

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95220; File No. SR-NASDAQ-2022-027)

July 7, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Modify Certain Pricing Limitations for Companies Listing in Connection with a Direct Listing with a Capital Raise

I. Introduction

On March 21, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to modify certain pricing limitations for companies listing in connection with a direct listing 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. The proposed rule change was published for comment in the Federal Register on April 8, 2022.³ On May 19, 2022, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 94592 (April 4, 2022), 87 FR 20905 (April 8, 2022).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 94947 (May 19, 2022), 87 FR 31915 (May 25, 2022). The Commission designated July 7, 2022, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

On May 23, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed. Amendment No. 1 was published for comment in the Federal Register on June 2, 2022.⁶ The Commission has received no comments on the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

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 the Exchange Act to list its common equity securities on the Exchange at the time of effectiveness of a registration statement⁸ 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”).⁹ 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

⁶ See Securities Exchange Act Release No. 94989 (May 26, 2022), 87 FR 33558 (June 2, 2022) (“Notice”).

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).

⁹ 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.

Rule 4120(c)(9) and Nasdaq Rule 4753 for the opening auction, otherwise known as the Nasdaq Halt Cross.¹⁰ 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 statement¹¹ (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 of the disclosed price range; or (b) the actual price calculated by the Nasdaq Halt Cross is at a price above the highest price of such price range. For the Nasdaq Halt Cross to execute at a price outside of the disclosed price range, the company would be required to publicly disclose and certify to the Exchange that the company does not expect that such price would materially change the company’s previous disclosure in its effective registration statement and that its effective registration statement contains a sensitivity analysis explaining how the company’s plans would

¹⁰ 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).

¹¹ 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 prospectus in such effective registration statement. See Notice, *supra* note 6, 87 FR at 33559 n.10. Throughout this order, we refer to this as the “disclosed price range.”

change if the actual proceeds from the offering are less than or exceed the amount in the disclosed price range.¹² The Exchange would calculate the 20% threshold below the disclosed price range 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.¹³ 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 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.¹⁴ The Exchange states that if there is insufficient buy interest to satisfy the CDL Order¹⁵ and all other market

¹² See proposed Nasdaq Rule 4120(c)(9)(B)(vii)d.2. The Exchange has proposed additional conditions, as discussed in more detail below, before the Nasdaq Halt Cross could proceed including a Post-Pricing Period and that the Price Volatility Constraint has been satisfied.

¹³ See proposed Nasdaq Rule 4120(c)(9)(B). If the company provides an upper limit in its certification, that price would serve as the upper limit of the price range within which the Nasdaq Halt Cross could proceed. See proposed Nasdaq Rule 4120(c)(9)(B)(vii)d.2.

¹⁴ See Nasdaq Rule 4120(c)(9)(B).

¹⁵ 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

orders or if the Pricing Range Limitation is not satisfied, the Nasdaq Halt Cross would not proceed and such security would not begin trading.¹⁶

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.¹⁷ The Exchange states it believes “that the Pricing Range Limitation imposed on a Direct Listing 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 for the lack of investor interest, but also if investor interest is greater than the company and its advisors anticipated.”¹⁸ 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.¹⁹ The

statement, must be executed in full in the Nasdaq Halt Cross, and may not be canceled or modified. See Nasdaq Rule 4702(b)(16).

¹⁶ See Notice, supra note 6, 87 FR at 33559. 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.

¹⁷ See id. The Exchange states that it believes 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 initial 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.

¹⁸ See id. 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.

¹⁹ See id. at 33559-60.

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.²⁰ 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.²¹ 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.²²

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 as much as 20% below the lowest price of the disclosed price range or 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 457.²³ In such circumstances, the company's registration statement would be required to contain a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the disclosed price

²⁰ See id. at 33560.

²¹ See id.

²² See id.

²³ See id. See also infra notes 29 and 31 and accompanying text.

range, and, as stated above, the company would be required to certify to the Exchange that it has met this requirement.²⁴ In addition, the company would be required to publicly disclose and certify to the Exchange prior to the beginning of the Display Only Period²⁵ that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement.²⁶ If the company's certification submitted to the Exchange in that regard includes an upside limit, the Exchange would not execute the Nasdaq Halt Cross if it would result in an offering price above such limit.²⁷ The Exchange states that the goal of these requirements is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.²⁸

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.²⁹ According to the Exchange, the Exchange believes such guidance also allows

²⁴ See Notice, supra note 6, 87 FR at 33560.

²⁵ 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."

²⁶ See Notice, supra note 6, 87 FR at 33560.

²⁷ See id. The Exchange proposes to define the "Price Range" as the price range established by the issuer in its preliminary prospectus included in the effective registration statement. See proposed Nasdaq Rule 4120(c)(9)(B). In addition, the Exchange proposes to define the "DLCR Price Range" as the price range starting from the price that is at or above 20% below the lowest price of the Price Range and continuing above the highest price of the Price Range, with an upper limit if one is provided by the company in its certification. See proposed Nasdaq Rule 4120(c)(9)(B)(vii)d.2.

²⁸ See Notice, supra note 6, 87 FR at 33560.

²⁹ 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),

deviation above the price range beyond the 20% threshold if such change or deviation does not materially change the previous disclosure.³⁰ 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 the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.³¹ The Exchange states that, for 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

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 33560 n.17. 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 33563.

³⁰ See id. at 33560. The Exchange states that in a prior proposal that the Commission disapproved, the Exchange proposed different requirements based on whether the Nasdaq Halt Cross would occur at a price that was within 20% of the disclosed price range, but that the Exchange is eliminating this proposed distinction and instead proposing to treat uniformly all instances when the actual price of the Nasdaq Halt Cross would occur outside of the disclosed price range. See id. at 33560 n.16 (citing Securities Exchange Act Release No. 94311 (February 24, 2022), 87 FR 11780 (March 2, 2022)).

³¹ See Notice, supra note 6, 87 FR at 33560.

this method of calculation is consistent with the SEC Staff’s guidance on Securities Act Rule 430A.³²

The Exchange states that the burden of complying with the disclosures required under federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omissions, remains with the issuer.³³ The Exchange further states that, in that regard, the Post-Pricing Period (as defined below), which is applicable in circumstances where the actual price calculated by the Nasdaq Halt Cross is outside of the disclosed price range, provides the company an opportunity, prior to the completion of the offering, to provide any additional disclosures that are dependent on the price of the offering, if any, or to determine and confirm to the Exchange that no additional disclosures are required under federal securities laws based on the actual price calculated by the Nasdaq Halt Cross.³⁴

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.³⁵ The Exchange states that prior to releasing a security for trading, the Exchange allows a “Pre-Launch Period” of indeterminate length, during

³² See id.

³³ See id. The Commission previously stated that while Securities Act Rule 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability for potentially misleading disclosure under the federal securities laws. See id. (citing Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021)).

³⁴ See Notice, supra note 6, 87 FR at 33560-61.

³⁵ See id. at 33561.

which price discovery takes place.³⁶ The “Price Volatility Constraint” would require that the Current Reference Price has not deviated by 10% or more from any Current Reference Price during the Pre-Launch Period within the previous 10 minutes.³⁷ The Pre-Launch Period would continue until at least five minutes after the Price Volatility Constraint has been satisfied.³⁸ The Exchange states that this change would provide investors with notice that the Nasdaq Halt Cross nears execution and allow a period of at least five minutes for investors to modify their orders, if needed, based on the Near Execution Price, prior to the execution of the Nasdaq Halt Cross and the pricing of the offering.³⁹ The Exchange also states that to assure that the Near Execution Price is a meaningful benchmark for investors and that the offering price does not deviate substantially from the Near Execution Price, the Exchange proposes to require that the Nasdaq Halt Cross may execute only if the actual price calculated by the Nasdaq Halt Cross is no more than 10% below or above the Near Execution Price (the “10% Price Collar”), in addition to the other existing conditions stated in proposed Nasdaq Rule 4120(c)(9)(B)(vii).⁴⁰

The Exchange states that an imbalance between buy and sell orders could sometimes cause the Current Reference Price to fall outside of the 10% Price Collar after the Price Volatility Constraint has been satisfied.⁴¹ According to the Exchange, such price fluctuations could be temporary and the Current Reference Price may return to and remain within the 10% Price

³⁶ See id.

³⁷ See id. See Nasdaq Rule 4753(a)(3) for a description of the “Current Reference Price.”

³⁸ See Notice, supra note 6, 87 FR at 33561.

³⁹ See id. The Exchange proposes to define “Near Execution Price” as the Current Reference Price at the time the Price Volatility Constraint has been satisfied, and to define the “Near Execution Time” as such time. See id.

⁴⁰ See id.

⁴¹ See id.

Collar, or the price fluctuation could be lasting such that the Current Reference Price remains outside of the 10% Price Collar.⁴² The Exchange proposes to assess the Current Reference Price as compared to the 10% Price Collar 30 minutes after the Near Execution Time.⁴³ If at that time the Current Reference Price is outside of the 10% Price Collar, all requirements of the Pre-Launch Period would reset and would need to be satisfied again.⁴⁴ Alternatively, if at that time the Current Reference Price is within the 10% Price Collar, price formation would continue without limitations until 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, at which time the Pre-Launch Period would end.⁴⁵

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.⁴⁶ To that end, the

⁴² See id.

⁴³ See id.

⁴⁴ See id. The Exchange states that once the Price Volatility Constraint has been satisfied anew, the Current Reference Price at such time would become the updated Near Execution Price and such time would become the Near Execution Time. See id. The Exchange further states that this process would continue iteratively if new resets are triggered, until the Nasdaq Halt Cross is executed or the offering is postponed. See id.

⁴⁵ See id.; proposed Nasdaq Rule 4120(c)(9)(B)(vii). The Exchange states that if at any time more than 30 minutes after the Near Execution Time the Current Reference Price falls outside of the 10% Price Collar, all requirements of the Pre-Launch Period would reset and would need to be satisfied again. See Notice, supra note 6, 87 FR at 33561.

⁴⁶ See Notice, supra note 6, 87 FR at 33561. The Exchange states that if the company's certification submitted to the Exchange includes an upside limit and the actual price calculated by the Nasdaq Halt Cross exceeds such limit, the Exchange will postpone and reschedule the offering. See id. at 33561 n.23.

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.⁴⁷ Once the Price Volatility Constraint has been satisfied, the Exchange would also disseminate the Near Execution Price, the Near Execution Time, and the 30-minute countdown from such time.⁴⁸ The Exchange states that, in this way, investors interested in participating in the opening auction would be informed when volatility has settled to a range that would allow the opening auction to take place, would be informed of the price range at which the auction would take place, and, if the price remains outside of that range for 30 minutes, would have at least five minutes to reevaluate their investment decision.⁴⁹

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.⁵⁰ The Exchange states that this would protect investors by assuring that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the company's effective registration statement, including the sensitivity analysis describing how the company would use any additional proceeds raised.⁵¹ The Exchange states that, accordingly,

⁴⁷ See id. at 33561.

⁴⁸ See id. The Exchange represents that the disclosure would indicate that the Near Execution Price and the Near Execution Time may be reset if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or any time thereafter) is more than 10% below or more than 10% above the Near Execution Price. See id.

⁴⁹ See id.

⁵⁰ See id.

⁵¹ See id.

an investor participating in a Direct Listing with a Capital Raise would make their initial investment decision prior to the launch of the offering by setting a price in their limit order above which they will not buy shares in the offering, but would also have the opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price, and would have at least five minutes once the Near Execution Price has been set and before the offering may be priced by the Exchange to modify their order, if needed.⁵²

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.⁵³ 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 information regarding the location of the public website where the Exchange would disseminate the Current Reference Price.⁵⁴

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.⁵⁵ This information circular would

⁵² See id.

⁵³ See id. at 33562.

⁵⁴ See id.

⁵⁵ See id. The Exchange states that an information circular is an industry-wide, free service provided by the Exchange. See id. at 33562 n.25.

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.⁵⁶ This information circular would also describe other requirements that: (a) members use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer, and concerning the authority of each person acting on behalf of such customer; (b) members in recommending transactions for a security subject to a Direct Listing with a Capital Raise have a reasonable basis to believe that (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security; and (c) members cannot accept market orders to be executed in the Nasdaq Halt Cross.⁵⁷ 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.⁵⁸

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 disclosed price range and would specify that price. The Exchange also represents that it would indicate in such circular whether or not there is an

⁵⁶ See id. at 33562.

⁵⁷ See id.; proposed Nasdaq Rule 4120(c)(9)(B)(i).

⁵⁸ See Notice, supra note 6, 87 FR at 33562.

upside limit above which the Nasdaq Halt Cross could not proceed, based on the company's certification.⁵⁹

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 outside of the disclosed price range.⁶⁰ Specifically, in such circumstances, the Exchange would initiate a "Post-Pricing Period" following the calculation of the actual price."⁶¹ During the Post-Pricing Period, the issuer must confirm to the Exchange that no additional disclosures are 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.⁶² The Exchange states that the security would be released for trading immediately following the Post-Pricing Period.⁶³ However, if the company cannot provide the required confirmation, then the Exchange would postpone and reschedule the offering.⁶⁴

The Exchange also proposes to clarify several provisions of existing rules by restating the provisions of Nasdaq Rule 4120(c)(8)(A) and (c)(9)(A) in a clear and direct manner in proposed

⁵⁹ 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 33565.

⁶⁰ See id. at 33562.

⁶¹ See id.

⁶² See id.

⁶³ See id.

⁶⁴ See id.

Nasdaq Rule 4120(c)(9)(B) without substantively changing the requirements.⁶⁵ 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.⁶⁶ 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.⁶⁷

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 Unrestricted Publicly Held Shares⁶⁸ for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement⁶⁹ 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

⁶⁵ See id.

⁶⁶ 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.

⁶⁷ See id.

⁶⁸ See Nasdaq Listing Rule 5005(a)(23) and (45) for the definitions of “Market Value” and “Unrestricted Publicly Held Shares,” respectively.

⁶⁹ See Nasdaq Listing Rule 5315(f)(2).

price of the disclosed price range.⁷⁰ 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.⁷¹ The Exchange further states that this is the minimum price at which the company could sell its shares in the opening transaction for a Direct Listing with a Capital Raise and thus assures that the company will satisfy the listing requirements at any price at which the opening auction successfully executes.⁷²

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 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.⁷³ 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

⁷⁰ 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.

⁷¹ See Notice, supra note 6, 87 FR at 33562.

⁷² See id.

⁷³ See id. (citing Nasdaq Listing Rules 5315(e)(1) and (2) and 5315(f)(1)).

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).⁷⁴

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.⁷⁵ 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,⁷⁶ 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 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.⁷⁷

⁷⁴ See proposed Nasdaq Listing Rule IM-5315-2.

⁷⁵ See proposed Nasdaq Rules 4753(a)(3)(A)(iv)c. and 4753(b)(2)(D)(iii).

⁷⁶ See Nasdaq Rule 4753(a)(3) for a description of the “Order Imbalance Indicator.”

⁷⁷ See Notice, supra note 6, 87 FR at 33562-63.

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2022-027 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the proposal should be approved or disapproved.⁷⁸ Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as modified by Amendment No. 1, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency with the Exchange Act and, in particular, with Section 6(b)(5)⁷⁹ of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.⁸⁰

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

⁷⁸ 15 U.S.C. 78s(b)(2)(B).

⁷⁹ 15 U.S.C. 78f(b)(5).

⁸⁰ Id.

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.⁸¹

The Exchange is proposing to modify the rules concerning the opening transaction on the first day of trading for a Direct Listing with a Capital Raise so that the opening transaction is not constrained by the Pricing Range Limitation, which limits the price of the opening transaction to the price range disclosed in the issuer's effective registration statement. Instead, the proposal would allow the opening transaction to proceed, provided other requirements are satisfied, at or above the price that is as low as 20% below the lowest price in the disclosed price range; or at a price above the highest price of such price range.

Specifically, under the proposal, to execute at a price outside of the disclosed price range, the company has to certify to Nasdaq and publicly disclose that the company does not expect that

⁸¹ 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 9, 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-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 9, 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).

such price would materially change the company’s previous disclosure in its effective registration statement and 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 were less than or exceeded the amount assumed in such price range.

In support of its proposal, the Exchange states that allowing an opening transaction to proceed at prices not within the disclosed price range is consistent with the protection of investors because it “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.”⁸²

Nasdaq also states that various aspects of its proposal are designed to protect investors, including, among others, those intended to increase the transparency and information available to investors on the price discovery process during the opening auction, provide investors an opportunity to modify their orders after notice that the Nasdaq Halt Cross nears execution, and ensure that the offering price does not deviate substantially from the Near Execution Price.⁸³ Nasdaq also states that allowing Direct Listings with a Capital Raise to price up to 20% below the lowest price and at a price above the highest price of the disclosed price range would be consistent with Chair Gensler’s recent call to treat “like cases alike.”⁸⁴

We have concerns about whether the Exchange has met its burden to demonstrate that its proposal to expand the conditions under which Direct Listings with a Capital Raise are permitted⁸⁵ is consistent with the protection of investors and the public interest, and other

⁸² See Notice, *supra* note 6, 87 FR at 33563.

⁸³ See generally *id.* at 33564-65.

⁸⁴ See *id.* at 33565.

⁸⁵ Under the Nasdaq rules for a Direct Listing with a Capital Raise approved by the Commission in May 2021, the actual price calculated by the Cross must be at or above the lowest price and at or below the highest price of the disclosed price range.

relevant provisions under Section 6(b)(5) and the Exchange Act and the rules and regulations thereunder. Under existing Nasdaq rules that permit Direct Listings with a Capital Raise, such offerings are required to price within the price range disclosed in the issuer’s effective registration statement. When these rules were approved in 2021, the Commission considered that required feature and also stated that the related registration statements would include, among other disclosures, a bona fide price range.⁸⁶ The Exchange has indicated that it 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.⁸⁷ Permitting Direct Listings with a Capital Raise to price outside of the disclosed price range could increase the frequency of such offerings and may raise investor protection concerns.

While the Exchange has indicated that the proposal is intended to treat like cases alike with respect to pricing flexibility, it has not addressed certain differences between listings that would occur under this proposed rule change and firm commitment underwritten initial public offerings on the Exchange that may affect investor protection, including the lack of a named underwriter,⁸⁸ any challenges to bringing claims under Section 11 of the Securities Act due to the

⁸⁶ See 2021 Order, supra note 9, 86 FR at 28174-75, 28177.

⁸⁷ See Notice, supra note 6, 87 FR at 33559.

⁸⁸ Section 2(a)(11) of the Securities Act defines "underwriter" to mean "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking." Given this broad definition of "underwriter," a financial advisor to an issuer engaged in a Direct Listing with a Capital Raise may, depending on the facts and circumstances including the nature and extent of the financial advisor’s activities, be deemed a statutory "underwriter" with respect to the securities offering, with attendant underwriter liabilities. See 2021 Order, supra note 9, 86 FR at 28176. Whether or not any person would be considered a statutory underwriter would be evaluated based on the particular facts and circumstances, in light of the definition of underwriter contained in Section 2(a)(11). In

potential assertion of tracing defenses,⁸⁹ and how those differences could affect the consistency of the proposal with Section 6(b)(5) of the Exchange Act.⁹⁰ It is not clear from the proposal what consideration, if any, the Exchange has given to addressing these issues, or why it believes

the context of a firm commitment underwritten initial public offering, Item 508 of Regulation S-K requires the underwriters to be named in the registration statement.

⁸⁹ Where a Securities Act registration statement, at the time of effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act provides a cause of action to “any person acquiring such security,” unless it is proved that at the time of the acquisition the person knew of such untruth or omission. Courts have interpreted this statutory provision to permit aftermarket purchasers (*i.e.*, those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can “trace” the acquired shares back to the offering covered by the false or misleading registration statement. *See, e.g.*, *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013). Tracing is not set forth in Section 11 and is a judicially-developed doctrine. The Commission has previously stated that shareholders’ ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in direct listings with a primary capital-raising component, and that this issue is potentially implicated any time securities that are not the subject of a recently effective registration statement trade in the same market as the shares issued pursuant to the registration statement. *See* 2021 Order, *supra* note 9, 86 FR at 28176. The Ninth Circuit has held that investors who purchase shares in a direct listing may bring claims pursuant to Section 11, even if they cannot prove that the shares they acquired were registered shares. *See* *Pirani v. Slack Techs., Inc.*, 13 F.4th 940 (9th Cir. 2021).

⁹⁰ Tracing concerns may be more prevalent in direct listings than traditional underwritten initial public offerings. As compared to traditional firm commitment underwritten initial public offerings in which lock-up arrangements are routinely imposed, direct listings to date typically have not imposed lock-up arrangements. This raises a concern that there may be a heightened risk that investors in direct listings may face difficulties tracing their shares, potentially jeopardizing their ability to pursue Section 11 claims. *See supra* note 89. Given the limited judicial precedent addressing tracing requirements in the context of direct listings, and the typical absence of lock-up arrangements in connection with direct listings to date, we are considering whether the Exchange has met its burden of establishing that the proposal to allow a direct listing to proceed at a price outside of the disclosed price range is consistent with Section 6(b)(5) of the Exchange Act that requires the rules of the Exchange be designed to protect investors and the public interest.

the proposal is consistent with investor protection, as required by Section 6(b)(5) of the Exchange Act, in light of the pricing flexibility proposed by the Exchange.

In a firm commitment underwritten initial public offering, issuers often adjust the price range disclosed in their registration statements prior to effectiveness in light of pricing feedback received from market analysts and potential investors. These revisions to the disclosed price range may provide valuable information to potential investors as to the issuer's valuation. If, under the proposal, the opening auction can proceed at any price above the disclosed price range, and up to 20% below the low end of the disclosed price range, it is not clear whether issuers pursuing Direct Listings with a Capital Raise would make similar revisions to the disclosed price range based on investor or market analyst sentiment, and whether the absence of any such corrective price signaling would detrimentally affect investors.

In the absence of a named underwriter in a direct listing where the opening price is executed outside of the disclosed price range, there may not be an adequate assurance that a party who may meet the definition of underwriter will review the information disclosed in the registration statement and take the steps necessary to claim a "due diligence" defense. To assert such a defense, a party must establish that, after reasonable investigation, the party had reasonable ground to believe and did believe, at the time the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.⁹¹

⁹¹ See U.S.C. 77k(b)(3).

Underwriters play a critical role in the securities offering process as gatekeepers to the public markets.⁹²

The Exchange's proposed expansion of its rules permitting Direct Listings with a Capital Raise could potentially result in increased regulatory arbitrage, if and to the extent that issuers and intermediaries, including financial advisors, are not subject to equivalent liability standards in the direct listings context as they would be in traditional firm commitment underwritten initial public offerings. Any ability of issuers or intermediaries to minimize potential liability through choosing a direct listing over other methods to become listed on the Exchange could be inconsistent with Section 6(b)(5) of the Exchange Act.

Although financial advisors may, depending on facts and circumstances, be held liable as statutory underwriters, absent greater clarity as to a financial advisor's status as a statutory underwriter in listings that would occur under this proposed rule change, investors would have no way to know whether financial advisors named as assisting with the direct listing would face Section 11 liability for the disclosure in the registration statement. Investors also may assume that financial advisors would incur equivalent liability, without any assurance that such is the case. Some legal observers have raised concerns that, without clarity on whether financial advisors would be held liable as statutory underwriters, any due diligence may not be as robust

⁹² See Securities Act Release No. 7393 (February 20, 1997), 62 FR 9276 (February 28, 1997) (“The due diligence efforts performed by underwriters, accounting professionals and others play a critical role in the integrity of our disclosure system.”); Securities Act Release No. 6335 (August 6, 1981), 46 FR 42015 (August 18, 1981) (“[T]he Securities Act imposes a high standard of conduct on specific persons, including underwriters and directors, associated with a registered public offering of securities. Under Section 11, they must make a reasonable investigation and have reasonable grounds to believe the disclosures in the registration statement are accurate.”).

as that performed by named underwriters in traditional initial public offerings.⁹³ Less robust due diligence could result in reduced disclosure quality and lead investors to improperly value the securities offered under the proposed rules. As the proposed rules would permit direct listings to be conducted at prices outside of the disclosed price range, would investors be able to make reasonable pricing decisions without greater clarity as to whether financial advisors would face liability as statutory underwriters? Without increased clarity on this point, would the proposed rule change be inconsistent with investor protection and the public interest?

There are a number of additional questions relating to investor protection and Securities Act liability that merit examination in connection with our consideration of whether the Exchange has met its burden to demonstrate its proposal is consistent with Section 6(b)(5) of the Exchange Act. It is not clear what role a financial advisor would perform, in relation to price range disclosures, in a direct listing where the offering can price outside of the disclosed price range. Would additional transparency into the functions performed by financial advisors in a direct listing where the offering can price outside of the disclosed price range be necessary for investors to determine how much reliance to place on issuer disclosures?

⁹³ See Tuch, Andrew F. and Seligman, Joel, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers and Direct Listings* (December 15, 2021), at 70-71, Washington University in St. Louis Legal Studies Research Paper No. 22-01-03, available at SSRN: <https://ssrn.com/abstract=4020460> (questioning the extent of due diligence performed by financial advisors in direct listings); Horton, Brent J., *Spotify's Direct Listing: Is It a Recipe for Gatekeeper Failure?*, 72 SMU L. Rev. 177 (2019). In the NYSE 2020 Order, the Commission stated that “financial advisors to issuers in Primary Direct Floor Listings have incentives to engage in robust due diligence, given their reputational interests and potential liability, including as statutory underwriters under the broad definition of that term.” NYSE 2020 Order, *supra* note 81, 85 FR at 85815.

Would any tracing concerns be exacerbated, thus raising investor protection concerns, in the context of direct listings where the offering can price outside of the disclosed price range?⁹⁴ What are the implications if the expansion of Direct Listings with a Capital Raise, as proposed by the Exchange, resulted in fewer investor protections in a direct listing? If under the proposal to modify the Pricing Range Limitation there is continued uncertainty as to whether a financial advisor would be liable as a statutory underwriter, is the liability of any other gatekeepers in the offering sufficient to protect investors?

The Commission also has concerns about the potential effect of the proposed rules on the usefulness of price range disclosure provided to investors in Securities Act registration statements.⁹⁵ Given the possibility under the proposed rules that the offering might price far outside the disclosed price range, would issuers be less likely to update their disclosed price ranges, compared to firm commitment underwritten initial public offerings?⁹⁶ Similarly, would

⁹⁴ See notes 89 and 90, supra, and accompanying text. The Commission disapproved a prior proposal of Nasdaq to expand the direct listing price range. See Securities Exchange Act Release No. 94311 (February 24, 2022). 87 FR 11780 (March 2, 2022) (“Disapproval Order”). In the Disapproval Order, the Commission stated that the Exchange did not respond to one commenter’s concerns, among others, 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 public offering and concerns relating to “tracing” share purchases for purposes of Section 11 claims. See Disapproval Order, 87 FR at 11785 n.82.

⁹⁵ Under the proposed rule change, to execute at a price outside of the disclosed price range, the company must certify to Nasdaq and publicly disclose that the company does not expect that such price would materially change the company’s previous disclosure in its effective registration statement and 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 were less than or exceeded the amount assumed in such price range.

⁹⁶ The Exchange has stated that its proposal to permit more flexibility as to pricing would allow Direct Listings with a Capital Raise to be treated similarly to other initial public offerings. See Notice, supra note 6, 87 FR at 33563, 33565.

disclosed price ranges for direct listings be less reliable as indicators of management's perceived valuation of the issuer? How would the ability to ultimately conduct the auction up to 20% below or anywhere above the disclosed price range affect issuer decisions as to what price range to disclose in the registration statement? Would this impact the usefulness of price range disclosure to potential investors or market analysts? If so, this raises concerns about the consistency of the proposal with investor protection and the public interest under Section 6(b)(5) of the Exchange Act.

Finally, it is not clear whether the proposed changes would result in the Exchange using the minimum price at which the opening auction could occur as the per share price for purposes of evaluating whether the issuer satisfies the applicable market value of publicly held shares requirement and other applicable bid price and market capitalization requirements. The Exchange proposes to amend Nasdaq Listing Rule IM-5315-2 to provide that the Exchange would calculate the market value of unrestricted publicly held shares, as well as applicable bid price and market capitalization requirements, using a price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement.⁹⁷ The Exchange also proposes to specify in Nasdaq Rule 4120(c)(9)(B) that “[t]he 20% threshold below the Price Range will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.”⁹⁸ Further, the Exchange states its belief that the proposed change to Nasdaq Listing Rule IM-5315-2 for calculating the market value of unrestricted publicly held shares, bid price, and market capitalization conforms these rules to the modifications of the Pricing Range

⁹⁷ See Notice, supra note 6, 87 FR at 33562.

⁹⁸ See id. at 33560.

Limitation and “is the minimum price at which the company could sell its shares in the Direct Listing with a Capital Raise transaction and so assure that the company will satisfy these requirements at any price at which the auction successfully executes.”⁹⁹ Is further clarification needed as to the precise manner of computing the 20% threshold under proposed Nasdaq Rule 4120(c)(9)(B) and whether that computation would lead to the same minimum price contemplated by the proposed revisions to Nasdaq Listing Rule IM-5315-2? Similarly, there are questions about whether the proposed change to the fourth-tie breaker in a Direct Listing with a Capital Raise that proposes to use “the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective statement” to “conform these rules to the modifications to the Pricing Range Limitation”¹⁰⁰ would also result in using the minimum price at which the opening auction could occur given the proposed changes described above in Nasdaq Rule 4120(c)(9)(B) for calculating the price that is 20% below the lowest price of the Price Range.

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 issued thereunder ... is on the self-regulatory organization [‘SRO’] that proposed the rule change.”¹⁰¹ 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,¹⁰² and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative

⁹⁹ See id. at 33562.

¹⁰⁰ Id. at 33563.

¹⁰¹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

¹⁰² See id.

finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.¹⁰³

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act¹⁰⁴ to determine whether the proposal should be approved or disapproved.

IV. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, 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 view of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁰⁵

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal 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

¹⁰³ See id.

¹⁰⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁰⁵ Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants 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 Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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
- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2022-027 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2022-027. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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-2022-027 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰⁶

J. Matthew DeLesDernier
Assistant Secretary

¹⁰⁶ 17 CFR 200.30-3(a)(57).