

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88078; File No. SR-NASDAQ-2019-060)

January 29, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Rules 4120 and 4753

I. Introduction

On July 18, 2019, The Nasdaq Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Rules 4120 and 4753 to permit the Exchange to declare a regulatory halt in a security that traded in the over-the-counter (“OTC”) market prior to its initial pricing on the Exchange, allow for the initial pricing of such a security through the IPO Cross, and establish a new tie-breaker for determining the Current Reference Price and the Cross price for such a security. The proposed rule change was published for comment in the Federal Register on August 6, 2019.³ On September 19, 2019, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

⁴ 15 U.S.C. 78s(b)(2).

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

On September 19, 2019, the Exchange also filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed.⁶ On November 1, 2019, the Commission published notice of Amendment No. 1 and instituted proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁸ The Commission received no comment letters on the proposal. On January 10, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and superseded the proposed rule change, as modified by Amendment No. 1.⁹ The Commission is publishing this notice to solicit comments on Amendment No. 2

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

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 87445, 84 FR 60130 (November 7, 2019).

⁹ In Amendment No. 2, the Exchange further revised the proposal to: (1) clarify that the proposal will not allow a company transferring from the OTC market to concurrently raise capital in the IPO Cross; (2) clarify that the proposal can be beneficial because Rule 4120(c)(8) will provide for extended quoting activity prior to the launch of a security; and (3) make technical and conforming changes. Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nasdaq-2019-060/srnasdaq2019060-6637710-203487.pdf>.

from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Description of the Proposal

Currently, a security that traded in the OTC market immediately prior to listing on the Exchange is released for initial trading on the Exchange by utilizing the Opening Cross pursuant to Rule 4752(d).¹⁰ The Exchange proposes to amend Rule 4120 to permit the Exchange to declare a regulatory halt¹¹ in a security that traded in the OTC market prior to its initial pricing on the Exchange.¹² The Exchange also proposes to amend Rules 4120 and 4753 to allow for the initial pricing on the Exchange of such a security through the IPO Cross (described in Rules 4120(c)(8) and 4753) if a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter in an initial public offering.¹³ If the issuer does not retain a financial advisor, the initial pricing on

¹⁰ See Amendment 2, supra note 9, at 4 n.4.

¹¹ For purposes of this proposed rule change, the term “regulatory halt” refers to Nasdaq’s authority to halt trading in a security under Rule 4120(a)(7). See id. at 4 n.3.

¹² The Exchange states that its proposal will facilitate a more orderly start to trading by permitting the Exchange to declare a regulatory halt in a security that traded in the OTC market prior to its initial pricing on the Exchange, before trading on the Exchange begins, which the Exchange believes will avoid potential price disparities or anomalies that may occur during any unlisted trading privileges (“UTP”) trading before the first transaction on the primary listing exchange. See id. at 7.

¹³ Rule 4120(c)(9) currently provides that the IPO Cross process is available for the initial pricing of a security that has not been listed on a national securities exchange or traded in the OTC market pursuant to FINRA Form 211 immediately prior to the initial pricing where a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering. The Exchange states that the IPO Cross will be a better mechanism to open trading in securities that traded in the OTC market given that these companies may attract significant interest upon listing on the Exchange from investors who previously could not invest in such securities. See id. at 8. The Exchange states that the initial interest in such securities upon listing on the Exchange makes it

the Exchange of such a security will continue to be effected through the Opening Cross.¹⁴

Moreover, the Exchange proposes to adopt Rules 4753(a)(3)(A)(iv)(e) and 4753(b)(2)(D)(v) to provide that, in the case of the initial pricing of a security that traded in the OTC market pursuant to FINRA Form 211 immediately prior to its initial pricing, the fourth tie-breaker used in calculating each of the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator for purposes of the IPO Cross and the price at which the IPO Cross will occur will be the price that is closest to the most recent transaction price in the OTC market.¹⁵

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act,¹⁷ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove

beneficial to provide the issuer's financial advisor with additional time by extending quoting activity prior to launch and to allow significant financial advisor involvement in determining when to launch trading. See id. at 8-9. The Exchange also represents that its proposal will not allow a company transferring from the OTC market to concurrently raise capital in the IPO Cross. See id. at 8 n.12.

¹⁴ See id. at 4 n.4.

¹⁵ The Exchange states that the most recent transaction price in the OTC market is predictive of the price that will develop upon the listing of the security on the Exchange. See id. at 8. This proposed change to the fourth tie-breaker will not affect the pricing of a security if the issuer does not retain a financial advisor. See id. at 4 n.5.

¹⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

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.

The Commission believes that the proposal to allow the Exchange to declare a regulatory halt prior to the initial pricing on the Exchange of a security that was previously traded in the OTC market is reasonably designed to address potential price disparities or anomalies that may occur during UTP trading in such security before the first transaction on the Exchange and contribute to a fair and orderly market. The Commission also believes that the proposal to allow a security that previously traded in the OTC market to utilize the IPO Cross for its initial pricing on the Exchange, provided that a broker-dealer serving in the role of financial advisor to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect an initial public offering, could facilitate a more orderly start to trading in such security on the Exchange, particularly for a company that attracts significant additional interest upon listing on the Exchange. Finally, the Commission believes that it is reasonable to utilize the most recent transaction price in the OTC market, which could be predictive of the price that will develop upon listing of the security on the Exchange, as the fourth tie-breaker for determining the Current Reference Price and the Cross price for a security transferring from the OTC market.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2019-060 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2019-060. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-060, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. As discussed above, in Amendment No. 2, the Exchange further revised the proposal to: (1) clarify that the proposal will not allow a company transferring from the OTC market to concurrently raise capital in the IPO Cross; (2) clarify that the proposal can be beneficial because Rule 4120(c)(8) will provide for extended quoting activity prior to the launch of a security; and (3) make technical and conforming changes. The Commission believes that Amendment No. 2 provides additional accuracy and clarity to the proposal and does not raise any novel regulatory issues. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁸ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

¹⁸ 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NASDAQ-2019-060), as modified by Amendment No. 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ Id.

²⁰ 17 CFR 200.30-3(a)(12).