

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87445; File No. SR-NASDAQ-2019-060)

November 1, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Rules 4120 and 4753

I. Introduction

On July 18, 2019, The Nasdaq Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Rules 4120 and 4753 to permit the Exchange to declare a regulatory halt in a security that traded in the over-the-counter (“OTC”) market prior to the initial pricing on the Exchange and to allow for the initial pricing of such a security through the IPO Cross. The proposed rule change was published for comment in the Federal Register on August 6, 2019.³ On September 19, 2019, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On September 19, 2019, the Exchange also filed Amendment No. 1 to the proposed rule change, which amended

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 86537 (July 31, 2019), 84 FR 38321.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 87012, 84 FR 50490 (September 25, 2019). The Commission designated November 4, 2019 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

and superseded the proposed rule change as originally filed.⁶ The Commission received no comment letters on the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

Currently, a security that traded in the OTC market immediately prior to listing on the Exchange is released for initial trading on the Exchange by utilizing the Opening Cross pursuant to Rule 4752(d).⁸ The Exchange proposes to amend Rule 4120 to permit the Exchange to declare a regulatory halt⁹ in a security that traded in the OTC market prior to its initial pricing on

⁶ In Amendment No. 1, the Exchange revised the proposal to: (1) clarify that when a security previously traded in the OTC market is initially priced using the IPO Cross, the fourth tie-breaker for each of the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator and the price at which the cross will occur will be the price that is closest to the most recent transaction price in the OTC market; (2) specify that, for purposes of this proposed rule change, the use of the term “regulatory halt” refers to Nasdaq’s authority to halt trading in a security under Rule 4120(a)(7); (3) clarify that, currently, a security that traded in the OTC market immediately prior to listing on Nasdaq is released for initial trading on Nasdaq through the Opening Cross under Rule 4752(d) and, pursuant to the proposal, if such an issuer does not retain a financial advisor, the initial pricing will continue to be effected through the Opening Cross; (4) include additional justification in support of the proposed rule change; and (5) make technical and conforming changes. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2019-060/srnasdaq2019060-6163792-192369.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Amendment 1, supra note 6, at 4 n.4.

⁹ For purposes of this proposed rule change, the term “regulatory halt” refers to Nasdaq’s authority to halt trading in a security under Rule 4120(a)(7). See id. at 4 n.3.

the Exchange.¹⁰ The Exchange also proposes to amend Rules 4120 and 4753 to allow for the initial pricing on the Exchange of such a security through the IPO Cross (described in Rules 4120(c)(8) and 4753) if a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter in an initial public offering.¹¹ If the issuer does not retain a financial advisor, the initial pricing on the Exchange of such a security will continue to be effected through the Opening Cross.¹² Moreover, the Exchange proposes to adopt Rules 4753(a)(3)(A)(iv)(e) and 4753(b)(2)(D)(v) to provide that, in the case of the initial pricing of a security that traded in the OTC market pursuant to FINRA Form 211 immediately prior to its initial pricing, the fourth tie-breaker used in calculating each of the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator for purposes of the IPO Cross and the price at which the IPO Cross will occur will be the price that is closest to the most recent transaction price in the OTC market.¹³

¹⁰ The Exchange states that its proposal would facilitate a more orderly start to trading by permitting the Exchange to declare a regulatory halt in a security that traded in the OTC market prior to its initial pricing on the Exchange, before trading on the Exchange begins, which the Exchange believes would avoid potential price disparities or anomalies that may occur during any unlisted trading privileges (“UTP”) trading before the first transaction on the primary listing exchange. See id. at 7.

¹¹ Rule 4120(c)(9) currently provides that the IPO Cross process is available for the initial pricing of a security that has not been listed on a national securities exchange or traded in the OTC 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 is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering. The Exchange states that the IPO Cross will be a better mechanism to open trading in securities that traded in the OTC market given that these companies may attract significant interest upon listing on the Exchange from investors who previously could not invest in such securities, and that it will be beneficial to allow significant financial advisor involvement in determining when to launch trading. See id. at 8-9.

¹² See id. at 4 n.4.

¹³ The Exchange states that the most recent transaction price in the OTC market is

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2019-060, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change, as modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with Section 6(b)(5) of the Act.¹⁶ Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

As discussed above, the proposal would allow the Exchange to declare a regulatory halt in a security that traded in the OTC market prior to its initial pricing on the Exchange. The

predictive of the price that will develop upon the listing of the security on the Exchange. See id. at 8. This proposed change to the fourth tie-breaker will not affect the pricing of a security if the issuer does not retain a financial advisor. See id. at 4 n.5.

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ Id.

¹⁶ 15 U.S.C. 78f(b)(5).

proposal would also allow the Exchange to use the IPO Cross to initially price such a security provided that a broker-dealer serving in the role of financial advisor to the issuer 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 would establish the fourth tie-breaker used in calculating the Current Reference Price and the IPO Cross price. Currently, the functions performed by an underwriter with respect to an initial public offering under Rule 4120(c)(8) include, for example, providing notice to the Exchange that the security is ready to trade, selecting price bands for the price validation test, and determining to postpone and reschedule the initial public offering. The underwriter functions under Rule 4120(c)(8) currently also apply to a broker-dealer serving in the role of financial advisor to the issuer of a security that has not been listed on a national securities exchange or traded in the OTC market pursuant to FINRA Form 211 immediately prior to its initial pricing on the Exchange, if the IPO Cross is used for the initial pricing of such a security on the Exchange. In the current proposal, the Exchange states that the IPO Cross will be a better mechanism to open trading in securities that traded in the OTC market given that these companies may attract significant interest upon listing on the Exchange from investors who previously could not invest in a security that was traded in the OTC market, and it would be beneficial to allow significant financial advisor involvement in determining when to launch trading.¹⁷ The Commission seeks commenters' views on the sufficiency and merit of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,¹⁸ in addition to any other comments they may wish to submit about the proposed rule change.

¹⁷ See Amendment 1, supra note 6, at 8-9.

¹⁸ See Amendment 1, supra note 6.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there does not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,¹⁹ any request for an opportunity to make an oral presentation.²⁰

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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

¹⁹ 17 CFR 240.19b-4.

²⁰ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NASDAQ-2019-060 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 No. SR-NASDAQ-2019-060. The 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 No. SR-NASDAQ-2019-060 and should be submitted by [insert date 21 days from the date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Jill M. Peterson
Assistant Secretary

²¹ 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).