

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- 93924; File No. SR-NASDAQ-2021-045)

January 6, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 2, to Modify Certain Pricing Limitations for Companies Listing in Connection with a Direct Listing Primary Offering

On June 11, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to modify certain pricing limitations for companies listing in connection with a direct listing primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange. The proposed rule change was published for comment in the Federal Register on June 30, 2021.<sup>4</sup> On August 12, 2021, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer period within which to either approve or disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>6</sup> On September 24, 2021, the Commission instituted proceedings under

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 92256 (June 24, 2021), 86 FR 34815 (June 30, 2021). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2021-045/srnasdaq2021045.htm>.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 92649 (August 12, 2021), 86 FR 46295 (August 18, 2021). The Commission designated September 28, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change.<sup>8</sup> On December 20, 2021, the Commission extended the time period for approving or disapproving the proposal to February 25, 2022.<sup>9</sup>

On December 22, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as originally filed. Amendment No. 2 to the proposed rule change is described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, 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 primary offering 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 in its entirety.<sup>10</sup>

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.

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<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> See Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021).

<sup>9</sup> See Securities Exchange Act Release No. 93830 (December 20, 2021), 86 FR 73071 (December 23, 2021).

<sup>10</sup> On December 21, 2021, Nasdaq submitted Amendment No. 1, which was subsequently withdrawn.

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

Summary of Amendment

Nasdaq is filing this amendment to SR-NASDAQ-2021-045<sup>11</sup> in order to address the issues the Commission raised in the OIP and make other modifications to clarify the proposed rule language.

As a preliminary matter, in this Amendment No. 2 (the “Amendment”) Nasdaq proposes to clarify how the main provisions of Rules 4120(c)(8)(A) and (c)(9)(A) apply to a Direct Listing with a Capital Raise by restating the provisions of these rule in a clear and direct manner. This change will make the rules easier to understand and apply.

Also in this Amendment, Nasdaq proposes to modify the Initial Proposal to require that 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

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<sup>11</sup> Securities Exchange Act Release No. 92256 (June 24, 2021), 86 FR 34815 (June 30, 2021) (the “Initial Proposal”). The Commission issued an Order Instituting Proceedings to Determine Whether To Approve or Disapprove the Initial Proposal. See Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021) (the “OIP”).

Act Rule 457(a). Nasdaq also proposes to clarify that 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.

Nasdaq also proposes to revise the certification process described in the Initial Proposal such that two certifications would be required in certain circumstances. In its initial certification to Nasdaq, which would be publicly disclosed and provided to Nasdaq prior to the beginning of the Display Only Period, the Company must confirm that its registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed or are less than [sic] the amount assumed in the price range established by the issuer in its effective registration statement.

Further, Nasdaq proposes to add to the operation of the Cross, in certain circumstances, a Post-Pricing Period. Specifically, if the actual price calculated by the Cross is not at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price [sic] of the price range established by the issuer in its effective registration statement, Nasdaq will initiate a brief Post-Pricing Period following the calculation of the actual price. In instances where the Post-Pricing Period is triggered, the issuer must confirm to Nasdaq during the Post-Pricing Period 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 Post-Pricing Period will end and the security will be released for trading immediately after the issuer provides such confirmation to Nasdaq. If the Company cannot provide the required confirmation, Nasdaq will postpone and reschedule the offering.

In the Amendment, Nasdaq proposes to prohibit market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise. In addition, Nasdaq undertakes to disseminate, free of charge, the Current Reference Price, on a public website, such as Nasdaq.com, during the Pre-Launch Period and to indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. 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 the Price Volatility Constraint has been satisfied.

Nasdaq also proposes in this Amendment 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 by Nasdaq on a public website such as Nasdaq.com.

Nasdaq also proposes to provide that it will 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 rules that:

- require members to 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
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to 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.

Nasdaq also proposes to make minor technical changes to improve the clarity of this proposal. Nasdaq believes that this amendment addresses the issues raised by the Commission in the OIP. This amendment supersedes and replaces the Initial Proposal in its entirety.

#### Description of Proposed Rule, as Amended

Nasdaq recently adopted Listing Rule IM-5315-2 to permit a company to list 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”);<sup>12</sup> 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

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<sup>12</sup> 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.

established requirements for disseminating information, establishing the opening price and initiating trading through the Cross in a Direct Listing with a Capital Raise.<sup>13</sup> 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 Limitation such that a Direct Listing with a Capital Raise can be executed in the Cross at a price that is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement.<sup>14</sup> In addition, Nasdaq proposes to modify the Pricing Range Limitation such that a Direct Listing with a Capital Raise can be executed in the Cross at a price above the price that is 20% above the highest price of such price range, provided that the company’s registration statement contains a sensitivity analysis explaining how the company’s plans would change if the actual proceeds from the offering exceed 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.

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<sup>13</sup> See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (the “Approval Order”).

<sup>14</sup> 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 will be calculated using the high end of the price range in the prospectus at the time of effectiveness and may be measured from either the high end (in the case of an increase in the price) or low end (in the case of a decrease in the price) of that range [sic].

Listing Rule IM-5315-2 requires that securities listing in connection with 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. 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.

Currently, in the case of the Direct Listing with a Capital Raise, a security is not released for trading by Nasdaq unless 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.<sup>15</sup> Specifically, under Rule 4120(c)(9)(B) Nasdaq shall release the security for trading only if: (i) all market orders will be executed in the Cross; and (ii) the actual price calculated by the Cross complies with the Pricing Range Limitation. If there is insufficient buy interest to satisfy the CDL Order and all other market orders, as required by the current rule, or if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement, the Cross would not proceed and such security would not begin trading. Nasdaq shall postpone and reschedule the offering only if either or both such conditions are not met. 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.

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<sup>15</sup> See Rule 4120(c)(9)(B).



### Proposed Change to Rule 4120(c)(9)

While many companies are interested in alternatives to the 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 result in additional investment opportunities while providing companies more options for becoming publicly traded.<sup>16</sup>

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

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<sup>16</sup> See Approval Order, 86 FR at 28177.

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 and its 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.<sup>17</sup> 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 and its 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.

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<sup>17</sup> See Approval Order, footnote 91.

Accordingly, Nasdaq proposes to modify the Pricing Range Limitation such that in the case of the Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the actual price at which the Cross would occur is at or above the price that is 20% below the lowest price of the price range established by the issuer in its effective registration statement and at or below the price that is 20% above the highest price of the price range. In other words, Nasdaq would release the security for trading, provided all other necessary conditions are satisfied, even if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement; provided however that the actual price cannot be more than 20% below the lowest price or more than 20% above the highest price of such range; and the company specified the quantity of shares registered, as permitted by Securities Act Rule 457, as explained below. In addition, there would be no limitation on releasing the security for trading at a price above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement if the company publicly disclosed and has certified 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 and the company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement.<sup>18</sup> The goal of the requirement is

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<sup>18</sup> The price range in the preliminary prospectus included in the effective registration statement is [sic] a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.<sup>19</sup>

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.<sup>20</sup>

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 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 Rule 430A if such deviation would not materially change the previous disclosure, in each case

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<sup>19</sup> 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.

<sup>20</sup> 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>.

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 430 [sic].

Finally, 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 and that there may be no upside limit above which the Cross could not proceed, 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 (as described in the Proposal) and indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. 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 the Price Volatility Constraint has been satisfied. This change will provide investors with notice that the Cross nears execution.

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 assure 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.

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 rules that:

- require members to 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
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to 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 circular<sup>21</sup> 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 whether or not there is an upside 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 above the price that is 20% above the highest price 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

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<sup>21</sup> The Information circular is an industry wide free service provided by Nasdaq.

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 Shares<sup>22</sup> 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

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<sup>22</sup> See Listing Rules 5005(a)(23) and 5005(a)(45).



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 as this is the minimum price at which the company could qualify to be listed. Nasdaq will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price.

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.<sup>23</sup>

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 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

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<sup>23</sup> 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.

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.<sup>24</sup>

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 the lowest price of the price range disclosed by the issuer in its effective registration statement.<sup>25</sup>

Lastly, Nasdaq proposes to clarify several provisions of the existing rules without 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

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<sup>24</sup> 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.

<sup>25</sup> 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 24 above because \$10.15 is the price that is closest to either.

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.<sup>26</sup>

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,<sup>27</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>28</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the 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.<sup>29</sup> 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)

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<sup>26</sup> This function is provided by the underwriter in an IPO and by a Financial Advisor in a Direct Listing. The Commission previously approved Nasdaq performing this function. See Approval Order.

<sup>27</sup> 15 U.S.C. 78f(b).

<sup>28</sup> 15 U.S.C. 78f(b)(5).

<sup>29</sup> 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>.

prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in 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 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 whether or not there is an upside 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 above the price that is 20% above the highest price 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. 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.

Nasdaq believes that the proposal to allow a Direct Listing with a Capital Raise to price above any price above the price range of the company's effective registration statement 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 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 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 the Price Volatility

Constraint has been satisfied. This change will provide investors with notice that the Cross nears execution.

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.

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 rules that:

- require members to 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
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to 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.<sup>30</sup> Allowing Direct Listings with a Capital Raise to similarly price up to 20% below the lowest price and at a price

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<sup>30</sup> <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

above the highest price of the price range in the company’s effective registration statement would be consistent with Chair Gensler’s recent call to treat “like cases alike.”<sup>31</sup>

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. 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

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<sup>31</sup> See <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>.



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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 2, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2021-045 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-2021-045. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-045, 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.<sup>32</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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