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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-86314; File No. SR-NASDAQ-2019-009]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, to Revise the Exchange's Initial Listing Standards Related to Liquidity

July 5, 2019

I. Introduction

On March 21, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to revise the Exchange’s initial listing standards related to liquidity. The proposed rule change was published for comment in the Federal Register on April 9, 2019.³ On May 24, 2019, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁵ On June 12, 2019, the Exchange filed Amendment No. 1 to the proposed rule change. On June 13, 2019, the Exchange withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 85503 (April 3, 2019), 84 FR 14172 (April 9, 2019) (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 85933, 84 FR 25329 (May 31, 2019). The Commission designated July 8, 2019, as the date by which the Commission shall approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

change. On July 1, the Exchange withdrew Amendment No. 2 and filed Amendment No. 3 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.⁶ The Commission received one comment on the proposed rule change.⁷ The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 3, from interested persons and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

II. Exchange's Description of the Proposal, as Modified by Amendment No. 3

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is filing this amendment to SR-NASDAQ-2019-009,⁸ which was published for comment by the Commission on April 9, 2019, in order to (i) clarify Nasdaq's initial intent to impose a new requirement that at least 50% of a company's round lot holders must each hold unrestricted securities with a market value of at least \$2,500; (ii) clarify that the new listing rule requiring a minimum average daily trading volume for securities trading over-the-counter ("OTC") of at least 2,000 shares over the 30 day period prior to listing (with trading occurring on more than half of those 30 days) includes trading volume of the underlying security on the

⁶ Amendment No. 3 is available at: <https://www.sec.gov/comments/sr-nasdaq-2019-009/srmasdaq2019009-5751370-186792.pdf>.

⁷ See Letter from Carol Anne Huff, Kirkland & Ellis LLP, to Eduardo A. Aleman, Deputy Secretary, Commission, dated June 5, 2019 ("Kirkland Letter"). The commenter stated that it believes the Exchange's proposed exclusion of "restricted securities" from the calculation of round lot holders and public float will provide for a more accurate measure of liquidity, but advocated for a reasonable grace period for former special purpose acquisition vehicles ("SPACs"), after their business combination, to demonstrate compliance with round lot holder and public float requirements, irrespective of the structure of the business combination.

⁸ Securities Exchange Act Release No. 85503 (April 3, 2019), 84 FR 14172 (April 9, 2019) (the "Initial Proposal").

primary market with respect to an ADR; (iii) clarify that, in connection with a company applying to list on the Exchange through a direct listing that has not had sustained recent trading in a private placement market prior to listing, Nasdaq will determine that the company has met the market value of unrestricted publicly held shares requirement if the company satisfies the applicable requirement and provides an independent third-party valuation evidencing a market value of publicly held shares of at least \$250,000,000; and (iv) make minor technical changes. This amendment supersedes and replaces the Initial Proposal in its entirety.

Nasdaq proposes several amendments in this rule change to increase Nasdaq's requirements for initial listing and help assure adequate liquidity for listed securities. In addition to the changes described above, Nasdaq proposes to revise its initial listing criteria to exclude restricted securities from the Exchange's calculations of a company's publicly held shares, market value of publicly held shares and round lot holders ("Initial Liquidity Calculations"). To do so, Nasdaq proposes to add three new definitions to define "restricted securities", "unrestricted publicly held shares" and "unrestricted securities" and proposes to amend the definition of "round lot holder". Nasdaq is not proposing to change the requirements for continued listing purposes at this time, but believes that these heightened initial listing requirements will result in enhanced liquidity for the companies that satisfy them on an ongoing basis.⁹ Each amendment is described in more detail below.

⁹ Nasdaq staff may apply additional and more stringent criteria to a listed company that satisfies all of the continued listing requirements but where there are indications that there is insufficient liquidity in the security to support fair and orderly trading. In such circumstances, Nasdaq would typically first allow the company to provide and implement a plan to increase its liquidity in the near term.

I. Restricted Securities

Nasdaq is proposing to modify its initial listing standards to exclude securities subject to resale restrictions from its Initial Liquidity Calculations. Currently, securities subject to resale restrictions are included in the Exchange's Initial Liquidity Calculations, however, such securities are not freely transferrable or available for outside investors to purchase and therefore do not truly contribute to a security's liquidity upon listing. Because the current Initial Liquidity Calculations include restricted securities, a security with a substantial number of restricted securities could satisfy the Exchange's initial listing requirements related to liquidity and list on the Exchange, even though there could be few freely tradable shares, resulting in a security listing on the Exchange that is illiquid. Nasdaq is concerned because illiquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value. Less liquid securities also may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices.

To address this concern, Nasdaq is proposing to adopt a new definition of "restricted securities" at Nasdaq Rule 5005(a)(37), which includes any securities subject to resale restrictions for any reason, including restricted securities (1) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings;¹⁰ (2) acquired through an employee stock benefit plan or as compensation for professional services;¹¹ (3) acquired in reliance on Regulation S, which cannot

¹⁰ See, e.g., 17 CFR 230.144(a)(3)(i) and (ii).

¹¹ See, e.g., 17 CFR 230.701(g), which states that securities issued pursuant to certain compensatory benefit plans and contracts relating to compensation are considered restricted securities.

be resold within the United States;¹² (4) subject to a lockup agreement or a similar contractual restriction;¹³ or (5) considered “restricted securities” under Rule 144.¹⁴ Nasdaq is also proposing to adopt a new definition of “unrestricted securities” at Nasdaq Rule 5005(a)(46), which includes securities that are not restricted securities. In connection with these amendments, Nasdaq is proposing to renumber the remaining provisions of Rule 5005 to maintain an organized rule structure.

The Exchange believes that these proposed amendments to the listing rules will enhance its listing criteria and better protect investors by helping to ensure that securities listed on Nasdaq are liquid and have sufficient investor interest to support an exchange listing. Nasdaq notes that in developing their index methodologies the FTSE Russell and S&P indices take a similar approach. As disclosed by FTSE Russell, “All FTSE Russell equity index constituents are free float adjusted in accordance with the index rules, to reflect the actual availability of stock in the market for public investment.”¹⁵ FTSE Russell excludes shares held within employee share plans, shares subject to a “lock-in” clause, and shares subject to contractual restrictions.¹⁶ S&P

¹² See 17 CFR 230.144(a)(3)(v), which states that securities of domestic issuers acquired in a transaction in reliance on Regulation S are considered restricted securities.

¹³ Securities issued in such transactions would typically include a “restrictive” legend stating that the securities cannot be freely resold unless they are registered with the SEC or in a transaction exempt from the registration requirements, such as the exemption available under Rule 144.

¹⁴ See generally Securities and Exchange Commission Investor Publications, Rule 144: Selling Restricted and Control Securities (January 16, 2013), available at: <https://www.sec.gov/reportspubs/investorpublications/investorpubsrule144htm.html>. Nasdaq would consider a security as subject to a resale restriction until any restrictive legends are removed, even if a safe harbor is available that permits the sale of the security at an earlier date.

¹⁵ See FTSE Russell, “Free-Float”, available at: <https://www.ftse.com/products/indices/free-float>.

¹⁶ See FTSE Russell, “Free Float Restrictions v2.0”, May 2018, available at: https://www.ftse.com/products/downloads/Free_Float_Restrictions.pdf.

Dow Jones adjusts its indices to “reflect only those shares available to investors rather than all of a company’s outstanding shares.”¹⁷

A. Publicly Held Shares

Nasdaq is proposing to modify its initial listing requirements related to publicly held shares so that they are based only on unrestricted shares. A company is required to have a minimum number of publicly held shares in order to list its primary equity securities (including American Depositary Receipts or “ADRs”)¹⁸ on all tiers of the Exchange. A company is also required to have a minimum number of publicly held shares in order to list its preferred stock or secondary classes of common stock on Nasdaq’s Global and Capital Market tiers;¹⁹ subscription receipts on Nasdaq’s Capital Market tier; or paired share units on Nasdaq’s Global Select or Global Market tiers. Currently, Nasdaq Rule 5005(a)(35) defines “publicly held shares” as “shares not held directly or indirectly by an officer, director or any person who is the beneficial owner of more than 10 percent of the total shares outstanding. Determinations of beneficial ownership in calculating publicly held shares shall be made in accordance with Rule 13d-3 under the Act.” As discussed above, the current definition of publicly held shares does not exclude securities subject to resale restrictions, which may result in a security with limited liquidity

¹⁷ See S&P Dow Jones Indices, “Float Adjustment Methodology”, April 2018, available at: <https://us.spindices.com/documents/index-policies/methodology-sp-float-adjustment.pdf>.

¹⁸ Rule 5005(a)(33) defines “Primary Equity Security” as “a Company’s first class of Common Stock, Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests or American Depositary Receipts (ADR) or Shares (ADS).”

¹⁹ There are no separate listing requirements on the Nasdaq Global Select Market for classes of securities other than primary equity securities. Instead, pursuant to Rule 5320, if the primary equity security is listed on the Nasdaq Global Select Market, generally any other security of that same company that qualifies for listing on the Nasdaq Global Market is also included in the Nasdaq Global Select Market.

satisfying the Exchange’s initial listing requirements related to publicly held shares and qualifying to list on the Exchange.

Nasdaq proposes adding a new definition of “unrestricted publicly held shares” at Nasdaq Rule 5005(a)(45), which would be defined as publicly held shares excluding the newly defined “restricted securities.” Nasdaq proposes to revise references to “publicly held shares” to “unrestricted publicly held shares” in the following rules:

<u>Rule Number</u>	<u>Nasdaq Market Tier</u>	<u>Security Type</u>	<u>Current Required Number of Publicly Held Shares</u>
5315(e)(2)	Global Select	Primary Equity Security (including Paired Share Units and direct listings)	At least 1,250,000
5405(a)(2)	Global	Primary Equity Security (including Paired Share Units)	At least 1,100,000
5415(a)(1)	Global	Preferred Stock or Secondary Class of Common Stock	At least 200,000
5505(a)(2)	Capital	Primary Equity Security	At least 1,000,000
5510(a)(3)	Capital	Preferred Stock or Secondary Class of Common Stock	At least 200,000
5520(g)(3)	Capital	Subscription Receipts	At least 1,100,000

As a result, only securities that are freely transferrable will be included in the calculation of publicly held shares to determine whether a company satisfies the Exchange's initial listing criteria under these rules. Nasdaq believes that excluding restricted securities will better reflect the liquidity of, and investor interest in, a security and therefore will better protect investors.

In addition to the above, Nasdaq proposes revising references to "publicly held shares" to "unrestricted publicly held shares" in Rule 5310(d), which states that "in computing the number of publicly held shares for Global Select purposes, Nasdaq will not consider shares held by an officer, director or 10% or greater Shareholder²⁰ of the Company," and Rule 5226(b) which requires a paired share unit to satisfy the security-level requirements of Rule 5315 or 5405, including the number of publicly held shares. Nasdaq also proposes to revise Rule 5205(g) to reflect the change to "unrestricted publicly held shares."²¹ Nasdaq also proposes revising Rule 5215(b) to state that in considering whether an ADR satisfies the initial listing requirements, Nasdaq will consider the unrestricted publicly held shares of the underlying security, and that in determining whether shares of the underlying security are restricted for this purpose, Nasdaq will only consider restrictions that prohibit the resale or trading of the underlying security on the foreign issuer's home country market, as discussed below.

B. Market Value of Publicly Held Shares

Nasdaq is proposing to modify its initial listing requirements related to market value of publicly held shares so that they are based only on unrestricted shares. A company is required to have a minimum market value of publicly held shares in order to list its primary equity securities

²⁰ Rule 5005(a)(40) defines "Shareholder" as "a record or beneficial owner of a security listed or applying to list. For purposes of the Rule 5000 Series, the term "Shareholder" includes, for example, a limited partner, the owner of a depository receipt, or unit."

²¹ Rule 5205(g) currently states that "The computation of Publicly Held Shares and Market Value of Publicly Held Shares shall be as of the date of application of the Company."

(including ADRs) on all tiers of the Exchange. A company is also required to have a minimum market value of publicly held shares in order to list its preferred stock or secondary classes of common stock on Nasdaq's Global and Capital Market tiers; subscription receipts on Nasdaq's Capital Market tier; or paired share units on Nasdaq's Global Select or Global Market tiers. The calculation of "market value of publicly held shares" does not exclude stock subject to resale restrictions. As discussed above, restricted securities may not contribute to liquidity and therefore the current calculation of market value of publicly held shares may result in a security with limited true liquidity satisfying the listing requirements related to the market value of publicly held shares and qualifying to list.

Nasdaq proposes revising its initial listing requirements so that they are based on the market value of unrestricted publicly held shares, and therefore exclude restricted securities, in the following rules:

<u>Rule Number</u>	<u>Nasdaq Market Tier</u>	<u>Security Type</u>	<u>Current Required Market Value</u>
5315(c)(1)-(3)	Global Select	Primary Equity Security of a Closed End Management Investment Company Listed with a Fund Family	(i) a total market value of the fund family of at least \$220 million; (ii) an average market value of all funds in the fund family of at least \$50 million; and (iii) a market of each fund in the fund family of at least \$35 million

5315(f)(2)(A)-(D)	Global Select	Primary Equity Securities (including direct listings and Paired Share Units)	(i) at least \$110 million; (ii) at least \$100 million, if the company has stockholders' equity of at least \$110 million; (iii) at least \$45 million in the case of an initial public offering or spin-off; or (iv) at least \$70 million in the case of a closed end management investment company registered under the Investment Company Act of 1940
5405(b)(1)(C)	Global	Primary Equity Securities (including Paired Share Units)	At least \$8 million (Income Standard)
5405(b)(2)(C)	Global	Primary Equity Securities (including Paired Share Units)	At least \$18 million (Equity Standard)
5405(b)(3)(B)	Global	Primary Equity Securities (including Paired Share Units)	At least \$20 million (Market Value Standard)
5405(b)(4)(B)	Global	Primary Equity	At least \$20 million (Total

		Securities (including Paired Share Units)	Assets/Total Revenue Standard)
5415(a)(2)	Global	Preferred Stock or Secondary Classes of Common Stock	At least \$4 million
5505(b)(1)(B)	Capital	Primary Equity Securities	At least \$15 million (Equity Standard)
5505(b)(2)(C)	Capital	Primary Equity Securities	At least \$15 million (Market Value Standard)
5505(b)(3)(C)	Capital	Primary Equity Securities	At least \$5 million (Net Income Standard)
5510(a)(4)	Capital	Preferred Stock or Secondary Classes of Common Stock	At least \$3.5 million
5520(g)(2)	Capital	Subscription Receipts	At least \$100 million

As discussed above, Nasdaq believes that excluding restricted securities from the calculation of market value of publicly held shares will better reflect the liquidity of, and investor interest in, a security and therefore will better protect investors. Specifically, market value of publicly held shares is an indication of the size and investor interest in a company. When

restricted securities are included in that calculation, a company could technically meet Nasdaq's requirement without actually having sufficient investor interest, resulting in a security that is illiquid. Less liquid securities may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices and a company's market value of publicly held shares.

In addition to the above, Nasdaq proposes revising references to "market value of publicly held shares" to "market value of unrestricted publicly held shares" in Rule 5226(b), which requires a paired share unit listing on Nasdaq's Global Select or Global Market tiers to satisfy the security-level requirements of Rule 5315 or 5405, including the market value of publicly held shares.²² Nasdaq also proposes to revise Rule 5205(g) to reflect that the computation for market value of unrestricted publicly held shares shall be as of the date of the application of the company for all market tiers.²³

Nasdaq also proposes revising references to "market value of publicly held shares" to "market value of unrestricted publicly held shares" in the preamble and subsections (a) and (b) of IM-5315-1, which currently set forth the Exchange's method of determining bid price, market capitalization and market value of publicly held shares for a company applying to list on the Exchange through a direct listing.²⁴ Currently, IM-5315-1(a) states that "[i]f the Company's

²² Nasdaq is also proposing to capitalize defined terms in Rule 5226(b) that were previously not capitalized for consistency and in order to maintain an organized rule book structure.

²³ Rule 5205(g) currently states that "The computation of Publicly Held Shares and Market Value of Publicly Held Shares shall be as of the date of application of the Company."

²⁴ A "direct listing" is the listing of a company that has sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing on Nasdaq.

security has had sustained recent trading in a Private Placement Market,²⁵ Nasdaq will attribute a price, market capitalization, and Market Value of Publicly Held Shares to the Company equal to the lesser of (i) the value calculable based on an independent third-party valuation (a “Valuation”) and (ii) the value calculable based on the most recent trading price in a Private Placement Market.” As a result of the proposed change, Nasdaq will attribute a market value of unrestricted publicly held shares to the company equal to the lesser of (i) the value calculable based on a Valuation and (ii) the value calculable based on the most recent trading price in a Private Placement Market.

Currently, IM-5315-1(b) states that “[f]or a security that has not had sustained recent trading in a Private Placement Market prior to listing, Nasdaq will determine that such Company has met the Market Value of Publicly Held Shares requirement if the Company provides a Valuation evidencing a Market Value of Publicly Held Shares of at least \$250,000,000. Nasdaq will also determine the bid price and market capitalization based on such Valuation.” Nasdaq is proposing to revise this rule to clarify that Nasdaq will determine that such company has met the market value of unrestricted publicly held shares requirement if the company satisfies the applicable market value of unrestricted publicly held shares requirement and provides a Valuation evidencing a market value of publicly held shares of at least \$250,000,000. As a result, a company applying to list on the Exchange through a direct listing will be subject to all proposed changes in Rule 5315 to exclude restricted securities from the Exchange’s Initial Liquidity Calculations, but restricted securities will not be excluded for purposes of determining whether the Valuation evidences a market value of publicly held shares of at least \$250,000,000.

²⁵ Rule 5005(a)(34) defines “Private Placement Market” as “a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer.”

Nasdaq believes that it is appropriate to include restricted securities in this calculation because this requirement is meant to measure the size of the entity, and not necessarily measure its liquidity, and restricted securities should be included in the measure of the entity size. Furthermore, as discussed above, a direct listing would also need to comply with the initial listing standards set forth in Rule 5315 including the revised Initial Liquidity Calculations.

Lastly, Nasdaq proposes revising Rule 5215(b) to state that in considering whether an ADR satisfies the initial listing requirements, Nasdaq will consider the market value of unrestricted publicly held shares of the underlying security, and that in determining whether shares of the underlying security are restricted for this purpose, Nasdaq will only consider restrictions that prohibit the resale or trading of the underlying security on the foreign issuer's home country market, as discussed below.

C. Round Lot Holders

Nasdaq is proposing to revise the listing criteria related to the minimum number of round lot holders for companies seeking to initially list primary equity securities (including ADRs), preferred stock, secondary classes of common stock and warrants on the Exchange so that they are based on holders of unrestricted securities. Currently, Nasdaq defines a "round lot holder" as "a holder of a Normal Unit of Trading" and notes that "beneficial holders will be considered in addition to holders of record."²⁶ Nasdaq defines a "round lot or normal unit of trading" as "100 shares of a security unless, with respect to a particular security, Nasdaq determines that a normal unit of trading shall constitute other than 100 shares."²⁷ A company is required to have a minimum number of round lot holders in order to list securities on the Exchange. While this is

²⁶ Currently, this is Nasdaq Rule 5005(a)(39) but will be converted to Nasdaq Rule 5005(a)(40).

²⁷ Currently, this is Nasdaq Rule 5005(a)(38) but will be converted to Nasdaq Rule 5005(a)(39).

another measure of liquidity designed to help assure that there will be sufficient investor interest and trading to support price discovery once a security is listed, as noted above, under the existing rule, all the shares held by a holder could be restricted securities that do not contribute to liquidity.

To address this concern, Nasdaq is proposing to revise the definition of “round lot holder” to mean a holder of a normal unit of trading of unrestricted securities. This change will impact the following rules:

<u>Rule Number</u>	<u>Nasdaq Market Tier</u>	<u>Security Type</u>	<u>Current Required Number of Round Lot Holders</u>
5315(f)(1)(C)	Global Select	Primary Equity Security (including Paired Share Units and direct listings)	At least 450 round lot holders or a minimum number of total holders
5405(a)(3)	Global	Primary Equity Security (including Paired Share Units)	At least 400
5410(d)	Global	Warrants	At least 400 unless such warrants are listed in connection with an initial firm

			commitment underwritten public offering
5415(a)(4)	Global	Preferred Stock or Secondary Class of Common Stock	At least 100
5505(a)(3)	Capital	Primary Equity Securities	At least 300
5510(a)(2)	Capital	Preferred Stock or Secondary Class of Common Stock	At least 100
5515(a)(4)	Capital	Warrants	At least 400 unless such warrants are listed in connection with an initial firm commitment underwritten public offering
5520(g)(4)	Capital	Subscription Receipts	At least 400

As a result of these changes, a holder of only restricted securities would not be considered in the round lot holder count. Nasdaq believes that these amendments will help ensure adequate distribution and investor interest in a listed security, which will result in a more liquid trading market and which will better protect investors. Illiquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result

in trading at a price that may not reflect their true market value. Less liquid securities also may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices.

In addition to the above, Nasdaq proposes revising references to “holder” to “round lot holders” in Rule 5226(b), which requires a paired share unit applying to list on the Nasdaq Global Select or Global Market tiers to meet the security-level requirements of Rule 5315 or 5405, which includes the number of round lot holders. Nasdaq also proposes revising Rule 5215(b) to state that in considering whether an ADR satisfies this proposed change that determination of round lot holders be based on holders of unrestricted securities, Nasdaq will consider whether round lot holders of the underlying security hold unrestricted shares of that underlying security, and that in determining whether shares of the underlying security are restricted for this purpose, Nasdaq will only consider restrictions that prohibit the resale or trading of the underlying security on the foreign issuer’s home country market, as discussed below. Nasdaq will also apply the new minimum value requirement for round lot holders to the underlying security, as proposed below, in addition to the minimum number of round lot holders required by the applicable tier that the company is seeking to list on.

D. American Depositary Receipts

Lastly, Nasdaq proposes to revise Rule 5215(b) to specify how these new requirements apply to ADRs. Specifically, as under the current rule for calculating publicly held shares, market value of publicly held shares, and round lot holders, Nasdaq will continue to consider the underlying security in calculating the unrestricted publicly held shares and market value of unrestricted publicly held shares and in calculating the new definition of a round lot holder. In determining whether shares of the underlying security are “restricted” for these purposes, only restrictions that prohibit the resale or trading of the underlying security on the foreign issuer’s

home country market would result in those securities being considered restricted for purposes of the proposed rules. Thus, if the restrictions provided as examples in the new definition of “restricted securities” would restrict the underlying security from being freely sold or tradable on its home country market, Nasdaq would also consider such restrictions when calculating “unrestricted publicly held shares.” Nasdaq believes that this is appropriate because the purpose of the Initial Liquidity Calculations, and the proposed changes described herein, is to establish investor interest in the foreign issuer and ensure adequate liquidity and distribution of the foreign issuer’s underlying security on its home country market, which is held by the depositary bank and represented by the ADR. For this reason, existing Rule 5215(b) currently looks to the underlying security when calculating publicly held shares, market value of publicly held shares, round lot and public holders and it is similarly appropriate to consider whether or not the underlying security is freely tradable in its home country market when determining unrestricted publicly held shares, market value of unrestricted publicly held shares, and round lot holders. Excluding securities that are only restricted from resale or trading in the United States would be not be an appropriate measure of investor interest in or liquidity of the underlying security because the underlying security will not be listed or trading in the U.S.²⁸ Moreover, applying the new definition of restricted securities to securities trading on a foreign market, if the securities trading on the home country market are not already restricted by the examples set forth in the new definition of restricted securities, would unduly impose the requirements of a U.S. national securities exchange on those securities, which will not be listed in the U.S.

²⁸ For example, the underlying security may not be eligible to trade in the U.S., but that would not cause all shares of that security to be considered restricted if they are freely tradable on the foreign issuer’s home country market.

In addition, Nasdaq proposes to revise the reference to Form S-12 in Rule 5215(b) to Form F-6 in order to refer to the current form required by the Commission to register ADRs under the Securities Act of 1933.²⁹

II. Minimum Value Requirement for Holders

Nasdaq is also proposing to revise the listing rules related to round lot holders listed in Part I.C, above, except for those applicable to listing warrants, to impose a new requirement related to the minimum investment amount held by shareholders. Under the current definition of a round lot, a shareholder may be considered a round lot holder by holding exactly 100 shares, which would be worth only \$400 in the case of a stock that is trading at the minimum bid price of \$4 per share.³⁰ Nasdaq believes that this minimal investment is not an appropriate representation of investor interest to support a listing on a national securities exchange. To address this concern, Nasdaq proposes to require that for initial listing at least 50% of a company's required round lot holders must each hold unrestricted securities with a market value of at least \$2,500. Nasdaq does not propose to impose this requirement on initial listings of warrants, however, because warrants do not have a minimum price requirement and may have little value at the time of issuance.³¹ Nonetheless, warrants are often issued as part of a unit and the common stock component of the unit would be required to satisfy the minimum value requirement. Further, in all cases, the security underlying a warrant must be listed on Nasdaq or

²⁹ Securities Exchange Act Release No. 34-19612 (March 18, 1983), 48 FR 12346 (March 24, 1983).

³⁰ On the Nasdaq Capital Market, certain companies are also eligible to list at \$2 or \$3 and the minimum value held by such a holder would be only \$200 or \$300, respectively. See Listing Rule 5505(a)(1)(B).

³¹ Warrants issued as part of a unit must satisfy the initial listing requirements for warrants applying to list on the applicable market tier in accordance with Rule 5225.

be a covered security, as defined in Section 18(b) of the Securities Act of 1933.³² Nasdaq has not observed problems with the trading of warrants.

Nasdaq believes that adopting this amendment will help ensure that a majority of the required minimum number of shareholders hold a meaningful value of unrestricted securities and that a company has sufficient investor interest to support an exchange listing.

III. Average Daily Trading Volume

Nasdaq is proposing to adopt an additional initial listing criteria for primary equity securities (including ADRs), preferred stock, secondary classes of common stock and paired share units, previously trading OTC in the United States. The new rules will require such securities to have a minimum average daily trading volume over the 30 trading days prior to listing of at least 2,000 shares a day (including trading volume of the underlying security on the primary market with respect to an ADR), with trading occurring on more than half of those 30 days (i.e., at least 16 days). Nasdaq believes that this will help ensure a liquid trading market, promote price discovery and establish an appropriate market price for the listed securities.

Nasdaq is proposing to implement this new requirement by making additional amendments to Rule 5315(e) to add a new Rule 5315(e)(4); Rule 5405(a) to add a new Rule 5405(a)(4); Rule 5415(a) to add a new Rule 5415(a)(6); Rule 5505(a) to add a new Rule 5505(a)(5); and Rule 5510(a) to add a new Rule 5510(a)(6).³³ In connection with the foregoing amendments, Nasdaq is proposing to revise the cross-references in Rules 5415(a) and 5510(a) to

³² 15 U.S.C. 77r(b).

³³ Rule 5005(a)(33) defines “Primary Equity Security” as “a Company’s first class of Common Stock, Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests or American Depositary Receipts (ADR) or Shares (ADS).” The Exchange considers ADRs to be primary equity securities and therefore the Exchange’s initial listing requirements for preferred stock and secondary classes of common stock (including Rules 5415(a)(6) and 5510(a)(6)) do not apply to ADRs.

add new Rules 5415(a)(6) and 5510(a)(6), respectively, and renumber the remaining provisions of Rule 5505(a) to maintain an organized rule structure. In addition, Nasdaq is proposing to revise Rule 5226(b) to clarify that the average daily trading volume requirement would apply to companies seeking to list paired share units on the Exchange.

As noted above, the average daily trading volume requirement will also apply to ADRs. Currently, Nasdaq considers the underlying security of an ADR when determining annual income from continuing operations, publicly held shares, market value of publicly held shares, stockholders' equity, round lot or public holders, operating history, market value of listed securities, total assets and total revenue. Nasdaq is proposing amend Rule 5215(b) to state that the average daily trading volume of the underlying security of an ADR will be considered in the Exchange's computations for this new requirement. Nasdaq would consider trading in the security underlying an ADR on the foreign issuer's primary market together with the average daily trading volume of the ADR in the U.S. OTC market in determining whether a foreign issuer seeking to list ADRs satisfies the requirement. Nasdaq believes that this will help demonstrate adequate investor interest in the foreign issuer and the underlying security, which will help promote price discovery and establish an appropriate market price for the ADR.³⁴

Nasdaq is proposing to adopt an exemption from the proposed average daily trading volume requirement for securities (including ADRs) listed in connection with a firm commitment underwritten public offering of at least \$4 million. Nasdaq believes that the sale of securities in an underwritten public offering provides an additional basis for believing that a liquid trading market will likely develop for such securities after listing, since the offering

³⁴ ADR shares trade separately from the underlying securities, and often have slightly different values. However, ADR share values usually track closely with the value of the underlying security.

process is designed to promote appropriate price discovery. Moreover, the underwriters in a firm commitment underwritten public offering will also generally make a market in the securities for a period of time after the offering, assisting in the creation of a liquid trading market. For these reasons, in part, Nasdaq's rules already provide similar exemptions in other situations involving a firm commitment underwritten offering.³⁵ Nasdaq believes that the process of a firm commitment underwritten offering similarly supports an exception from the proposed average daily trading volume requirement. Nasdaq also notes that the same volume requirement is being proposed for each of Nasdaq's Global Select, Global and Capital Market tiers, and that it is therefore appropriate to base the exemption on the same minimum \$4 million offering in each case, notwithstanding the different listing criteria generally applicable to companies seeking to list on each tier. Finally, Nasdaq believes that the proposed minimum \$4 million firm commitment underwritten public offering is large enough to represent a fundamental change in how the company will trade following the offering, such that the prior trading volume will not be representative of the volume following the offering. In that regard, Nasdaq notes that the minimum \$4 million offering would be sufficient to satisfy Nasdaq's one million share public float requirement at the minimum \$4 price for listing on Capital Market. This exemption will be included in new Rules 5315(e)(4), 5405(a)(4), 5415(a)(6), 5505(a)(5), and 5510(a)(6).

³⁵ For example, Rules 5410(d) and 5515(a)(4) provide an exemption from the minimum round lot holder requirement for warrants listed in connection with an initial firm commitment underwritten public offering. Rule 5110(c)(3) provides an exemption from the requirements applicable to a company that was formed by a reverse merger if the company completes a firm commitment underwritten public offering where the gross proceeds to the company will be at least \$40 million.

Nasdaq proposes that this change be effective 30 days after approval by the SEC. Nasdaq notes that it had originally solicited comment on a similar proposal in October 2018,³⁶ which provided companies with notice that Nasdaq was considering adopting the proposed changes to the Exchange's Initial Liquidity Calculations. The proposed 30-day delay from approval until operation of the proposed rule will allow companies a short opportunity to complete an offering or transaction before the new rules become effective if they have substantially completed the Nasdaq review process or are near completion of an offering or transaction, and have relied on the existing rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁸ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, as set forth below. Further, the Exchange believes that this proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission has previously opined on the importance of meaningful listing standards for the protection of investors and the public interest.³⁹ In particular, the Commission stated:

³⁶ See https://listingcenter.nasdaq.com/assets/Liquidity_Measures_Comment_Solicitation.pdf.

³⁷ 15 U.S.C. 78f(b).

³⁸ 15 U.S.C. 78f(b)(5).

³⁹ Securities Exchange Act Release No. 65708 (November 8, 2011), 76 FR 70799 (November 15, 2011) (approving SR-Nasdaq-2011-073 adopting additional listing

Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.⁴⁰

As described below, Nasdaq believes that the proposed rule changes in this filing are consistent with the investor protection requirement of Section 6(b)(5) of the Act because they each will enable Nasdaq to help ensure that issuers seeking to list on the Exchange have sufficient public float, investor base, and trading interest likely to generate depth and liquidity. Illiquid securities may trade infrequently, in a more volatile manner and with a wider bid-ask spread, all of which may result in trading at a price that may not reflect their true market value. Less liquid securities also may be more susceptible to price manipulation, as a relatively small amount of trading activity can have an inordinate effect on market prices.

I. Restricted Securities

The proposed amendments will adopt new definitions of “restricted securities” and “unrestricted securities” in order to exclude securities that are subject to resale restrictions from the Exchange’s Initial Liquidity Calculations. The Exchange believes that these amendments will bolster the Exchange’s quantitative shareholder requirements, and as a result, better reflect and safeguard the liquidity of a security. The Commission has previously noted the importance of

requirements for companies applying to list after consummation of a “reverse merger” with a shell company.)

⁴⁰ Id. at 70802.

adequate liquidity in a security and the consequences for investors when a security is thinly traded. In In the Matter of the Application of Rocky Mountain Power Company, the Commission observed:

We note that the requirement concerning the number of shareholders is not only an important listing criterion but is also a standard used in conjunction with other standards to ensure that a stock has the investor following and liquid market necessary for trading. In response to the Panel's questions, the Company's president acknowledged that the market for Rocky Mountain's shares would be initially "very, very small," and that fewer than 20,000 of the Company's over 700,000 shares outstanding were freely tradeable.

While Rocky Mountain, as a technical matter, complied with the shareholder requirement, it failed to demonstrate an adequate market for its shares, which is at the heart of this and other [Nasdaq] inclusion requirements.⁴¹

Nasdaq believes that adopting the new definitions of restricted securities and unrestricted securities will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest because securities subject to resale restrictions are not freely transferrable and therefore excluding restricted securities from the Exchange's Initial Liquidity Calculations will help ensure that Nasdaq lists only companies with liquid securities and sufficient investor interest to support an exchange listing meeting the Exchange's listing criteria, which will better protect investors.

⁴¹ See Rocky Mountain Power Co., Securities Exchange Act Release No. 40648, 1998 SEC LEXIS 2422; 53 S.E.C. 979 (November 9, 1998).

A. Publicly Held Shares

The proposed amendments will adopt a new definition of “unrestricted publicly held shares” which excludes restricted securities and revise Nasdaq’s initial listing standards to conform the minimum number of publicly held shares to the new definition. Nasdaq believes that these changes will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest because it will help ensure that a security to be listed has adequate liquidity and is thus suitable for listing and trading on an exchange, which will reduce trading volatility and price manipulation, thereby protecting investors and the public interest.

B. Market Value of Publicly Held Shares

The proposed amendments will revise the definition of “market value” to exclude restricted securities from the calculation of “market value of unrestricted publicly held shares” and revise Nasdaq’s initial listing standards to conform the minimum market value to the new definition. Nasdaq believes that these changes will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest because it will help ensure that a security to be listed has adequate liquidity and investor interest and is thus suitable for listing and trading on an exchange, which will reduce trading volatility and price manipulation, thereby protecting investors and the public interest.

C. Round Lot Holders

The proposed amendments will exclude restricted securities from the calculation of the number of round lot holders required to meet the Exchange’s initial listing criteria by revising the definition of “round lot holder” to exclude restricted securities. Nasdaq believes that this amendment will promote just and equitable principles of trade, remove impediments to and

perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest by helping ensure adequate distribution, shareholder interest and a liquid trading market of a security.

D. American Depositary Receipts

The proposed amendments will modify Nasdaq's rules to state that when considering the security underlying an ADR, Nasdaq will only consider restrictions that prohibit the resale or trading of the underlying security on the foreign issuer's home country market. However, any restrictions, including those provided as examples in the new definition of "restricted securities," which would restrict the underlying security from being freely sold or tradable on its home country market would be considered by Nasdaq when calculating "unrestricted publicly held shares." Nasdaq believes that this is appropriate because the purpose of the Initial Liquidity Calculations, and the proposed changes described herein, is to establish investor interest in the foreign issuer and ensure adequate liquidity and distribution of the foreign issuer's underlying security on its home country market, which is held by the depositary bank and represented by the ADR. For this reason, existing Rule 5215(b) currently looks to the underlying security when calculating publicly held shares, market value of publicly held shares, round lot and public holders and it is similarly appropriate to consider whether or not the underlying security is freely tradable in its home country market when determining unrestricted publicly held shares, market value of unrestricted publicly held shares, and round lot holders. Excluding securities that are only restricted from resale or trading in the United States would be not be an appropriate measure of investor interest in or liquidity of the underlying security because the underlying security will not be listed or trading in the U.S. Moreover, applying the new definition of restricted securities to securities trading on a foreign market, if the securities trading on the home country market are not already restricted by the examples set forth in the new definition of

restricted securities, would unduly impose the requirements of a U.S. national securities exchange on those securities, which will not be listed in the U.S. For the foregoing reasons, Nasdaq believes that this provision will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

Further, the Exchange believes that this provision is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. While the Exchange's Initial Liquidity Calculations for ADRs would be calculated differently than other securities, these differences are not unfair because they recognize the unique structure of ADRs, as already reflected in the existing treatment of ADRs under Nasdaq's rules, where Nasdaq looks to the underlying security in order to ensure sufficient investor interest and adequate liquidity and distribution of the foreign issuer's underlying security, which is represented by the ADR.

II. Minimum Value Requirement for Holders

The Exchange proposes adopting a new requirement that at least 50% of a company's round lot holders hold unrestricted securities with a market value of at least \$2,500. Nasdaq believes that the proposed \$2,500 minimum value is reasonable because the Exchange has noticed problems with companies listing where a large number of round lot holders hold exactly 100 shares, which would be worth only \$400 in the case of a stock that is trading at the minimum bid price of \$4 per share, or as little as \$200 in the case of a stock listing under the alternative price criteria. Nasdaq notes that the proposed \$2,500 threshold is from 6.5 times to 12.5 times larger than the existing minimum investment, and Nasdaq believes that this increased amount is a more appropriate representation of genuine investor interest in the company and will make it more difficult to circumvent the requirement through share transfers for no value. As such, Nasdaq believes that these amendments will promote just and equitable principles of trade,

remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest by requiring more than half of the required number of shareholders hold a more significant investment in the company, and that the company will therefore have an adequate distribution, shareholder interest and a liquid trading market of a security.

Nasdaq does not propose to impose this requirement on the initial listings of warrants because warrants do not have a minimum price requirement and may have little value at the time of issuance. The value of warrants is derived from the value of the underlying security, which must be listed on Nasdaq or be a covered security and Nasdaq has not observed problems with the trading of warrants. As such, Nasdaq believes that it is not unfairly discriminatory to treat warrants differently under this proposal and that excluding warrants avoids imposing an unnecessary impediment to the mechanism of a free and open market.

III. Average Daily Trading Volume

The proposed amendments will generally impose a minimum average daily trading volume over the 30 trading days prior to listing of at least 2,000 shares a day (including trading volume of the underlying security on the primary market with respect to an ADR), with trading occurring on more than half of those 30 days (i.e., at least 16 days). This will apply to primary equity securities, preferred stock, secondary classes of common stock and ADRs previously trading OTC in the United States that apply to list on the Exchange. Nasdaq believes this proposed change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest by helping to assure adequate liquidity and price discovery of a security. The Exchange believes that companies trading at least 2,000 shares a day over a period of 30 trading days prior to listing, with trading occurring on more than half of those 30 days, can

demonstrate sufficient investor interest to support sustained trading activity when listed on a national stock exchange.

The proposed rule change will provide a limited exemption to this requirement for securities (including ADRs) listed in connection with a firm commitment underwritten public offering of at least \$4 million. Nasdaq believes that it is consistent with the protection of investors and the public interest, and not unfairly discriminatory, to exempt from the proposed average daily trading volume requirement securities satisfying this exemption because underwriters facilitate appropriate price discovery and will generally make a market in the securities for a period of time after the offering, assisting in the creation of a liquid trading market. Further, Nasdaq believes that this exemption is consistent with the protection of investors and the public interest, and not unfairly discriminatory, because the proposed minimum \$4 million firm commitment underwritten public offering is large enough to represent a fundamental change in how the company will trade following the offering, such that the prior trading volume will not be representative of the volume following the offering.

Under the proposed rule, Nasdaq would consider trading in the security underlying an ADR on the foreign issuer's primary market together with the average daily trading volume of the ADR in the U.S. OTC market in determining whether a foreign issuer seeking to list ADRs satisfies the requirement. Nasdaq believes that this distinction is not unfairly discriminatory because the trading volume in the underlying security on the foreign issuer's primary market represents interest in the foreign issuer's security and that interest is reasonably likely to be indicative of investor interest in the ADR.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. All domestic

and foreign companies seeking to list primary equity securities, preferred stock, secondary classes of common stock or subscription receipts would be affected in the same manner by these changes, across all market tiers. As discussed above, companies listing ADRs would be treated differently in some respects than companies listing other primary equity securities, but those differences reflect the unique characteristics of ADRs and does not impose an unnecessary burden on competition.

To the extent that companies prefer listing on a market with these proposed listing standards, other exchanges can choose to adopt similar enhancements to their requirements. As such, these changes are neither intended to, nor expected to, impose any burden on competition between exchanges.

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

On October 5, 2018, Nasdaq launched a formal comment solicitation on proposals to exclude restricted securities from the Exchange's Initial Liquidity Calculations and adopt a new initial listing criteria related to prior trading volume for securities that are currently trading OTC ("2018 Solicitation"), a copy of which is attached hereto as Exhibit 2.⁴² No comments were received in response to the comment solicitation.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with the requirements of the Act and the rules and regulations

⁴² The Commission notes that Exhibit 2 is attached to the Exchange's Amendment No. 3 and not to this notice and order.

thereunder applicable to a national securities exchange.⁴³ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with Section 6(b)(5) of the Act,⁴⁴ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of meaningful listing standards for an exchange is of critical importance to financial markets and the investing public. Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed, and to provide listed status only to those that are bona fide companies with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market and assuring compliance with its listing standards.⁴⁵

⁴³ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴⁴ 15 U.S.C. 78f(b)(5).

⁴⁵ See, e.g., Securities Exchange Act Release Nos. 65708 (November 8, 2011), 76 FR 70799 (November 15, 2011) (SR-Nasdaq-2011-073) (order approving a proposal to adopt additional listing requirements for companies applying to list after consummation of a "reverse merger" with a shell company); 63607 (December 23, 2010), 75 FR 82420 (December 30, 2010) (SR-NASDAQ-2010-137) (order approving a proposal to amend initial listing standards to list securities of special purpose acquisition companies); and 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR-NYSE-2008-17) (order approving a proposal to adopt new initial and continued listing standards to list securities of special purpose acquisition companies).

Nasdaq has proposed to make more rigorous certain of its initial listing standards in order to help assure an adequate level of liquidity exists for securities that are listing on the Exchange for the first time. The Exchange has proposed to exclude securities subject to resale restrictions from the Exchange's Initial Liquidity Calculations. The Commission believes the proposed changes to the Exchange's calculation of a company's publicly held shares, market value of publicly held shares, and round lot holders for purposes of qualifying the company's securities for initial listing, including the proposed new definitions of "Restricted Securities," "Unrestricted Publicly Held Shares," and "Unrestricted Securities," and the proposed amended definition of "Round Lot Holder," are consistent with the requirements of the Act, including the protection of investors, the prevention of fraudulent and manipulative acts and practices, and the promotion of fair and orderly markets.

As noted by the Exchange, Exchange rules currently only exclude from the publicly held share requirement shares held, directly or indirectly, by officers, directors or any person who is the beneficial owner of more than 10 percent of the total shares outstanding.⁴⁶ Nasdaq's publicly held share and market value of publicly held share requirements, as well as its round lot holder requirement, however, currently do not exclude restricted shares that would not be freely tradeable at the time of listing. As a result, under the Exchange's current initial listing standards,⁴⁷ a security that may not have a substantial number of unrestricted, freely transferable securities outstanding and may be considered illiquid may nevertheless satisfy the Exchange's current initial listing requirements related to liquidity and qualify to list on the Exchange.

⁴⁶ See definition of "Publicly Held Shares" in Nasdaq Rule 5005(a)(35).

⁴⁷ See supra Section II.A.1.I (Restricted Securities).

Nasdaq notes that an illiquid stock may trade infrequently and may be subject to volatility as well as potentially more susceptible to manipulation.⁴⁸

The proposed amendments should allow the Exchange to more accurately determine whether a security has adequate distribution and liquidity and is thus suitable for listing and trading on the Exchange. The Commission believes that these amendments should help to ensure that the Exchange lists only securities with a sufficient market, with adequate depth and liquidity, and with sufficient investor interest to support an exchange listing.

With respect to a company applying to list on the Exchange through a direct listing, the Exchange amended its proposal to specify that for a company that has not had sustained recent trading in a private placement market prior to listing, Nasdaq will determine that the company has met the Market Value of Unrestricted Publicly Held Shares requirement if the Company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement set forth in Nasdaq Rule 5315 and provides a Valuation evidencing a Market Value of Publicly Held Shares of at least \$250,000,000.⁴⁹ The Commission believes that this change is reasonable given that a company applying to list on the Exchange through a direct listing that is subject to the \$250,000,000 valuation requirement would also be required to comply with the initial listing standards set forth in Nasdaq Rule 5315, including the revised Initial Liquidity Calculations.

⁴⁸ See id.

⁴⁹ See supra Section II.A.1.I.B (Market Value of Publicly Held Shares). The Exchange originally proposed that it would determine that such a company had met the Market Value of Unrestricted Publicly Held Shares requirement if the company provided a valuation evidencing a Market Value of Unrestricted Publicly Held Shares of at least \$250,000,000. See Notice, supra note 3, 84 FR at 14174. The Exchange states that the \$250,000,000 valuation requirement is designed to be a measure of the size of the company rather than a measure of its liquidity. See supra Section II.A.1.I.B (Market Value of Publicly Held Shares).

With respect to ADRs, the Commission believes that it is reasonable and consistent with the Act for the Exchange to consider restrictions that prohibit the resale or trading of the foreign security underlying the ADR on the foreign issuer's home country market (rather than on the U.S. markets) when determining whether a security is restricted for purposes of the Initial Liquidity Calculations. The Exchange states that for ADRs, the purpose of the Initial Liquidity Calculations is to establish investor interest in the foreign issuer and ensure adequate liquidity and distribution of the foreign issuer's underlying security on its home country market, which is held by the depositary bank and represented by the ADR; therefore, excluding securities that are only restricted from resale or trading in the United States would not be an appropriate measure of investor interest in or liquidity of the underlying security because the underlying security will not be listed or trading in the U.S.⁵⁰ The Commission notes that pursuant to current Nasdaq Rule 5215(b), the Exchange looks to an ADR's underlying foreign security for purposes of the Initial Liquidity Calculations, and that the proposal should help to ensure adequate liquidity and distribution and sufficient investor interest in the company's underlying security on its home country market to support the listing of an ADR in the U.S.

The Commission received one comment letter that generally supported the proposed changes but requested that SPACs be given additional time to comply with the new requirements after a business combination.⁵¹ The commenter notes that the Exchange currently provides a 30-day grace period for a former SPAC to demonstrate compliance with the round lot requirement, if the business combination is structured in a certain way, and states that a grace period will become more important if the new standards are approved and should be allowed regardless of the transaction structure. Nasdaq has not proposed a grace period for SPACs so the comment is

⁵⁰ See supra note 28 and accompanying text.

⁵¹ See Kirkland Letter, supra note 7.

beyond the scope of this proposal. The Commission notes, however, that it previously stated, in reviewing a Nasdaq proposal providing for a grace period for SPACs to comply with the holder and other requirements after a business combination, that initial listing standards, absent an explicit exception, apply upon initial listing.⁵² The Commission also recently disapproved a NYSE proposal requesting additional time for a post-business combination SPAC to comply with listing standards.⁵³ As noted above, the Commission believes that the proposed standards should help to ensure upon initial listing (including for SPACs and former SPACs after the business combination) that there is adequate depth and liquidity and investor interest to support exchange listing and trading, which should help to protect investors and the public interest.

The Commission also believes the proposed new initial listing requirement that at least 50% of a company's required Round Lot Holders hold Unrestricted Securities with a market value of at least \$2,500 is consistent with the Act, including the protection of investors, the prevention of fraudulent and manipulative acts and practices, and the promotion of fair and orderly markets. The Exchange stated that it has noticed problems with companies listing where a large number of Round Lot Holders hold exactly 100 shares, worth as little as \$400 in the case of a stock that is trading at the minimum bid price of \$4 per share, or as little as \$200 in the case of a stock listing under the alternative price criteria.⁵⁴ The Exchange stated that the proposed \$2,500 threshold is 6.5 times to 12.5 times larger than the existing minimum investment, and that it believes this increased amount is a more appropriate representation of genuine investor interest in the company and will make it more difficult to circumvent the Round Lot Holder requirement

⁵² See Securities Exchange Act Release No. 82478 (January 9, 2018), 83 FR 2278 (January 16, 2018) (SR-NASDAQ-2017-087) (Order Instituting Proceedings).

⁵³ See Securities Exchange Act Release No. 86117 (June 14, 2019), 84 FR 28879 (June 20, 2019) (SR-NYSE-2018-46).

⁵⁴ See supra Section II.A.2.II (Minimum Value Requirement for Holders).

through share transfers for no value.⁵⁵ The Commission believes that the proposed new minimum value requirement is reasonably designed to ensure that at least 50% of the required number of Round Lot Holders have a sufficient investment in the company and that the company should therefore have adequate distribution and liquidity and shareholder interest to support an exchange listing.

The Commission believes that it is reasonable and not unfairly discriminatory for the Exchange not to impose this minimum value requirement on the initial listing of warrants. The Exchange states that warrants do not have minimum price requirements and may have little value at the time of issuance.⁵⁶ The Exchange also represents that it has not observed problems with the trading of warrants.⁵⁷ The Commission notes that the security underlying a warrant must be listed on the Exchange or be a covered security, as defined in Section 18(b) of the Securities Act of 1933.⁵⁸

The Commission further believes that the Exchange's proposal to impose a new minimum average daily trading volume requirement for the initial listing of securities trading OTC at the time of their listing is consistent with the Act.⁵⁹ The Exchange states that it believes that companies trading at least 2,000 shares a day over a period of 30 trading days prior to

⁵⁵ See id. Nasdaq Rule 5505(a)(1)(B) allows, under certain conditions, for companies to list with a minimum price of \$2.00 or \$3.00 per share.

⁵⁶ See supra Section II.A.1.II (Minimum Value Requirement for Holders).

⁵⁷ See id. As Nasdaq stated, warrants are often issued as part of a unit and the common stock component of the unit would be required to satisfy the minimum value requirement. See id.

⁵⁸ See Nasdaq Rules 5410(b) and 5515(a)(2).

⁵⁹ The trading volume provisions apply to primary equity securities, ADRs, preferred stock, secondary classes of common stock and paired share units to the extent there is trading in these securities in the U.S. OTC market. See supra Section I.A.1.III (Average Daily Trading Volume).

listing, with trading occurring on more than half of those 30 days, can demonstrate sufficient investor interest to support sustained trading activity when listed on the Exchange and help to promote price discovery of a security when listed.⁶⁰ The Commission believes that the proposed requirement is reasonably designed to ensure that companies trading OTC prior to listing have adequate liquidity and trading activity to support an exchange listing.

With respect to ADRs, the Exchange amended its proposal to make clear that, to the extent the ADR has trading in the U.S. OTC market, such daily trading volume will be combined with trading volume of the security underlying the ADR in the foreign issuer's primary market. The Commission believes that combining the trading volume of the ADR and the security underlying the ADR to meet this standard is consistent with the Exchange's purpose to ensure there is sufficient interest and trading activity to support an exchange listing of the ADR and help in price discovery upon listing.

In addition, the Commission believes that the proposed exception to the minimum average daily trading volume requirement for securities listed in connection with a firm commitment underwritten public offering of at least \$4 million reasonably accommodates issuers that may not meet the requirement but should nevertheless have adequate liquidity upon an exchange listing. As noted by the Exchange, it has proposed this exception to the trading volume requirement because it believes the underwritten offering process is designed to promote appropriate price discovery and provides a basis for believing that a liquid trading market will likely develop for the securities after listing. The Commission notes that the underwriters in a firm commitment underwriting will typically have "indications of interest" from prospective

⁶⁰ See id.

investors and will use this information to recommend a price for the shares⁶¹ and, as the Exchange stated, will generally make a market in the securities for a period of time after the offering and thereby assist in creating a liquid market. While the dollar amount for the exception of a \$4 million underwritten public offering is relatively low,⁶² particularly when compared to the higher listing standards of the Global Select and Global tiers, the Commission notes that the other changes to the liquidity requirements, as well as other listing standards, will all still have to be met upon initial listing.

Nasdaq states that it is not proposing to change the requirements for continued listing at this time, and believes that the proposed heightened initial listing requirements will result in enhanced liquidity for the companies that satisfy them on an ongoing basis.⁶³ The Commission would expect Nasdaq to review its experience with the new initial listing standards and consider whether the adoption of the new rule has addressed the concerns identified by Nasdaq and propose any appropriate changes, if necessary, to its listing standards, including continued listing standards.

For the reasons discussed above, the Commission believes that Nasdaq's proposal will further the purposes of Section 6(b)(5) of the Act by, among other things, protecting investors and the public interest, and preventing fraudulent and manipulative acts and practices, as well as promoting fair and orderly markets under the Act.

⁶¹ See "Investor Bulletin: Investing in an IPO," issued by the Commission, available at <https://www.sec.gov/files/ipo-investorbulletin.pdf>.

⁶² See, e.g., Nasdaq Rule 5110(c)(3) (providing an exception to certain initial listing requirements for a "reverse merger" company completing an underwritten public offering of at least \$40 million).

⁶³ See supra note 9 and accompanying text.

IV. Solicitation of Comments on Amendment No. 3 to the Proposed Rule Change

Interested persons are invited to submit written views, data, and arguments concerning whether Amendment No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2019-009 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2019-009. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-009 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the Federal Register. The Commission notes that the original proposal was published for comment in the Federal Register.⁶⁴ The Commission notes that Amendment No. 3 clarifies and provides additional explanation relating to the proposed rule change. The changes and additional information in Amendment No. 3 assist the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁶⁵ to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

⁶⁴ See Notice, supra note 3.

⁶⁵ 15 U.S.C. 78s(b)(2).

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁶⁶ that the proposed rule change (SR-NASDAQ-2019-009), as modified by Amendment No. 3, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁷

J. Lynn Taylor,
Assistant Secretary.

⁶⁶ Id.

⁶⁷ 17 CFR 200.30-3(a)(12).

