

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94311; File No. SR-NASDAQ-2021-045)

February 24, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Disapproving a 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)¹ of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 19b-4 thereunder,³ 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, 2021.⁴ On August 12, 2021, pursuant to Section 19(b)(2) of the Exchange Act,⁵ 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.⁶ On September 24, 2021, the Commission instituted proceedings

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 92649, 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.

under Section 19(b)(2)(B) of the Exchange Act⁷ to determine whether to approve or disapprove the proposed rule change.⁸

On December 20, 2021, the Commission extended the time period for approving or disapproving the proposal to February 25, 2022.⁹ On December 22, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as originally filed.¹⁰ Amendment No. 2 was published for comment in the Federal Register on January 12, 2022.¹¹

This order disapproves the proposed rule change, as modified by Amendment No. 2, because, as discussed below, Nasdaq has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and, in particular, the requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest.

I. Description of the Proposal, as Modified by Amendment No. 2

Nasdaq Listing Rule IM-5315-2 provides listing requirements for Nasdaq's Global Select Market for a company that has not previously had its common equity securities registered under

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021) ("OIP").

⁹ See Securities Exchange Act Release No. 93830, 86 FR 73071 (December 23, 2021).

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

¹¹ See Securities Exchange Act Release No. 93924 (January 6, 2022), 87 FR 1797 (January 12, 2022) ("Amended Notice").

the Exchange Act to list its common equity securities on the Exchange at the time of effectiveness of a registration statement¹² pursuant to 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”).¹³ Securities qualified for listing under Nasdaq Listing Rule IM-5315-2 must begin trading on the Exchange following the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9) and Nasdaq Rule 4753 for the opening auction, otherwise known as the Nasdaq Halt Cross.¹⁴ Currently, in the case of a Direct Listing with a Capital Raise, the Exchange will release the security for trading on the first day of listing if, among other things, the actual price calculated by the Nasdaq Halt 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 statement¹⁵ (the

¹² The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).

¹³ A Direct Listing with a Capital Raise includes listings 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. See Nasdaq Listing Rule IM-5315-2. See also Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (order approving rules to permit a Direct Listing with a Capital Raise and adopting related rules concerning how the opening transaction for such listing will be effected) (“2021 Order”). The Exchange’s rules provide for a company listing pursuant to a Direct Listing with a Capital Raise to list only on the Nasdaq Global Select Market.

¹⁴ See Nasdaq Listing Rule IM-5315-2. “Nasdaq Halt Cross” means the process for determining the price at which Eligible Interest shall be executed at the open of trading for a halted security and for executing that Eligible Interest. See Nasdaq Rule 4753(a)(4). “Eligible Interest” means any quotation or any order that has been entered into the system and designated with a time-in-force that would allow the order to be in force at the time of the Nasdaq Halt Cross. See Nasdaq Rule 4753(a)(5). Pursuant to Nasdaq Rule 4120, the Exchange will halt trading in a security that is the subject of an initial public offering (or direct listing), and terminate that halt when the Exchange releases the security for trading upon certain conditions being met, as discussed further below. See Nasdaq Rule 4120(a)(7) and (c)(8).

¹⁵ The Exchange states that references in the proposal to the price range established by the issuer in its effective registration statement refer to the price range disclosed in the

“Pricing Range Limitation”). The Exchange has proposed to modify the Pricing Range Limitation to provide that the Exchange would release the security for trading if (a) the actual price calculated by the Nasdaq Halt Cross 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 disclosed price range; or (b) the actual price calculated by the Nasdaq Halt Cross is at a price above the price that is 20% above the highest price of such price range, provided that, among other things, the company has publicly disclosed and certified to the Exchange 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 that the company does not expect that such price would materially change the company’s previous disclosure in its effective registration statement.¹⁶ The Exchange would calculate the 20% threshold based on the maximum offering price set forth in the registration fee table in the company’s effective registration statement, which the Exchange argues is consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.¹⁷ The Exchange has also proposed to make related conforming changes.

Currently Nasdaq Rule 4120(c)(9)(B) states that, notwithstanding the provisions of Nasdaq Rule 4120(c)(8)(A) and (c)(9)(A), in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, the Exchange, in

prospectus in such effective registration statement. See Amended Notice, supra note 11, 87 FR at 1799 n.14. Throughout this order, we refer to this as the “disclosed price range.”

¹⁶ See proposed Nasdaq Rule 4120(c)(9)(B)(vii)c. See also Amended Notice, supra note 11, 87 FR at 1799.

¹⁷ See proposed Nasdaq Rule 4120(c)(9)(B)(vii)c.3.

consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. The Exchange will release the security for trading if: (i) all market orders will be executed in the Nasdaq Halt Cross; and (ii) the actual price calculated by the Nasdaq Halt Cross complies with the Pricing Range Limitation. The Exchange will postpone and reschedule the offering only if either or both of such conditions are not met.¹⁸ The Exchange states that if there is insufficient buy interest to satisfy the CDL Order¹⁹ and all other market orders, as required by the current rule, or if the actual price calculated by the Nasdaq Halt Cross is outside the disclosed price range, the Nasdaq Halt Cross would not proceed and such security would not begin trading.²⁰

According to the Exchange, based on conversations it has had with companies and their advisors, the Exchange believes that some companies may be reluctant to use the existing rules for a Direct Listing with a Capital Raise because of concerns about the Pricing Range Limitation.²¹ The Exchange states that the Pricing Range Limitation imposed on a Direct Listing

¹⁸ See Nasdaq Rule 4120(c)(9)(B).

¹⁹ A “Company Direct Listing Order” or “CDL Order” is a market order that may be entered only on behalf of the issuer and may be executed only in the Nasdaq Halt Cross for a Direct Listing with a Capital Raise. The CDL Order is entered without a price (with a price later set in accordance with the requirements of Nasdaq Rule 4120(c)(9)(B)), must be for the quantity of shares offered by the issuer as disclosed in its effective registration statement, must be executed in full in the Nasdaq Halt Cross, and may not be canceled or modified. See Nasdaq Rule 4702(b)(16).

²⁰ See Amended Notice, supra note 11, 87 FR at 1799. The Exchange represents that in such event, because the Nasdaq Halt Cross cannot be conducted, the Exchange would postpone and reschedule the offering and notify 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. See id.

²¹ See id. The Exchange states that a Direct Listing with a Capital Raise could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors, because, unlike in a traditional firm commitment underwritten

with a Capital Raise (but not on a traditional IPO) increases the probability of a failed offering, because the offering cannot proceed without some delay not only due to lack of investor interest, but also if investor interest is greater than the company and its advisors anticipated.²² According to the Exchange, the Exchange believes that there may be instances of offerings where the price determined by the Exchange's opening auction will exceed the highest price of the price range disclosed in the company's effective registration statement.²³ The Exchange states that, under the existing rule, a security subject to a Direct Listing with a Capital Raise cannot be released for trading by the Exchange if the actual price calculated by the Nasdaq Halt Cross is above the highest price of the disclosed price range.²⁴ The Exchange further states that, in this case, the Exchange would have to cancel or postpone the offering until the company amends its effective registration statement, and that, at a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event.²⁵ In addition, the Exchange states that 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 the Exchange's view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits.²⁶

public offering ("IPO"), 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. See id.

²² See id. at 1800. The Exchange states that 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. See id.

²³ See id.

²⁴ See id.

²⁵ See id.

²⁶ See id.

The Exchange has proposed to modify the Pricing Range Limitation such that even if the actual price calculated by the Nasdaq Halt Cross is outside the disclosed price range, the Exchange would release a security for trading if the actual price at which the Nasdaq Halt Cross would occur is at or above the price that is 20% below the lowest price of the disclosed price range and at or below the price that is 20% above the highest price of the disclosed price range, provided all other necessary conditions are satisfied, and that the company has specified the quantity of shares registered, as permitted by Securities Act Rule 457.²⁷ In addition, under the proposal, the Exchange would release the security for trading, provided all other necessary conditions are satisfied, at a price more than 20% above the highest price of the disclosed price range, if the company publicly disclosed and has certified to the Exchange prior to the beginning of the Display Only Period²⁸ that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement, 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, and the price range in the preliminary prospectus included in its effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.²⁹ The Exchange states that the goal of the requirement is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.³⁰

²⁷ See *id.* See also *infra* notes 31 and 33 and accompanying text.

²⁸ See Nasdaq Rule 4120(c)(7)(A) and proposed Nasdaq Rule 4120(c)(9)(B)(iii)–(v) for a description of the “Display Only Period.”

²⁹ See Amended Notice, *supra* note 11, 87 FR at 1800; proposed Nasdaq Rule 4120(c)(9)(B)(vii)c.2.

³⁰ See Amended Notice, *supra* note 11, 87 FR at 1800.

The Exchange states that it believes that its proposed approach is consistent with Securities Act Rule 430A and staff guidance, which, according to the Exchange, 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.³¹ According to the Exchange, the Exchange 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.³² The Exchange states that, accordingly, the Exchange 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) 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

³¹ See id. The Exchange states that 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, and the Exchange 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 id. at 1800 n.20. The Exchange also states that the Exchange believes that the proposed modification of the Pricing Range Limitation is consistent with the protection of investors, because, according to the Exchange, this approach is similar to the pricing of an IPO where an issuer is permitted to price outside of the disclosed price range in accordance with the SEC Staff's guidance. See id. at 1802.

³² See id. at 1800.

issued is not increased from the number of shares disclosed in the prospectus.³³ The Exchange states that, for the purposes of this rule, the 20% threshold would be calculated based on the maximum offering price set forth in the registration fee table, and that this method of calculation is consistent with the SEC Staff's guidance on Securities Act Rule 430A.³⁴

According to the Exchange, given that there may be a Direct Listing with a Capital Raise that could price outside of the disclosed price range and that there may be no upside limit above which the Nasdaq Halt Cross could not proceed, the Exchange proposes to enhance transparency by providing readily available, real time pricing information to investors.³⁵ To that end, the Exchange states that it would 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 disclosed price range.³⁶ The Exchange 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.³⁷ The "Price Volatility Constraint" would require that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes.³⁸ The Exchange states that the Price Volatility Constraint would provide investors with notice that

³³ See id.

³⁴ See id.

³⁵ See id.

³⁶ See id. See Nasdaq Rule 4753(a)(3) for a description of the "Current Reference Price" and Nasdaq Rule 4120(c)(8)(A) and proposed Nasdaq Rule 4120(c)(9)(B)(v)–(vii) for a description of the "Pre-Launch Period."

³⁷ See Amended Notice, supra note 11, 87 FR at 1800–01.

³⁸ See id. at 1801.

the Nasdaq Halt Cross nears execution.³⁹ The Pre-Launch Period would continue until the Price Volatility Constraint has been satisfied.⁴⁰ Further, the Pre-Launch Period shall end, and the security shall be released for trading when the Exchange, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade and the conditions in proposed Nasdaq Rule 4120(c)(9)(B)(vii) and (viii) are met.⁴¹

The Exchange 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.⁴² The Exchange states that this would 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 would use any additional proceeds raised.⁴³

In addition, the Exchange states that to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, the Exchange proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise.⁴⁴ These rules would require members to provide to a customer, before that customer places an order to be executed in the Nasdaq Halt Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Nasdaq Halt Cross, including

³⁹ See id.

⁴⁰ See id.

⁴¹ See proposed Nasdaq Rule 4120(c)(9)(B)(vii).

⁴² See Amended Notice, supra note 11, 87 FR at 1801.

⁴³ See id.

⁴⁴ See id.

information regarding the location of the public website where the Exchange would disseminate the Current Reference Price.⁴⁵

The Exchange states that to assure that members have the necessary information to be provided to their customers, the Exchange 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.⁴⁶ This information circular would describe any special characteristics of the offering and the Exchange'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 that members must provide to their customers.⁴⁷ The information circular would also describe other requirements that: (a) 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; (b) 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; and (c) require members not to accept market orders to be executed in the Nasdaq Halt Cross.⁴⁸

⁴⁵ See id.

⁴⁶ See id. The Exchange states that an information circular is an industry-wide, free service provided by the Exchange. See id. at 1801 n.21.

⁴⁷ See id. at 1801.

⁴⁸ See id.; proposed Nasdaq Rule 4120(c)(9)(B)(i).

The Exchange states that 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.⁴⁹

The Exchange represents that in each instance of a Direct Listing with a Capital Raise, the Exchange’s information circular would inform market participants that the auction could price up to 20% below the lowest price of the price range and would specify that price. The Exchange also represents that it would indicate in such circular whether or not there is an upside limit above which the Nasdaq Halt Cross could not proceed, based on the company’s certification.⁵⁰

The Exchange states that 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, the Exchange proposes to introduce to the operation of the Nasdaq Halt Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Nasdaq Halt 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.⁵¹ Specifically, in such circumstances, the Exchange would initiate a “Post-Pricing Period” following the calculation of the actual price.⁵² During the Post-Pricing Period, the issuer must confirm to the Exchange that no additional disclosures are

⁴⁹ See Amended Notice, supra note 11, 87 FR at 1801.

⁵⁰ See id. The Exchange states that it believes that investors have become familiar with the approach of pricing an IPO outside of the price range stated in an effective registration statement. See id. at 1803.

⁵¹ See id. at 1801.

⁵² See id.

required under the federal securities laws based on the actual price calculated by the Nasdaq Halt Cross. Further, during this period no additional orders for the security could be entered in the Nasdaq Halt Cross, and no existing orders could be modified.⁵³ The Exchange states that the security would be released for trading immediately following the Post-Pricing Period.⁵⁴ However, if the Company cannot provide the required confirmation, then the Exchange would postpone and reschedule the offering.⁵⁵

The Exchange also proposes to clarify several provisions of existing Nasdaq Rule 4120(c)(9) without changing them.⁵⁶ Specifically, the Exchange proposes to clarify the mechanics of the Nasdaq Halt Cross by specifying that the Exchange will initiate a 10-minute Display Only Period only after the CDL Order has been entered and that the Exchange shall select price bands for purposes of applying the price validation test in the Nasdaq Halt Cross in connection with a Direct Listing with a Capital Raise.⁵⁷ The Exchange 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 validation test.⁵⁸

Nasdaq 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

⁵³ See id.

⁵⁴ See id.

⁵⁵ See id.

⁵⁶ See Amended Notice, supra note 11, 87 FR at 1802.

⁵⁷ See id. The Exchange would select an upper price band and a lower price band with the default for an upper and lower price band set at zero. The Exchange represents that if a security does not pass the price validation test, the Exchange may select different price bands before recommencing the process to release the security for trading. See id.

⁵⁸ See id.

Unrestricted Publicly Held Shares⁵⁹ for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement⁶⁰ if the amount of the company's Unrestricted Publicly Held Shares before the offering, along with the market value of the shares to be sold by the company in the Exchange's opening auction in the Direct Listing with a Capital Raise, is at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million). For this purpose, under current rules, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the disclosed price range.⁶¹ The Exchange states that because the Exchange proposes to allow the opening auction to price up to 20% below the lowest price of the disclosed price range, the Exchange proposes to make a conforming change to Nasdaq Listing Rule IM-5315-2 to provide that the price used to determine such company's compliance with the required Market Value of Unrestricted Publicly Held Shares would be the price per share equal to the price that is 20% below the lowest price of the disclosed price range.⁶² The Exchange further states that this is the minimum price at which the company could qualify to be listed.⁶³

The Exchange states that 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

⁵⁹ See Nasdaq Listing Rule 5005(a)(23) and (45) for the definitions of "Market Value" and "Unrestricted Publicly Held Shares," respectively.

⁶⁰ See Nasdaq Listing Rule 5315(f)(2).

⁶¹ See Nasdaq Listing Rule IM-5315-2. The Exchange will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price. See id.

⁶² See Amended Notice, supra note 11, 87 FR at 1801.

⁶³ See id.

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.⁶⁴ The Exchange also proposes to amend Nasdaq Listing Rule IM-5315-2 to specify 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 Act Rule 457(a), and that securities qualified for listing under Nasdaq Listing Rule IM-5315-2 must satisfy the additional requirements of Nasdaq Rule 4120(c)(9)(B).⁶⁵

Finally, the Exchange has proposed to amend Nasdaq Rules 4753(a)(3)(A) and 4753(b)(2) to conform the requirements for disseminating information and establishing the opening price through the Nasdaq Halt 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 disclosed price range.⁶⁶ Specifically, the Exchange proposes changes to Nasdaq 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,⁶⁷ and to the calculation of the price at which the Nasdaq Halt Cross will execute, for a Direct Listing with a Capital Raise. Under these rules currently, where there are multiple prices that would satisfy the conditions for determining the 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 disclosed price range. The Exchange states that, to conform these rules to the proposed modification of the price range within which

⁶⁴ See id. at 1801–02 (citing Nasdaq Listing Rules 5315(e)(1) and (2) and 5315(f)(1)).

⁶⁵ See proposed Nasdaq Listing Rule IM-5315-2.

⁶⁶ See proposed Nasdaq Rules 4753(a)(3)(A)(iv)c. and 4753(b)(2)(D)(iii).

⁶⁷ See Nasdaq Rule 4753(a)(3) for a description of the “Order Imbalance Indicator.”

the opening auction would proceed, the Exchange 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 disclosed price range.⁶⁸

II. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Exchange Act,⁶⁹ the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder that are applicable to such organization.⁷⁰ The Commission shall disapprove a proposed rule change if it does not make such a finding.⁷¹ The Commission’s Rules of Practice, under Rule 700(b)(3), state that the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder ... is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements ... is not sufficient.”⁷²

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁷³ and any failure of the self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the

⁶⁸ See Amended Notice, supra note 11, 87 FR at 1802.

⁶⁹ See 15 U.S.C. 78s(b)(2)(C).

⁷⁰ See 15 U.S.C. 78s(b)(2)(C)(i).

⁷¹ See 15 U.S.C. 78s(b)(2)(C)(ii); and see also 17 CFR 201.700(b)(3).

⁷² 17 CFR 201.700(b)(3).

⁷³ See id.

Exchange Act and the applicable rules and regulations.⁷⁴ Moreover, “unquestioning reliance” on a self-regulatory organization’s representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.⁷⁵

For the reasons discussed below, the Commission is disapproving the proposed rule change because the information before the Commission is insufficient to support a finding that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission concludes that the Exchange has not met its burden to demonstrate that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act, and in particular the requirements that a national securities exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.

The Commission has consistently recognized the importance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.⁷⁶

⁷⁴ See id.

⁷⁵ Susquehanna Int’l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 447 (D.C. Cir. 2017).

⁷⁶ The Commission has stated in approving national securities 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., 2021 Order, supra note 13, 86 FR at 28172 n.47; Securities Exchange Act Release Nos. 90768 (December 22, 2020), 85 FR 85807, 85811 n.55 (December 29, 2020) (SR-

The Exchange proposes to modify its rules concerning pricing restrictions for the opening auction on the first day of trading for a Direct Listing with a Capital Raise. Instead of imposing the Pricing Range Limitation, which limits the price of the opening transaction to the price range disclosed in the issuer's effective registration statement, the proposal would allow the opening auction to proceed at a price up to 20% above or below the disclosed price range, or at a price more than 20% above the disclosed price range if certain additional conditions are met.

The Exchange states that it believes that its proposal to modify the Pricing Range Limitation is consistent with the protection of investors and argues that the proposal is similar to the pricing flexibility that is permitted for a firm commitment underwritten IPO.⁷⁷ However, in the context of a firm commitment underwritten IPO, the IPO price is determined prior to the time of sale to the underwriters and initial investors, which takes place in advance of the opening transaction on the Exchange. Accordingly, issuers and underwriters have the ability to provide investors with any necessary additional disclosures prior to completing the offering, including those that are dependent on the price of the offering, and to delay the offering if necessary to provide any such disclosures. In contrast, in the context of a Direct Listing with a Capital Raise,

NYSE-2019-67) (“NYSE 2020 Order”); 82627 (February 2, 2018), 83 FR 5650, 5653 n.53 (February 8, 2018) (SR-NYSE-2017-30) (“NYSE 2018 Order”); 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 has stated that 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. See, e.g., 2021 Order, supra note 13, 86 FR at 28172 n.47; NYSE 2020 Order, 85 FR at 85811 n.55; NYSE 2018 Order, 83 FR at 5653 n.53; Securities Exchange Act Release Nos. 87648 (December 3, 2019), 84 FR 67308, 67314 n.42 (December 9, 2019) (SR-NASDAQ-2019-059); 88716 (April 21, 2020), 85 FR 23393, 23395 n.22 (April 27, 2020) (SR-NASDAQ-2020-001).

⁷⁷ See Amended Notice, supra note 11, 87 FR at 1802.

the IPO price is the opening auction price on the Exchange, so that the IPO price and proceeds to the issuer are not known by the issuer and market participants until the securities are sold to investors in the opening transaction on the Exchange. The Exchange's current rules for a Direct Listing with a Capital Raise require it to postpone and reschedule the offering if the opening auction price does not fall within the disclosed price range, so that issuers are able to update any disclosures if necessary before proceeding with an offering outside of the disclosed price range. However, as discussed below, the Exchange's proposal to expand Direct Listings with a Capital Raise would not ensure, in all cases, that issuers conducting a Direct Listing with a Capital Raise would have an opportunity to convey additional material information to investors, if needed, prior to the time of sale.

As discussed above, in cases where the opening auction price will be more than 20% above the high end of the disclosed price range, an issuer would have to have previously certified to the Exchange and publicly disclosed, prior to the beginning of the Display Only Period,⁷⁸ that it does not expect such price to materially change the issuer's previous disclosure in its effective registration statement. In such cases, when the opening auction price will be more than 20% above the high end of the disclosed price range, the issuer would then need to confirm to the Exchange again, during the Post-Pricing Period, that no additional disclosures are required under the federal securities laws based on the actual price calculated in the auction. If the issuer could not provide the required confirmation, the Exchange would postpone and reschedule the offering.

However, the Exchange does not propose to apply these additional protections to a Direct Listing with a Capital Raise where the opening auction price will be outside of the disclosed

⁷⁸ Starting at the beginning of the Display Only Period, the Exchange would begin disseminating the Order Imbalance Indicator, which includes the Current Reference Price and other order information, every second. See proposed Nasdaq Rule 4120(c)(9)(B)(iv).

price range, but up to 20% above the high end or 20% below the low end of such disclosed price range. In these cases, the Exchange has not proposed any mechanism by which an issuer or the Exchange could postpone or reschedule the offering, even if the disclosures included in the registration statement are not based on an opening auction price that is outside the disclosed price range.⁷⁹ The Exchange argues that under its proposal an issuer in a Direct Listing with a Capital Raise would have the same ability as an issuer in a firm commitment underwritten IPO to delay an offering at any time.⁸⁰ Under Nasdaq's proposal, however, should concerns arise relating to the adequacy of the disclosure for an offering that prices within 20% of the disclosed price range, the Nasdaq procedures would not give the issuer the option to halt or delay the offering once the issuer submits its order. If the opening auction price would be up to 20% above the high end or 20% below the low end of the disclosed price range and the conditions in proposed Nasdaq Rule 4120(c)(9)(B)(vii)(a) and (b) and the Price Volatility Constraint are met, the opening auction would proceed.⁸¹ Accordingly, the Commission does not believe that the

⁷⁹ Registration statements for initial public offerings typically provide disclosure based on an assumed offering price equal to the mid-point of the disclosed price range. They may or may not contain additional information explaining how the disclosure would change, including how the issuer's plans and financial condition would be affected, given specified changes in the assumed offering price. Moreover, the proposed Nasdaq rule would impose no such obligation on offerings that price up to 20% above the high end or 20% below the low end of the disclosed price range. As a result, if the opening auction price is substantially below the low end of the disclosed price range, depending on what information the issuer had provided prior to effectiveness of the registration statement, the issuer may need to provide additional disclosure relating to, among other things, changes in the planned use of offering proceeds, liquidity, or material risk factors.

⁸⁰ See Letter from Nikolai Utochkin, Counsel, Listing and Governance, Nasdaq (December 21, 2021), at 8 ("Nasdaq Letter").

⁸¹ See proposed Nasdaq Rule 4120(c)(9)(B)(viii) (stating "... Nasdaq shall postpone and reschedule the pricing of the security only if the conditions in paragraphs (vii)a. and b., above, are not met.").

proposal adequately addresses how an issuer would be able to disclose any additional material information related to the final offering price prior to the time of sale in a Direct Listing with a Capital Raise where the actual price calculated in the opening auction is higher or lower than, but no more than 20% outside of, the disclosed price range.⁸² In these cases, the inability of an issuer to provide potentially material disclosures to investors in a timely manner prior to the sale of securities continues to raise investor protection concerns under Section 6(b)(5) of the Exchange Act.⁸³ Therefore, the Exchange has not met its burden to demonstrate that its proposal is consistent with the Exchange Act.

Similarly, in cases where the opening auction price will be more than 20% above the high end of the disclosed price range, the issuer would have to have included in its registration statement a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the offering exceeded the amount assumed in the disclosed price range. The Exchange states that requiring this sensitivity analysis is designed to protect investors because it allows investors to see how changes in the share price ripple through critical elements of the

⁸² One commenter opposing the proposal raises concerns about the potential absence of material information concerning the final offering price prior to the time of the sale of shares in a Direct Listing with a Capital Raise. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (October 21, 2021), at 2 (“CII Letter”). This commenter states that its sensitivity to this lack of disclosure in the Exchange proposal is heightened by its broader concerns about the loss of investor protections relating to direct listings generally, including the difficulties of investors in bringing claims under Section 11 of the Securities Act for material misstatements or omissions in direct listing registration statements. The commenter argues that investors in direct listings, including Direct Listings with a Capital Raise, are likely to continue to have “fewer legal rights than investors in a traditional initial public offering.” See id. at 4. The Exchange has not responded to this commenter's concerns, including the concern relating to “tracing” share purchases for purposes of Section 11 claims, in its proposal.

⁸³ See OIP, supra note 8.

companies' disclosure.⁸⁴ However, this sensitivity analysis is not required under the Exchange's proposal in cases where the actual price calculated in the opening auction for a Direct Listing with a Capital Raise is higher or lower than, but no more than 20% outside of, the disclosed price range. This could result in an offering proceeding without investors having the opportunity to receive additional material information, such as a sensitivity analysis, in these cases. As noted above, the Commission believes this could raise investor protection concerns under Section 6(b)(5) of the Exchange Act.

In addition, the Exchange proposes to establish a Price Volatility Constraint, which would require that the Current Reference Price not deviate by 10% or more from any Current Reference Price in the previous 10 minutes, as a condition to the opening auction in a Direct Listing with a Capital Raise.⁸⁵ Specifically, the Exchange's proposal provides that "[t]he Pre-Launch Period shall continue until the Price Volatility Constraint is satisfied."⁸⁶ The Exchange also proposes to disseminate information about whether the Price Volatility Constraint has been satisfied, which, according to the Exchange, "will indicate whether the security is ready to trade," and "will provide investors with notice that the Cross nears execution."⁸⁷ Once the Price Volatility Constraint is satisfied, however, there are additional conditions that must be met

⁸⁴ See Nasdaq Letter, at 3. See also *id.* at 7–8 (describing the requirements that would apply to an offering that prices more than 20% above the high end of the disclosed price range).

⁸⁵ See *supra* notes 37–39 and accompanying text.

⁸⁶ Proposed Nasdaq Rule 4120(c)(9)(B)(vii).

⁸⁷ Amended Notice, *supra* note 11, 87 FR at 1800–01. See proposed Nasdaq Rule 4120(c)(9)(B)(v) stating that the Price Volatility Constraint "indicates that the security may be ready to trade." See also Nasdaq Letter, at 7 ("Then, Nasdaq will publicly indicate when the Price Volatility Constraint has been met, thus providing investors with real time information that the price discovery process nears completion and the security is ready to trade shortly.")

before the opening cross will occur and in the intervening period the expected opening auction price may change because orders can continue to be entered and cancelled.⁸⁸ Specifically, the Exchange, in consultation with the financial advisor to the issuer, must make the determination that the security is ready to trade, and several additional conditions specified in proposed Nasdaq Rule 4120(c)(9)(B)(vii) and (viii) must be met, including the potential initiation and conclusion of a Post-Pricing Period.⁸⁹ Thus, it would appear that there could be a substantial price change during the period of time between the Exchange’s dissemination of the fact that the Price Volatility Constraint has been satisfied and the actual execution of the opening cross for a Direct Listing with a Capital Raise. In such event, investors could be misled that the opening cross “nears execution” and that the disseminated Current Reference Price will likely be close to the opening auction price when, in fact, the auction may not occur for a considerable time and the opening auction price may differ substantially. The Exchange has not addressed this potential discrepancy between the stated purpose of the proposed dissemination of the Price Volatility Constraint, and its potential application in practice, or explained how this result would be consistent with the protection of investors, the public interest, or the other requirements of Section 6(b)(5) of the Exchange Act.

As stated above, under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations

⁸⁸ The Exchange’s proposal states that investors could enter additional orders or cancel existing orders throughout the pre-opening process until the actual opening auction price is calculated; therefore, the Current Reference Price may change throughout this time period. See proposed Nasdaq Rule 4120(c)(9)(B)(v) and (viii)(b).

⁸⁹ These conditions also include a determination that the issuer’s CDL Order will be executed in full in the Nasdaq Halt Cross, a price validation test, and satisfaction of the pricing conditions. See proposed Nasdaq Rule 4120(c)(9)(B)(vii).

issued thereunder ... is on the self-regulatory organization that proposed the rule change.⁹⁰ For the foregoing reasons, the Exchange has not met its burden to demonstrate that its proposal is consistent with the Exchange Act. In particular, the Exchange has not adequately demonstrated that its proposal to allow a Direct Listing with a Capital Raise to proceed at an opening auction price that falls outside of the disclosed price range is consistent with investor protection, the public interest, and other relevant provisions of Section 6(b)(5) of the Exchange Act.⁹¹

Accordingly, for the reasons set forth above, the Commission must disapprove the proposed rule change, as modified by Amendment No. 2, because the Exchange has not met its burden to demonstrate that the proposal is consistent with Section 6(b)(5) of the Exchange Act.⁹²

⁹⁰ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁹¹ 15 U.S.C. 78f(b)(5).

⁹² In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f). According to the Exchange, the proposal would give issuers additional flexibility in becoming a public company, and in that way promote competition among service providers, such as underwriters and other advisers, to such companies. See Amended Notice, supra note 11, 87 FR at 1804. One commenter expresses its belief that the ability for companies to raise primary capital in a direct listing provides companies with additional choice and flexibility as they consider alternatives to going public and, therefore, helps facilitate capital formation. See Letter from Evan Damast, Global Head of Equity and Fixed Income Syndicate, Morgan Stanley (July 21, 2021); Letter from Evan Damast, Global Head of Equity and Fixed Income Syndicate, Morgan Stanley (February 1, 2022). Another commenter states that adding a primary capital raise to a direct listing would advance the efficiency and openness of the U.S. capital markets and solve a conflict of interest problem. See Letter from Bill Gurley, General Partner, Benchmark (February 2, 2022). See also Letter from Ran D. Ben-Tzur and Jennifer J. Hitchcock, Fenwick & West LLP (February 1, 2022) (stating that the proposal would mitigate issuers' reluctance to use a Direct Listing with a Capital Raise because traditional IPOs are not subject to similar price range limitations); Letter from Barry McCarthy (February 1, 2022) (stating that Direct Listings with a Capital Raise are the next logical evolution of a direct listing, but will not work with the current price range constraints). Another commenter states that it believes the proposal would stimulate a vibrant ecosystem of data and analytics and fintech companies to further refine IPO pricing accuracy and broaden investor participation, thus improving capital intermediation for U.S. markets. See Letter from Burke Dempsey, EVP Head of Investment Banking, Wedbush Securities Inc. (August 9,

III. Conclusion

The Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act,⁹³ that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Exchange Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR-NASDAQ-2021-045), as modified by Amendment No. 2, be, and hereby is, DISAPPROVED.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁴

Eduardo Aleman
Assistant Secretary

2021). For the reasons discussed throughout, however, the Commission is disapproving the proposed rule change because it does not find that the proposed rule change is consistent with the Exchange Act.

⁹³ 15 U.S.C. 78s(b)(2).

⁹⁴ 17 CFR 200.30-3(a)(12).