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September 15, 2022

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Amendment No. 2 (SR-NASDAQ-2022-027)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC filed the above-referenced filing on September 15, 2022.

Sincerely,

A handwritten signature in black ink that reads 'Nikolai Utochkin'.

Nikolai Utochkin
Counsel – Listing and Governance

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2022 - * 027

Amendment No. (req. for Amendments *) 2

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010
Section 806(e)(1) *

Section 806(e)(2) *

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) *

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Nikolai Last Name * Utochkin

Title * Associate General Counsel

E-mail * [REDACTED]

Telephone * [REDACTED] Fax [REDACTED]

Signature

Pursuant to the requirements of the Securities Exchange of 1934, The Nasdaq Stock Market LLC has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 09/15/2022


(Title *)

By John Zecca

EVP and Chief Legal Officer

(Name *)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2022.09.15 14:45:41 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information *

Add Remove View

SR-NASDAQ-2022-027 19b-4 A-2.doc

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

Add Remove View

SR-NASDAQ-2022-027 Exhibit 1 A-2.

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2- Notices, Written Comments, Transcripts, Other Communications

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

Add Remove View

SR-NASDAQ-2022-027 Exhibit 4 A-2.c

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

SR-NASDAQ-2022-027 Exhibit 5 A-2.c

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to modify certain pricing limitations for companies listing in connection with a Direct Listing with a Capital Raise on the Nasdaq Global Select Market in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq. This Amendment No. 2 supersedes the original filing, as modified by Amendment No. 1, in its entirety.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on August 21, 2020. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Nikolai Utochkin
Counsel – Listing and Governance
Nasdaq, Inc.
[REDACTED]

or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Arnold Golub
Deputy General Counsel
Nasdaq, Inc.
[REDACTED]

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

a. Purpose

Nasdaq is filing this amendment to SR-NASDAQ-2022-027³ to address the issues the Commission raised in the OIP and make other modifications to clarify the proposed rule language. This Amendment No.2 supersedes and replaces Amendment No.1 in its entirety.

In this Amendment No. 2 (the “Amendment”) Nasdaq proposes to modify the Initial Proposal, as modified by Amendment No.1⁴, to require that a company offering securities for sale in connection with a Direct Listing with a Capital Raise must retain an

³ Securities Exchange Act Release No. 94592 (April 4, 2022), 87 FR 20905 (April 8, 2022) (the “Initial Proposal”). On May 23, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed. Securities Exchange Act Release No. 94989 (May 26, 2022), 87 FR 33558 (June 2, 2022). The Commission issued an Order Instituting Proceedings to Determine Whether To Approve or Disapprove the Initial Proposal, as modified by Amendment No.1. See Securities Exchange Act Release No. 95220 (July 7, 2022), 87 FR 41780 (July 13, 2022) (the “OIP”).

⁴ Nasdaq submitted Amendment No.1 in order to: (i) clarify Nasdaq’s view of the applicability of Securities Act Rule 430A and mechanics of complying with the disclosures required under federal securities laws by a company listing in connection with a Direct Listing with a Capital Raise in circumstances where the actual price calculated by the Cross is outside of the price range established by the issuer in its effective registration statement; (ii) specify that if the company’s certification to Nasdaq (that the company does not expect that an offering price above the price range would materially change the company’s previous disclosure in its effective registration statement) includes an upside limit, Nasdaq will not execute the cross if it results in an offering price above such limit; and (iii) make minor technical changes to improve the structure, clarity and readability of the proposed rules.

underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.⁵

Also in this Amendment, Nasdaq proposes to modify the Pricing Range Limitation, as defined below, such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can be executed in the Cross at a price that is above the highest price of the price range established by the issuer in its effective registration statement only if the execution price is at or below the price that is 80% above the highest price of the price range.⁶

Description of Proposed Rule, as Amended

In 2021, Nasdaq adopted Listing Rule IM-5315-2 to permit a company to list on the Nasdaq Global Select Market in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a “Direct Listing with a Capital Raise”);⁷ created a new order type (the “CDL Order”), which is used during the Nasdaq Halt Cross (the “Cross”) for the shares offered

⁵ Nasdaq believes that this proposal addresses the issues raised by the Commission in the OIP related to the potential lack of a named underwriter in a Direct Listing with a Capital Raise, as explained below. Nasdaq also believes that this proposal addresses concerns raised in the comment letter submitted by the Council of Institutional Investors (CII), dated August 8, 2022. Nasdaq believes that the CII letter raises concerns that are substantively the same as the concerns raised by the Commission in the OIP.

⁶ Nasdaq believes that this proposal addresses the issues raised by the Commission in the OIP related to the usefulness and reliability of price range disclosure provided to investors, as explained below.

⁷ A Direct Listing with a Capital Raise includes situations where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

by the company in a Direct Listing with a Capital Raise; and established requirements for disseminating information, establishing the opening price and initiating trading through the Cross in a Direct Listing with a Capital Raise.⁸ For a Direct Listing with a Capital Raise, Nasdaq rules currently require that the actual price calculated by the Cross be at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement (the “Pricing Range Limitation”).

Nasdaq now proposes to modify the Pricing Range Limitation⁹ such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can also be executed in the Cross at a price that is at or above the price that is as low as 20% below the lowest price in the price range established by the issuer in its effective registration statement;¹⁰ or at a price above the highest price of such price range but only if the execution price is at or below the price that is 80% above the highest price of the price range. Specifically, to execute at a price outside of the price range, the company’s registration statement must contain a sensitivity analysis explaining how the company’s

⁸ See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (the “Approval Order”).

⁹ On February 24, 2022, the Commission issued an order disapproving a similar proposal by Nasdaq. Securities Exchange Act Release No. 94311 (February 24, 2022), 87 FR 11780 (March 2, 2022) (the “Disapproval Order”). Nasdaq believes that this proposal addresses the issues raised by the Commission in the Disapproval Order.

¹⁰ References in this proposal to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement. Separately, as explained in more details below, Nasdaq proposes to prescribe that the 20% threshold below the lowest price in the price range will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

plans would change if the actual proceeds from the offering were less than or exceeded the amount assumed in such price range and the company has publicly disclosed and certified to Nasdaq that the company does not expect that such price would materially change the company's previous disclosure in its effective registration statement. Nasdaq also proposes to make related conforming changes.

Current Direct Listing with a Capital Raise Requirements

Currently, a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Cross, which is described in Rules 4120(c)(9) and 4753.¹¹

Currently, in addition to pricing within the Pricing Range Limitation,¹² Rule 4120(c)(9) requires that in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. In addition, under Rule 4120(c)(9)(B) Nasdaq will release the security for trading only if all market orders will be executed in the Cross. If there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the Pricing Range Limitation is not satisfied, the Cross would not proceed and such security would not begin trading. In such event, because the Cross cannot be conducted, the Exchange would postpone and reschedule the offering and notify market participants via a Trader Update that the Direct Listing with a Capital Raise scheduled for that date has been

¹¹ See Listing Rule IM-5315-2.

¹² See Rule 4120(c)(9)(B).

cancelled and any orders for that security that have been entered on the Exchange would be cancelled back to the entering firms.¹³

Proposed Change to Rule 4120(c)(9)

While many companies are interested in alternatives to traditional IPOs, based on conversations with companies and their advisors Nasdaq believes that there may be a reluctance to use the existing Direct Listing with a Capital Raise rules because of concerns about the Pricing Range Limitation.

One potential benefit of a Direct Listing with a Capital Raise as an alternative to a traditional IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, in a Direct Listing with a Capital Raise the initial sale price is determined based on market interest and the matching of buy and sell orders in an auction open to all market participants. In that regard, in the Approval Order the Commission stated that:

The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may

¹³ Nasdaq will postpone and reschedule the offering only if either or both such conditions are not met.

result in additional investment opportunities while providing companies more options for becoming publicly traded.¹⁴

A successful initial public offering of shares requires sufficient investor interest. If an offering cannot be completed due to lack of investor interest, there is likely to be a substantial amount of negative publicity for the company and the offering may be delayed or cancelled. The Pricing Range Limitation imposed on a Direct Listing with a Capital Raise (but not on a traditional IPO) increases the probability of such a failed offering because the offering cannot proceed without some delay not only for the lack of investor interest, but also if investor interest is greater than the company, its underwriter, and other advisors anticipated. In the Approval Order, the Commission noted a frequent academic observation of traditional firm commitment underwritten offerings that the IPO price, established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.¹⁵ Nasdaq believes that the price range in a company's effective registration statement for a Direct Listing with a Capital Raise would similarly be determined by the company, its underwriter, and other advisors and, therefore, there may be instances of offerings where the price determined by the Nasdaq opening auction will exceed the highest price of the price range in the company's effective registration statement.

As explained above, under the existing rule a security subject to a Direct Listing with a Capital Raise cannot be released for trading by Nasdaq if the actual price

¹⁴ See Approval Order, 86 FR at 28177.

¹⁵ See Approval Order, footnote 91.

calculated by the Cross is above the highest price of the price range established by the issuer in its effective registration statement. In this case, Nasdaq would have to cancel or postpone the offering until the company amends its effective registration statement. At a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event. In addition, as explained above, the determination of the public offering price of a traditional IPO is not subject to limitations similar to the Pricing Range Limitation for a Direct Listing with a Capital Raise, which, in Nasdaq's view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits. This reluctance could result in denying investors and companies the benefits of this different price discovery method.

Accordingly, Nasdaq proposes to modify the Pricing Range Limitation such that in the case of the Direct Listing with a Capital Raise, a security could be released for trading by Nasdaq if the actual price at which the Cross would occur is as much as 20% below the lowest price of the price range established by the issuer in its effective registration statement. In addition, a security could be released for trading by Nasdaq if the actual price at which the Cross would occur was above the highest price in the price range established by the issuer in its effective registration statement but only if the execution price is at or below the price that is 80% above the highest price of the price range.¹⁶ In such cases (whether lower or higher than the price range) the company will be required to specify the quantity of shares registered in its registration statement, as

¹⁶ In the prior proposal, Nasdaq proposed different requirements based on whether the Cross would occur at a price that was within 20% of the price range. See Disapproval Order. Nasdaq is eliminating this proposed distinction and is proposing herein to treat all prices outside of the price range the same.

permitted by Securities Act Rule 457,¹⁷ and that registration statement will be required to contain a sensitivity analysis (the company must also certify to Nasdaq in that regard) explaining how the company's plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the price range established by the issuer in its effective registration statement.¹⁸ In addition, the company will be required to publicly disclose and certify to Nasdaq prior to beginning of the Display Only Period that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement. If the company's certification submitted to Nasdaq in that regard includes a price limit that is below the price that is 80% above the highest price of the price range (the "Upside Limit"), Nasdaq will not execute the Cross if it results in the offering price above such limit. The goal of these requirements is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.¹⁹

¹⁷ Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount. Nasdaq proposes to require that companies selling shares through a Direct Listing with a Capital Raise will register securities by specifying the quantity of shares registered and not a maximum offering amount. See also Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

¹⁸ The price range in the preliminary prospectus included in the effective registration statement must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

¹⁹ Sensitivity analysis disclosure may include but is not limited to: use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. An example of this disclosure could be: We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes.

Nasdaq believes that this approach is consistent with SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which generally allow a company to price a public offering 20% outside of the disclosed price range without regard to the materiality of the changes to the disclosure contained in the company's registration statement. Nasdaq believes such guidance also allows deviation above the price range beyond the 20% threshold if such change or deviation does not materially change the previous disclosure. Accordingly, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. For purposes of this rule, the 20% threshold will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.²⁰

²⁰ Nasdaq believes that applying additional protections related to the disclosure requirements in the registration statement and the certifications to Nasdaq, as described above, to all instances where the Cross is executed outside the disclosed price range addresses an issue the Commission raised in the Disapproval Order.

Nasdaq notes that the Commission previously stated that while Securities Act Rule 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability for potentially misleading disclosure under the federal securities laws.²¹ Accordingly, the burden of complying with the disclosures required under federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omissions, remains with the issuer. In that regard, Nasdaq believes that the Post-Pricing Period, applicable in circumstances where the actual price calculated by the Cross is outside of the price range established by the issuer in its effective registration statement, as described below, provides the company an opportunity, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, if any; and/or determine and confirm to Nasdaq that no additional

See footnote 9 above. For brevity, proposed rules define the “Price Range” as the price range established by the issuer in its preliminary prospectus included in the effective registration statement, including the maximum and the minimum prices of such range; and “DLCR Price Range” as the price range that includes any price that is below the Price Range and at or above the price that is 20% below the lowest price of the Price Range, or is above the highest price of the Price Range. If the company’s certification includes an upside limit, the DLCR Price Range is as defined in the preceding sentence, but subject to the upper limit provided by the company in its certification.

²¹ Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021).

disclosures are required under federal securities laws based on the actual price calculated by the Cross.

Nasdaq believes that an underwriter plays an important role in a traditional IPO and, therefore, proposes to require that a company listing securities on Nasdaq in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement. Describing the role and responsibilities of an underwriter, the Commission recently explained that:

[a]s intermediaries between an issuer and the investing public, underwriters play a critical role as “gatekeepers” to the public markets. Historically, in initial public offerings, where the investing public might be unfamiliar with a particular issuer, financial firms that act as underwriters would lend their well-known name to support that issuer’s offering. Where public investors may not have been inclined to invest with the company seeking to conduct a public offering, they could take comfort in the fact that a large, well-known financial institution, acting as underwriter, was including its name on the first page of the issuer’s prospectus...

An underwriter’s participation in an issuer’s offering also exposes the underwriter to potential liability under the Securities Act. The civil liability provisions of the Securities Act reflect the unique position underwriters occupy in the chain of distribution of securities and provide strong incentives for underwriters to take steps to help ensure the accuracy of disclosure in a registration statement. Section

11 of the Securities Act imposes on underwriters, among other parties identified in Section 11(a), civil liability for any part of the registration statement, at effectiveness, which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, to any person acquiring such security. Similarly, Section 12(a)(2) imposes liability upon anyone, including underwriters, who offers or sells a security, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, to any person purchasing such security from them. These provisions provide significant investor protections to those who acquire securities sold pursuant to a registration statement by providing tools to hold companies, underwriters, and other parties accountable for misstatements and omissions in connection with public offerings of securities. As a result, anyone who might be named as a potential defendant in these suits has strong incentives to take the necessary steps to avoid such liability.

One defense available to an underwriter in a distribution is the “due diligence” defense, which shields an underwriter from liability if it can establish that, after reasonable investigation, the underwriter had reasonable ground to believe and did believe, at the time the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact

required to be stated therein or necessary to make the statements therein not misleading.²²

Nasdaq believes that these significant investor protections provisions are necessary in a Direct Listing with a Capital Raise if an offering can price outside the price range established in the issuer's effective registration statement, subject to proposed limitations, because such provisions allow investors to make reasonable pricing decisions with clarity that the company's underwriter would face statutory liability, as described above. Accordingly, Nasdaq proposes to require that a company listing securities on Nasdaq in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.

Nasdaq also believes that the requirement to retain a named underwriter, as described above, may mitigate concerns, raised by the Commission in the OIP, regarding challenges to bringing claims under Section 11 of the Securities Act due to the potential assertion of tracing defenses because an underwriter may choose to impose lock-up arrangements, as described below.

As a preliminary matter, Nasdaq notes that in the Approval Order the Commission explained that the issue of traceability:

is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market as those that are so subject. Where a registration statement, at the time of effectiveness, contains an

²² Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 FR 29,458 (May 13, 2022).

untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act provides a cause of action to “any person acquiring such security,” unless it is proved that at the time of the acquisition the person “knew of such untruth or omission.” In the context of conventional public offerings, courts have interpreted this statutory provision to permit aftermarket purchasers (i.e., those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the offering covered by the false or misleading registration statement. Tracing is not set forth in Section 11 and is a judicially-developed doctrine. The application of this doctrine and, in particular, the pleading standards and factual proof that potential claimants must satisfy vary depending on the particular facts of the distribution and judicial district, and may be affected by pending litigation.²³

The Commission then reaffirmed its position that “concerns regarding shareholders' ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in a [] Direct Listing with a Capital Raise.” The Commission further stated that it “is not aware of any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims. The Commission is actively monitoring this issue and will be able to respond to

²³ The Approval order, 86 FR at 28176

such concerns when and if they arise.”²⁴ Nasdaq believes that no such precedent exists as of the date of this Amendment and that the modifications to the Pricing Range Limitation in this proposal do not, in any way, exacerbate the tracing issues.

However, as stated above, Nasdaq believes that the requirement to retain a named underwriter may mitigate traceability concerns that may arise in a Direct Listing with a Capital Raise. As in a traditional firm commitment underwritten IPO, in which lock-up arrangements are often imposed, an underwriter retained in connection with a Direct Listing with a Capital Raise, as required by the Amendment, will be able to impose lock-up arrangements for the same reasons that make lock up agreements common in an IPO.

Nasdaq also believes that the requirement to retain a named underwriter, as described above, mitigates concerns, raised by the Commission in the OIP, regarding the usefulness of price range disclosure provided to investors in a Securities Act registration statement filed in connection with a Direct Listing with a Capital Raise. Nasdaq believes that an underwriter retained in connection with a Direct Listing with a Capital Raise will perform substantially similar functions, including those related to establishing and adjusting the price range, to those performed by an underwriter in a typical IPO because the underwriter will be subject to similar liability and reputational risk.

To further mitigate concerns regarding the usefulness of price range disclosure provided to investors, Nasdaq proposes to require that the securities of a company listing in connection with a Direct Listing with a Capital Raise cannot price above the Upside Limit. The Upside Limit will incentivize the company and its underwriter to set the disclosed price range to avoid a failed offering consequences described above. The

²⁴ The Approval order, 86 FR at 28177

Upside Limit would also help assure that an issuer would adjust the price range disclosed in their registration statements prior to effectiveness in light of pricing feedback received from market analysts and potential investors.

To determine an appropriate Upside Limit, Nasdaq analyzed operating companies IPOs on the Nasdaq Global Select Market and the NYSE for the past five years where an IPO opened on an exchange at a price that is above the highest price of the price range in the issuer's effective registration statement.²⁵ This analysis indicated that some IPOs opened on an exchange at a price that was more than 100% above the highest price of the price range. Based on the same data, more than half of these IPOs opened at a price that was 30% or more above the highest price of the price range. However, about 90% of these IPOs opened at a price that was no more than the Upside Limit. Based on this data Nasdaq believes that, on balance, capital formation and investor protection goals would be best served by a pricing limitation equal to the Upside Limit.

Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. Prior to releasing a security for trading, Nasdaq allows a "Pre-Launch Period" of indeterminate length, during which price discovery takes place. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price during the Pre-Launch Period within the previous 10 minutes. The Pre-Launch Period will continue until at least five minutes after the Price Volatility Constraint has been

²⁵ This data set included over 400 records and covers a period from January 2017 to July 2022.

satisfied. Nasdaq will also introduce the Near Execution Price which is the Current Reference Price at the time the Price Volatility Constraint has been satisfied; and set the Near Execution Time as such time. This change will provide investors with notice that the Cross nears execution and allows a period of at least five minutes for investors to modify their orders, if needed, based on the Near Execution Price, prior to the execution of the Cross and the pricing of the offering. Further, to assure that the Near Execution Price is a meaningful benchmark for investors, and that the offering price does not deviate substantially from the Near Execution Price, Nasdaq proposes to require, in addition to other the existing conditions stated in proposed Rule 4120(c)(9)(B)(vii), that the Cross may execute only if the actual price calculated by the Cross is no more than 10% below or above the Near Execution Price (the “10% Price Collar”).

Nasdaq notes that imbalance between the buy and sell orders could sometimes cause the Current Reference Price to fall outside the 10% Price Collar after the Price Volatility Constraint has been satisfied. Such price fluctuations could be temporary, and the Current Reference Price may return to and remain within the 10% Price Collar. The price fluctuation could also be lasting such that the Current Reference Price remains outside the 10% Price Collar. Given this, Nasdaq proposes to assess the Current Reference Price vis-à-vis the 10% Price Collar 30 minutes after the Near Execution Time. If at that time the Current Reference Price is outside the 10% Price Collar, all requirements of the Pre-Launch Period shall reset and must be satisfied again.²⁶ Once the

²⁶ For the avoidance of doubt, while the Price Volatility Constraint cannot initially be satisfied sooner than ten minutes after the beginning of the Pre-Launch Period, if it is subsequently reset, the Price Volatility Constraint can be satisfied again in less than ten minutes because it would look back at prior pricing during the Pre-

Price Volatility Constraint has been satisfied anew, the Current Reference Price at such time will become the updated Near Execution Price and such time will become the updated Near Execution Time. This process will continue iteratively, if new resets are triggered, until the Cross is executed, or the offering is postponed.

If the Current Reference Price 30 minutes after the Near Execution Time is within the 10% Price Collar, price formation may continue without limitations until Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade (and certain existing conditions restated in proposed Rule 4120(c)(9)(B)(vii) are met). However, if at any time 30 minutes after the Near Execution Time the Current Reference Price is outside the 10% Price Collar, all requirements of the Pre-Launch Period shall reset and must be satisfied again, in the same manner as described in the immediately preceding paragraph.

Given that, as proposed, there may be a Direct Listing with a Capital Raise that could price outside the price range of the company's effective registration statement, subject to the Upside Limit above which the Cross could not proceed,²⁷ Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, during the Pre-Launch

Launch Period (including pricing prior to the reset) to determine if the Current Reference Price has deviated by 10% or more from any Current Reference Price within the previous 10 minutes.

²⁷ In addition to the Upside Limit, if the company's certification submitted to Nasdaq pursuant to proposed Listing Rule 4120(c)(9)(B)(vii)d.2. includes a price limit that is lower than the Upside Limit and the actual price calculated by the Cross exceeds such lower limit, Nasdaq will postpone and reschedule the offering.

Period and indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. Once the Price Volatility Constraint has been satisfied, Nasdaq will also disseminate the Near Execution Price, the Near Execution Time and the 30-minute countdown from such time. The disclosure will indicate that the Near Execution Price and the Near Execution Time may be reset, as described above, if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price.

In this way, investors interested in participating in the opening auction will be informed when volatility has settled to a range that will allow the open to take place and they will be informed of the price range at which the auction would take place. If the price moves outside, and remains outside this range, 30 minutes after the original range was set they will be informed of the new range and will have at least five minutes to reevaluate their investment decision.²⁸

Nasdaq also proposes to prohibit market orders (other than by the Company through its CDL Order) from the opening of a Direct Listing with a Capital Raise. This

²⁸ Nasdaq believes that the introduction, as described above, of the 10% Price Collar, the Near Execution Price, the Near Execution Time, the 30-minute reset and the five minute prohibition on executing the Cross after the Price Volatility Constraint has been satisfied addresses concerns the Commission raised in the Disapproval Order. See footnote 9 above. Specifically, in the Disapproval Order, the Commission stated that, as previously proposed, “investors could be misled that the opening cross ‘nears execution’ and that the disseminated Current Reference Price will likely be close to the opening auction price when, in fact, the auction may not occur for a considerable time and the opening auction price may differ substantially.” As revised, the opening auction price must remain within 10% of the price publicly announced as the Near Execution Price for the auction to occur and investors will have enhanced disclosure about the possibility that the Price Volatility Constraint could be reset.

will protect investors by assuring that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the company's effective registration statement including the sensitivity analysis describing how the company will use any additional proceeds raised. Accordingly, an investor participating in a Direct Listing with a Capital Raise will make their initial investment decision prior to the launch of the offering by setting the price in their limit order above which they will not buy shares in the offering, but will also have an opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price. Under the proposed rule, such investor will have at least five minutes once the Near Execution Price has been set and before the offering may be priced by Nasdaq to modify their order, if needed. As described above, all relevant price formation information will be disseminated by Nasdaq on a public website in real time.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the location of the public website where Nasdaq will disseminate the Current Reference Price.

To assure that members have the necessary information to be provided to their customers, Nasdaq proposes to distribute, at least one business day prior to the

commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, an information circular to its members that describes any special characteristics of the offering, and Nasdaq's rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, including information about the notice they must provide customers and other Nasdaq requirements that:

- members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

These member requirements are intended to remind members of their obligations to “know their customers,” increase transparency of the pricing mechanisms of a Direct Listing with a Capital Raise, and help assure that investors have sufficient price discovery information.

In each instance of a Direct Listing with a Capital Raise, Nasdaq's information circular²⁹ will inform the market participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular a statement that the Cross cannot proceed at a price in excess of the Upside Limit and whether or not there is a lower price limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also remind the market participants that Nasdaq prohibits market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise.

To assure that the issuer has the ability, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is outside of the price range established by the issuer in its effective registration statement. Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering.

²⁹ The information circular is an industry wide free service provided by Nasdaq.

Proposed Conforming Changes to Listing Rule IM-5315-2

Listing Rule IM-5315-2 allows a company that has not previously had its common equity securities registered under the Act to list its common equity securities on the Nasdaq Global Select Market at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange.

Listing Rule IM-5315-2 provides that in determining whether a company listing in connection with a Direct Listing with a Capital Raise satisfies the Market Value of Unrestricted Publicly Held Shares³⁰ for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement if the amount of the company's Unrestricted Publicly Held Shares before the offering along with the market value of the shares to be sold by the company in the Exchange's opening auction in the Direct Listing with a Capital Raise is at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million).

Listing Rule IM-5315-2 further provides that, for this purpose, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.

Because Nasdaq proposes to allow the opening auction to price up to 20% below the lowest price of the price range established by the issuer in its effective registration statement, Nasdaq proposes to make a conforming change to Listing Rule IM-5315-2 to provide that the price used to determine such company's compliance with the Market

³⁰ See Listing Rules 5005(a)(23) and 5005(a)(45).

Value of Unrestricted Publicly Held Shares is the price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq proposes to clarify in Listing Rule IM-5315-2 that the 20% threshold below the price range will be calculated based on the maximum offering price set forth in the registration fee table. Nasdaq will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price. This price is the minimum price at which the company could sell its shares in the Direct Listing with a Capital Raise transaction and so assures that the company will satisfy these requirements at any price at which the auction successfully executes.

Any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to, and required to meet, all other applicable initial listing requirements, including the requirements to have the applicable number of shareholders and at least 1,250,000 Unrestricted Publicly Held Shares outstanding at the time of initial listing, and the requirement to have a price per share of at least \$4.00 at the time of initial listing.³¹

Proposed Conforming Changes to Rules 4753(a)(3)(A) and 4753(b)(2)

Nasdaq proposes to amend Rules 4753(a)(3)(A) and 4753(b)(2) to conform the requirements for disseminating information and establishing the opening price through

³¹ See Listing Rules 5315(f)(1), (e)(1) and (2), respectively. Rule 5315(f)(1) requires a security to have: (A) at least 550 total holders and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or (B) at least 2,200 total holders; or (C) a minimum of 450 round lot holders and at least 50% of such round lot holders must each hold unrestricted securities with a market value of at least \$2,500.

the Cross in a Direct Listing with a Capital Raise to the proposed amendment to allow the opening auction to price as much as 20% below the lowest price of the price range established by the issuer in its effective registration statement.

Specifically, Nasdaq proposes changes to Rules 4753(a)(3)(A) and 4753(b)(2) to make adjustments to the calculation of the Current Reference Price, which is disseminated in the Nasdaq Order Imbalance Indicator, in the case of a Direct Listing with a Capital Raise and for how the price at which the Cross will execute. These rules currently provide that where there are multiple prices that would satisfy the conditions for determining a price, the fourth tie-breaker for a Direct Listing with a Capital Raise is the price that is closest to the lowest price of the price range disclosed by the issuer in its effective registration statement.³²

To conform these rules to the modification of the Pricing Range Limitation change, as described above, Nasdaq proposes to modify the fourth tie-breaker for a Direct Listing with a Capital Raise, to use the price closest to the price that is 20% below (calculated as provided for in Listing Rule IM-5315-2) the lowest price of the price range disclosed by the issuer in its effective registration statement.³³

³² To illustrate: The bottom of the range is \$10. More than one price exists within the range under the previous set of tie-breakers such that both \$10.15 and \$10.25, satisfy all other requirements. The operation of the fourth tie-breaker will result in the auction price of \$10.15 because it is the price that is closest to \$10.

³³ Note that using the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement as a tie-breaker (rather than the price representing the bottom of the range) does not change the outcome in the example in footnote 32 above because \$10.15 is the price that is closest to either.

Lastly, Nasdaq proposes to clarify several provisions of the existing rules by restating the provisions of Rules 4120(c)(8)(A) and (c)(9)(A) in a clear and direct manner without substantively changing them. Specifically, Nasdaq proposes to clarify the mechanics of the Cross by specifying that Nasdaq will initiate a 10-minute Display Only Period only after the CDL Order had been entered. This clarification simply states what is already implied by the rule because the Cross and the offering may not proceed without the company's order to sell the securities in a Direct Listing with a Capital Raise. Similarly, Nasdaq proposes to clarify without changing the existing rule that Nasdaq shall select price bands for purposes of applying the price validation test in the Cross in connection with a Direct Listing with a Capital Raise. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero. If a security does not pass the price validation test, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.³⁴ Nasdaq also proposes to clarify that the "actual price," as the term is used in the rule, is the Current Reference Price at the time the system applies the price bands test.

³⁴ This function is provided by the underwriter in an IPO and by a Financial Advisor in a Direct Listing when the company is not selling shares in a primary offering. The Commission previously approved Nasdaq performing this function. See Approval Order.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendment to modify the Pricing Range Limitation is consistent with the protection of investors because this approach is similar to the pricing of an IPO where an issuer is permitted to price outside of the price range disclosed by the issuer in its effective registration statement in accordance with the SEC's Staff guidance, as described above.³⁷ Specifically, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in

³⁵ 15 U.S.C. 78f(b).

³⁶ 15 U.S.C. 78f(b)(5).

³⁷ In a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. [See https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921](https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921).

the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. As a result, Nasdaq will allow the Cross to take place as low as 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement, but no lower, and so this is the minimum price at which the company could be listed. In addition, to better inform investors and market participants, Nasdaq will issue an industry wide circular to inform the participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular that the Cross cannot proceed at a price in excess of the Upside Limit and whether or not there is a lower price limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also remind the market participants that Nasdaq prohibits market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise.

To assure that the issuer has the ability, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and below the lowest price of the price range established by the issuer in its effective registration statement; or is above the highest price of the price range established by the issuer in its effective registration statement but below the Upside Limit (and below the high end price limit, if any, set in the company's certification submitted to Nasdaq pursuant to proposed Listing Rule

4120(c)(9)(B)(vii)d.2., if any). Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross, with such confirmation ending the Post-Pricing Period. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering. Nasdaq believes that this modification is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market because it will help assure that a company listing in connection with a Direct Listing with a Capital Raise complies with the disclosure requirements under federal securities laws and that investors receive all required information.

Nasdaq believes that the proposal to allow a Direct Listing with a Capital Raise to price above the price range of the company's effective registration statement but below the Upside Limit is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market investors because this approach is similar to, but more stringent than, that of pricing a traditional IPO. In addition, to protect investors Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will disseminate, free of charge, the Current Reference Price on a public website (such as Nasdaq.com) during the Pre-Launch Period and indicate whether the Current

Reference Price is within the price range established by the issuer in its effective registration statement.

Nasdaq believes that a proposed requirement that a company offering securities for sale in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement is designed to protect investors and the public interest because these provisions provide significant investor protections to those who acquire securities sold pursuant to a registration statement by providing tools to hold underwriters accountable for misstatements and omissions in connection with a Direct Listing with a Capital Raise.

Nasdaq believes that the requirement that the securities of a company listing in connection with a Direct Listing with a Capital Raise cannot price above the Upside Limit is designed to protect investors and the public interest because it would incentivize the company and its underwriter to avoid a failed offering by taking steps to help ensure the accuracy of price range disclosure in a registration statement. In addition, as described above, an underwriter has strong incentives to take the necessary steps to avoid statutory liability.

Nasdaq believes that the provision prohibiting market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise is designed to protect investors because this provision will assure that investors only purchase shares at a price that is at, or better than, the price they affirmatively set, after having the opportunity to review the company's effective registration statement including the sensitivity analysis describing how the company will use any additional proceeds raised.

Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until at least five minutes after the Price Volatility Constraint has been satisfied. Nasdaq will also introduce the Near Execution Price which is the Current Reference Price at the time the Price Volatility Constraint has been satisfied; and set the Near Execution Time at such time. This change will provide investors with notice that the Cross nears execution and a period of at least five minutes to modify their orders, if needed, based on the Near Execution Price, prior to the execution of the Cross and the pricing of the offering. Further, to help assure that the offering price does not deviate substantially from the Near Execution Price, Nasdaq proposes to require, in addition to other conditions described above, that the Cross may execute only if the actual price calculated by the Cross is within the 10% Price Collar. Nasdaq believes that these changes are designed to protect investors and the public interest because an investor participating in a Direct Listing with a Capital Raise will make their initial investment decision prior to the launch of the offering by setting the price in their limit order above which they will not buy shares in the offering, but will also have an opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price. Under the proposed rule, such investor will have at least five minutes once the Near Execution Price has been set and before the offering may be priced by Nasdaq to modify their order, if needed. While the auction may take longer

than this five minute period to complete, investors are protected during this time because the Price Volatility Constraint will reset if the actual price calculated by the Cross is more than 10% below or above the Near Execution Price. Once the Price Volatility Constraint has been satisfied, Nasdaq proposes to disseminate the Near Execution Price and the Near Execution Time on a public website, such as Nasdaq.com.

Nasdaq believes that the proposal to reset the Price Volatility Constraint, the Near Execution Price and the Near Execution Time in the circumstances described above is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market investors because in certain circumstances an imbalance between the buy and sell orders could sometimes cause the Current Reference Price to fall outside the 10% Price Collar after the Price Volatility Constraint has been satisfied. These provisions will protect investors by increasing the information available to them in connection with the price formation process during the opening auction.

To protect investors and increase transparency, Nasdaq also proposes to disseminate on a public website, such as Nasdaq.com, the 30-minute countdown from the Near Execution Time and indicate that the Near Execution Price and the Near Execution Time may be reset, as described above, if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is outside the 10% Price Collar.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise.

These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website such as Nasdaq.com.

To assure that members have the necessary information to be provided to their customers, Nasdaq proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, an information circular to its members that describes any special characteristics of the offering, and Nasdaq's rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, including information about the notice they must provide customers and other Nasdaq requirements that:

- members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the

customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

These member requirements are consistent with the protection of investors because they are designed to remind members of its obligations to “know their customers,” increase transparency of the pricing mechanisms of a Direct Listing with a Capital Raise, and help assure that investors have sufficient price discovery information.

Nasdaq believes that the Commission Staff has already concluded that pricing up to 20% below the lowest price and at a price above the highest price of the price range in the company’s effective registration statement is appropriate for a company conducting an initial public offering notwithstanding it being outside of the range stated in an effective registration statement, and investors have become familiar with this approach at least since the Commission Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.³⁸ Allowing Direct Listings with a Capital Raise to similarly price up to 20% below the lowest price and at a price above the highest price of the price range in the company’s effective registration statement but below the Upside Limit would be consistent with Chair Gensler’s recent call to treat “like cases alike.”³⁹

Nasdaq believes that the proposed amendments to Listing Rule IM-5315-2 and Rules 4753(a)(3)(A) and 4753(b)(2) to conform these rules to the modification of the Pricing Range Limitation is consistent with the protection of investors. These amendments would simply substitute Nasdaq’s reliance on the price equal to the lowest

³⁸ <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

³⁹ See <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>.

price of the price range disclosed by the issuer in its effective registration statement to the price that is 20% below such lowest price, making it more difficult to meet the requirements. In the case of Listing Rule IM-5315-2, a company listing in connection with a Direct Listing with a Capital Raise would still need to meet all applicable initial listing requirements based on the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. In the case of the Rules 4753(a)(3)(A) and 4753(b)(2) such price, which is the minimum price at which the Cross will occur, will serve as the fourth tie-breaker where there are multiple prices that would satisfy the conditions for determining the auction price, as described above. Nasdaq believes that this proposal to resolve a potential tie among the prices that satisfy all other requirements in the Cross, by choosing the price that is closest to the price that is 20% below the range, is consistent with Section 6(b)(5) of the Act because it is designed to protect investors by providing them with the most advantageous offering price among possible alternative prices.

Nasdaq also believes that the proposal, by eliminating an impediment to companies using a Direct Listing with a Capital Raise, will help removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.

Finally, Nasdaq believes that the proposal to clarify several provisions of the existing rules without changing them is designed to remove impediments to and perfect the mechanism of a free and open market because such changes make the rules easier to understand and apply without changing their substance.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments would not impose any burden on competition, but would rather increase competition. Nasdaq believes that allowing listing venues to improve their rules enhances competition among exchanges. Nasdaq also believes that this proposed change will give issuers interested in this pathway to access the capital markets additional flexibility in becoming a public company, and in that way promote competition among service providers, such as underwriters and other advisors, to such companies.

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

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.
4. Amended rule text indicating additions to or deletions from the immediately preceding filing.
5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-NASDAQ-2022-027)

September __, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Modify Certain Pricing Limitations for Companies Listing in Connection with a Direct Listing with a Capital Raise

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on September 15, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify certain pricing limitations for companies listing in connection with a Direct Listing with a Capital Raise on the Nasdaq Global Select Market in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq. This Amendment No. 2 supersedes the original filing, as modified by Amendment No. 1, in its entirety.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Nasdaq is filing this amendment to SR-NASDAQ-2022-027³ to address the issues the Commission raised in the OIP and make other modifications to clarify the proposed rule language. This Amendment No.2 supersedes and replaces Amendment No.1 in its entirety.

³ Securities Exchange Act Release No. 94592 (April 4, 2022), 87 FR 20905 (April 8, 2022) (the "Initial Proposal"). On May 23, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed. Securities Exchange Act Release No. 94989 (May 26, 2022), 87 FR 33558 (June 2, 2022). The Commission issued an Order Instituting Proceedings to Determine Whether To Approve or Disapprove the Initial Proposal, as modified by Amendment No.1. See Securities Exchange Act Release No. 95220 (July 7, 2022), 87 FR 41780 (July 13, 2022) (the "OIP").

In this Amendment No. 2 (the “Amendment”) Nasdaq proposes to modify the Initial Proposal, as modified by Amendment No.1⁴, to require that a company offering securities for sale in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.⁵

Also in this Amendment, Nasdaq proposes to modify the Pricing Range Limitation, as defined below, such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can be executed in the Cross at a price that is above the highest price of the price range established by the issuer in its effective registration statement only if the execution price is at or below the price that is 80% above the highest price of the price range.⁶

⁴ Nasdaq submitted Amendment No.1 in order to: (i) clarify Nasdaq’s view of the applicability of Securities Act Rule 430A and mechanics of complying with the disclosures required under federal securities laws by a company listing in connection with a Direct Listing with a Capital Raise in circumstances where the actual price calculated by the Cross is outside of the price range established by the issuer in its effective registration statement; (ii) specify that if the company’s certification to Nasdaq (that the company does not expect that an offering price above the price range would materially change the company’s previous disclosure in its effective registration statement) includes an upside limit, Nasdaq will not execute the cross if it results in an offering price above such limit; and (iii) make minor technical changes to improve the structure, clarity and readability of the proposed rules.

⁵ Nasdaq believes that this proposal addresses the issues raised by the Commission in the OIP related to the potential lack of a named underwriter in a Direct Listing with a Capital Raise, as explained below. Nasdaq also believes that this proposal addresses concerns raised in the comment letter submitted by the Council of Institutional Investors (CII), dated August 8, 2022. Nasdaq believes that the CII letter raises concerns that are substantively the same as the concerns raised by the Commission in the OIP.

⁶ Nasdaq believes that this proposal addresses the issues raised by the Commission in the OIP related to the usefulness and reliability of price range disclosure provided to investors, as explained below.

Description of Proposed Rule, as Amended

In 2021, Nasdaq adopted Listing Rule IM-5315-2 to permit a company to list on the Nasdaq Global Select Market in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a “Direct Listing with a Capital Raise”);⁷ created a new order type (the “CDL Order”), which is used during the Nasdaq Halt Cross (the “Cross”) for the shares offered by the company in a Direct Listing with a Capital Raise; and established requirements for disseminating information, establishing the opening price and initiating trading through the Cross in a Direct Listing with a Capital Raise.⁸ For a Direct Listing with a Capital Raise, Nasdaq rules currently require that the actual price calculated by the Cross be at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement (the “Pricing Range Limitation”).

Nasdaq now proposes to modify the Pricing Range Limitation⁹ such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can also be executed in the Cross at a price that is at or above the price that is as low as 20% below the lowest price in the price range established by the issuer in its effective

⁷ A Direct Listing with a Capital Raise includes situations where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

⁸ See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (the “Approval Order”).

⁹ On February 24, 2022, the Commission issued an order disapproving a similar proposal by Nasdaq. Securities Exchange Act Release No. 94311 (February 24, 2022), 87 FR 11780 (March 2, 2022) (the “Disapproval Order”). Nasdaq believes that this proposal addresses the issues raised by the Commission in the Disapproval Order.

registration statement;¹⁰ or at a price above the highest price of such price range but only if the execution price is at or below the price that is 80% above the highest price of the price range. Specifically, to execute at a price outside of the price range, the company's registration statement must contain a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering were less than or exceeded the amount assumed in such price range and the company has publicly disclosed and certified to Nasdaq that the company does not expect that such price would materially change the company's previous disclosure in its effective registration statement. Nasdaq also proposes to make related conforming changes.

Current Direct Listing with a Capital Raise Requirements

Currently, a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Cross, which is described in Rules 4120(c)(9) and 4753.¹¹

Currently, in addition to pricing within the Pricing Range Limitation,¹² Rule 4120(c)(9) requires that in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is

¹⁰ References in this proposal to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement. Separately, as explained in more details below, Nasdaq proposes to prescribe that the 20% threshold below the lowest price in the price range will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

¹¹ See Listing Rule IM-5315-2.

¹² See Rule 4120(c)(9)(B).

ready to trade. In addition, under Rule 4120(c)(9)(B) Nasdaq will release the security for trading only if all market orders will be executed in the Cross. If there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the Pricing Range Limitation is not satisfied, the Cross would not proceed and such security would not begin trading. In such event, because the Cross cannot be conducted, the Exchange would postpone and reschedule the offering and notify market participants via a Trader Update that the Direct Listing with a Capital Raise scheduled for that date has been cancelled and any orders for that security that have been entered on the Exchange would be cancelled back to the entering firms.¹³

Proposed Change to Rule 4120(c)(9)

While many companies are interested in alternatives to traditional IPOs, based on conversations with companies and their advisors Nasdaq believes that there may be a reluctance to use the existing Direct Listing with a Capital Raise rules because of concerns about the Pricing Range Limitation.

One potential benefit of a Direct Listing with a Capital Raise as an alternative to a traditional IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, in a Direct Listing with a Capital Raise the initial sale price is determined based on market interest and the matching of buy and sell orders

¹³ Nasdaq will postpone and reschedule the offering only if either or both such conditions are not met.

in an auction open to all market participants. In that regard, in the Approval Order the Commission stated that:

The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.¹⁴

A successful initial public offering of shares requires sufficient investor interest. If an offering cannot be completed due to lack of investor interest, there is likely to be a substantial amount of negative publicity for the company and the offering may be delayed or cancelled. The Pricing Range Limitation imposed on a Direct Listing with a Capital Raise (but not on a traditional IPO) increases the probability of such a failed offering because the offering cannot proceed without some delay not only for the lack of investor interest, but also if investor interest is greater than the company, its underwriter, and other advisors anticipated. In the Approval Order, the Commission noted a frequent academic observation of traditional firm commitment underwritten offerings that the IPO price, established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.¹⁵ Nasdaq believes that the price range in a company's effective registration statement for a Direct

¹⁴ See Approval Order, 86 FR at 28177.

¹⁵ See Approval Order, footnote 91.

Listing with a Capital Raise would similarly be determined by the company, its underwriter, and other advisors and, therefore, there may be instances of offerings where the price determined by the Nasdaq opening auction will exceed the highest price of the price range in the company's effective registration statement.

As explained above, under the existing rule a security subject to a Direct Listing with a Capital Raise cannot be released for trading by Nasdaq if the actual price calculated by the Cross is above the highest price of the price range established by the issuer in its effective registration statement. In this case, Nasdaq would have to cancel or postpone the offering until the company amends its effective registration statement. At a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event. In addition, as explained above, the determination of the public offering price of a traditional IPO is not subject to limitations similar to the Pricing Range Limitation for a Direct Listing with a Capital Raise, which, in Nasdaq's view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits. This reluctance could result in denying investors and companies the benefits of this different price discovery method.

Accordingly, Nasdaq proposes to modify the Pricing Range Limitation such that in the case of the Direct Listing with a Capital Raise, a security could be released for trading by Nasdaq if the actual price at which the Cross would occur is as much as 20% below the lowest price of the price range established by the issuer in its effective registration statement. In addition, a security could be released for trading by Nasdaq if the actual price at which the Cross would occur was above the highest price in the price range established by the issuer in its effective registration statement but only if the

execution price is at or below the price that is 80% above the highest price of the price range.¹⁶ In such cases (whether lower or higher than the price range) the company will be required to specify the quantity of shares registered in its registration statement, as permitted by Securities Act Rule 457,¹⁷ and that registration statement will be required to contain a sensitivity analysis (the company must also certify to Nasdaq in that regard) explaining how the company's plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the price range established by the issuer in its effective registration statement.¹⁸ In addition, the company will be required to publicly disclose and certify to Nasdaq prior to beginning of the Display Only Period that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement. If the company's certification submitted to Nasdaq in that regard includes a price limit that is below the price that is 80% above the highest price of the price range (the "Upside Limit"), Nasdaq will not execute the Cross if it results in the offering price above such limit. The goal of

¹⁶ In the prior proposal, Nasdaq proposed different requirements based on whether the Cross would occur at a price that was within 20% of the price range. See Disapproval Order. Nasdaq is eliminating this proposed distinction and is proposing herein to treat all prices outside of the price range the same.

¹⁷ Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount. Nasdaq proposes to require that companies selling shares through a Direct Listing with a Capital Raise will register securities by specifying the quantity of shares registered and not a maximum offering amount. See also Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

¹⁸ The price range in the preliminary prospectus included in the effective registration statement must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

these requirements is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.¹⁹

Nasdaq believes that this approach is consistent with SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which generally allow a company to price a public offering 20% outside of the disclosed price range without regard to the materiality of the changes to the disclosure contained in the company's registration statement. Nasdaq believes such guidance also allows deviation above the price range beyond the 20% threshold if such change or deviation does not materially change the previous disclosure. Accordingly, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. For purposes of this rule, the 20% threshold will be calculated based on the maximum offering price set forth

¹⁹ Sensitivity analysis disclosure may include but is not limited to: use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. An example of this disclosure could be: We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes.

in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.²⁰

Nasdaq notes that the Commission previously stated that while Securities Act Rule 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability for potentially misleading disclosure under the federal securities laws.²¹ Accordingly, the burden of complying with the disclosures required under federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omissions, remains with the issuer. In that regard, Nasdaq believes that the Post-Pricing Period, applicable in circumstances where the actual price calculated by the Cross is outside of the price range established by the issuer in its effective registration statement,

²⁰ Nasdaq believes that applying additional protections related to the disclosure requirements in the registration statement and the certifications to Nasdaq, as described above, to all instances where the Cross is executed outside the disclosed price range addresses an issue the Commission raised in the Disapproval Order. See footnote 9 above. For brevity, proposed rules define the “Price Range” as the price range established by the issuer in its preliminary prospectus included in the effective registration statement, including the maximum and the minimum prices of such range; and “DLCR Price Range” as the price range that includes any price that is below the Price Range and at or above the price that is 20% below the lowest price of the Price Range, or is above the highest price of the Price Range. If the company’s certification includes an upside limit, the DLCR Price Range is as defined in the preceding sentence, but subject to the upper limit provided by the company in its certification.

²¹ Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021).

as described below, provides the company an opportunity, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, if any; and/or determine and confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross.

Nasdaq believes that an underwriter plays an important role in a traditional IPO and, therefore, proposes to require that a company listing securities on Nasdaq in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement. Describing the role and responsibilities of an underwriter, the Commission recently explained that:

[a]s intermediaries between an issuer and the investing public, underwriters play a critical role as “gatekeepers” to the public markets. Historically, in initial public offerings, where the investing public might be unfamiliar with a particular issuer, financial firms that act as underwriters would lend their well-known name to support that issuer’s offering. Where public investors may not have been inclined to invest with the company seeking to conduct a public offering, they could take comfort in the fact that a large, well-known financial institution, acting as underwriter, was including its name on the first page of the issuer’s prospectus...

An underwriter’s participation in an issuer’s offering also exposes the underwriter to potential liability under the Securities Act. The civil liability provisions of the Securities Act reflect the unique position underwriters occupy in the chain of

distribution of securities and provide strong incentives for underwriters to take steps to help ensure the accuracy of disclosure in a registration statement. Section 11 of the Securities Act imposes on underwriters, among other parties identified in Section 11(a), civil liability for any part of the registration statement, at effectiveness, which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, to any person acquiring such security.

Similarly, Section 12(a)(2) imposes liability upon anyone, including underwriters, who offers or sells a security, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading, to any person purchasing such security from them. These provisions provide significant investor protections to those who acquire securities sold pursuant to a registration statement by providing tools to hold companies, underwriters, and other parties accountable for misstatements and omissions in connection with public offerings of securities. As a result, anyone who might be named as a potential defendant in these suits has strong incentives to take the necessary steps to avoid such liability.

One defense available to an underwriter in a distribution is the “due diligence” defense, which shields an underwriter from liability if it can establish that, after reasonable investigation, the underwriter had reasonable ground to believe and did believe, at the time the registration statement became effective, that the

statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.²²

Nasdaq believes that these significant investor protections provisions are necessary in a Direct Listing with a Capital Raise if an offering can price outside the price range established in the issuer's effective registration statement, subject to proposed limitations, because such provisions allow investors to make reasonable pricing decisions with clarity that the company's underwriter would face statutory liability, as described above. Accordingly, Nasdaq proposes to require that a company listing securities on Nasdaq in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.

Nasdaq also believes that the requirement to retain a named underwriter, as described above, may mitigate concerns, raised by the Commission in the OIP, regarding challenges to bringing claims under Section 11 of the Securities Act due to the potential assertion of tracing defenses because an underwriter may choose to impose lock-up arrangements, as described below.

As a preliminary matter, Nasdaq notes that in the Approval Order the Commission explained that the issue of traceability:

is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market as those that are so subject. Where a registration statement, at the time of effectiveness, contains an

²² Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 FR 29,458 (May 13, 2022).

untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act provides a cause of action to “any person acquiring such security,” unless it is proved that at the time of the acquisition the person “knew of such untruth or omission.” In the context of conventional public offerings, courts have interpreted this statutory provision to permit aftermarket purchasers (i.e., those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the offering covered by the false or misleading registration statement. Tracing is not set forth in Section 11 and is a judicially-developed doctrine. The application of this doctrine and, in particular, the pleading standards and factual proof that potential claimants must satisfy vary depending on the particular facts of the distribution and judicial district, and may be affected by pending litigation.²³

The Commission then reaffirmed its position that “concerns regarding shareholders' ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in a [] Direct Listing with a Capital Raise.” The Commission further stated that it “is not aware of any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims. The Commission is actively monitoring this issue and will be able to respond to

²³ The Approval order, 86 FR at 28176

such concerns when and if they arise.”²⁴ Nasdaq believes that no such precedent exists as of the date of this Amendment and that the modifications to the Pricing Range Limitation in this proposal do not, in any way, exacerbate the tracing issues.

However, as stated above, Nasdaq believes that the requirement to retain a named underwriter may mitigate traceability concerns that may arise in a Direct Listing with a Capital Raise. As in a traditional firm commitment underwritten IPO, in which lock-up arrangements are often imposed, an underwriter retained in connection with a Direct Listing with a Capital Raise, as required by the Amendment, will be able to impose lock-up arrangements for the same reasons that make lock up agreements common in an IPO.

Nasdaq also believes that the requirement to retain a named underwriter, as described above, mitigates concerns, raised by the Commission in the OIP, regarding the usefulness of price range disclosure provided to investors in a Securities Act registration statement filed in connection with a Direct Listing with a Capital Raise. Nasdaq believes that an underwriter retained in connection with a Direct Listing with a Capital Raise will perform substantially similar functions, including those related to establishing and adjusting the price range, to those performed by an underwriter in a typical IPO because the underwriter will be subject to similar liability and reputational risk.

To further mitigate concerns regarding the usefulness of price range disclosure provided to investors, Nasdaq proposes to require that the securities of a company listing in connection with a Direct Listing with a Capital Raise cannot price above the Upside Limit. The Upside Limit will incentivize the company and its underwriter to set the disclosed price range to avoid a failed offering consequences described above. The

²⁴ The Approval order, 86 FR at 28177

Upside Limit would also help assure that an issuer would adjust the price range disclosed in their registration statements prior to effectiveness in light of pricing feedback received from market analysts and potential investors.

To determine an appropriate Upside Limit, Nasdaq analyzed operating companies IPOs on the Nasdaq Global Select Market and the NYSE for the past five years where an IPO opened on an exchange at a price that is above the highest price of the price range in the issuer's effective registration statement.²⁵ This analysis indicated that some IPOs opened on an exchange at a price that was more than 100% above the highest price of the price range. Based on the same data, more than half of these IPOs opened at a price that was 30% or more above the highest price of the price range. However, about 90% of these IPOs opened at a price that was no more than the Upside Limit. Based on this data Nasdaq believes that, on balance, capital formation and investor protection goals would be best served by a pricing limitation equal to the Upside Limit.

Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. Prior to releasing a security for trading, Nasdaq allows a "Pre-Launch Period" of indeterminate length, during which price discovery takes place. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price during the Pre-Launch Period within the previous 10 minutes. The Pre-Launch Period will continue until at least five minutes after the Price Volatility Constraint has been satisfied. Nasdaq will also introduce the Near Execution Price which is the Current

²⁵ This data set included over 400 records and covers a period from January 2017 to July 2022.

Reference Price at the time the Price Volatility Constraint has been satisfied; and set the Near Execution Time as such time. This change will provide investors with notice that the Cross nears execution and allows a period of at least five minutes for investors to modify their orders, if needed, based on the Near Execution Price, prior to the execution of the Cross and the pricing of the offering. Further, to assure that the Near Execution Price is a meaningful benchmark for investors, and that the offering price does not deviate substantially from the Near Execution Price, Nasdaq proposes to require, in addition to other the existing conditions stated in proposed Rule 4120(c)(9)(B)(vii), that the Cross may execute only if the actual price calculated by the Cross is no more than 10% below or above the Near Execution Price (the “10% Price Collar”).

Nasdaq notes that imbalance between the buy and sell orders could sometimes cause the Current Reference Price to fall outside the 10% Price Collar after the Price Volatility Constraint has been satisfied. Such price fluctuations could be temporary, and the Current Reference Price may return to and remain within the 10% Price Collar. The price fluctuation could also be lasting such that the Current Reference Price remains outside the 10% Price Collar. Given this, Nasdaq proposes to assess the Current Reference Price vis-à-vis the 10% Price Collar 30 minutes after the Near Execution Time. If at that time the Current Reference Price is outside the 10% Price Collar, all requirements of the Pre-Launch Period shall reset and must be satisfied again.²⁶ Once the

²⁶ For the avoidance of doubt, while the Price Volatility Constraint cannot initially be satisfied sooner than ten minutes after the beginning of the Pre-Launch Period, if it is subsequently reset, the Price Volatility Constraint can be satisfied again in less than ten minutes because it would look back at prior pricing during the Pre-Launch Period (including pricing prior to the reset) to determine if the Current Reference Price has deviated by 10% or more from any Current Reference Price within the previous 10 minutes.

Price Volatility Constraint has been satisfied anew, the Current Reference Price at such time will become the updated Near Execution Price and such time will become the updated Near Execution Time. This process will continue iteratively, if new resets are triggered, until the Cross is executed, or the offering is postponed.

If the Current Reference Price 30 minutes after the Near Execution Time is within the 10% Price Collar, price formation may continue without limitations until Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade (and certain existing conditions restated in proposed Rule 4120(c)(9)(B)(vii) are met). However, if at any time 30 minutes after the Near Execution Time the Current Reference Price is outside the 10% Price Collar, all requirements of the Pre-Launch Period shall reset and must be satisfied again, in the same manner as described in the immediately preceding paragraph.

Given that, as proposed, there may be a Direct Listing with a Capital Raise that could price outside the price range of the company's effective registration statement, subject to the Upside Limit above which the Cross could not proceed,²⁷ Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, during the Pre-Launch Period and indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. Once the Price Volatility

²⁷ In addition to the Upside Limit, if the company's certification submitted to Nasdaq pursuant to proposed Listing Rule 4120(c)(9)(B)(vii)d.2. includes a price limit that is lower than the Upside Limit and the actual price calculated by the Cross exceeds such lower limit, Nasdaq will postpone and reschedule the offering.

Constraint has been satisfied, Nasdaq will also disseminate the Near Execution Price, the Near Execution Time and the 30-minute countdown from such time. The disclosure will indicate that the Near Execution Price and the Near Execution Time may be reset, as described above, if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price.

In this way, investors interested in participating in the opening auction will be informed when volatility has settled to a range that will allow the open to take place and they will be informed of the price range at which the auction would take place. If the price moves outside, and remains outside this range, 30 minutes after the original range was set they will be informed of the new range and will have at least five minutes to reevaluate their investment decision.²⁸

Nasdaq also proposes to prohibit market orders (other than by the Company through its CDL Order) from the opening of a Direct Listing with a Capital Raise. This will protect investors by assuring that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the

²⁸ Nasdaq believes that the introduction, as described above, of the 10% Price Collar, the Near Execution Price, the Near Execution Time, the 30-minute reset and the five minute prohibition on executing the Cross after the Price Volatility Constraint has been satisfied addresses concerns the Commission raised in the Disapproval Order. See footnote 9 above. Specifically, in the Disapproval Order, the Commission stated that, as previously proposed, “investors could be misled that the opening cross ‘nears execution’ and that the disseminated Current Reference Price will likely be close to the opening auction price when, in fact, the auction may not occur for a considerable time and the opening auction price may differ substantially.” As revised, the opening auction price must remain within 10% of the price publicly announced as the Near Execution Price for the auction to occur and investors will have enhanced disclosure about the possibility that the Price Volatility Constraint could be reset.

company's effective registration statement including the sensitivity analysis describing how the company will use any additional proceeds raised. Accordingly, an investor participating in a Direct Listing with a Capital Raise will make their initial investment decision prior to the launch of the offering by setting the price in their limit order above which they will not buy shares in the offering, but will also have an opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price. Under the proposed rule, such investor will have at least five minutes once the Near Execution Price has been set and before the offering may be priced by Nasdaq to modify their order, if needed. As described above, all relevant price formation information will be disseminated by Nasdaq on a public website in real time.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the location of the public website where Nasdaq will disseminate the Current Reference Price.

To assure that members have the necessary information to be provided to their customers, Nasdaq proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, an information circular to its members that describes any special

characteristics of the offering, and Nasdaq's rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, including information about the notice they must provide customers and other Nasdaq requirements that:

- members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

These member requirements are intended to remind members of their obligations to “know their customers,” increase transparency of the pricing mechanisms of a Direct Listing with a Capital Raise, and help assure that investors have sufficient price discovery information.

In each instance of a Direct Listing with a Capital Raise, Nasdaq’s information circular²⁹ will inform the market participants that the auction could price up to 20% below the lowest price of the price range in the company’s effective registration

²⁹ The information circular is an industry wide free service provided by Nasdaq.

statement and specify what that price is. Nasdaq will also indicate in such circular a statement that the Cross cannot proceed at a price in excess of the Upside Limit and whether or not there is a lower price limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also remind the market participants that Nasdaq prohibits market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise.

To assure that the issuer has the ability, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is outside of the price range established by the issuer in its effective registration statement. Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering.

Proposed Conforming Changes to Listing Rule IM-5315-2

Listing Rule IM-5315-2 allows a company that has not previously had its common equity securities registered under the Act to list its common equity securities on the Nasdaq Global Select Market at the time of effectiveness of a registration statement

pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange.

Listing Rule IM-5315-2 provides that in determining whether a company listing in connection with a Direct Listing with a Capital Raise satisfies the Market Value of Unrestricted Publicly Held Shares³⁰ for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement if the amount of the company's Unrestricted Publicly Held Shares before the offering along with the market value of the shares to be sold by the company in the Exchange's opening auction in the Direct Listing with a Capital Raise is at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million).

Listing Rule IM-5315-2 further provides that, for this purpose, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.

Because Nasdaq proposes to allow the opening auction to price up to 20% below the lowest price of the price range established by the issuer in its effective registration statement, Nasdaq proposes to make a conforming change to Listing Rule IM-5315-2 to provide that the price used to determine such company's compliance with the Market Value of Unrestricted Publicly Held Shares is the price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq proposes to clarify in Listing Rule IM-5315-2 that the 20% threshold below the price range will be calculated based on the maximum offering

³⁰ See Listing Rules 5005(a)(23) and 5005(a)(45).

price set forth in the registration fee table. Nasdaq will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price. This price is the minimum price at which the company could sell its shares in the Direct Listing with a Capital Raise transaction and so assures that the company will satisfy these requirements at any price at which the auction successfully executes.

Any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to, and required to meet, all other applicable initial listing requirements, including the requirements to have the applicable number of shareholders and at least 1,250,000 Unrestricted Publicly Held Shares outstanding at the time of initial listing, and the requirement to have a price per share of at least \$4.00 at the time of initial listing.³¹

Proposed Conforming Changes to Rules 4753(a)(3)(A) and 4753(b)(2)

Nasdaq proposes to amend Rules 4753(a)(3)(A) and 4753(b)(2) to conform the requirements for disseminating information and establishing the opening price through the Cross in a Direct Listing with a Capital Raise to the proposed amendment to allow the opening auction to price as much as 20% below the lowest price of the price range established by the issuer in its effective registration statement.

Specifically, Nasdaq proposes changes to Rules 4753(a)(3)(A) and 4753(b)(2) to make adjustments to the calculation of the Current Reference Price, which is

³¹ See Listing Rules 5315(f)(1), (e)(1) and (2), respectively. Rule 5315(f)(1) requires a security to have: (A) at least 550 total holders and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or (B) at least 2,200 total holders; or (C) a minimum of 450 round lot holders and at least 50% of such round lot holders must each hold unrestricted securities with a market value of at least \$2,500.

disseminated in the Nasdaq Order Imbalance Indicator, in the case of a Direct Listing with a Capital Raise and for how the price at which the Cross will execute. These rules currently provide that where there are multiple prices that would satisfy the conditions for determining a price, the fourth tie-breaker for a Direct Listing with a Capital Raise is the price that is closest to the lowest price of the price range disclosed by the issuer in its effective registration statement.³²

To conform these rules to the modification of the Pricing Range Limitation change, as described above, Nasdaq proposes to modify the fourth tie-breaker for a Direct Listing with a Capital Raise, to use the price closest to the price that is 20% below (calculated as provided for in Listing Rule IM-5315-2) the lowest price of the price range disclosed by the issuer in its effective registration statement.³³

Lastly, Nasdaq proposes to clarify several provisions of the existing rules by restating the provisions of Rules 4120(c)(8)(A) and (c)(9)(A) in a clear and direct manner without substantively changing them. Specifically, Nasdaq proposes to clarify the mechanics of the Cross by specifying that Nasdaq will initiate a 10-minute Display Only Period only after the CDL Order had been entered. This clarification simply states what is already implied by the rule because the Cross and the offering may not proceed without the company's order to sell the securities in a Direct Listing with a Capital Raise.

³² To illustrate: The bottom of the range is \$10. More than one price exists within the range under the previous set of tie-breakers such that both \$10.15 and \$10.25, satisfy all other requirements. The operation of the fourth tie-breaker will result in the auction price of \$10.15 because it is the price that is closest to \$10.

³³ Note that using the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement as a tie-breaker (rather than the price representing the bottom of the range) does not change the outcome in the example in footnote 32 above because \$10.15 is the price that is closest to either.

Similarly, Nasdaq proposes to clarify without changing the existing rule that Nasdaq shall select price bands for purposes of applying the price validation test in the Cross in connection with a Direct Listing with a Capital Raise. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero. If a security does not pass the price validation test, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.³⁴ Nasdaq also proposes to clarify that the “actual price,” as the term is used in the rule, is the Current Reference Price at the time the system applies the price bands test.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendment to modify the Pricing Range Limitation is consistent with the protection of investors because this approach is similar

³⁴ This function is provided by the underwriter in an IPO and by a Financial Advisor in a Direct Listing when the company is not selling shares in a primary offering. The Commission previously approved Nasdaq performing this function. See Approval Order.

³⁵ 15 U.S.C. 78f(b).

³⁶ 15 U.S.C. 78f(b)(5).

to the pricing of an IPO where an issuer is permitted to price outside of the price range disclosed by the issuer in its effective registration statement in accordance with the SEC's Staff guidance, as described above.³⁷ Specifically, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. As a result, Nasdaq will allow the Cross to take place as low as 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement, but no lower, and so this is the minimum price at which the company could be listed. In addition, to better inform investors and market participants, Nasdaq will issue an industry wide circular to inform the participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular that the Cross cannot proceed at a price in excess of the Upside Limit and whether or not there is a lower price limit above which the Cross could

³⁷ In a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. See <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>.

not proceed, based on the company's certification, as described above. Nasdaq will also remind the market participants that Nasdaq prohibits market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise.

To assure that the issuer has the ability, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and below the lowest price of the price range established by the issuer in its effective registration statement; or is above the highest price of the price range established by the issuer in its effective registration statement but below the Upside Limit (and below the high end price limit, if any, set in the company's certification submitted to Nasdaq pursuant to proposed Listing Rule 4120(c)(9)(B)(vii)d.2., if any). Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross, with such confirmation ending the Post-Pricing Period. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering. Nasdaq believes that this modification is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market because it

will help assure that a company listing in connection with a Direct Listing with a Capital Raise complies with the disclosure requirements under federal securities laws and that investors receive all required information.

Nasdaq believes that the proposal to allow a Direct Listing with a Capital Raise to price above the price range of the company's effective registration statement but below the Upside Limit is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market investors because this approach is similar to, but more stringent than, that of pricing a traditional IPO. In addition, to protect investors Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will disseminate, free of charge, the Current Reference Price on a public website (such as Nasdaq.com) during the Pre-Launch Period and indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement.

Nasdaq believes that a proposed requirement that a company offering securities for sale in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement is designed to protect investors and the public interest because these provisions provide significant investor protections to those who acquire securities sold pursuant to a registration statement by providing tools to hold underwriters accountable for misstatements and omissions in connection with a Direct Listing with a Capital Raise.

Nasdaq believes that the requirement that the securities of a company listing in connection with a Direct Listing with a Capital Raise cannot price above the Upside Limit is designed to protect investors and the public interest because it would incentivize the company and its underwriter to avoid a failed offering by taking steps to help ensure the accuracy of price range disclosure in a registration statement. In addition, as described above, an underwriter has strong incentives to take the necessary steps to avoid statutory liability.

Nasdaq believes that the provision prohibiting market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise is designed to protect investors because this provision will assure that investors only purchase shares at a price that is at, or better than, the price they affirmatively set, after having the opportunity to review the company's effective registration statement including the sensitivity analysis describing how the company will use any additional proceeds raised.

Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until at least five minutes after the Price Volatility Constraint has been satisfied. Nasdaq will also introduce the Near Execution Price which is the Current Reference Price at the time the Price Volatility Constraint has been satisfied; and set the Near Execution Time at such time. This change will provide investors with notice that the Cross nears execution and a period of at least five minutes to modify their orders, if needed, based on

the Near Execution Price, prior to the execution of the Cross and the pricing of the offering. Further, to help assure that the offering price does not deviate substantially from the Near Execution Price, Nasdaq proposes to require, in addition to other conditions described above, that the Cross may execute only if the actual price calculated by the Cross is within the 10% Price Collar. Nasdaq believes that these changes are designed to protect investors and the public interest because an investor participating in a Direct Listing with a Capital Raise will make their initial investment decision prior to the launch of the offering by setting the price in their limit order above which they will not buy shares in the offering, but will also have an opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price. Under the proposed rule, such investor will have at least five minutes once the Near Execution Price has been set and before the offering may be priced by Nasdaq to modify their order, if needed. While the auction may take longer than this five minute period to complete, investors are protected during this time because the Price Volatility Constraint will reset if the actual price calculated by the Cross is more than 10% below or above the Near Execution Price. Once the Price Volatility Constraint has been satisfied, Nasdaq proposes to disseminate the Near Execution Price and the Near Execution Time on a public website, such as Nasdaq.com.

Nasdaq believes that the proposal to reset the Price Volatility Constraint, the Near Execution Price and the Near Execution Time in the circumstances described above is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market investors because in certain circumstances an imbalance between the buy and sell orders could sometimes cause the

Current Reference Price to fall outside the 10% Price Collar after the Price Volatility Constraint has been satisfied. These provisions will protect investors by increasing the information available to them in connection with the price formation process during the opening auction.

To protect investors and increase transparency, Nasdaq also proposes to disseminate on a public website, such as Nasdaq.com, the 30-minute countdown from the Near Execution Time and indicate that the Near Execution Price and the Near Execution Time may be reset, as described above, if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is outside the 10% Price Collar.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website such as Nasdaq.com.

To assure that members have the necessary information to be provided to their customers, Nasdaq proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, an information circular to its members that describes any special characteristics of the offering, and Nasdaq's rules that apply to the initial pricing through

the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, including information about the notice they must provide customers and other Nasdaq requirements that:

- members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

These member requirements are consistent with the protection of investors because they are designed to remind members of its obligations to “know their customers,” increase transparency of the pricing mechanisms of a Direct Listing with a Capital Raise, and help assure that investors have sufficient price discovery information.

Nasdaq believes that the Commission Staff has already concluded that pricing up to 20% below the lowest price and at a price above the highest price of the price range in the company’s effective registration statement is appropriate for a company conducting an initial public offering notwithstanding it being outside of the range stated in an effective registration statement, and investors have become familiar with this approach at

least since the Commission Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.³⁸ Allowing Direct Listings with a Capital Raise to similarly price up to 20% below the lowest price and at a price above the highest price of the price range in the company's effective registration statement but below the Upside Limit would be consistent with Chair Gensler's recent call to treat "like cases alike."³⁹

Nasdaq believes that the proposed amendments to Listing Rule IM-5315-2 and Rules 4753(a)(3)(A) and 4753(b)(2) to conform these rules to the modification of the Pricing Range Limitation is consistent with the protection of investors. These amendments would simply substitute Nasdaq's reliance on the price equal to the lowest price of the price range disclosed by the issuer in its effective registration statement to the price that is 20% below such lowest price, making it more difficult to meet the requirements. In the case of Listing Rule IM-5315-2, a company listing in connection with a Direct Listing with a Capital Raise would still need to meet all applicable initial listing requirements based on the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. In the case of the Rules 4753(a)(3)(A) and 4753(b)(2) such price, which is the minimum price at which the Cross will occur, will serve as the fourth tie-breaker where there are multiple prices that would satisfy the conditions for determining the auction price, as described above.

Nasdaq believes that this proposal to resolve a potential tie among the prices that satisfy all other requirements in the Cross, by choosing the price that is closest to the price that is 20% below the range, is consistent with Section 6(b)(5) of the Act because it is designed

³⁸ <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

³⁹ See <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>.

to protect investors by providing them with the most advantageous offering price among possible alternative prices.

Nasdaq also believes that the proposal, by eliminating an impediment to companies using a Direct Listing with a Capital Raise, will help removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.

Finally, Nasdaq believes that the proposal to clarify several provisions of the existing rules without changing them is designed to remove impediments to and perfect the mechanism of a free and open market because such changes make the rules easier to understand and apply without changing their substance.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments would not impose any burden on competition, but would rather increase competition. Nasdaq believes that allowing listing venues to improve their rules enhances competition among exchanges. Nasdaq also believes that this proposed change will give issuers interested in this pathway to access the capital markets additional flexibility in becoming a public company, and in that way promote competition among service providers, such as underwriters and other advisors, to such companies.

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

No written comments were either solicited or received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2022-027 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-2022-027. 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 Web site (<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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2022-027 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

J. Matthew DeLesDernier
Assistant Secretary

⁴⁰ 17 CFR 200.30-3(a)(12).

EXHIBIT 4

Changes to the Proposed Rule Text

Text is marked to show changes to proposed rule language in the original filing. Additions to original filing are double underlined; deletions from original filing are ~~stricken through~~.

The Nasdaq Stock Market Rules

* * * * *

4120. Limit Up-Limit Down Plan and Trading Halts

(a) – (b) No change.

(c) Procedure for Initiating and Terminating a Trading Halt

(1) – (8) No change.

(9) (A) No change.

(B) Direct Listing with a Capital Raise. A “Direct Listing with a Capital Raise” is an offering of securities at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders where: (1) the Company registers securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a); and (2) the Company retains an underwriter with respect to the primary sales of shares by the Company and identifies the underwriter in its effective registration statement. Notwithstanding the provisions of Rules 4120(c)(8)(A) and (c)(9)(A), in the case of a Direct Listing with a Capital Raise [(as defined in Listing Rule IM-5315-2)], for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. Nasdaq shall release the security for trading if: (i) all market orders will be executed in the Cross; and, (ii) the actual price calculated by the Cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement. Nasdaq shall postpone and reschedule the offering only if either or both of such conditions are not met.] a trading halt in a security initiated under Rule 4120(a)(7) shall be terminated when the conditions described in paragraphs (i) to (viii) below are satisfied and Nasdaq releases the security for trading. ~~A Company offering securities for sale in connection with a Direct Listing with a Capital Raise must register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a).~~

For the purpose of this paragraph (B), the “Price Range” is the price range

established by the issuer in its preliminary prospectus included in the effective registration statement and includes the maximum and the minimum prices of such range. The Price Range must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K. The 20% threshold below the Price Range, as described below, will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

(i) At least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, Nasdaq will distribute an information circular to its members that describes any special characteristics of the offering, and Nasdaq's rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, as well as the requirement that:

a. members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer;

b. members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security; and

c. members cannot accept market orders to be executed in the Cross and must provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website, such as Nasdaq.com, as provided by paragraph (v) below.

(ii) Beginning at 4:00 a.m., market participants may enter orders, which will be accepted and entered into the system. Market participants may not enter market orders to buy or sell securities, except for the Company Direct Listing Order (as defined in Rule 4702(b)(16)(A)). Market orders other than the CDL Order will be rejected by the system.

(iii) After 9:30am, at the time determined by Nasdaq, prior to terminating the halt, Nasdaq will initiate a 10-minute Display Only Period, which shall not begin until after the CDL Order has been entered. During the Display Only

Period market participants may continue to enter orders in the security in Nasdaq systems.

(iv) At the beginning of the Display Only Period and continuing through the resumption of trading, Nasdaq shall disseminate by electronic means certain information pursuant to Rule 4753(a)(3), including the Current Reference Price, every second.

(v) After the conclusion of the 10-minute Display Only Period, the security will enter a "Pre-Launch Period" of indeterminate duration. Market participants may continue to enter orders and order cancellations for participation in the Cross during the Pre-Launch Period up to the point when Nasdaq initiates a Post-Pricing Period pursuant to paragraph (viii) below, if applicable, or the security is released for trading. During the Pre-Launch Period, to provide price discovery transparency, Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, and indicate whether it is within the Price Range.

(vi) Prior to the conclusion of the Pre-Launch Period, Nasdaq shall select price bands for purposes of applying the price validation test in paragraph (vii)c. below. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero.

(vii) The Pre-Launch Period shall continue until at least 5 minutes after the Price Volatility Constraint has been satisfied. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes of the Pre-Launch Period. The Near Execution Price is the Current Reference Price at the time the Price Volatility Constraint has been satisfied (such time is the Near Execution Time). If the security is not released for trading within 30 minutes from the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price, the requirements of this paragraph (vii) shall reset and must be satisfied again.

Throughout the Pre-Launch Period, Nasdaq will disseminate information about whether the Price Volatility Constraint has been satisfied in order to provide transparency about whether the security may be ready to trade. Once the Price Volatility Constraint has been satisfied, Nasdaq will also disseminate the Near Execution Price, the Near Execution Time and the 30-minute countdown from such time. The disclosure will indicate that the Near Execution Price and the Near Execution Time may be reset, as described in this paragraph (vii), if the security is not released for trading within 30 minutes of the Near Execution

Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price.

The failure to satisfy The Price Volatility Constraint or the conditions of this paragraph (vii), below, will result in a delay of the release of the security for trading, and a continuation of the Pre-Launch Period, until all conditions have been satisfied. If a security does not pass the price validation test described in paragraph (vi) above, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.

The Pre-Launch Period shall end, and the security shall be released for trading (except as provided for by paragraph (viii) below), when Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade and the following conditions are all met:

- a. The Nasdaq system determines that the CDL Order will be executed in full in the Cross;
- b. the actual price calculated by the Cross is at or above the price that is 10% below the Near Execution Price and at or below the price that is 10% above the Near Execution Price;
- c. the difference between the Expected Price and the actual price calculated by the Cross, if any, is within the price bands previously selected by Nasdaq. The actual price is the Current Reference Price at the time of this test; and
- d. 1. the actual price calculated by the Cross is within the Price Range; or
2. the actual price calculated by the Cross is below the Price Range and at or above the price that is 20% below the lowest price of the Price Range; or is at or below the price that is 80% above the highest price of the Price Range (“DLCR Price Range”), provided that the Company has initially certified to Nasdaq and publicly disclosed, prior to the beginning of the Display Only Period, that (i) the Company does not expect that a price that is within the DLCR Price Range would materially change the Company’s previous disclosure in its effective registration statement, and (ii) such registration statement contains a sensitivity analysis explaining how the Company’s plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the Price Range. If the Company’s certification includes an upside limit that is lower than the one imposed through the DLCR Price Range, the DLCR Price Range shall be as defined in the preceding sentence, but subject to the upper limit provided by the Company in its certification.

(viii) a. If the actual price calculated by the Cross is within the Price Range, Nasdaq shall postpone and reschedule the pricing of the securities subject

to a Direct Listing with a Capital Raise only if the conditions in paragraphs (vii)a. b. and c., above, are not met.

b. If the actual price calculated by the Cross is at or within the DLCR Price Range but outside the Price Range, and the conditions in paragraphs (vii)a., b., c. and d., above, are met, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation then Nasdaq will postpone and reschedule the offering.

c. If the actual price calculated by the Cross is outside the DLCR Price Range, pursuant to paragraph (vii), above, Nasdaq will postpone and reschedule the offering.

(10) No change.

* * * * *

4753. Nasdaq Halt Cross

(a) Definitions.

For the purposes of this rule the term:

(1) – (2) No change.

(3) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) "Current Reference Price" shall mean:

(i) – (iii) No change.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean:

a. – b. No change.

c. In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the price that is 20% below (calculated as provided for in Listing Rule IM-5315-2) the lowest price of the price range disclosed by the issuer in its effective registration statement;

d. - f. No change.

Notwithstanding the foregoing, the Order Imbalance Indicator will not include the Current Reference Price if there is a Market Order Imbalance.

(B) – (G) No change.

(4) – (6) No change.

(b) Processing of Nasdaq Halt Cross. For Nasdaq-listed securities that are the subject of a trading halt or pause initiated pursuant to Rule 4120(a)(1), (4), (5), (6), (7) or (11), the Nasdaq Halt Cross shall occur at the time specified by Nasdaq pursuant to Rule 4120, and Market hours trading shall commence when the Nasdaq Halt Cross concludes.

(1) No change.

(2)

(A) – (C) No change.

(D) If more than one price exists under subparagraph (C), the Nasdaq Halt Cross shall occur at:

(i) - (ii) No change.

(iii) In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the price that is 20% below (calculated as provided for in Listing Rule IM-5315-2) the lowest price of the price range disclosed by the issuer in its effective registration statement;

(iv) - (vi) No change.

(E) No change.

(3) – (4) No change.

(c) – (d) No change.

* * * * *

IM-5315-2. Determination of Price-Based Requirements for Direct Listings with a Capital Raise

As described in Listing Rule IM-5315-1, Nasdaq recognizes that some companies that have 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, may wish to list those securities on Nasdaq. Such companies may list on the Nasdaq Global Select Market without an attendant initial public offering of equity securities by the Company if the Company meets the applicable initial listing requirements and the additional requirements in Listing Rule IM-5315-1.

In addition, in certain cases, a Company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders. Any such listing is referred to as a “Direct Listing with a Capital Raise” where either: (i) only the Company itself is selling shares in the opening auction on the first day of trading; or (ii) the Company is selling shares and selling shareholders may also sell shares in such opening auction.

A Company offering securities for sale in connection with a Direct Listing with a Capital Raise must: (i) register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a); and, (ii) retain an underwriter with respect to the primary sales of shares by the Company and identify the underwriter in its effective registration statement.

In determining whether such a Company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement if the amount of the Company’s Unrestricted Publicly Held Shares before the offering along with the market value of the shares to be sold by the Company in the Exchange’s opening auction in the Direct Listing with a Capital Raise is at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million).

For this purpose, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq will determine that the Company has met the applicable bid price and market capitalization requirements based on the same per share price. The 20% threshold below the price range will be calculated based on the maximum offering price set forth in the registration fee table.

Securities qualified for listing under this IM-5315-2 must satisfy the additional requirements of Rule 4120(c)(9)(B) and begin trading on Nasdaq following the initial pricing through the mechanism outlined in Rule 4120(c)(9)(B) and Rule 4753.

* * * * *

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market Rules

* * * * *

4120. Limit Up-Limit Down Plan and Trading Halts

(a) – (b) No change.

(c) Procedure for Initiating and Terminating a Trading Halt

(1) – (8) No change.

(9) (A) No change.

(B) Direct Listing with a Capital Raise. A “Direct Listing with a Capital Raise” is an offering of securities at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders where: (1) the Company registers securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a); and (2) the Company retains an underwriter with respect to the primary sales of shares by the Company and identifies the underwriter in its effective registration statement. Notwithstanding the provisions of Rules 4120(c)(8)(A) and (c)(9)(A), in the case of a Direct Listing with a Capital Raise [(as defined in Listing Rule IM-5315-2), for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. Nasdaq shall release the security for trading if: (i) all market orders will be executed in the Cross; and, (ii) the actual price calculated by the Cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement. Nasdaq shall postpone and reschedule the offering only if either or both of such conditions are not met.] a trading halt in a security initiated under Rule 4120(a)(7) shall be terminated when the conditions described in paragraphs (i) to (viii) below are satisfied and Nasdaq releases the security for trading.

For the purpose of this paragraph (B), the “Price Range” is the price range established by the issuer in its preliminary prospectus included in the effective registration statement and includes the maximum and the minimum prices of such range. The Price Range must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K. The 20% threshold below the Price Range, as

described below, will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

(i) At least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, Nasdaq will distribute an information circular to its members that describes any special characteristics of the offering, and Nasdaq's rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, as well as the requirement that:

a. members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer;

b. members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security; and

c. members cannot accept market orders to be executed in the Cross and must provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website, such as Nasdaq.com, as provided by paragraph (v) below.

(ii) Beginning at 4:00 a.m., market participants may enter orders, which will be accepted and entered into the system. Market participants may not enter market orders to buy or sell securities, except for the Company Direct Listing Order (as defined in Rule 4702(b)(16)(A)). Market orders other than the CDL Order will be rejected by the system.

(iii) After 9:30am, at the time determined by Nasdaq, prior to terminating the halt, Nasdaq will initiate a 10-minute Display Only Period, which shall not begin until after the CDL Order has been entered. During the Display Only Period market participants may continue to enter orders in the security in Nasdaq systems.

(iv) At the beginning of the Display Only Period and continuing through the resumption of trading, Nasdaq shall disseminate by electronic means certain

information pursuant to Rule 4753(a)(3), including the Current Reference Price, every second.

(v) After the conclusion of the 10-minute Display Only Period, the security will enter a "Pre-Launch Period" of indeterminate duration. Market participants may continue to enter orders and order cancellations for participation in the Cross during the Pre-Launch Period up to the point when Nasdaq initiates a Post-Pricing Period pursuant to paragraph (viii) below, if applicable, or the security is released for trading. During the Pre-Launch Period, to provide price discovery transparency, Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, and indicate whether it is within the Price Range.

(vi) Prior to the conclusion of the Pre-Launch Period, Nasdaq shall select price bands for purposes of applying the price validation test in paragraph (vii)c. below. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero.

(vii) The Pre-Launch Period shall continue until at least 5 minutes after the Price Volatility Constraint has been satisfied. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes of the Pre-Launch Period. The Near Execution Price is the Current Reference Price at the time the Price Volatility Constraint has been satisfied (such time is the Near Execution Time). If the security is not released for trading within 30 minutes from the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price, the requirements of this paragraph (vii) shall reset and must be satisfied again.

Throughout the Pre-Launch Period, Nasdaq will disseminate information about whether the Price Volatility Constraint has been satisfied in order to provide transparency about whether the security may be ready to trade. Once the Price Volatility Constraint has been satisfied, Nasdaq will also disseminate the Near Execution Price, the Near Execution Time and the 30-minute countdown from such time. The disclosure will indicate that the Near Execution Price and the Near Execution Time may be reset, as described in this paragraph (vii), if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price.

The failure to satisfy The Price Volatility Constraint or the conditions of this paragraph (vii), below, will result in a delay of the release of the security for

trading, and a continuation of the Pre-Launch Period, until all conditions have been satisfied. If a security does not pass the price validation test described in paragraph (vi) above, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.

The Pre-Launch Period shall end, and the security shall be released for trading (except as provided for by paragraph (viii) below), when Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade and the following conditions are all met:

- a. The Nasdaq system determines that the CDL Order will be executed in full in the Cross;
 - b. the actual price calculated by the Cross is at or above the price that is 10% below the Near Execution Price and at or below the price that is 10% above the Near Execution Price;
 - c. the difference between the Expected Price and the actual price calculated by the Cross, if any, is within the price bands previously selected by Nasdaq. The actual price is the Current Reference Price at the time of this test; and
 - d. 1. the actual price calculated by the Cross is within the Price Range; or
2. the actual price calculated by the Cross is below the Price Range and at or above the price that is 20% below the lowest price of the Price Range; or is at or below the price that is 80% above the highest price of the Price Range (“DLCR Price Range”), provided that the Company has initially certified to Nasdaq and publicly disclosed, prior to the beginning of the Display Only Period, that (i) the Company does not expect that a price that is within the DLCR Price Range would materially change the Company’s previous disclosure in its effective registration statement, and (ii) such registration statement contains a sensitivity analysis explaining how the Company’s plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the Price Range. If the Company’s certification includes an upside limit that is lower than the one imposed through the DLCR Price Range, the DLCR Price Range shall be as defined in the preceding sentence, but subject to the upper limit provided by the Company in its certification.
- (viii) a. If the actual price calculated by the Cross is within the Price Range, Nasdaq shall postpone and reschedule the pricing of the securities subject to a Direct Listing with a Capital Raise only if the conditions in paragraphs (vii)a. b. and c., above, are not met.
- b. If the actual price calculated by the Cross is at or within the DLCR Price Range but outside the Price Range, and the conditions in paragraphs (vii)a., b., c. and d., above, are met, Nasdaq will initiate a Post-Pricing

Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation then Nasdaq will postpone and reschedule the offering.

c. If the actual price calculated by the Cross is outside the DLCR Price Range, pursuant to paragraph (vii), above, Nasdaq will postpone and reschedule the offering.

(10) No change.

* * * * *

4753. Nasdaq Halt Cross

(a) Definitions.

For the purposes of this rule the term:

(1) – (2) No change.

(3) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) "Current Reference Price" shall mean:

(i) – (iii) No change.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean:

a. – b. No change.

c. In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the price that is 20% below (calculated as provided for in Listing Rule IM-5315-2) the lowest price of the price range disclosed by the issuer in its effective registration statement;

d. - f. No change.

Notwithstanding the foregoing, the Order Imbalance Indicator will not include the Current Reference Price if there is a Market Order Imbalance.

(B) – (G) No change.

(4) – (6) No change.

(b) Processing of Nasdaq Halt Cross. For Nasdaq-listed securities that are the subject of a trading halt or pause initiated pursuant to Rule 4120(a)(1), (4), (5), (6), (7) or (11), the Nasdaq Halt Cross shall occur at the time specified by Nasdaq pursuant to Rule 4120, and Market hours trading shall commence when the Nasdaq Halt Cross concludes.

(1) No change.

(2)

(A) – (C) No change.

(D) If more than one price exists under subparagraph (C), the Nasdaq Halt Cross shall occur at:

(i) - (ii) No change.

(iii) In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the price that is 20% below (calculated as provided for in Listing Rule IM-5315-2) the lowest price of the price range disclosed by the issuer in its effective registration statement;

(iv) - (vi) No change.

(E) No change.

(3) – (4) No change.

(c) – (d) No change.

* * * * *

IM-5315-2. Determination of Price-Based Requirements for Direct Listings with a Capital Raise

As described in Listing Rule IM-5315-1, Nasdaq recognizes that some companies that have 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, may wish to list those securities on Nasdaq. Such companies may list on the Nasdaq Global Select Market without an attendant initial public offering of equity securities by the Company if the Company meets the applicable initial listing requirements and the additional requirements in Listing Rule IM-5315-1.

In addition, in certain cases, a Company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders. Any such listing is referred to as a “Direct Listing with a Capital Raise” where either: (i) only the Company itself is selling shares in the opening auction on the first day of trading; or (ii) the Company is selling shares and selling shareholders may also sell shares in such opening auction.

A Company offering securities for sale in connection with a Direct Listing with a Capital Raise must: (i) register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a); and, (ii) retain an underwriter with respect to the primary sales of shares by the Company and identify the underwriter in its effective registration statement.

In determining whether such a Company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement if the amount of the Company’s Unrestricted Publicly Held Shares before the offering along with the market value of the shares to be sold by the Company in the Exchange’s opening auction in the Direct Listing with a Capital Raise is at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million).

For this purpose, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq will determine that the Company has met the applicable bid price and market capitalization requirements based on the same per share price. The 20% threshold below the price range will be calculated based on the maximum offering price set forth in the registration fee table.

Securities qualified for listing under this IM-5315-2 must satisfy the additional requirements of Rule 4120(c)(9)(B) and begin trading on Nasdaq following the initial pricing through the mechanism outlined in Rule 4120(c)(9)(B) and Rule 4753.

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