 within one year of listing.

(e) This Rule 5606 will be operative one year after the Commission issues an order granting the approval of this proposed Rule 5606 ("Approval Date"). A Company must be in compliance with this Rule 5606 by the later of: (1) one calendar year from the Approval Date ("Effective Date"); or (2) the date the Company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the Company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.

Adopted Aug. 6, 2021 (SR-NASDAQ-2020-081).

## 5610. Code of Conduct

Each Company shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available. A code of conduct satisfying this rule must comply with the definition of a "code of ethics" set out in Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. In addition, the code must provide for an enforcement mechanism. Any waivers of the code for directors or Executive Officers must be approved by the Board. Companies, other than Foreign Private Issuers, shall disclose such waivers within four business days by filing a current report on Form 8-K with the Commission or, in cases where a Form 8-K is not required, by distributing a press release. Foreign Private Issuers shall disclose such waivers either by distributing a press release or including disclosure in a Form 6-K or in the next Form 20-F or 40-F. Alternatively, a Company, including a Foreign Private Issuer, may disclose waivers on the Company's website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K.

## IM-5610. Code of Conduct

Ethical behavior is required and expected of every corporate director, officer and employee whether or not a formal code of conduct exists. The requirement of a publicly available code of conduct applicable to all directors, officers and employees of a Company is intended to demonstrate to investors that the board and management of Nasdaq Companies have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. For Company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.

Rule 5610 requires Companies to adopt a code of conduct complying with the definition of a "code of ethics" under Section 406(c) of the Sarbanes-Oxley Act of 2002 ("the Sarbanes-Oxley Act") and any regulations promulgated thereunder by the Commission. See 17 C.F.R. 228.406 and 17 C.F.R. 229.406. Thus, the code must include such standards as are reasonably necessary to promote the ethical handling of conflicts of interest, full and fair disclosure, and compliance with laws, rules and regulations, as specified by the Sarbanes-Oxley Act. However, the code of conduct required by Rule 5610 must apply to all directors, officers, and employees. Companies can satisfy this obligation by adopting one or more codes of conduct, such that all directors, officers and employees are subject to a code that satisfies the definition of a "code of ethics."

As the Sarbanes-Oxley Act recognizes, investors are harmed when the real or perceived private interest of a director, officer or employee is in conflict with the interests of the Company, as when the individual receives improper personal benefits as a result of his or her position with the Company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the Company. Also, the disclosures a Company makes to the Commission are the essential source of information about the Company for regulators and investors — there can be no question about the duty to make them fairly, accurately and

timely. Finally, illegal action must be dealt with swiftly and the violators reported to the appropriate authorities. Each code of conduct must require that any waiver of the code for Executive Officers or directors may be made only by the board and must be disclosed to Shareholders, along with the reasons for the waiver. All Companies, other than Foreign Private Issuers, must disclose such waivers within four business days by filing a current report on Form 8-K with the Commission, providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, or, in cases where a Form 8-K is not required, by distributing a press release. Foreign Private Issuers must disclose such waivers either by providing website disclosure that satisfies the requirements of Item 5.05(c) of Form 8-K, by including disclosure in a Form 6-K or in the next Form 20-F or 40-F or by distributing a press release. This disclosure requirement provides investors the comfort that waivers are not granted except where they are truly necessary and warranted, and that they are limited and qualified so as to protect the Company and its Shareholders to the greatest extent possible.

Each code of conduct must also contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended July 22, 2010 (SR-NASDAQ-2008-014).

## **5615. Exemptions from Certain Corporate Governance Requirements**

This rule provides the exemptions from the corporate governance rules afforded to certain types of Companies, and sets forth the phase-in schedules for initial public offerings, Companies emerging from bankruptcy, Companies transferring from other markets and Companies ceasing to be Smaller Reporting Companies. This rule also describes the applicability of the corporate governance rules to Controlled Companies and sets forth the phase-in schedule afforded to Companies ceasing to be Controlled Companies.

### **(a) Exemptions to the Corporate Governance Requirements**

#### **(1) Asset-backed Issuers and Other Passive Issuers**

The following are exempt from the requirements relating to:

(A) Majority Independent Board (Rule 5605(b)), Audit Committee (Rule 5605(c)), Compensation Committee (Rule 5605(d)), Director Nominations (Rule 5605(e)), the Controlled Company Exemption (Rule 5615(c)(2)), and Code of Conduct (Rule 5610):

(i) asset-backed issuers; and

(ii) issuers, such as unit investment trusts, including Portfolio Depository Receipts, which are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

(B) Shareholder Approval: issuers of Portfolio Depository Receipts as defined in Rule 5705(a), shall not be required to comply with Rule 5635(a) in connection with the acquisition of the stock or assets of an affiliated registered investment company in a transaction that complies with Rule 17a-8 under the Investment Company Act of 1940 and does not otherwise require shareholder approval under the Investment Company Act of 1940 and the rules thereunder or any other Exchange rule.

#### **IM-5615-1. Asset-backed Issuers and Other Passive Issuers**

Because of their unique attributes, Rules 5605(b), 5605(c), 5605(d), 5605(e) and 5610 do not apply to asset-backed issuers and issuers, such as unit investment trusts, that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities. This is consistent with Nasdaq's traditional approach to such issuers.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

#### **(2) Cooperatives**

Cooperative entities, such as agricultural cooperatives, that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock are exempt from Rules 5605(b), (d), (e), and 5615(c)(2). However, such entities must comply with all federal securities laws, including without limitation those rules required by Section 10A(m) of the Act and Rule 10A-3 thereunder.

#### **IM-5615-2. Cooperatives**

Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members. Because of their unique structure and the fact that they do not have a publicly traded class of common stock, such entities are exempt from Rule 5605(b), (d), and (e). This is consistent with Nasdaq's traditional approach to such Companies.



### **(3) Foreign Private Issuers**

(A) A Foreign Private Issuer may follow its home country practice in lieu of the requirements of the Rule 5600 Series, the requirement to disclose third party director and nominee compensation set forth in Rule 5250(b)(3), and the requirement to distribute annual and interim reports set forth in Rule 5250(d), provided, however, that such a Company shall: comply with the Notification of Noncompliance requirement (Rule 5625), the Voting Rights requirement (Rule 5640), the Diverse Board Representation Rule (Rule 5605(f)), the Board Diversity Disclosure Rule (Rule 5606), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii). Except as provided in this paragraph, a Foreign Private Issuer must comply with the requirements of the Rule 5000 Series.

#### **(B) Disclosure Requirements**

(i) A Foreign Private Issuer that follows a home country practice in lieu of one or more of the Listing Rules shall disclose in its annual reports filed with the Commission each requirement that it does not follow and describe the home country practice followed by the Company in lieu of such requirements. Alternatively, a Foreign Private Issuer that is not required to file its annual report with the Commission on Form 20-F may make this disclosure only on its website. A Foreign Private Issuer that follows a home country practice in lieu of the requirement in Rule 5605(d)(2) to have an independent compensation committee must disclose in its annual reports filed with the Commission the reasons why it does not have such an independent committee.

(ii) A Foreign Private Issuer making its initial public offering or first U.S. listing on Nasdaq shall disclose in its registration statement or on its website each requirement that it does not follow and describe the home country practice followed by the Company in lieu of such requirements.

### **IM-5615-3. Foreign Private Issuers**

A Foreign Private Issuer (as defined in Rule 5005) listed on Nasdaq may follow the practice in such Company's home country (as defined in General Instruction F of Form 20-F) in lieu of the provisions of the Rule 5600 Series, Rule 5250(b)(3), and Rule 5250(d), subject to several important exceptions. First, such an issuer shall comply with Rule 5625 (Notification of Noncompliance). Second, such a Company shall have an audit committee that satisfies Rule 5605(c)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). Fourth, such an issuer shall comply with Rule 5605(f) (Diverse Board Representation) and Rule 5606 (Board Diversity Disclosure). Finally, a Foreign Private Issuer that elects to follow home country practice in lieu of a requirement of Rules 5600, 5250(b)(3), or 5250(d) shall submit to Nasdaq a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing Companies, the certification is required at the time the Company seeks to adopt its first noncompliant practice. In the interest of transparency, the rule requires a Foreign Private Issuer to make appropriate disclosures in the Company's annual filings with the Commission (typically Form 20-F or 40-F), and at the time of the Company's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F-1, 20-F, or 40-F); alternatively, a Company that is not required to file an annual report on Form 20-F may provide these disclosures in English on its website in addition to, or instead of, providing these disclosures on its registration statement or annual report. The Company shall disclose each requirement that it does not follow and include a brief statement of the home country practice the Company follows in lieu of these corporate governance requirement(s). If the disclosure is only available on the website, the annual report and registration statement should so state and provide the web address at which the information may be obtained. Companies that must file annual reports on Form 20-F are encouraged to provide these disclosures on their websites, in addition to the required Form 20-F disclosures, to provide maximum transparency about their practices.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040); amended May 20, 2009 (SR-NASDAQ-2009-049); amended June 16, 2009 (SR-NASDAQ-2009-052); amended May 14, 2010 (SR-NASDAQ-2010-060), operative June 13, 2010; amended Nov. 7, 2012 (SR-NASDAQ-2012-128); amended July 1, 2016 (SR-NASDAQ-2016-013), operative Aug 1, 2016; amended Aug. 6, 2021 (SR-NASDAQ-2020-081).

### **(4) Limited Partnerships**

A limited partnership is not subject to the requirements of the Rule 5600 Series, except as provided in this Rule 5615(a)(4). A limited partnership may request a written interpretation pursuant to Rule 5602.

(A) No provision of this Rule shall be construed to require any foreign Company that is a partnership to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such Company or that is contrary to generally accepted business practices in the Company's country of domicile. Nasdaq shall have the ability to provide exemptions from applicability of these provisions as may be necessary or appropriate to carry out this intent.

#### **(B) Corporate General Partner**

Each Company that is a limited partnership shall maintain a corporate general partner or co-general partner, which shall have the authority to manage the day-to-day affairs of the partnership.

**(C) Independent Directors/Audit Committee**

The corporate general partner or co-general partner shall maintain a sufficient number of Independent Directors on its board to satisfy the audit committee requirements set forth in Rule 5605(c).

**(D) Partner Meetings**

A Company that is a limited partnership shall not be required to hold an annual meeting of limited partners unless required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement.

**(E) Quorum**

(i) In the event that a meeting of limited partners is required pursuant to paragraph (D), the quorum for such meeting shall be not less than 33-1/3 percent of the limited partnership interests outstanding.

(ii) Notwithstanding the quorum requirements in paragraph (i) above, Nasdaq will accept any quorum requirement for a non-U.S. Company, that is not a Foreign Private Issuer, if the Company's home country law mandates such quorum for the shareholders' meeting and prohibits the Company from establishing a higher quorum required by paragraph (i) above. A Company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such Company's home country describing the home country law that conflicts with Nasdaq's quorum requirement and certifying that, as the result, the Company is prohibited from complying with the quorum requirements in paragraph (i) above and cannot obtain an exemption or waiver from that law. Any Company relying on this exception from the quorum requirements must:

(a) make a public announcement as promptly as possible but not more than four business days following the submission of the independent counsel's statement to Nasdaq, as described above, on or through the Company's website and either by filing a Form 8-K, where required by SEC rules, or by issuing a press release explaining the Company's reliance on the exception;

(b) maintain the website disclosure for the period of time the Company continues to rely on this exception from the quorum requirements; and

(c) update the website disclosure at least annually to indicate that the Company is prohibited under its home country law from complying with Nasdaq's quorum requirements as of such date.

**(F) Solicitation of Proxies**

In the event that a meeting of limited partners is required pursuant to paragraph (D), the Company shall provide all limited partners with proxy or information statements and if a vote is required, shall solicit proxies thereon

**(G) Review of Related Party Transactions**

Each Company that is a limited partnership shall conduct an appropriate review of all related party transactions on an ongoing basis and shall utilize the Audit Committee or a comparable body of the Board of Directors for the review of potential material conflict of interest situations where appropriate.

**(H) Shareholder Approval**

Each Company that is a limited partnership must obtain shareholder approval 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, as would be required under Rule 5635(c) and IM-5635-1.

**(I) Auditor Registration**

Each Company that is a limited partnership must be audited by an independent public accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7212].

**(J) Notification of Noncompliance.**

Each Company that is a limited partnership must provide Nasdaq with prompt notification after an Executive Officer of the Company, or a person performing an equivalent role, becomes aware of any noncompliance by the Company with the requirements of this Rule 5600 Series.

**(5) Management Investment Companies**

Management investment companies (including business development companies) are subject to all the requirements of the

Rule 5600 Series, except that such management investment companies registered under the Investment Company Act of 1940 are exempt from the requirements relating to Independent Directors (as set forth in Rule 5605(b)), Compensation Committee (as set forth in Rule 5605(d)), Independent Director Oversight of Director Nominations (as set forth in Rule 5605(e)), and Codes of Conduct (as set forth in Rule 5610).

Management investment companies that are Index Fund Shares (as defined in Rule 5705(b)), Managed Fund Shares (as defined in Rule 5735), Managed Portfolio Shares (as defined in Rule 5760), Exchange Traded Fund Shares (as defined in Rule 5704), and Proxy Portfolio Shares (as defined in Rule 5750), respectively, shall not be required to comply with Rule 5635(a) in connection with the acquisition of the stock or assets of an affiliated registered investment company in a transaction that complies with Rule 17a-8 under the Investment Company Act of 1940 and does not otherwise require shareholder approval under the Investment Company Act of 1940 and the rules thereunder or any other Exchange rule.

Management investment companies defined as Derivative Securities are exempt from additional requirements of the Rule 5600 Series as outlined in Nasdaq Rule 5615(a)(6)(A) below.

#### **IM-5615-4. Management Investment Companies**

Management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance covered by 5600. In light of this, Nasdaq exempts from Rules 5605(b), (d), (e) and 5610 management investment companies registered under the Investment Company Act of 1940. Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of the Rule 5600 Series.

Management investment companies defined as Derivative Securities are exempt from additional requirements of the Rule 5600 Series as outlined in Nasdaq Rule 5615(a)(6)(A) below.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Aug. 18, 2009 (SR-NASDAQ-2009-078); amended Mar. 11, 2010 (SR-NASDAQ-2010-036); amended Nov. 7, 2014 (SR-NASDAQ-2014-020); amended Oct. 13, 2015 (SR-NASDAQ-2015-121); amended May 28, 2019 (SR-NASDAQ-2019-039), operative June 28, 2019.

#### **(6) Issuers of Non- Voting Preferred Securities, Debt Securities and Derivative Securities**

(A) Issuers whose only securities listed on Nasdaq are non-voting preferred securities, debt securities or Derivative Securities, are exempt from the requirements relating to Independent Directors (as set forth in Rule 5605(b)), Compensation Committees (as set forth in Rule 5605(d)), Director Nominations (as set forth in Rule 5605(e)), Codes of Conduct (as set forth in Rule 5610), and Meetings of Shareholders (as set forth in Rule 5620(a)). In addition, these issuers are exempt from the requirements relating to Audit Committees (as set forth in Rule 5605(c)), except for the applicable requirements of SEC Rule 10A-3. Notwithstanding, if the issuer also lists its common stock or voting preferred stock, or their equivalent on Nasdaq it will be subject to all the requirements of the Nasdaq 5600 Rule Series.

(B) For the purposes of this Rule 5600 Series only, the term "Derivative Securities" is defined as the following: Exchange Traded Fund Shares (Rule 5704), Portfolio Depository Receipts and Index Fund Shares (Rule 5705); Equity Index-Linked Securities (Rule 5710(k)(i)), Commodity-Linked Securities (Rule 5710(k)(ii)), Fixed Income Index-Linked Securities (5710(k)(iii)), Futures-Linked Securities (5710(k)(iv)), Multifactor Index-Linked Securities (5710(k)(v)), Index-Linked Exchangeable Notes (Rule 5711(a)), Equity Gold Shares (Rule 5711(b)), Trust Certificates (Rule 5711(c)), Commodity-Based Trust Shares (Rule 5711(d)), Currency Trust Shares (Rule 5711(e)), Commodity Index Trust Shares (Rule 5711(f)), Commodity Futures Trust Shares (Rule 5711(g)), Partnership Units (Rule 5711(h)), Managed Trust Securities (Rule 5711(j)), SEEDS (Rule 5715), Trust Issued Receipts (Rule 5720), Managed Fund Shares (Rule 5735), NextShares (Rule 5745), and Proxy Portfolio Shares (Rule 5750). Derivative Securities are subject to certain exemptions to the Rule 5600 Series as described in Rule 5615(a)(6).

#### **(b) Phase-In Schedules**

##### **(1) Initial Public Offerings**

A Company listing in connection with its initial public offering shall be permitted to phase in its compliance with the independent committee requirements set forth in Rules 5605(d)(2) and (e)(1)(B) on the same schedule as it is permitted to phase in its compliance with the independent audit committee requirement pursuant to Rule 10A-3(b)(1)(iv)(A) under the Act. Accordingly, a Company listing in connection with its initial public offering shall be permitted to phase in its compliance with the committee composition requirements set forth in Rule 5605(d)(2) and (e)(1)(B) as follows: (1) one member must satisfy the requirement at the time of listing; (2) a majority of members must satisfy the requirement within 90 days of listing; and (3) all members must satisfy the requirement within one year of listing. Furthermore, a Company listing in connection with its initial public offering shall have twelve months from the date of listing to comply with the majority independent board requirement in Rule 5605(b). It should be noted, however, that pursuant to Rule 10A-3(b)(1)(iii) under the Act investment companies are not afforded the exemptions under Rule 10A-3(b)(1)(iv) under the Act. Companies may choose not to adopt a nomination committee and may instead rely upon a majority of the Independent Directors to discharge responsibilities under Rule 5605(b). For purposes of the Rule 5600 Series other than Rules 5605(c)(2)(A)(ii) and 5625, a Company shall be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered

under the Act. For purposes of Rule 5605(c)(2)(A)(ii) and Rule 5625, a Company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in Rule 10A-3(b)(1)(iv)(A) under the Act, namely, that the Company was not, immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.

## **(2) Companies Emerging from Bankruptcy**

Companies that are emerging from bankruptcy shall be permitted to phase-in independent nomination and compensation committees and majority independent boards on the same schedule as Companies listing in conjunction with their initial public offering.

## **(3) Transfers from other Markets**

Companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on Nasdaq. This transition period is not intended to supplant any applicable requirements of Rule 10A-3 under the Act.

## **(4) Phase-In Schedule for a Company Ceasing to be a Smaller Reporting Company**

Pursuant to Rule 12b-2 under the Act, a Company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (for purposes of this Rule, the "Determination Date"). A Company which ceases to meet the requirements for smaller reporting company status as of the Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Determination Date (the "Start Date").

By six months from the Start Date, a Company must comply with Rule 5605(d)(3) and certify to Nasdaq that: (i) it has complied with the requirement in Rule 5605(d)(1) to adopt a formal written compensation committee charter including the content specified in Rule 5605(d)(1)(A)-(D); and (ii) it has complied, or within the applicable phase-in schedule will comply, with the additional requirements in Rule 5605(d)(2)(A) regarding compensation committee composition.

A Company shall be permitted to phase in its compliance with the additional compensation committee eligibility requirements of Rule 5605(d)(2)(A) relating to compensatory fees and affiliation as follows: (i) one member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.

Since a Smaller Reporting Company is required to have a compensation committee comprised of at least two Independent Directors, a Company that has ceased to be a Smaller Reporting Company may not use the phase-in schedule for the requirements of Rule 5605(d)(2)(A) relating to minimum committee size or that the committee consist only of Independent Directors as defined under Rule 5605(a)(2).

During this phase-in schedule, a Company that has ceased to be a Smaller Reporting Company must continue to comply with Rule 5605(d)(5).

## **(c) How the Rules Apply to a Controlled Company**

### **(1) Definition**

A Controlled Company is a Company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.

### **(2) Exemptions Afforded to a Controlled Company**

A Controlled Company is exempt from the requirements of Rules 5605(b), (d) and (e), except for the requirements of subsection (b)(2) which pertain to executive sessions of Independent Directors. A Controlled Company, other than a Foreign Private Issuer, relying upon this exemption must comply with the disclosure requirements set forth in Instruction 1 to Item 407(a) of Regulation S-K. A Foreign Private Issuer must disclose in its next annual report (e.g., Form 20-F or 40-F) that it is a Controlled Company and the basis for that determination.

### **(3) Phase-In Schedule for a Company Ceasing to be a Controlled Company**

A Company that has ceased to be a Controlled Company within the meaning of Rule 5615(c)(1) shall be permitted to phase-in its independent nomination and compensation committees and majority independent board on the same schedule as Companies listing in conjunction with their initial public offering. It should be noted, however, that a Company that has ceased to be a Controlled Company within the meaning of Rule 5615(c)(1) must comply with the audit committee requirements of Rule 5605(c) as of the date it ceased to be a Controlled Company. Furthermore, the executive sessions requirement of Rule 5605(b)(2) applies to Controlled Companies as of the date of listing and continues to apply after it ceases to be controlled.

This exemption recognizes that majority Shareholders, including parent companies, have the right to select directors and control certain key decisions, such as executive officer compensation, by virtue of their ownership rights. In order for a group to exist for purposes of this rule, the Shareholders must have publicly filed a notice that they are acting as a group (e.g., a Schedule 13D). A Controlled Company not relying upon this exemption need not provide any special disclosures about its controlled status. It should be emphasized that this controlled company exemption does not extend to the audit committee requirements under Rule 5605(c) or the requirement for executive sessions of Independent Directors under Rule 5605(b)(2).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040); amended May 20, 2009 (SR-NASDAQ-2009-049); amended Aug. 18, 2009 (SR-NASDAQ-2009-78); amended Mar. 11, 2010 (SR-NASDAQ-2010-036); amended Mar. 15, 2010 (SR-NASDAQ-2010-006); amended May 14, 2010 (SR-NASDAQ-2010-060), operative June 13, 2010; amended June 9, 2011 (SR-NASDAQ-2011-082), operative July 9, 2011; amended Nov. 7, 2012 (SR-NASDAQ-2012-128); amended Jan. 11, 2013 (SR-NASDAQ-2012-109); amended Nov. 7, 2014 (SR-NASDAQ-2014-020); amended Oct. 13, 2015 (SR-NASDAQ-2015-121); amended July 1, 2016 (SR-NASDAQ-2016-013), operative Aug 1, 2016; amended Dec. 27, 2017 (SR-NASDAQ-2017-133), operative Jan. 26, 2018; amended Nov. 14, 2018 (SR-NASDAQ-2018-095); amended May 28, 2019 (SR-NASDAQ-2019-039), operative June 28, 2019; amended April 3, 2020 (SR-NASDAQ-2019-090); amended November 19, 2020 (SR-NASDAQ-2020-078), operative December 19, 2020; amended Apr. 14, 2021 (SR-NASDAQ-2020-100); amended Aug. 6, 2021 (SR-NASDAQ-2020-081); amended October 21, 2021 (SR-NASDAQ-2021-083).

## **5620. Meetings of Shareholders**

(a) Each Company listing common stock or voting preferred stock, and their equivalents, shall hold an annual meeting of Shareholders no later than one year after the end of the Company's fiscal year-end, unless such Company is a limited partnership that meets the requirements of Rule 5615(a)(4)(D).

### **IM-5620. Meetings of Shareholders or Partners**

Rule 5620(a) requires that each Company listing common stock or voting preferred stock, and their equivalents, hold an annual meeting of Shareholders within one year of the end of each fiscal year. At each such meeting, Shareholders must be afforded the opportunity to discuss Company affairs with management and, if required by the Company's governing documents, to elect directors. A new listing that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one-year after its first fiscal year-end following listing. Of course, Nasdaq's meeting requirement does not supplant any applicable state or federal securities laws concerning annual meetings.

This requirement is not applicable to issuers whose only securities listed on Nasdaq are non-voting preferred securities, debt securities, Derivative Securities as defined in Rule 5615(a)(6)(B) or securities listed pursuant to Rule 5730(a) (such as Trust Preferred Securities and Contingent Value Rights), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock). Notwithstanding, if the Company also lists common stock or voting preferred stock, or their equivalent, the Company must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended May 28, 2019 (SR-NASDAQ-2019-039), operative June 28, 2019.

#### **(b) Proxy Solicitation**

Each Company that is not a limited partnership shall solicit proxies and provide proxy statements for all meetings of Shareholders and shall provide copies of such proxy solicitation to Nasdaq. Limited partnerships that are required to hold an annual meeting of partners are subject to the requirements of Rule 5615(a)(4)(F).

#### **(c) Quorum**

(i) Each Company that is not a limited partnership shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 % of the outstanding shares of the Company's common voting stock. Limited partnerships that are required to hold an annual meeting of partners are subject to the requirements of Rule 5615(a)(4)(E).

(ii) Notwithstanding the quorum requirements in paragraph (i) above, Nasdaq will accept any quorum requirement for a non-U.S. Company, that is not a Foreign Private Issuer, if the Company's home country law mandates such quorum for the shareholders' meeting and prohibits the Company from establishing a higher quorum required by paragraph (i) above, and the Company cannot obtain an exemption or waiver from that law. A Company relying on this provision shall submit to Nasdaq a written statement from an independent counsel in such Company's home country describing the home country law that conflicts with Nasdaq's quorum requirement and certifying that, as the result, the Company is prohibited from complying with the quorum requirements in paragraph (i) above, and the Company cannot obtain an exemption or waiver from that law. Any Company relying on this exception from the quorum requirements must:



(a) make a public announcement as promptly as possible but not more than four business days following the submission of the independent counsel's statement to Nasdaq, as described above, on or through the Company's website and either by filing a Form 8-K, where required by SEC rules, or by issuing a press release explaining the Company's reliance on the exception

(b) maintain the website disclosure for the period of time the Company continues to rely on this exception from the quorum requirements; and

(c) update the website disclosure at least annually to indicate that the Company is prohibited under its home country law from complying with Nasdaq's quorum requirements as of such date.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 14, 2021 (SR-NASDAQ-2020-100).

#### **5625. Notification of Noncompliance**

A Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any noncompliance by the Company with the requirements of this Rule 5600 Series.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended May 14, 2010 (SR-NASDAQ-2010-060), operative June 13, 2010.

#### **5630. Review of Related Party Transactions**

(a) Each Company that is not a limited partnership shall conduct an appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis by the Company's audit committee or another independent body of the board of directors. For purposes of this rule, the term "related party transaction" shall refer to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Act. However, in the case of non-U.S. issuers, the term "related party transactions" shall refer to transactions required to be disclosed pursuant to Form 20-F, Item 7.B.

(b) Limited partnerships shall comply with the requirements of Rule 5615(a)(4)(G).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended May 20, 2009 (SR-NASDAQ-2009-049); amended June 16, 2009 (SR-NASDAQ-2009-052).

#### **5635. Shareholder Approval**

This Rule sets forth the circumstances under which shareholder approval is required prior to an issuance of securities in connection with: (i) the acquisition of the stock or assets of another company; (ii) equity-based compensation of officers, directors, employees or consultants; (iii) a change of control; and (iv) transactions other than public offerings. General provisions relating to shareholder approval are set forth in Rule 5635(e), and the financial viability exception to the shareholder approval requirement is set forth in Rule 5635(f). Nasdaq-listed Companies and their representatives are encouraged to use the interpretative letter process described in Rule 5602.

##### **(a) Acquisition of Stock or Assets of Another Company**

Shareholder approval is required prior to the issuance of securities in connection with the acquisition of the stock or assets of another company if:

(1) where, due to the present or potential issuance of common stock, including shares issued pursuant to an earn-out provision or similar type of provision, or securities convertible into or exercisable for common stock, other than a public offering for cash:

(A) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or

(B) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities; or

(2) any director, officer or Substantial Shareholder (as defined by Rule 5635(e)(3)) of the Company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the Company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or

##### **(b) Change of Control**

Shareholder approval is required prior to the issuance of securities when the issuance or potential issuance will result in a change of control of the Company.

##### **(c) Equity Compensation**

Shareholder approval is required 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, except for:

- (1) warrants or rights issued generally to all security holders of the Company or stock purchase plans available on equal terms to all security holders of the Company (such as a typical dividend reinvestment plan);
- (2) tax qualified, non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the Company's independent compensation committee or a majority of the Company's Independent Directors; or plans that merely provide a convenient way to purchase shares on the open market or from the Company at Market Value;
- (3) plans or arrangements relating to an acquisition or merger as permitted under IM-5635-1; or
- (4) issuances to a person not previously an employee or director of the Company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the Company, provided such issuances are approved by either the Company's independent compensation committee or a majority of the Company's Independent Directors. Promptly following an issuance of any employment inducement grant in reliance on this exception, a Company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

Amended June 16, 2009 (SR-NASDAQ-2009-052); amended Sept. 26, 2018 (SR-NASDAQ-2018-008).

#### **IM-5635-1. Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements**

Employee ownership of Company stock can be an effective tool to align employee interests with those of other Shareholders. Stock option plans or other equity compensation arrangements can also assist in the recruitment and retention of employees, which is especially critical to young, growing Companies, or Companies with insufficient cash resources to attract and retain highly qualified employees. However, these plans can potentially dilute shareholder interests. Rule 5635(c) ensures that Shareholders have a voice in these situations, given this potential for dilution.

Rule 5635(c) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following:

- (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction);
- (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;
- (3) any material expansion of the class of participants eligible to participate in the plan; and
- (4) any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. However, if a plan contains a formula for automatic increases in the shares available (sometimes called an "evergreen formula"), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

As a general matter, when preparing plans and presenting them for shareholder approval, Companies should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Rule 5635(c) provides an exception to the requirement for shareholder approval for warrants or rights offered generally to all Shareholders. In addition, an exception is provided for tax qualified, non-discriminatory employee benefit plans as well as parallel nonqualified plans as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. An equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the Company provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, is also exempt from shareholder approval under this section.

Further, the rule provides an exception for inducement grants to new employees because in these cases a Company has an arm's length relationship with the new employees. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition. The rule requires that such issuances be approved by the Company's

independent compensation committee or a majority of the Company's Independent Directors. The rule further requires that promptly following an issuance of any employment inducement grant in reliance on this exception, a Company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Rule 5635(c). These shares may be used for post-transaction grants of options and other equity awards by the listed Company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. Nasdaq would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in connection with a merger or acquisition would be counted by Nasdaq in determining whether the transaction involved the issuance of 20% or more of the Company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 5635(a).

Inducement grants, tax qualified non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the Company's independent compensation committee or a majority of the Company's Independent Directors. It should also be noted that a Company would not be permitted to use repurchased shares to fund option plans or grants without prior shareholder approval.

For purposes of Rule 5635(c) and IM-5635-1, the term "parallel nonqualified plan" means a plan that is a "pension plan" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be considered a parallel nonqualified plan unless: (i) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted); (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence; and, (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

**(d) Transactions other than Public Offerings**

(1) For purposes of this Rule 5635(d):

(A) "Minimum Price" means a price that is 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.

(B) "20% Issuance" means 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.

(2) Shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price.

Amended Jan. 15, 2020 (SR-NASDAQ-2020-004).

**IM-5635-2. Interpretative Material Regarding the Use of Share Caps to Comply with Rule 5635**

Rule 5635 limits the number of shares or voting power that can be issued or granted without shareholder approval prior to the issuance of certain securities. (An exception to this rule is available to Companies when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise as set forth in Rule 5635(f). However, a share cap is not permissible in conjunction with the financial viability exception provided in Rule 5635(f), because the application to Nasdaq and the notice to Shareholders required in the rule must occur prior to the issuance of any common stock or securities convertible into or exercisable for common stock.) Generally, this limitation applies to issuances of 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance. (While Nasdaq's experience is that this issue is generally implicated with respect to these situations, it may also arise with respect to the 5% threshold set forth in Rule 5635(a)(2).) Companies sometimes comply with the 20% limitation in this rule by placing a "cap" on the number of shares that can be issued in the transaction, such

that there cannot, under any circumstances, be an issuance of 20% or more of the common stock or voting power previously outstanding without prior shareholder approval. If a Company determines to defer a shareholder vote in this manner, shares that are issuable under the cap (in the first part of the transaction) must not be entitled to vote to approve the remainder of the transaction. In addition, a cap must apply for the life of the transaction, unless shareholder approval is obtained. For example, caps that no longer apply if a Company is not listed on Nasdaq are not permissible under the Rule. Of course, if shareholder approval is not obtained, then the investor will not be able to acquire 20% or more of the common stock or voting power outstanding before the transaction and would continue to hold the balance of the original security in its unconverted form.

Nasdaq has observed situations where Companies have attempted to cap the issuance of shares at below 20% but have also provided an alternative outcome based upon whether shareholder approval is obtained, including, but not limited to a "penalty" or a "sweetener." Instead, if the terms of a transaction can change based upon the outcome of the shareholder vote, no common shares may be issued prior to the approval of the Shareholders. Companies that engage in transactions with defective caps may be subject to delisting. For example, a Company issues a convertible preferred stock or debt instrument that provides for conversions of up to 20% of the total shares outstanding with any further conversions subject to shareholder approval. However, the terms of the instrument provide that if Shareholders reject the transaction, the coupon or conversion ratio will increase or the Company will be penalized by a specified monetary payment, including a rescission of the transaction. Likewise, a transaction may provide for improved terms if shareholder approval is obtained. Nasdaq believes that in such situations the cap is defective because the presence of the alternative outcome has a coercive effect on the shareholder vote, and thus may deprive Shareholders of their ability to freely exercise their vote. Accordingly, Nasdaq will not accept a cap that defers the need for shareholder approval in such situations.

Companies having questions regarding this policy are encouraged to contact the Nasdaq Listing Qualifications Department at (301) 978-8008, which will provide a written interpretation of the application of Nasdaq Rules to a specific transaction, upon prior written request of the Company.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

### **IM-5635-3. Definition of a Public Offering**

Rule 5635(d) provides that shareholder approval is required for a 20% Issuance at a price that is less than the Minimum Price. Under this rule, however, shareholder approval is not required for a "public offering."

Companies are encouraged to consult with Nasdaq staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Nasdaq staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Nasdaq staff will consider all relevant factors, including but not limited to:

- (i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the Company);
- (ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);
- (iii) the extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the Company and those investors);
- (iv) the offering price (including the extent of any discount to the market price of the securities offered); and
- (v) the extent to which the Company controls the offering and its distribution.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Sept. 26, 2018 (SR-NASDAQ-2018-008).

#### **(e) Definitions and Computations Relating to the Shareholder Approval Requirements**

(1) For purposes of making any computation in this paragraph, when determining the number of shares issuable in a transaction, all shares that could be issued are included, regardless of whether they are currently treasury shares. When determining the number of shares outstanding, only shares issued and outstanding are considered. Treasury shares, shares held by a subsidiary, and unissued shares reserved for issuance upon conversion of securities or upon exercise of options or warrants are not considered outstanding.

(2) Voting power outstanding as used in this Rule refers to the aggregate number of votes which may be cast by holders of those securities outstanding which entitle the holders thereof to vote generally on all matters submitted to the Company's security holders for a vote.

(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 shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a "Substantial Shareholder."

(4) Where shareholder approval is required, the minimum vote that will constitute shareholder approval shall be a majority of the total votes cast on the proposal. These votes may be cast in person, by proxy at a meeting of Shareholders or by written consent in lieu of a special meeting to the extent permitted by applicable state and federal law and rules (including interpretations thereof), including, without limitation, Regulations 14A and 14C under the Act. Nothing contained in this Rule 5635(e)(4) shall affect a Company's obligation to hold an annual meeting of Shareholders as required by Rule 5620(a).

(5) Shareholder approval shall not be required for any share issuance if such issuance is part of a court-approved reorganization under the federal bankruptcy laws or comparable foreign laws.

#### **(f) Financial Viability Exception**

An exception applicable to a specified issuance of securities may be made upon prior written application to Nasdaq's Listing Qualifications Department when:

(1) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise; and

(2) reliance by the Company on this exception is expressly approved by the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors. The Listing Qualifications Department shall respond to each application for such an exception in writing.

A Company that receives such an exception must mail to all Shareholders not later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required. Such notification shall disclose the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received), the fact that the Company is relying on a financial viability exception to the stockholder approval rules, and that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has expressly approved reliance on the exception. The Company shall also make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing the same information as promptly as possible, but no later than ten days before the issuance of the securities.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040); amended Mar. 15, 2010 (SR-NASDAQ-2010-006); amended Sept. 10, 2013 (SR-NASDAQ-2013-118); amended Sept. 26, 2018 (SR-NASDAQ-2018-008).

### **IM-5635-4. Interpretive Material Regarding Future Priced Securities and Other Securities with Variable Conversion Terms**

#### **Summary**

Provisions of this IM-5635-4 would apply to any security with variable conversion terms. For example, Future Priced Securities are private financing instruments which were created as an alternative means of quickly raising capital for Companies. The security is generally structured in the form of a convertible security and is often issued via a private placement. Companies will typically receive all capital proceeds at the closing. The conversion price of the Future Priced Security is generally linked to a percentage discount to the market price of the underlying common stock at the time of conversion and accordingly the conversion rate for Future Priced Securities floats with the market price of the common stock. As such, the lower the price of the Company's common stock at the time of conversion, the more shares into which the Future Priced Security is convertible. The delay in setting the conversion price is appealing to Companies who believe that their stock will achieve greater value after the financing is received. However, the issuance of Future Priced Securities may be followed by a decline in the common stock price, creating additional dilution to the existing holders of the common stock. Such a price decline allows holders to convert the Future Priced Security into large amounts of the Company's common stock. As these shares are issued upon conversion of the Future Priced Security, the common stock price may tend to decline further.

For example, a Company may issue \$10 million of convertible preferred stock (the Future Priced Security), which is convertible by the holder or holders into \$10 million of common stock based on a conversion price of 80% of the closing price of the common stock on the date of conversion. If the closing price is \$5 on the date of conversion, the Future Priced Security holders would receive 2,500,000 shares of common stock. If, on the other hand, the closing price is \$1 on the date of conversion, the Future Priced Security holders would receive 12,500,000 shares of common stock.

Unless the Company carefully considers the terms of the securities in connection with several Nasdaq Rules, the issuance of Future Priced Securities could result in a failure to comply with Nasdaq listing standards and the concomitant delisting of the Company's securities from Nasdaq. Nasdaq's experience has been that Companies do not always appreciate this potential consequence. Nasdaq Rules that bear upon the continued listing qualification of a Company and that must be considered when issuing Future Priced Securities include:

1. the shareholder approval rules see Rule 5635
2. the voting rights rules see Rule 5640



3. the bid price requirement see Rules 5450(a)(1) and 5555(b)(1)
4. the listing of additional shares rules see Rule 5250(e)(2)
5. the change in control rules see Rule 5635(b) and 5110(a)
6. Nasdaq's discretionary authority rules see the Rule 5100 Series

*It is important for Companies to clearly understand that failure to comply with any of these rules could result in the delisting of the Company's securities.*

This notice is intended to be of assistance to Companies considering financings involving Future Priced Securities. By adhering to the above requirements, Companies can avoid unintended listing qualifications problems. Companies having any questions about this notice should contact the Nasdaq Office of General Counsel at (301) 978-8400 or Listing Qualifications Department at (301) 978-8008. Nasdaq will provide a Company with a written interpretation of the application of Nasdaq Rules to a specific transaction, upon request of the Company.

#### How the Rules Apply

#### Shareholder Approval

Rule 5635(d) requires shareholder approval prior to a 20% Issuance at a price that is less than the Minimum Price.

(Nasdaq may make exceptions to this requirement when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and reliance by the Company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors.)

When Nasdaq staff is unable to determine the number of shares to be issued in a transaction, it looks to the maximum potential issuance of shares to determine whether there will be an issuance of 20 percent or more of the common stock outstanding. In the case of Future Priced Securities, the actual conversion price is dependent on the market price at the time of conversion and so the number of shares that will be issued is uncertain until the conversion occurs. Accordingly, staff will look to the maximum potential issuance of common shares at the time the Future Priced Security is issued. Typically, with a Future Priced Security, the maximum potential issuance will exceed 20 percent of the common stock outstanding because the Future Priced Security could, potentially, be converted into common stock based on a share price of one cent per share, or less. Further, for purposes of this calculation, the lowest possible conversion price is below the Minimum Price of the stock for purposes of Rule 5635(d) at the time of issuance of the Future Priced Security. Therefore, shareholder approval must be obtained *prior* to the issuance of the Future Priced Security. Companies should also be cautioned that obtaining shareholder ratification of the transaction after the issuance of a Future Priced Security does not satisfy the shareholder approval requirements.

Some Future Priced Securities may contain features to obviate the need for shareholder approval by: (1) placing a cap on the number of shares that can be issued upon conversion, such that the holders of the Future Priced Security cannot, without prior shareholder approval, convert the security into 20% or more of the common stock or voting power outstanding before the issuance of the Future Priced Security (See IM-5635-2, Interpretative Material Regarding the Use of Share Caps to Comply with Rule 5635), or (2) placing a floor on the conversion price, such that the conversion price will always be at least as high as the Minimum Price prior to the issuance of the Future Priced Securities. Even when a Future Priced Security contains these features, however, shareholder approval is still required under Rule 5635(b) if the issuance will result in a change of control. Additionally, discounted issuances of common stock to officers, directors, employees or consultants require shareholder approval pursuant to 5635(c).

#### Voting Rights

Rule 5640 provides:

Voting rights of existing Shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

IM-5640 also provides rules relating to voting rights of Nasdaq Companies.

Under the voting rights rules, a Company cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities. The voting rights rules are typically implicated when the holders of the Future Priced Security are entitled to vote on an as-converted basis or when the holders of the Future Priced Security are entitled to representation on the Board of Directors. The percentage of the overall vote attributable to the Future Priced Security holders and the Future Priced Security holders' representation on the board of directors must not exceed their relative contribution to the Company based on the Minimum Price at the time of the issuance of the Future Priced Security. Staff will consider whether a voting rights violation exists by comparing the Future Priced Security holders' voting rights to their relative contribution to the Company based on the Minimum Price at the time of the issuance of the Future Priced Security. If the voting power or the board percentage exceeds that percentage interest, a violation exists because a new class of securities has been created that votes at a higher rate than an already existing class. Future Priced Securities that vote on an as-converted basis also raise voting rights concerns because of the possibility that, due to a decline in

the price of the underlying common stock, the Future Priced Security holder will have voting rights disproportionate to its investment in the Company.

It is important to note that compliance with the shareholder approval rules prior to the issuance of a Future Priced Security does not affect whether the transaction is in violation of the voting rights rule. Furthermore, Shareholders can not otherwise agree to permit a voting rights violation by the Company. Because a violation of the voting rights requirement can result in delisting of the Company's securities from Nasdaq, careful attention must be given to this issue to prevent a violation of the rule.

### **The Bid Price Requirement**

The bid price requirement establishes a minimum bid price for issues listed on Nasdaq. The Nasdaq Rules provide that, for an issue to be eligible for continued listing on Nasdaq, the minimum bid price per share shall be \$1. An issue is subject to delisting from Nasdaq, as described in the Rule 5800 Series if its bid price falls below \$1.

The bid price rules must be thoroughly considered because the characteristics of Future Priced Securities often exert downward pressure on the bid price of the Company's common stock. Specifically, dilution from the discounted conversion of the Future Priced Security may result in a significant decline in the price of the common stock. Furthermore, there appear to be instances where short selling has contributed to a substantial price decline, which, in turn, could lead to a failure to comply with the bid price requirement. (If used to manipulate the price of the stock, short selling by the holders of the Future Priced Security is prohibited by the antifraud provisions of the securities laws and by Nasdaq Rules and may be prohibited by the terms of the placement.)

### **Listing of Additional Shares**

Rule 5250(e)(2) provides:

The Company shall be required to notify Nasdaq on the appropriate form no later than 15 calendar days prior to: establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval; issuing securities that may potentially result in a change of control of the Company; issuing any common stock or security convertible into common stock in connection with the acquisition of the stock or assets of another company, if any officer or director or Substantial Shareholder of the Company has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the Company to be acquired or in the consideration to be paid; or entering into 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.

Companies should be cognizant that under this rule notification is required at least 15 days *prior* to issuing any security (including a Future Priced Security) convertible into shares of a class of securities already listed on Nasdaq. Failure to provide such notice can result in a Company's removal from Nasdaq.

### **Public Interest Concerns**

Rule 5101 provides:

Nasdaq is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. Nasdaq Companies, from new public Companies to Companies of international stature, are publicly recognized as sharing these important objectives.

Nasdaq, therefore, in addition to applying the enumerated criteria set forth in the Listing Rules, has broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.

The returns on Future Priced Securities may become excessive compared with those of public investors in the Company's common securities. In egregious situations, the use of a Future Priced Security may raise public interest concerns under the Rule 5100 Series. In addition to the demonstrable business purpose of the transaction, other factors that Nasdaq staff will consider in determining whether a transaction raises public interest concerns include: (1) the amount raised in the transaction relative to the Company's existing capital structure; (2) the dilutive effect of the transaction on the existing holders of common stock; (3) the risk undertaken by the Future Priced Security investor; (4) the relationship between the Future Priced Security investor and the Company; (5) whether the transaction was preceded by other similar transactions; and (6) whether the transaction is consistent with the just and equitable principles of trade.

Some Future Priced Securities may contain features that address the public interest concerns. These features tend to provide incentives to the investor to hold the security for a longer time period and limit the number of shares into which the Future Priced Security may be converted. Such features may limit the dilutive effect of the transaction and increase the risk undertaken by the Future Priced Security investor in relationship to the reward available.

## Business Combinations with non-Nasdaq Entities Resulting in a Change of Control

Rule 5110(a) provides:

A Company must apply for initial listing in connection with a transaction whereby the Company combines with a non-Nasdaq entity, resulting in a change of control of the Company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing. In determining whether a change of control has occurred, Nasdaq shall consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the Company. Nasdaq shall also consider the nature of the businesses and the relative size of the Nasdaq Company and non-Nasdaq entity. The Company must submit an application for the post-transaction entity with sufficient time to allow Nasdaq to complete its review before the transaction is completed. If the Company's application for initial listing has not been approved prior to consummation of the transaction, Nasdaq will issue a Staff Determination Letter as set forth in Rule 5810 and begin delisting proceedings pursuant to the Rule 5800 Series.

This provision, which applies regardless of whether the Company obtains shareholder approval for the transaction, requires Companies to qualify under the initial listing standards in connection with a combination that results in a change of control. It is important for Companies to realize that in certain instances, the conversion of a Future Priced Security may implicate this provision. For example, if there is no limit on the number of common shares issuable upon conversion, or if the limit is set high enough, the exercise of conversion rights under a Future Priced Security could result in the holders of the Future Priced Securities obtaining control of the listed Company. In such event, a Company may be required to re-apply for initial listing and satisfy all initial listing requirements.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended June 16, 2009 (SR-NASDAQ-2009-052); amended Sept. 26, 2018 (SR-NASDAQ-2018-008).

### 5636T. Temporary COVID-19 Exception

(a) This Rule 5636T is operative until, and including, June 30, 2020. To rely on this rule, the Company must execute a binding agreement governing the issuance of the securities, submit the notices required by paragraphs (b)(5)(A) and (e), and obtain the approval under paragraph (b)(5)(B)(ii) (if applicable) no later than June 30, 2020. The issuance of the securities governed by such agreement may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement.

(b) Notwithstanding the requirements of Rule 5635(d), a Company may issue securities without shareholder approval upon application to Nasdaq's Listing Qualifications Department demonstrating that the transaction satisfies the following requirements:

- (1) the need for the transaction is due to circumstances related to COVID-19;
- (2) the delay in securing shareholder approval would:
  - (A) have a material adverse impact on the Company's ability to maintain operations under its pre-COVID-19 business plan;
  - (B) result in workforce reductions;
  - (C) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or
  - (D) seriously jeopardize the financial viability of the enterprise;
- (3) the Company undertook a process designed to ensure that the proposed transaction represents the best terms available to the Company;
- (4) the Company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has:
  - (A) expressly approved reliance on this exception; and
  - (B) determined that the transaction is in the best interest of shareholders.
- (5) (A) The Company must submit a supplement to the Listing of Additional Shares notification form, in accordance with and in the same timeframe set forth in paragraph (e) below, certifying to Nasdaq that it complies with all requirements of this Rule 5636T(b) (and Rule 5636T(c) if applicable) and describing how it complies;
- (B) (i) After submitting the information described in paragraph (A) above, a Company does not need to obtain approval from Nasdaq prior to issuing shares in the transaction if the maximum issuance of common stock (or securities convertible into common stock) 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%.
- (ii) In all other cases, the Nasdaq Listing Qualifications Department must approve the Company's reliance on this 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 Rule 5636T(b) (and Rule 5636T(c) if applicable).

(c) A transaction described in Rule 5636T(b) shall not require shareholder approval under Rule 5635(c) for an affiliate's participation in the transaction, provided that the transaction satisfies the following requirements:

- (1) any affiliate's participation must be less than 5% of the transaction;
- (2) all affiliates' participation collectively must be less than 10% of the transaction;
- (3) any affiliate's participation must have been specifically required by unaffiliated investors; and
- (4) the affiliates must not have participated in negotiating the economic terms of the transaction.

(d) A Company that relies on the exception in this Rule 5636T must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:

- (1) the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
- (2) that shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the Company is relying on this temporary exception to the shareholder approval rules; and
- (3) 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.

(e) Notification Requirement

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) (related to the listing of additional shares), but must provide the notification required by that rule, and paragraph (b) (5)(A) of this rule, as promptly as possible, but no later than the time of the public announcement required by paragraph (d) of this rule and in no event later than June 30, 2020, in accordance with paragraph (a) of this rule. Companies are reminded that issuances must comply with all other requirements of the Nasdaq Listing Rules, except as provided for herein.

(f) Aggregation

Securities issued in reliance on the exception in this Rule 5636T will be aggregated with any subsequent issuance, 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. 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.

Adopted May 1, 2020 (SR-NASDAQ-2020-025).

## **5640. Voting Rights**

Voting rights of existing Shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

### **IM-5640. Voting Rights Policy**

The following Voting Rights Policy is based upon, but more flexible than, former Rule 19c-4 under the Act. Accordingly, Nasdaq will permit corporate actions or issuances by Nasdaq Companies that would have been permitted under former Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, Nasdaq will consider, among other things, the economics of such actions or issuances and the voting rights being granted. Nasdaq's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of Nasdaq Companies change over time. The text of the Nasdaq Voting Rights Policy is as follows:

#### **Companies with Dual Class Structures**

The restriction against the issuance of super voting stock is primarily intended to apply to the issuance of a new class of stock, and Companies with existing dual class capital structures would generally be permitted to issue additional shares of the existing super voting stock without conflict with this policy.

## Consultation with Nasdaq

Violation of the Nasdaq Voting Rights Policy could result in the loss of a Company's Nasdaq or public trading market. The policy can apply to a variety of corporate actions and securities issuances, not just super voting or so-called "time phase" voting common stock. While the policy will continue to permit actions previously permitted under former Rule 19c-4, it is extremely important that Nasdaq Companies communicate their intentions to their Nasdaq representatives as early as possible before taking any action or committing to take any action that may be inconsistent with the policy. Nasdaq urges Companies listed on Nasdaq not to assume, without first discussing the matter with the Nasdaq staff, that a particular issuance of common or preferred stock or the taking of some other corporate action will necessarily be consistent with the policy. It is suggested that copies of preliminary proxy or other material concerning matters subject to the policy be furnished to Nasdaq for review prior to formal filing.

## Review of Past Voting Rights Activities

In reviewing an application for initial qualification for listing of a security in Nasdaq, Nasdaq will review the Company's past corporate actions to determine whether another self-regulatory organization (SRO) has found any of the Company's actions to have been a violation or evasion of the SRO's voting rights policy. Based on such review, Nasdaq may take any appropriate action, including the denial of the application or the placing of restrictions on such listing. Nasdaq will also review whether a Company seeking initial listing of a security in Nasdaq has requested a ruling or interpretation from another SRO regarding the application of that SRO's voting rights policy with respect to a proposed transaction. If so, Nasdaq will consider that fact in determining its response to any ruling or interpretation that the Company may request on the same or similar transaction.

## Non-U.S. Companies

Nasdaq will accept any action or issuance relating to the voting rights structure of a non-U.S. Company that is in compliance with Nasdaq's requirements for domestic Companies or that is not prohibited by the Company's home country law.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).