

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-87648; File No. SR-NASDAQ-2019-059)

December 3, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt Requirements for the Nasdaq Capital and Global Markets Applicable to Direct Listings

I. Introduction

On August 15, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt requirements for the Nasdaq Capital and Global Markets applicable to direct listings. The proposed rule change was published for comment in the Federal Register on September 4, 2019.<sup>3</sup> On October 17, 2019, pursuant to Section 19(b)(2) of the Exchange Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> On November 26, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as

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

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

<sup>3</sup> See Securities Exchange Act Release No. 86792 (August 28, 2019), 84 FR 46580 (September 4, 2019) (“Notice”).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 87328, 84 FR 56868 (October 23, 2019). The Commission designated December 3, 2019, as the date by which the Commission shall approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

originally filed.<sup>6</sup> The Commission received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## II. Exchange's Description of the Proposal, as Modified by Amendment No. 1

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

#### 1. Purpose

Nasdaq is filing this amendment to SR-NASDAQ-2019-059,<sup>7</sup> which was published for comment by the Commission on August 28, 2019, in order to: (i) specify that to constitute compelling evidence under the proposed Listing Rules IM-5405-1(a)(3) and IM-5505-1(a)(3), a tender offer by the company or an unaffiliated third party needs to be for cash and be commenced and completed within the prior six months; (ii) clarify that for affiliate participation to be considered de minimis under the proposed Listing Rules IM-5405-1(a)(3) and IM-5505-1(a)(3), the transaction must comply with the requirements of Listing Rules IM-5405-1(a)(3)(ii)(C) or IM-5505-1(a)(3)(ii)(C) and the company must certify such compliance to Nasdaq in writing; (iii) update the preamble to proposed Listing Rules IM-5405-1 and IM-5505-1 to clarify that this Interpretative Material describes when a company whose stock is not previously registered under the Exchange Act may list on the Nasdaq Global or Capital Market, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private

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<sup>6</sup> Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2019-059/srnasdaq2019059-6482012-199454.pdf>.

<sup>7</sup> Securities Exchange Act Release No. 86792 (August 28, 2019), 84 FR 46580 (September 4, 2019) (the "Initial Proposal").

placements; (iv) require that the examples of transactions that could constitute compelling evidence for purposes of Listing Rules IM-5405-1(a)(3) and IM-5505-1(a)(3) are exhaustive; (v) clarify that references to third parties mean unaffiliated third parties; and (vi) make minor technical changes to improve the structure, clarity and readability of the proposed rules.

For purposes of these proposed rule changes, all references to the term “affiliate” and derivatives of this term rely on the definition of “affiliate” in SEC Rule 10A-3(e). See 17 CFR § 240.10A-3(e). This amendment supersedes and replaces the Initial Proposal in its entirety.

Nasdaq recognizes that some companies, whose stock was not previously registered under the Exchange Act, 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 to allow existing shareholders to sell their shares. Nasdaq previously adopted requirements applicable to such Direct Listings listing on the Nasdaq Global Select Market<sup>8</sup> and now proposes to adopt requirements for the Nasdaq Global and Capital Markets.

The proposed Listing Rules IM-5405-1 and IM-5505-1 describe when a company whose stock is not previously registered under the Exchange Act may list on the Nasdaq Global and

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<sup>8</sup> Securities Exchange Act Release No. 85156 (February 15, 2019), 84 FR 5787 (February 22, 2019) (SR–NASDAQ–2019–001) (the “2019 Rule Change”). Nasdaq proposes to insert the defined term “Direct Listing” into the existing language of Listing Rule IM-5315-1 as follows: “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 (a “Direct Listing”).” Nasdaq also proposes to update the title of Listing Rule IM-5315-1 without further modification to that rule section. Nasdaq intends to submit a subsequent rule filing to adopt a global definition for Direct Listings that will include the substantive provisions from the preamble to Listing Rule IM-5315-1 and proposed Listing Rules IM-5405-1 and IM-5505-1.

Capital Markets, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements, set forth the additional listing requirements for Direct Listings on the Nasdaq Global and Capital Markets and describe how the Exchange will calculate compliance with the Nasdaq Global and Capital Markets initial listing standards related to the requirements based on the price of a security, including the bid price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares.<sup>9</sup>

Nasdaq also proposes to modify Nasdaq Rule 4753 to clarify that the securities listed pursuant to Listing Rules IM-5405-1 and IM-5505-1 can use the same crossing mechanism available for IPOs outlined in Rule 4120(c)(8) and Rule 4753 (the “IPO Cross”).

Finally, the proposed Listing Rules IM-5405-1 and IM-5505-1 require that such securities must begin trading on Nasdaq following the initial pricing through the IPO Cross. To allow such initial pricing, the company must: (i) in accordance with Rule 4120(c)(9), have a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed, who is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering; and (ii) list upon effectiveness of a Securities Act of 1933 registration statement filed solely for the purpose of allowing existing shareholders to sell their shares.

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<sup>9</sup> On March 21, 2019, Nasdaq filed with the Commission a proposed rule change to revise the initial listing standards related to liquidity that, among other changes, added three new definitions to define “restricted securities,” “unrestricted publicly held shares” and “unrestricted securities.” This rule change was approved by the Commission effective July 5, 2019 and operative August 5, 2019. See Securities Exchange Act Release No. 86314 (July 5, 2019), 84 FR 33102 (July 11, 2019).

### Calculation of Price-based Initial Listing Requirements

Direct Listings are subject to all initial listing requirements applicable to equity securities and, subject to applicable exemptions, the corporate governance requirements set forth in the Rule 5600 Series. To provide transparency to the initial listing process, the Exchange proposes to adopt Listing Rules IM-5405-1 and IM-5505-1, which will state how the Exchange calculates the initial listing requirements based on the price of a security, including the bid price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held shares for a Direct Listing on the Nasdaq Global and Capital Markets.<sup>10</sup>

Unless Nasdaq determines to accept evidence of the security's price based on a tender offer for cash by the company or an unaffiliated third party, a sale between unaffiliated third parties involving the company's equity securities, or equity security sales by the company, as described in more detail below, under Listing Rules IM-5405-1 and IM-5505-1, Nasdaq would generally require that a company listing on the Nasdaq Global and Capital Markets through a Direct Listing provide Nasdaq an independent third-party valuation (a "Valuation"), as defined in Listing Rule IM-5315-1, that meets the requirements of Listing Rules IM-5315-1(e) and (f).

Under Listing Rule IM-5315-1(e), any Valuation used for this purpose must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations. The Valuation must be of a recent date as of the time of the approval of the company for listing and the evaluator must have considered, among other factors, the annual financial statements required to be included in the registration statement, along with financial statements for any completed fiscal quarters subsequent to the end of the last year of audited financials included in the registration statement. Nasdaq will consider any market factors or

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<sup>10</sup> Substantive provisions of Listing Rules IM-5405-1 and IM-5505-1 are identical.

factors particular to the listing applicant that would cause concern that the value of the company had diminished since the date of the Valuation and will continue to monitor the company and the appropriateness of relying on the Valuation up to the time of listing. Nasdaq may withdraw its approval of the listing at any time prior to the listing date if it believes that the Valuation no longer accurately reflects the company's likely market value.<sup>11</sup>

Under Listing Rule IM-5315-1(f), Nasdaq requires that a valuation agent will not be considered independent if:

- At the time it provides such Valuation, the valuation agent or any affiliated person or persons beneficially own in the aggregate as of the date of the valuation, more than 5% of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days.
- The valuation agent or any affiliated entity has provided any investment banking services to the listing applicant within the 12 months preceding the date of the Valuation. For purposes of this provision, "investment banking services" includes, without limitation, acting as an underwriter in an offering for the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital, equity lines of credit, PIPEs (private investment, public equity transactions), or similar investments; serving as placement agent for the issuer; or acting as a member of a selling group in a securities underwriting.

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<sup>11</sup> In addition, under Listing Rule 5101 Nasdaq has broad discretionary authority to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.

- The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.

For a security that has had sustained recent trading in a Private Placement Market<sup>12</sup> prior to listing, Nasdaq will determine a company's price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held shares based on the lesser of: (i) the value calculable based on the Valuation<sup>13</sup> and (ii) the value calculable based on the most recent trading price in a Private Placement Market.<sup>14</sup>

Under Proposed Listing Rules IM-5405-1(a)(5) and IM-5505-1(a)(5), to determine compliance with the price-based requirements and suitability for listing on the Exchange, Nasdaq will examine the trading price trends for the stock in the Private Placement Market over a period of several months prior to listing and will only rely on a Private Placement Market price if it is consistent with a sustained history over that several month period evidencing a market value in excess of Nasdaq's market value requirement. Nasdaq believes that the price from such sustained trading in a Private Placement Market for the issuer's securities is predictive of the price in the market for the common stock that will develop upon listing of the securities on Nasdaq.

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<sup>12</sup> Nasdaq defines "Private Placement Market" in Listing Rule 5005(a)(34) as a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer.

<sup>13</sup> As described in more detail below, under proposed Listing Rules IM-5405-1(a)(3) and IM-5505-1(a)(3), in lieu of a Valuation, Nasdaq may accept certain other compelling evidence of the security's price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares.

<sup>14</sup> Proposed Listing Rules IM-5405-1(a)(1) and IM-5505-1(a)(1).

Alternatively, in the absence of any recent sustained trading in a Private Placement Market over a period of several months,<sup>15</sup> to determine that such company has met the applicable price-based initial listing requirements, Nasdaq proposes to require, under proposed Listing Rules IM-5405-1(a)(2) and IM-5505-1(a)(2) that a Valuation must evidence a price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares that exceed 200% of the otherwise applicable requirement. Thus, to list on the Nasdaq Global Market, the Valuation must evidence a minimum bid price of at least \$8 per share; Market Value of Unrestricted Publicly Held Shares of \$16 million under the Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$36 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$40 million and Market Value of Listed Securities of \$150 million under the Market Value Standard; or Market Value of Unrestricted Publicly Held Shares of \$40 million under the Total Assets/Total Revenue Standard.<sup>16</sup>

To list on the Nasdaq Capital Market, the Valuation must generally evidence a minimum bid price of at least \$8 per share;<sup>17</sup> Market Value of Unrestricted Publicly Held Shares of \$10 million under the Net Income Standard; or Market Value of Unrestricted Publicly Held Shares of

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<sup>15</sup> Limited trading in the Private Placement Market may not be sufficient for the Exchange to reach a conclusion that the company meets the applicable price-based requirements.

<sup>16</sup> See Listing Rules 5405(a) and (b), which generally require minimum bid price of at least \$4 per share; Market Value of Unrestricted Publicly Held Shares of \$8 million under the Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$18 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$20 million and Market Value of Listed Securities of \$75 million under the Market Value Standard; or Market Value of Unrestricted Publicly Held Shares of \$20 million under the Total Assets/Total Revenue Standard.

<sup>17</sup> A company listing equity securities under Listing Rule IM-5505-1 is not eligible to rely on the reduced bid price requirement of Listing Rule 5505(a)(1)(B) given that such securities do not trade in a continuous market prior to listing while Listing Rule 5505(a)(1)(B) requires that such security “must meet the applicable closing price requirement for at least five consecutive business days prior to approval.”

\$30 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$30 million and Market Value of Listed Securities of \$100 million under the Market Value Standard.<sup>18</sup>

Nasdaq believes that some companies, that are clearly large enough to be suitable for listing on the Exchange, do not have sustained trading in their securities on a Private Placement Market prior to going public. Nasdaq believes that for these companies a recent Valuation indicating that the company exceeds 200% of the otherwise applicable price-based requirement will give a significant degree of comfort that the company will meet the applicable initial listing price-based requirements upon commencement of trading. Nasdaq believes that it is unlikely that any Valuation would reach a conclusion that is incorrect to the degree necessary for a company using this provision to fail to meet the applicable initial listing requirement upon listing, in particular because any Valuation used for this purpose must be provided by a valuation agent that meets the independence requirements of proposed Listing Rule IM-5315-1(f) and has significant experience and demonstrable competence in the provision of such valuations, as required by Listing Rule IM-5315-1(e).

Nasdaq further believes that in certain unique circumstances a company that is clearly large enough to be suitable for listing on the Exchange may provide other compelling evidence, subject to limitations described below, to demonstrate that it meets all applicable price-based requirements without a Valuation. In such cases, Nasdaq under Proposed Listing Rules IM-5405-

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<sup>18</sup> See Listing Rules 5505(a) and (b), which generally require minimum bid price of at least \$4 per share; Market Value of Unrestricted Publicly Held Shares of \$5 million under the Net Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$15 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$15 million and Market Value of Listed Securities of \$50 million under the Market Value Standard.

1(a)(3) and IM-5505-1(a)(3) may (but is not required to) accept other compelling evidence of the security's price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares, including, a tender offer for cash by the company or an unaffiliated third party, a sale between unaffiliated third parties involving the company's equity securities, or equity security sales by the company.<sup>19</sup>

In order to be considered compelling evidence of the company's value, Nasdaq proposes to require that such transactions were recent, completed (and, in the case of a tender offer, commenced and completed) within the prior six months, and substantial in size, representing sales of at least 20% of the applicable Market Value of Unrestricted Publicly Held Shares requirement.<sup>20</sup> In addition, to help assure that such transactions adequately support the value of the company, Nasdaq -proposes to require that such transactions cannot involve affiliates of the company unless such participation is de minimis. To be considered de minimis, the transaction must comply with the requirement that and the company must certify to Nasdaq in writing that: any affiliate's participation must be less than 5% of the transaction (and all affiliates' participation collectively must be less than 10% of the transaction), such participation must have been suggested or required by unaffiliated investors and the affiliates must not have participated

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<sup>19</sup> See also, footnote 11 above.

<sup>20</sup> Listing Rule 5405(b) generally requires, for a company listing on the Nasdaq Global Market, Market Value of Unrestricted Publicly Held Shares of \$8 million under the Income Standard; Market Value of Unrestricted Publicly Held Shares of \$18 million under the Equity Standard; Market Value of Unrestricted Publicly Held Shares of \$20 million under the Market Value Standard; or Market Value of Unrestricted Publicly Held Shares of \$20 million under the Total Assets/Total Revenue Standard. Listing Rule 5505(b) generally requires, for a company listing on the Nasdaq Capital Market, Market Value of Unrestricted Publicly Held Shares of \$5 million under the Net Income Standard; Market Value of Unrestricted Publicly Held Shares of \$15 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$15 million under the Market Value Standard.

in negotiating the economic terms of the transaction. The examples of transactions that could constitute compelling evidence for purposes of Listing Rules IM-5405-1 and IM-5505-1 are meant to be exhaustive. Finally, Nasdaq will examine any such evidence produced by the company to assure that it is indicative of the company's overall value. If, based on facts and circumstances, Nasdaq determines that such evidence is not reliable, Nasdaq will require a Valuation that meets the requirements of Listing Rules IM-5315-1(e) and (f) and the company must then satisfy the other standards in the rule that require a Valuation.

In order to determine that such company has met the applicable price-based initial listing requirements and to list on Nasdaq based on such evidence without a Valuation, Nasdaq proposes to require such evidence to show that the security's price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares exceed 250% of the otherwise applicable requirement. Thus, to list on the Nasdaq Global Market, the compelling evidence provided by the company must show a minimum bid price of at least \$10 per share; Market Value of Unrestricted Publicly Held Shares of \$20 million under the Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$45 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$50 million and Market Value of Listed Securities of \$187.5 million under the Market Value Standard; or Market Value of Unrestricted Publicly Held Shares of \$50 million under the Total Assets/Total Revenue Standard.<sup>21</sup>

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<sup>21</sup> See Listing Rules 5405(a) and (b), which generally require minimum bid price of at least \$4 per share; Market Value of Unrestricted Publicly Held Shares of \$8 million under the Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$18 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$20 million and Market Value of Listed Securities of \$75 million under the Market Value Standard; or Market Value of Unrestricted Publicly Held Shares of \$20 million under the Total Assets/Total Revenue Standard.

To list on the Nasdaq Capital Market, such evidence must show a minimum bid price of at least \$10 per share; Market Value of Unrestricted Publicly Held Shares of \$12.5 million under the Net Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$37.5 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$37.5 million and Market Value of Listed Securities of \$125 million under the Market Value Standard.<sup>22</sup>

Nasdaq believes that sales of the company's equity securities representing at least 20% of the applicable Market Value of Unrestricted Publicly Held Shares on the Nasdaq Capital Market thus demonstrating a payment in excess of \$1 million for a company listing under the Net Income Standard or in excess of \$3 million for a company listing under other standards,<sup>23</sup> is compelling evidence that the sale is substantial enough in size to be indicative of the company's overall value.

Similarly, Nasdaq believes that sales of the company's equity securities representing at least 20% of the applicable Market Value of Unrestricted Publicly Held Shares on the Nasdaq Global Market thus demonstrating a payment in excess of \$1.6 million for a company listing under the Net Income Standard, or in excess of \$3.6 million for a company listing under the Equity Standard, or in excess of \$4 million for a company listing under other standards,<sup>24</sup> is

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<sup>22</sup> See Listing Rules 5505(a) and (b), which generally require minimum bid price of at least \$4 per share; Market Value of Unrestricted Publicly Held Shares of \$5 million under the Net Income Standard; or Market Value of Unrestricted Publicly Held Shares of \$15 million under the Equity Standard; or Market Value of Unrestricted Publicly Held Shares of \$15 million and Market Value of Listed Securities of \$50 million under the Market Value Standard.

<sup>23</sup> Id.

<sup>24</sup> See footnote 21 above.

compelling evidence that the sale is substantial enough in size to be indicative of the company's overall value.

Nasdaq believes that recent, substantial in size, arm's-length tender offers for cash by an unaffiliated third party, sales between unaffiliated third parties involving the company's equity securities, or equity security sales by the company, with de minimis insider participation, indicating the company exceeds 250% of the otherwise applicable price-based requirements will give a significant degree of comfort that the company will meet the applicable price-based requirements upon commencement of trading. Nasdaq also believes that recent, substantial in size (representing at least 20% of the applicable Market Value of Unrestricted Publicly Held Shares) tender offers for cash by the company indicating the company exceeds 250% of the otherwise applicable price-based requirements is compelling evidence of the company's value notwithstanding the company's involvement in the pricing of the transaction, because it is, in Nasdaq's view, unlikely that the company would misprice the securities purchased in a tender offer for cash to the degree necessary for a company using this provision to fail to meet the applicable initial listing requirement upon listing, in particular because of the substantial size of the transaction. In addition, Nasdaq believes that the new requirement that such securities must begin trading on Nasdaq following the initial pricing through the IPO Cross will help assure these securities begin trading close to their inherent value.

#### Foreign Exchange Listings

For a company transferring from a foreign regulated exchange where there is a broad, liquid market for the company's shares, or listing on Nasdaq while trading on such exchange, Nasdaq will determine that the company has met the applicable price-based requirements based on the recent trading in such market. Nasdaq believes that the price of the issuer's securities from such broad and liquid trading is predictive of the price in the market for the common stock that

will develop upon listing of the securities on Nasdaq. While this is consistent with Nasdaq's current practice, Listing Rules IM-5405-1(a)(4) and IM-5505-1(a)(4) will clarify that a company transferring from a foreign regulated exchange where there is a broad, liquid market for the company's shares or listing on the Nasdaq Global or Capital Markets while trading on such exchange is not subject to the new requirements applicable to Direct Listings.

#### Clarification of the Role of a Financial Advisor in a Direct Listing

In 2014, Nasdaq first adopted rules to allow the use of the Nasdaq IPO Cross to initiate trading in securities that 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 and described the role of financial advisors in that process.<sup>25</sup> At that time, the Exchange added Rule 4120(c)(9)<sup>26</sup> to set forth the process by which trading commences in such securities. Under that rule, securities of companies that have not previously been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to listing on Nasdaq can be launched for trading using the IPO Cross. Prior to that rule change, securities of companies that were not conducting IPOs were released using the Halt Cross outlined in Rule 4120(c)(7), which differed from the IPO Cross.<sup>27</sup>

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<sup>25</sup> Securities Exchange Act Release No. 71931 (April 11, 2014), 79 FR 21829 (April 17, 2014) (SR-NASDAQ-2014-032) (the "2014 Rule Change"). Nasdaq stated that "an advisor, with market knowledge of the book and an understanding of the company and its security, would be well placed to provide advice on when the security should be released for trading." The 2014 Rule Change at 21830.

<sup>26</sup> In 2014, Nasdaq filed SR-NASDAQ-2014-081 modifying the functions that are performed by an underwriter with respect to an initial public offering and renumbered certain paragraphs of Rule 4120. Securities Exchange Act Release No. 73399 (October 21, 2014), 79 FR 63981 (October 27, 2014) (approving SR-NASDAQ-2014-081). All references in this filing are to the renumbered rules, as currently in effect.

<sup>27</sup> The Halt Cross process has a shorter quoting period (five minutes) and provides no ability to extend the quoting period in the event trading interest or volatility in the market

The 2014 Rule Change extended the safeguards contained in the IPO Cross to securities that 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 and established that a broker-dealer serving in the role of financial advisor to the issuer could serve in the same capacity for such securities as the underwriter does for IPOs. Specifically, Rule 4120(c)(9) provides that the IPO Cross process described in Rules 4120 and 4753 is available to securities that 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 where “a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering.”<sup>28</sup>

Rule 4753 provides the definition of Current Reference Price and a description of the calculation of the price at which the Nasdaq Halt Cross will occur.<sup>29</sup> In each case, the applicable price could be determined based on the issuer’s IPO price.<sup>30</sup> In the absence of an IPO price from the underwriter, Nasdaq believes that the only viable options are to rely on a price from recent

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appears likely to have a material impact on the security, unless there is an order imbalance as defined in the rule. See the 2014 Rule Change for additional details on the differences between the Halt Cross and the IPO Cross.

<sup>28</sup> Subsequent to the 2014 Rule Change, Nasdaq expanded and elaborated the functions that are performed by an underwriter with respect to an initial public offering. See footnote 26, above. Rule 4120(c)(9) requires a broker-dealer serving in the role of a financial advisor to the issuer of the securities being listed to perform all such functions in order for the issuer to utilize the IPO Cross for the initial pricing of the security.

<sup>29</sup> Rules 4753(a)(3)(A) and 4753(b)(2)(D).

<sup>30</sup> Rules 4753(a)(3)(A)(iv)a. and 4753(b)(2)(D)(i). The price closest to the “Issuer’s Initial Public Offering Price” is the fourth tie-breaker in these rules, applicable when no single price is determined from the three prior tests.

sustained trading the Private Placement Market<sup>31</sup> or one provided by the financial advisor to the company.

Nasdaq has successfully employed, in limited circumstances, the IPO Cross for securities that 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 since 2014<sup>32</sup> and following the 2019 Rule Change. Nasdaq continues to believe that financial advisors to issuers seeking to utilize that process are well placed to perform the functions that are currently performed by underwriters with respect to an initial public offering.

In the 2019 Rule Change, Nasdaq elaborated on the role of a financial advisor to the issuer of a security that is listing under IM-5315-1.<sup>33</sup> Nasdaq now proposes to amend Rule 4753 to allow for securities listed pursuant to Listing Rules IM-5405-1 and IM-5505-1 to be launched for trading using the IPO Cross, subject to additional requirements in the proposed Listing Rules IM-5405-1 and IM-5505-1.

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<sup>31</sup> As described above, Nasdaq believes that the price from such recent sustained trading in a Private Placement Market for the issuer's securities is predictive of the price in the market for the common stock that will develop upon listing of the securities on Nasdaq. See also proposed Listing Rules IM-5405-1(a)(5) and IM-5505-1(a)(5).

<sup>32</sup> Among other instances, Nasdaq utilized the IPO Cross for the initial pricing of the common stock of American Realty Capital Healthcare Trust, Inc. as indicated in the 2014 Rule Change.

<sup>33</sup> Specifically, Nasdaq amended Rules 4753(a)(3)(A)(iv) and 4753(b)(2)(D) to state that in the case of the initial pricing of a Direct Listing for a security qualifying for listing under Listing Rule IM-5315-1, the fourth tie-breaker in calculating each of the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator and the price at which the Nasdaq Halt Cross will occur, respectively, shall be: (i) for a security that has had recent sustained trading in a Private Placement Market prior to listing, the most recent transaction price in that market or, (ii) if there is not such sustained trading in a Private Placement Market, a price determined by the Exchange in consultation with the financial advisor to the issuer identified pursuant to Rule 4120(c)(9). See 2019 Rule Change.

Nasdaq also proposes to require that all securities listed under Listing Rules IM-5405-1 and IM-5505-1 must begin trading on Nasdaq following the initial pricing through the IPO Cross. To that end, Nasdaq proposes to cross reference Rule 4120(c)(8) in Listing Rules IM-5405-1 and IM-5505-1 to require that the company, in accordance with Rule 4120(c)(9), must have a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed, who is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering. In addition, Nasdaq proposes to require that each company qualified for listing under Listing Rules IM-5405-1 and IM-5505-1 must list its securities upon effectiveness of a Securities Act of 1933 registration statement filed solely for the purpose of allowing existing shareholders to sell their shares.

Finally, Nasdaq proposes to define “Direct Listing” in Listing Rule IM-5315-1 and update the title without further modification to that rule section. Nasdaq also proposes to update the reference to “direct listings under IM-5315-1” in Listing Rule IM-5900-7 as a defined term without changing the substance of this rule.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>34</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>35</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, to remove impediments to and perfect the mechanism of a

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<sup>34</sup> 15 U.S.C. 78f(b).

<sup>35</sup> 15 U.S.C. 78f(b)(5).

free and open market and a national market system and, in general, to protect investors and the public interest.

#### Calculation of Price-based Initial Listing Requirements

The proposed rule change to require a Valuation and describe how Nasdaq will calculate compliance with the price-based requirements for listing on the Nasdaq Global and Capital Markets is designed to protect investors and the public interest because any company relying solely on a Valuation will have to demonstrate that the company exceeds 200% of the otherwise applicable price-based requirement, which will give a significant degree of comfort that upon commencement of trading the company will meet the applicable price-based requirements.<sup>36</sup> In addition, having in place independence standards for the party providing a Valuation will ensure that the entity providing a Valuation for purposes of listing on Nasdaq will have a significant level of independence from the listing applicant and thereby enhance the reliability of such Valuation.

Finally, in addition to the proposed new requirements, Direct Listings are subject to all initial listing requirements applicable to equity securities and, subject to applicable exemptions, the corporate governance requirements set forth in the Rule 5600 Series. Nasdaq's existing requirements are designed to protect investors and serve to help assure that securities listed on Nasdaq have sufficient investor interest and will trade in a liquid manner. As such, Nasdaq believes these provisions protect investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act.

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<sup>36</sup> See footnotes 21 and 22 above. The Commission notes that footnotes 16-18 above discuss the applicable requirements.

The proposed rule change also protects investors and the public interest by requiring that there be sustained recent trading in the Private Placement Market in order for a Direct Listing to rely on such price to demonstrate compliance with the applicable price-based requirements. Nasdaq believes that the price from such sustained trading in the Private Placement Market for the issuer's securities is predictive of the price in the market for the common stock that will develop upon listing of the securities on Nasdaq and that qualifying a company based on the lower of such trading price or the Valuation helps assure that the company satisfies Nasdaq's requirements. In the absence of recent sustained trading in the Private Placement Market, the requirement to demonstrate that the company exceeds 200% of the otherwise applicable price-based requirement, similarly helps assure that the company satisfies Nasdaq's requirement by imposing a standard that is double the otherwise applicable standard.<sup>37</sup>

The proposed rule change to allow a company in certain unique circumstances to list without a Valuation is designed to protect investors and the public interest because it requires such company to produce compelling evidence that the security's price, Market Value of Listed Securities and Market Value of Unrestricted Publicly Held Shares exceed 250% of the otherwise applicable requirement. Moreover, in order to be considered compelling, such evidence of the company's value must be based on a tender offer for cash by the company or an unaffiliated third party or on a sale between unaffiliated third parties involving the company's equity securities, or equity security sales by the company. In addition, such transactions must be recent, completed (and, in the case of a tender offer, commenced and completed) within the prior six months, and substantial in size, representing sales of at least 20% of the applicable Market Value of

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<sup>37</sup> See footnotes 21 and 22, above. The Commission notes that footnotes 16-18 above discuss the applicable requirements.

Unrestricted Publicly Held Shares requirement which helps assure, in Nasdaq's view, that the company satisfies the applicable price-based requirement upon commencement of trading on Nasdaq. Finally, recent, substantial in size (representing at least 20% of the applicable Market Value of Unrestricted Publicly Held Shares) tender offers for cash by the company indicating the company exceeds 250% of the otherwise applicable price-based requirements is compelling evidence of the company's value notwithstanding the company's involvement in the pricing of the transaction, because, in Nasdaq's view, it is unlikely that the company would misprice the securities purchased in a tender offer for cash to the degree necessary for a company using this provision to fail to meet the applicable initial listing requirement upon listing, in particular because of the substantial size of the transaction.

The proposed rule change also protects investors and the public interest by requiring that for a company to demonstrate compliance with the applicable price-based requirements based on a tender offer for cash by the company or an unaffiliated third party, a sale between unaffiliated third parties involving the company's equity securities, or equity security sales by the company, because such transactions, in addition to being recent and substantial in size, must also have been conducted in a manner that helps assure that such transactions adequately support the value of the company. To that end, Nasdaq proposes to require that such transactions cannot involve affiliates of the company unless such participation is de minimis. To be considered de minimis, the transaction must comply with the requirement that and the company must certify to Nasdaq in writing that: any affiliate's participation must be less than 5% of the transaction (and all affiliates' participation collectively must be less than 10% of the transaction), such participation must have been suggested or required by unaffiliated investors and the affiliates must not have participated in negotiating the economic terms of the transaction.

The proposed requirement that a company that lists on the Nasdaq Global or Capital Markets through a Direct Listing must list at the time of effectiveness of a registration statement filed under the Securities Act of 1933 solely for the purpose of allowing existing shareholders to sell their shares is designed to protect investors and the public interest, because it will ensure such companies satisfy the rigorous disclosure requirements under the Securities Act of 1933 and are subject to review by Commission staff.

Finally, the proposal to rely on the price from the existing trading market for a company transferring from a foreign regulated exchange or listing on Nasdaq while trading on such exchange is consistent with the protection of investors because the price from the broad and liquid trading market for the issuer's securities is predictive of the price in the market for the common stock that will develop upon listing of the securities on Nasdaq. This provision applies only where there is a broad, liquid market for the company's shares in its country of origin and is designed to clarify that a company transferring from a foreign regulated exchange or listing on Nasdaq while trading on such exchange that satisfies Listing Rules IM-5405-1(a)(4) or IM-5505-1(a)(4) is not subject to the new requirements applicable to Direct Listings. Enhancing transparency around this requirement will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system and protect investors and the public interest.<sup>38</sup>

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<sup>38</sup> Provisions of Listing Rules IM-5405-1(a)(4) and IM-5505-1(a)(4) are identical to Listing Rule IM-5315-1(c) applicable to Direct Listings on the Nasdaq Global Select Market, which was adopted in the 2019 Rule Change.

### Clarification of the Role of a Financial Advisor in a Direct Listing

Nasdaq believes that the proposed rule change to modify the fourth tie-breaker used in calculating the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator and the price at which the Nasdaq Halt Cross will occur, protects investors and the public interest. The 2019 Rule Change established that, in using the IPO Cross to initiate the initial trading in the company's securities, the Current Reference Price and price at which the Nasdaq Halt Cross will occur may be based on the most recent transaction price in a Private Placement Market where the security has had recent sustained trading in such a market over several months; otherwise the price will be determined by the Exchange in consultation with a financial advisor to the issuer. The proposed rule change simply provides that in addition to the initial pricing of a security listing under Listing Rules IM-5315-1 the same process will occur for securities listing under IM-5405-1 or IM-5505-1.

Where there has been sustained recent trading on a Private Placement Market over several months, Nasdaq believes the most recent price from such trading is predictive of the price that will develop upon listing of the securities on Nasdaq. Where there has not been such sustained recent trading, Nasdaq notes that financial advisors have been performing the functions of the underwriter in the IPO Cross on a limited basis since 2014 and following the 2019 Rule Change and have market knowledge of buying and selling interest and an understanding of the company and its security. As such, Nasdaq believes that the rule change will promote fair and orderly markets because these mechanisms of establishing the Current Reference Price and the price at which the Nasdaq Halt Cross will occur will help protect against volatility in the pricing and initial trading of the securities covered by the proposed rule change.

Similarly, the proposed requirement that a company that lists on the Nasdaq Global or Capital Markets through a Direct Listing must begin trading of the company's securities

following the initial pricing through the IPO Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of unseasoned securities covered by the proposed rule change. Accordingly, Nasdaq believes these changes, as required by Section 6(b)(5) of the Exchange Act, are reasonably designed to protect investors and the public interest and promote just and equitable principles of trade for the opening of securities listing in connection with a Direct Listing on the Nasdaq Global or Capital Markets.

Finally, Nasdaq believes that the proposed rule change to update the title of Listing Rule IM-5315-1, to insert the defined term “Direct Listing” into the existing language of this rule and to update the reference to “direct listings under IM-5315-1” in Listing Rule IM-5900-7 using a defined term, does not change the substance of these rules and protects investors and the public interest by clarifying the applicability of these rules and making it easier to understand.

**B. Self-Regulatory Organization’s Statement on Burden on Competition**

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

The proposed rule change to adopt Listing Rules IM-5405-1 and IM-5505-1 is designed to provide transparency to the mechanism of listing securities in connection with a Direct Listing on the Nasdaq Global or Capital Markets that is appropriately protective of investors and is not designed to limit the ability of the issuers of those securities to list them on any other national securities exchange.

In addition, the proposed change is designed to extend the availability of the IPO Cross to securities listing on Nasdaq under IM-5405-1 or IM-5505-1 and thus impacts the determination of the initial pricing of securities upon listing Nasdaq and will have no impact on competition.

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. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>39</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Exchange Act,<sup>40</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Section 6(b)(5) of the Exchange Act<sup>41</sup> also requires that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission has consistently recognized the importance of exchange listing standards. Among other things, such listing standards help ensure that exchange listed

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<sup>39</sup> 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>40</sup> 15 U.S.C. 78f(b)(5).

<sup>41</sup> Id.

companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.<sup>42</sup>

The Exchange has stated that it recognizes that some companies whose stock was not previously registered under the Exchange Act and that have sold common equity securities in private placements, and 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 the Exchange to allow existing shareholders to sell their shares in an initial listing on the Exchange.<sup>43</sup> The Exchange therefore has proposed to adopt listing requirements to permit it to list on the Nasdaq Global and Capital Markets securities of a company whose stock has not previously been registered under the Exchange Act and is listing, without a related underwritten offering, upon the effectiveness of a registration statement under the Securities Act of 1933 (“Securities Act”) that is registering only the resale of shares sold by the company in earlier private placements (“Direct Listing”).<sup>44</sup> The Exchange’s listing

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<sup>42</sup> The Commission has stated in approving exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange’s standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., Securities Exchange Act Release Nos. 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission notes that, in general, adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest.

<sup>43</sup> See supra note 8 and accompanying text.

<sup>44</sup> See proposed Nasdaq Rules IM-5405-1 and IM-5505-1. For purposes of this Discussion and Commission Findings section, the Commission refers to “Direct Listing” as defined in this paragraph. The Commission notes that Nasdaq has agreed to submit a subsequent

standards currently contain requirements applicable to Direct Listings listed on the Nasdaq Global Select Market.<sup>45</sup>

The Commission believes that the proposed rule change will provide a means for a category of companies with securities that have not previously been traded on a public market that are listing only upon effectiveness of a selling shareholder registration statement, without a related underwritten offering, and that would not qualify to list under the Nasdaq Global Select Market standards, to list on the Exchange's other tiers.<sup>46</sup> In particular, for companies that otherwise meet the Exchange's listing standards for the Nasdaq Global Market or Nasdaq Capital Market, respectively,<sup>47</sup> the proposed rule change sets forth how the Exchange will determine

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proposed rule change that would adopt a global definition for Direct Listings that includes these characteristics as described in the preamble to Nasdaq Rule IM-5315-1 and proposed Nasdaq Rules IM-5405-1 and IM-5505-1. See supra note 8.

<sup>45</sup> See Nasdaq Rule IM-5315-1. See also Securities Exchange Act Release No. 85156 (February 15, 2019), 84 FR 5787 (February 22, 2019) (SR-NASDAQ-2019-001) (notice of filing and immediate effectiveness of proposed rule change to adopt Nasdaq Rule IM-5315-1). The Exchange's listing standards pertaining to Direct Listings on the Nasdaq Global Select Market are substantially similar to listing standards that the Commission approved for another exchange. See Securities Exchange Act Release Nos. 82627 (February 2, 2018), 83 FR 5650 (February 8, 2018) (SR-NYSE-2017-30) ("2018 Order") (approving listing standards for companies that list without a prior Exchange Act registration and that are not listing in connection with an underwritten initial public offering); 58550 (September 15, 2008), 73 FR 54442 (September 19, 2008) (SR-NYSE-2008-68) ("2008 Order") (approving proposal to allow the exchange to determine that a company meets the exchange's market value listing requirements by relying on a third-party valuation of the company).

<sup>46</sup> The Nasdaq Global Select Market has the highest quantitative listing requirements to list on Nasdaq, followed by the Nasdaq Global Market and then the Nasdaq Capital Market.

<sup>47</sup> Companies listing upon an effective registration statement would have to meet the distribution and minimum bid price requirements set forth in Nasdaq Rules 5405(a) or 5505(a) and one of the financial standards set forth in Nasdaq Rules 5405(b) or 5505(b), as well as comply with all other applicable Nasdaq rules, including the corporate governance requirements. See supra notes 16-18, 21-22, and accompanying text for a description of some of the requirements in Nasdaq Rules 5405(a) and (b) and 5505(a) and

whether a company satisfies the initial listing requirements for these markets that are based on the price of security, which are currently the bid price, Market Value of Listed Securities, and Market Value of Unrestricted Publicly Held Shares requirements.<sup>48</sup>

Under the proposal, the Exchange would generally require a company listing securities under the proposed Direct Listing standards to provide an independent third-party Valuation that would be used as described below, with certain differences depending on whether or not there is sustained trading in a Private Placement Market, to determine whether the company has met the price-based initial listing requirements.<sup>49</sup>

For a company whose security has had sustained recent trading in a Private Placement Market, the Exchange generally will attribute a price, Market Value of Listed Securities, and Market Value of Unrestricted Publicly Held Shares to the company equal to the lesser of (i) the value calculable based on a Valuation and (ii) the value calculable based on the most recent trading price in a Private Placement Market.<sup>50</sup> The Commission believes that using the lesser of these values to determine whether the company has met the Exchange's price-based initial listing requirements provides a reasonable means of assessing these metrics in the special circumstances where a company's stock is not previously registered under the Exchange Act and is listing upon effectiveness of a selling shareholder registration statement, without a related underwritten offering. The Commission has recognized that the most recent trading price in a Private

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(b) and how they would apply to Direct Listings. See also infra note 74 and accompanying text.

<sup>48</sup> See proposed Nasdaq Rules IM-5405-1(a) and IM-5505-1(a). This Discussion and Commission Findings section refers to the bid price, Market Value of Listed Securities, and Market Value of Unrestricted Publicly Held Shares requirements as the "price-based initial listing requirements."

<sup>49</sup> See proposed Nasdaq Rules IM-5405-1(a)(1) and (2) and IM-5505-1(a)(1) and (2).

<sup>50</sup> See proposed Nasdaq Rules IM-5405-1(a)(1) and IM-5505-1(a)(1).

Placement Market may be an imperfect indication as to the value of a security upon listing, in part because Private Placement Markets generally do not have the depth and liquidity and price discovery mechanisms found on public trading markets.<sup>51</sup> The proposed rule requires, however, the Exchange to examine the trading price trends in the Private Placement Market over a period of several months prior to listing and specifies that the Exchange will only rely on a Private Placement Market price if it is consistent with a sustained history over a several month period evidencing a market value in excess of Nasdaq's market value requirement.<sup>52</sup> The Commission therefore agrees with the Exchange that consideration of both of these values (i.e., the Valuation and trading on a Private Placement Market) should provide the Exchange with an estimation of a company's Market Value of Listed Securities, Market Value of Unrestricted Publicly Held Securities, and bid price that can support qualifying the company's securities for Exchange listing under the initial listing standards.<sup>53</sup> Further, by assessing whether a company meets price-based initial listing requirements using the lesser of the Valuation and a value based on the most recent Private Placement Market trading, the Exchange will be using the more conservative estimate to determine whether the company qualifies to list under the Nasdaq Global or Capital Market standards.

For a company whose security has not had sustained recent trading in a Private Placement Market, the Exchange generally will determine that the company has met its bid price, Market

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<sup>51</sup> See 2008 Order, supra note 45, 73 FR at 54443.

<sup>52</sup> See proposed Nasdaq Rules IM-5405-1(a)(5) and IM-5505-1(a)(5). In relying on the price in a Private Placement Market, the Commission has previously stated that a national security exchange should consider the trading characteristics of the stock, including its trading volume and price volatility over a sustained period of time. See 2008 Order, supra note 45, 73 FR at 54444. See also infra note 70.

<sup>53</sup> See 2008 Order, supra note 45, 73 FR at 54443-44.

Value of Listed Securities, and Market Value of Unrestricted Publicly Held Shares requirements if the company provides a Valuation evidencing that these metrics exceed 200% of the otherwise applicable requirements.<sup>54</sup> According to the Exchange, “a recent Valuation indicating that the company exceeds 200% of the otherwise applicable price-based requirement will give a significant degree of comfort that the company will meet the applicable initial listing price-based requirements upon commencement of trading.”<sup>55</sup> The Commission believes that requiring a company that does not have a recent and sustained history of trading its securities in a Private Placement Market to provide a Valuation that shows that the company exceeds 200% of the otherwise applicable price-based initial listing requirements could provide the Exchange with a reasonable level of assurance that the company will meet the Market Value of Listed Securities, Market Value of Unrestricted Publicly Held Shares, and bid price requirements to support listing on the Exchange and the maintenance of fair and orderly markets in accordance with the Exchange Act.

The Commission has previously recognized that a Valuation used to qualify a company for listing is only an estimate of what a company’s true market value and security price will be upon commencement of public trading.<sup>56</sup> The Exchange’s rules seek to ensure that the Valuation used in the listing standards described above is reliable by requiring it to be provided by an independent third party that has significant experience and demonstrable competence in providing valuations of companies, and to be of a recent date as of the time of approval of the

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<sup>54</sup> See proposed Nasdaq Rules IM-5405-1(a)(2) and IM-5505-1(a)(2). See also supra notes 16-18 and accompanying text, which set forth the increased requirements.

<sup>55</sup> See supra Section II.A.1, Calculation of Price-based Initial Listing Requirements.

<sup>56</sup> See 2008 Order, supra note 45, 73 FR at 54443.

company for listing.<sup>57</sup> The proposed independence criteria provide that the valuation agent will not be “independent” if the valuation agent, or any affiliated person, owns in the aggregate more than 5% of the securities to be listed,<sup>58</sup> or has provided investment banking services to the company in the 12 months prior to the Valuation or in connection with the listing.<sup>59</sup> The Commission believes that, consistent with Section 6(b)(5) of the Exchange Act and the protection of investors, these independence requirements should help to ensure that the Valuation is reliable.<sup>60</sup>

In addition, the Exchange will be able to approve a security for listing if, in lieu of a Valuation, the company provides other compelling evidence that the security’s price, Market Value of Listed Securities, and Market Value of Unrestricted Publicly Held shares exceed 250% of the otherwise applicable requirement.<sup>61</sup> The Exchange will be allowed to consider as compelling evidence a tender offer for cash by the company or an unaffiliated<sup>62</sup> third party, sales

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<sup>57</sup> See proposed Nasdaq Rules IM-5405-1(a)(1) and (2) and IM-5505-1(a)(1) and (2) (incorporating by reference Nasdaq Rule IM-5315-1(e) and (f)). The Commission notes that Nasdaq Rule IM-5315-1(e), incorporated by reference into proposed Nasdaq Rules IM-5405-1(a)(1) and (2) and IM-5505-1(a)(1) and (2), includes additional requirements that must be satisfied before the Exchange can rely on a Valuation, such as requiring that the evaluator must have considered, among other factors, the annual financial statements required to be included in the registration statement.

<sup>58</sup> This calculation of ownership will include any right to receive such securities exercisable within 60 days.

<sup>59</sup> See proposed Nasdaq Rules IM-5405-1(a)(1) and (2) and IM-5505-1(a)(1) and (2) (incorporating by reference Nasdaq Rule IM-5315-1(f)).

<sup>60</sup> See 2018 Order, supra note 45, 83 FR at 5654 (approving independence standards for the entity conducting the valuation and other requirements that must be satisfied for the exchange to rely on a valuation).

<sup>61</sup> See proposed Nasdaq Rules IM-5405-1(a)(3) and IM-5505-1(a)(3). See also supra notes 21-22 and accompanying text, which set forth the increased requirements.

<sup>62</sup> The Commission notes that Nasdaq will rely on the definition of “affiliate” in SEC Rule 10A-3(e), 17 CFR 240.10A-3(e), to determine if a party to a transaction is an affiliate of

between unaffiliated third parties involving the company's equity securities, or equity security sales by the company.<sup>63</sup> The Commission believes that the Exchange's proposed requirements that limit the compelling evidence that the Exchange may accept in lieu of a Valuation to these specific types of transactions, and that require that such transactions must have been completed or, in the case of a tender offer, commenced and completed, within the prior six months, have represented at least 20% of the applicable Market Value of Publicly Held Shares requirement, and not have involved the company's affiliates unless such participation meets the de minimis standards described below, should provide a reasonable basis for the Exchange to determine whether the transaction provides a reliable indication of the company's value.<sup>64</sup> The specified requirements for affiliate participation to be considered de minimis,<sup>65</sup> among other considerations, can aid the Exchange in assessing whether it can rely on the transaction, whether it be a sale or a tender offer, to qualify the company for listing. Further, the requirement that the company provide written certification to the Exchange of compliance with these new rules will provide clarity and give the Exchange a means to obtain necessary information to ensure compliance. With respect to a tender offer used as evidence of compliance with price-based initial listing requirements, the Commission also notes that the tender offer will be subject, at a

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the company or a third-party participant is unaffiliated with the company. See supra Section I.A.1.

<sup>63</sup> See proposed Nasdaq Rules IM-5405-1(a)(3) and IM-5505-1(a)(3).

<sup>64</sup> See proposed Nasdaq Rules IM-5405-1(a)(3)(i) and (ii) and IM-5505-1(a)(3)(i) and (ii).

<sup>65</sup> The de minimis standard requires that affiliate participation be less than 5% individually or less than 10% collectively, that participation be suggested or required by unaffiliated investors, and that affiliates not have participated in negotiating the economic terms of the transaction. See proposed Nasdaq Rules IM-5405-1(a)(3)(ii)(C)(1)-(3) and IM-5505-1(a)(3)(ii)(C)(1)-(3).

minimum, to Section 14(e) of the Exchange Act and Regulation 14E thereunder.<sup>66</sup> Finally, requiring that such evidence shows a value exceeding 250% of the otherwise applicable price-based initial listing requirements can provide the Exchange with some reasonable level of assurance that the company would satisfy the underlying price-based initial listing requirements.<sup>67</sup>

The Commission notes that the Exchange is not required to accept other evidence in lieu of a Valuation as evidence of compliance with its price-based initial listing requirements.<sup>68</sup> Additionally, in its proposal, the Exchange noted it has broad discretionary authority pursuant to Nasdaq Rule 5101 to consider whether a company may appropriately be listed on the Exchange.<sup>69</sup> The proposed rule language requires, as noted above, that the Exchange will only

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<sup>66</sup> See 15 U.S.C. 78n(e) and 17 CFR 240.14e-1 to 17 CFR 24.014e-8.

<sup>67</sup> See *supra* Section II.A.1, Calculation of Price-based Initial Listing Requirements (stating Nasdaq’s belief that recent, substantial in size, arm’s length tender offers for cash by an unaffiliated third party, sales between unaffiliated third parties involving the company’s equity securities, or equity security sales by the company, with de minimis insider participation, indicating that the company exceeds 250% of the otherwise applicable price-based requirements, will give a significant degree of comfort that the company will meet the applicable price-based initial listing requirements; and that, as to an issuer tender offer that is recent, substantial in size, and that indicates the company exceeds 250% of the otherwise applicable price based requirements, such a tender offer is, in Nasdaq’s view, compelling evidence of the company’s value because it is unlikely the company would misprice the securities purchased to the degree necessary to fail to meet the applicable initial listing requirements).

<sup>68</sup> See proposed Nasdaq Rules IM-5405-1(a)(3) and IM-5505-1(a)(3), which state that “in lieu of a Valuation Nasdaq may (but is not required to) accept other compelling evidence.”

<sup>69</sup> See *supra* note 11. Nasdaq Rule 5101 states that the exchange has broad discretionary authority to deny initial listing, apply additional or more stringent criteria for initial or continued listing, or suspend or delist particular securities based on any event, condition or circumstance that exists or occurs that makes initial or continued listing of the securities on the Exchange inadvisable or unwarranted in the opinion of the Exchange, even though the securities meet all enumerated criteria for initial or continued listing on the Exchange.

rely on a price in a Private Placement Market if it is consistent with a sustained history of trading over several months evidencing a market value in excess of the listing requirement.<sup>70</sup> In addition, in relying on the Valuation, Nasdaq has represented that it will consider any market factors or factors particular to the listing applicant that would cause concern that the value of the company had diminished since the date of the Valuation and continue to monitor the company and the appropriateness of relying on the Valuation up until the time of listing.<sup>71</sup> Further, when considering whether to accept other compelling evidence of a company's value in lieu of a Valuation, the Exchange has stated that it will examine any such evidence produced by the company to assure that it is indicative of the company's overall value.<sup>72</sup> Nasdaq has stated that, if based on the facts and circumstances, Nasdaq determines that such evidence is not reliable, the company will be required to provide a Valuation meeting the requirements of its rules.<sup>73</sup> Such review of the transaction, as Nasdaq has indicated, should help it determine whether it is appropriate to rely on the transaction as providing a reliable indication of the company's value when qualifying companies for listing under the new listing standards.

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<sup>70</sup> See supra note 52 and accompanying text. See also proposed Nasdaq Rules IM-5405-1(a)(5) and IM-5505-1(a)(5). As noted by Nasdaq in its filing, limited trading in a Private Placement Market may not be sufficient for the Exchange to reach a conclusion that the company meets the applicable price-based requirements. See supra note 15.

<sup>71</sup> See supra note 11 and accompanying text. Nasdaq further noted in its filing that it may withdraw its approval of the listing at any time prior to the listing date if it believes that the Valuation no longer accurately reflects the company's likely market value. See supra note 11 and accompanying text.

<sup>72</sup> See supra Section II.A.1, Calculation of Price-based Initial Listing Requirements.

<sup>73</sup> See supra Section II.A.1, Calculation of Price-based Initial Listing Requirements. For the requirements for such Valuation, see Nasdaq Rule IM-5315-1(e) and (f) and proposed Nasdaq Rules IM-5405-1(a)(1) and (2) and IM-5505-1(a)(1) and (2).

Based on the above, the Commission believes that the proposed initial listing requirements can provide a reasonable basis for the Exchange to find that a company has met the price-based initial listing requirements (i.e. bid price, Market Value of Listed Securities, and Market Value of Unrestricted Publicly Held Shares) to support listing on the Exchange and the maintenance of fair and orderly markets, thereby protecting investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act. The Commission also notes that companies listing pursuant to the new provisions will still be required to meet the listing prerequisites contained in Nasdaq Rule 5210, as well as the corporate governance requirements detailed in the 5600 series of rules. Furthermore, the Commission notes that companies listing pursuant to the proposed provisions will be required to comply with the distribution requirements contained in Nasdaq Rules 5405 and 5505, i.e., that the company have 400 or 300 Round Lot Holders, as applicable, and 1,100,000 or 1,000,000 Unrestricted Publicly Held Shares, as applicable, and comply with other requirements that vary depending on which listing standard the company uses to qualify for listing.<sup>74</sup> The Commission believes that these existing provisions should continue to help ensure that the company has the requisite liquidity for listing on the Exchange.

In addition, securities qualified for listing under the proposed listing requirements for the Nasdaq Global or Capital Markets, which are listing without a related underwritten public offering, must list upon effectiveness of a registration statement pursuant to the Securities Act filed solely for the purpose of allowing existing shareholders to sell their shares.<sup>75</sup> The Commission believes that this requirement should help to ensure that investors and the market

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<sup>74</sup> For example, some of the listing standards require certain levels of shareholder equity or operating history. See Nasdaq Rules 5405 and 5505.

<sup>75</sup> See proposed Nasdaq Rules IM-5405-1(b)(ii) and IM-5505-1(b)(ii).

have access to complete, accurate, and reliable disclosure of material information needed for informed investment decisions and secondary market trading of the listed securities.

Under the proposed rule change, securities that are not listed in connection with an underwritten initial public offering and instead qualify for listing under the listing requirements for Direct Listings on the Nasdaq Global or Capital Markets must begin trading on the Exchange following initial pricing through the IPO Cross procedures and companies will be required to have a broker-dealer serving in the role of financial advisor to the issuer who is willing to perform the functions under Nasdaq Rule 4120(c)(8) related to the opening of trading in the security that would be performed by an underwriter in an underwritten initial public offering.<sup>76</sup> The Commission notes that the Exchange's rules currently provide that, in the case of initial price of a security listed under the listing requirements for Direct Listings on the Nasdaq Global Select Market, the fourth tie-breaker used in calculating the Current Reference Price and determining the opening price of the security will be the most recent transaction price in the Private Placement Market (for a security that has had recent sustained trading in a Private Placement Market prior to listing) or the price determined by the Exchange in consultation with the financial advisor to the issuer.<sup>77</sup> The proposal would extend these pricing provisions to Direct Listings on the Nasdaq Global and Capital Markets.<sup>78</sup> The Commission believes that specifying that the IPO Cross must be used to open the securities, and relying on the most recent transaction price in the Private Placement Market or a price determined by the Exchange in consultation with the issuer's financial advisor for purposes of the fourth tie-breaker in the cross,

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<sup>76</sup> See proposed Nasdaq Rules IM-5405-1(b) and IM-5505-1(b).

<sup>77</sup> See Nasdaq Rules 4753(a)(3)(A)(iv)b. and (b)(2)(D)(ii).

<sup>78</sup> See proposed Nasdaq Rules 4753(a)(3)(A)(iv)b. and (b)(2)(D)(ii).

should help establish a reliable Current Reference Price and the price at which the match will occur, and thereby facilitate the opening of these securities when trading first commences on the Exchange for certain securities not listed in connection with an underwritten IPO. The Commission believes these changes, consistent with Section 6(b)(5) of the Exchange Act, are reasonably designed to protect investors and the public interest and promote just and equitable principles of trade for the opening of securities listed under the new standards.

The Exchange has also proposed that, for a company transferring from a foreign regulated exchange or concurrently listing on the Exchange and a foreign regulated exchange, the Exchange will determine that the company has met the applicable price-based requirements based on the most recent trading price in such market, provided that there is a broad, liquid market for the company's shares in its country of origin.<sup>79</sup> The Commission believes that in these circumstances using the most recent trading price from the foreign regulated market will provide a reasonable basis for the Exchange to determine whether the company meets the Exchange's price-based based initial listing requirements, and provide clarity that other requirements described herein applicable to Direct Listing will not apply in such circumstances, thereby supporting listing on the Exchange and the maintenance of fair and orderly markets and the public interest in accordance with Section 6(b)(5) of the Exchange Act.

The Commission believes that the proposed changes to Nasdaq Rule IM-5315-1 to make Direct Listings, as described therein, a defined term and add to the caption that these requirements apply to the Nasdaq Global Select Market will provide clarity to the Exchange's

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<sup>79</sup> See proposed Nasdaq Rules IM-5405-1(a)(4) and IM-5505-1(a)(4). The Commission notes that these proposed rules are the same as existing Nasdaq Rule IM-5315-1(c), which applies to the Nasdaq Global Select Market, and will extend this provision to companies listing on the Nasdaq Global and Capital Markets.

rules. The Commission notes that the proposed rule change will not modify any substantive requirements for Direct Listings on the Nasdaq Global Select Market. The Commission also believes that updating the numbering for current Nasdaq Rule IM-5505 to proposed Nasdaq Rule IM-5505-2 and using the defined term Direct Listing in proposed Nasdaq Rule IM-5900-7 are also non-substantive changes that will provide clarity to the Exchange's rules, consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act.

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act.

#### IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written views, data, and arguments concerning whether Amendment No. 1 is consistent with the Exchange 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-059 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2019-059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies

of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-059 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. The Commission notes that the original proposal was published for comment in the Federal Register and that the Commission received no comments on the proposal.<sup>80</sup> The Commission notes that Amendment No. 1 clarifies and provides additional explanation relating to the proposed rule change. The changes and additional information in Amendment No. 1 assist the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Exchange Act. In particular, the Commission

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<sup>80</sup> See Notice, supra note 3.

believes that the amendments and clarifications on what may constitute other compelling evidence in lieu of a Valuation, including what level of affiliate participation may be considered de minimis, that companies must provide written certification that they have met these requirements, that third party transactions must be between unaffiliated third parties, and that, as to tender offers, only cash tender offers can be compelling evidence will help the Exchange administer the requirements and provide clarity on what types of transactions may qualify. The Commission has also found that the proposal, as modified by Amendment No. 1, is consistent with the Exchange Act for the reasons discussed herein. Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Exchange Act.<sup>81</sup>

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<sup>81</sup> 15 U.S.C. 78s(b)(2).

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>82</sup> that the proposed rule change (SR-NASDAQ-2019-059), as modified by Amendment No. 1 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>83</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>82</sup> Id.

<sup>83</sup> 17 CFR 200.30-3(a)(12).