

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-96443; File No. SR-NASDAQ-2022-027)

December 2, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to modify certain pricing limitations for companies listing in connection with a direct listing 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.<sup>3</sup> On May 19, 2022, pursuant to Section 19(b)(2) of the Exchange Act,<sup>4</sup> 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.<sup>5</sup>

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 94592 (Apr. 4, 2022), 87 FR 20905 (Apr. 8, 2022). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2022-027/srnasdaq2022027.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> 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,

On May 23, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed.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.<sup>6</sup> On July 7, 2022, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change.<sup>8</sup> On September 16, 2022, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the original filing, as modified by Amendment No. 1, in its entirety.<sup>9</sup> On September 27, 2022, the Commission extended the time period for approving or disapproving the proposal to December 4, 2022.<sup>10</sup> On November 18, 2022, the Exchange filed Amendment No. 3 to the proposed rule change, which superseded the original filing, as modified by Amendment Nos. 1 and 2, in its entirety.<sup>11</sup> The Commission is

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disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>6</sup> See Securities Exchange Act Release No. 94989 (May 26, 2022), 87 FR 33558 (June 2, 2022).

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

<sup>8</sup> See Securities Exchange Act Release No. 95220 (July 7, 2022), 87 FR 41780 (July 13, 2022) (“OIP”).

<sup>9</sup> See Securities Exchange Act Release No. 95811 (Sept. 16, 2022), 87 FR 57951 (Sept. 22, 2022) (“Notice”).

<sup>10</sup> See Securities Exchange Act Release No. 95933 (Sept. 27, 2022), 87 FR 59844 (Oct. 3, 2022).

<sup>11</sup> Amendment No. 3 to the proposed rule change revised the proposal to: (i) provide that the 20% threshold below and the 80% threshold above the Price Range, as described below, will be calculated based on the high end of the price range in the registration statement at the time of effectiveness; (ii) clarify that Nasdaq will make the determination that the security is ready to trade, in consultation with the identified underwriter (rather than the financial advisor to the issuer); (iii) clarify certain conditions in proposed Rule 4120(c)(9)(B)(vii)(d); and (iv) make minor technical changes to improve the clarity and readability of the proposal. Amendment No. 3 to the proposed rule change is available on the Commission’s website at [www.sec.gov/comments/sr-nasdaq-2022-027/srnasdaq2022027-20151099-319977.pdf](http://www.sec.gov/comments/sr-nasdaq-2022-027/srnasdaq2022027-20151099-319977.pdf) (“Amendment No. 3”).

publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 3, from interested persons and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

II. Description of the Proposal, as Modified by Amendment No. 3

Nasdaq Listing Rule IM-5315-2 sets forth listing requirements for a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on Nasdaq's Global Select Market at the time of effectiveness of a registration statement,<sup>12</sup> 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").<sup>13</sup> 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.<sup>14</sup> Currently, in the case of a Direct Listing with a Capital Raise, the Exchange will release

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<sup>12</sup> The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 ("Securities Act").

<sup>13</sup> 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.

<sup>14</sup> 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

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 statement<sup>15</sup> (the “Pricing Range Limitation”). As discussed further below, the Exchange will postpone and reschedule the offering if the actual price calculated by the Nasdaq Halt Cross does not satisfy the Pricing Range Limitation.

The Exchange proposes 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 or below the price that is 80% above the highest price of the disclosed price range (the “80% Upside Limit”). 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 change if the actual proceeds from the offering are

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(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). For purposes of this order, the opening auction on the first day of trading for a Direct Listing with a Capital Raise is referred to as the “Nasdaq Halt Cross” or the “opening cross.”

<sup>15</sup> 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 9, 87 FR at 57952 n.16. Throughout this order, we refer to this price range established by the issuer in its effective registration statement as the “disclosed price range.”

less than or exceed those from prices in the disclosed price range.<sup>16</sup> The Exchange would calculate the 20% threshold below the disclosed price range and the 80% Upside Limit based on the high end of the price range in the registration statement at the time of effectiveness.<sup>17</sup> The Exchange also proposes to make related changes to conform its rules concerning the Nasdaq Halt Cross and listing requirements for Direct Listings with a Capital Raise to these modified requirements and to clarify the mechanics of the Nasdaq Halt Cross in the context of the opening cross for Direct Listings with a Capital Raise.

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 (including the CDL Order<sup>18</sup>) will be executed in the Nasdaq Halt Cross; and (ii) the actual

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<sup>16</sup> See proposed Nasdaq Rule 4120(c)(9)(B)(vii)d.2. The Exchange proposes additional conditions, as discussed in more detail below, before the Nasdaq Halt Cross could proceed, including a Post-Pricing Period and a requirement that the Price Volatility Constraint has been satisfied. See infra notes 73-75 and accompanying text and note 49 and accompanying text for a description of the “Price Volatility Constraint” and the “Post-Pricing Period,” respectively.

<sup>17</sup> 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.

<sup>18</sup> 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 cancelled or modified. See Nasdaq Rule 4702(b)(16).

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.<sup>19</sup> The Exchange states that if there is insufficient buy interest to satisfy the CDL Order and all other market orders or if the Pricing Range Limitation is not satisfied, the Nasdaq Halt Cross would not proceed and such security would not begin trading.<sup>20</sup>

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.<sup>21</sup> 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, its underwriter, and other advisors anticipated.”<sup>22</sup> According to the Exchange, it believes that the price range in a

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<sup>19</sup> See Nasdaq Rule 4120(c)(9)(B).

<sup>20</sup> See Notice, supra note 9, 87 FR at 57953. 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.

<sup>21</sup> 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.

<sup>22</sup> 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.

company's effective registration statement for a Direct Listing with a Capital Raise would similarly be determined by the company, its underwriter, and other advisors and, therefore, 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

The Exchange proposes 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 up to a

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<sup>23</sup> See id.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See id.

price at or below the 80% Upside Limit. For the Nasdaq Halt Cross to execute at a price outside of the disclosed price range, all other necessary conditions must be satisfied, and the company would be required to specify the quantity of shares registered, as permitted by Securities Act Rule 457.<sup>27</sup> 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 range, and, as stated above, the company would be required to certify to the Exchange that it has met this requirement.<sup>28</sup> In addition, the company would be required to publicly disclose and certify to the Exchange prior to the beginning of the Display Only Period<sup>29</sup> that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement.<sup>30</sup> If the company's certification submitted to Nasdaq in that regard includes an upper price limit that is below the 80% Upside Limit, Nasdaq will not execute the Nasdaq Halt Cross if it results in an offering price above such certified

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<sup>27</sup> See *id.* See also *infra* notes 34 and 36 and accompanying text.

<sup>28</sup> See Notice, *supra* note 9, 87 FR at 57952.

<sup>29</sup> 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."

<sup>30</sup> See Notice, *supra* note 9, 87 FR at 57953.



limit.<sup>31</sup> 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.<sup>32</sup>

The Exchange states that it believes that its proposed approach can be analogized to Securities Act Rule 430A and staff guidance,<sup>33</sup> 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.<sup>34</sup> According to the Exchange, it believes such guidance also allows deviation above

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<sup>31</sup> 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 (*i.e.*, the disclosed price range). 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 to a price that is at or below the 80% Upside Limit, or a lower upside limit if one is provided by the company in its certification. See proposed Nasdaq Rule 4120(c)(9)(B)(vii)d.2.

<sup>32</sup> See Notice, supra note 9, 87 FR at 57954. 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 is proposing to treat uniformly all instances when the actual price of Nasdaq Halt Cross can occur outside of the disclosed price range under its proposal. See id. at 57953 n.22 (citing Securities Exchange Act Release No. 94311 (Feb. 24, 2022), 87 FR 11780 (Mar. 2, 2022) ("2022 Order")).

<sup>33</sup> See Amendment No. 3, supra note 11, at 12.

<sup>34</sup> See Notice, supra note 9, 87 FR at 57954. 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 57953 n.23. The Exchange also states that it 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 57958.

the price range beyond the 20% threshold if such change or deviation does not materially change the previous disclosure.<sup>35</sup> The Exchange states that, accordingly, it 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 Securities Act Rule 424(b) prospectus, rather than a post-effective amendment, when either: (i) the 20% threshold noted in the Instruction to Securities Act 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 Securities Act Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in the Instruction to Securities Act 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.<sup>36</sup> The Exchange states that, for purposes of this rule, the 20% threshold and the 80% Upside Limit would be calculated based on the high end of the price range in the registration statement at the time of effectiveness.<sup>37</sup>

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.<sup>38</sup> The Exchange further states that, in that

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<sup>35</sup> See id. at 57954.

<sup>36</sup> See id.

<sup>37</sup> See Amendment No. 3, supra note 11, at 12-13.

<sup>38</sup> See Notice, supra note 9, 87 FR at 57954. According to the Exchange, 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

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.<sup>39</sup>

The Exchange states that an underwriter plays an important role in a traditional IPO and, therefore, proposes to require that a company listing securities on Nasdaq in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.<sup>40</sup> According to the Exchange, the role and responsibilities of an underwriter provide significant investor protections that are necessary in a Direct Listing with a Capital Raise if an offering can price outside the disclosed price range, subject to the proposed limitations, because they allow investors to make reasonable pricing decisions with clarity that the company's underwriter would face statutory liability.<sup>41</sup> The Exchange further states that the requirement to retain a named underwriter may mitigate traceability concerns that may arise in a Direct Listing with a Capital Raise.<sup>42</sup> The Exchange states that, as in a traditional firm commitment underwritten IPO, in

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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 (Sept. 24, 2021), 86 FR 54262 (Sept. 30, 2021)).

<sup>39</sup> See Notice, supra note 9, 87 FR at 57954.

<sup>40</sup> See id.

<sup>41</sup> See id. at 57955.

<sup>42</sup> See id.

which lock-up arrangements are often imposed, an underwriter retained in connection with a Direct Listing with a Capital Raise will be able to impose lock-up arrangements for the same reasons that make lock up agreements common in an IPO.<sup>43</sup>

The Exchange also states that an underwriter retained in connection with a Direct Listing with a Capital Raise will perform substantially similar functions, including those related to establishing and adjusting the price range, to those performed by an underwriter in a “typical” IPO because the underwriter will be subject to similar liability and reputational risk.<sup>44</sup> The Exchange states that, to further mitigate concerns regarding the usefulness of price range disclosure provided to investors, the Exchange proposes to require that the securities of a company listing in connection with a Direct Listing with a Capital Raise cannot price above the 80% Upside Limit in order to incentivize the company and its underwriter to set the disclosed price range to avoid the consequences of a failed offering.<sup>45</sup> The Exchange states that the 80% Upside Limit would also help assure that an issuer would adjust the price range disclosed in its registration statement prior to effectiveness in light of pricing feedback received from market analysts and potential investors.<sup>46</sup>

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<sup>43</sup> See id.

<sup>44</sup> See id.

<sup>45</sup> See id.

<sup>46</sup> See id. To determine an appropriate upside limit, the Exchange states that it analyzed operating companies IPOs on the Nasdaq Global Select Market and the NYSE for the past five years where an IPO opened on an exchange at a price that is above the highest price of the disclosed price range. This analysis indicated that: some IPOs opened on an exchange at a price that was more than 100% above the highest price of the price range; more than half of these IPOs opened at a price that was 30% or more above the highest price of the price range; and about 90% of these IPOs opened at a price that was no more than the 80% Upside Limit. See id.

The Exchange also proposes to adopt a new “Price Volatility Constraint” (which has the meaning described below) and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade.<sup>47</sup> The Exchange states that prior to releasing a security for trading, the Exchange allows a “Pre-Launch Period” of indeterminate length, during which price discovery takes place.<sup>48</sup> 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.<sup>49</sup> The Pre-Launch Period would continue until at least five minutes after the Price Volatility Constraint has been satisfied.<sup>50</sup> 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.<sup>51</sup> 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

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<sup>47</sup> See id.

<sup>48</sup> See id.

<sup>49</sup> See id. See Nasdaq Rule 4753(a)(3) for a description of the “Current Reference Price.”

<sup>50</sup> See Notice, supra note 9, 87 FR at 57955.

<sup>51</sup> 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.

Price (the “10% Price Collar”), in addition to the other existing conditions stated in proposed Nasdaq Rule 4120(c)(9)(B)(vii).<sup>52</sup>

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.<sup>53</sup> According to the Exchange, such price fluctuations could be temporary and the Current Reference Price may return to and remain within the 10% Price Collar, or the price fluctuation could be lasting such that the Current Reference Price remains outside of the 10% Price Collar.<sup>54</sup> The Exchange proposes to assess the Current Reference Price as compared to the 10% Price Collar 30 minutes after the Near Execution Time if the cross has not yet been executed at that time.<sup>55</sup> 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.<sup>56</sup> 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 named underwriter to the issuer, makes the determination that the security

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<sup>52</sup> See id.

<sup>53</sup> See id.

<sup>54</sup> See id. at 57955-56.

<sup>55</sup> See id. at 57956.

<sup>56</sup> See Amendment No. 3, supra note 11, at 21. 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 Notice, supra note 9, 87 FR at 57956. 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.

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.<sup>57</sup>

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, subject to the 80% 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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

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<sup>57</sup> See Amendment No. 3, supra note 11, at 21; 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 9, 87 FR at 57956.

<sup>58</sup> See Notice, supra note 9, 87 FR at 57956. The Exchange states that if the company's certification submitted to the Exchange includes a price limit that is lower than the 80% Upside Limit and the actual price calculated by the Nasdaq Halt Cross exceeds such lower limit, the Exchange would postpone and reschedule the offering. See id. at 57956 n.33.

<sup>59</sup> See id. at 57956.

<sup>60</sup> 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.

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.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> The Exchange states that, accordingly, 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.<sup>64</sup>

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.<sup>65</sup>

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<sup>61</sup> See id.

<sup>62</sup> See id.

<sup>63</sup> See id.

<sup>64</sup> See id.

<sup>65</sup> See id.



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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup> 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

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<sup>66</sup> See id.

<sup>67</sup> See id. The Exchange states that an information circular is an industry-wide, free service provided by the Exchange. See id. at 57957 n.35.

<sup>68</sup> See id. at 57956.

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.<sup>69</sup> 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.<sup>70</sup>

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 a statement that the Nasdaq Halt Cross cannot proceed at a price in excess of the 80% Upside Limit and whether or not there is a lower price limit above which the Nasdaq Halt Cross could not proceed, based on the company’s certification.<sup>71</sup>

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.<sup>72</sup> Specifically, in such circumstances, the Exchange

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<sup>69</sup> See id. at 57956-57; proposed Nasdaq Rule 4120(c)(9)(B)(i).

<sup>70</sup> See Notice, supra note 9, 87 FR at 57957.

<sup>71</sup> 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 57960.

<sup>72</sup> See id. at 57957.

would initiate a “Post-Pricing Period” following the calculation of the actual price.<sup>73</sup> 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.<sup>74</sup> The Exchange states that the security would be released for trading immediately following the Post-Pricing Period.<sup>75</sup> However, if the company cannot provide the required confirmation, then the Exchange would postpone and reschedule the offering.<sup>76</sup>

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 Nasdaq Rule 4120(c)(9)(B) without substantively changing the requirements.<sup>77</sup> 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.<sup>78</sup> The Exchange proposes to clarify that the “actual price,” as the term is used in the rule

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<sup>73</sup> See id.

<sup>74</sup> See id.

<sup>75</sup> See id.

<sup>76</sup> See id.

<sup>77</sup> See id. at 57958.

<sup>78</sup> 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.

to refer to the price calculated by the opening cross, is the Current Reference Price at the time the system applies the price validation test.<sup>79</sup>

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 Shares<sup>80</sup> for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> The Exchange further states that this

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<sup>79</sup> See id.

<sup>80</sup> See Nasdaq Listing Rule 5005(a)(23) and (45) for the definitions of "Market Value" and "Unrestricted Publicly Held Shares," respectively.

<sup>81</sup> See Nasdaq Listing Rule 5315(f)(2).

<sup>82</sup> 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.

<sup>83</sup> See Notice, supra note 9, 87 FR at 57957.

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.<sup>84</sup>

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.<sup>85</sup> 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).<sup>86</sup>

Finally, the Exchange proposes 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

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<sup>84</sup> See id. The Exchange also proposes to clarify in Nasdaq Listing Rule IM-5315-2 that the 20% threshold below the disclosed price range will be calculated based on the high end of the price range in the registration statement at the time of effectiveness. See Amendment No. 3, supra note 11, at 27.

<sup>85</sup> See Notice, supra note 9, 87 FR at 57957 (citing Nasdaq Listing Rules 5315(e)(1) and (2) and 5315(f)(1)).

<sup>86</sup> See proposed Nasdaq Listing Rule IM-5315-2.

disclosed price range.<sup>87</sup> 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,<sup>88</sup> 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.<sup>89</sup>

### III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>90</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with Section 6(b)(5) of the Exchange Act,<sup>91</sup> 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

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<sup>87</sup> See proposed Nasdaq Rules 4753(a)(3)(A)(iv)c. and 4753(b)(2)(D)(iii).

<sup>88</sup> See Nasdaq Rule 4753(a)(3) for a description of the “Order Imbalance Indicator.”

<sup>89</sup> See Notice, supra note 9, 87 FR at 57957.

<sup>90</sup> 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule change’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>91</sup> 15 U.S.C. 78f(b)(5).

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.

The Commission has consistently recognized the importance and significance 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.<sup>92</sup>

The Exchange's listing standards currently provide the Exchange with discretion to list a company on Nasdaq's Global Select Market in connection with a Direct Listing with a Capital Raise, which provides companies with the option, without a firm commitment underwritten

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<sup>92</sup> 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 28169; Securities Exchange Act Release Nos. 90768 (Dec. 22, 2020), 85 FR 85807, 85811 n.55 (Dec. 29, 2020) (SR-NYSE-2019-67) ("NYSE 2020 Order"); 82627 (Feb. 2, 2018), 83 FR 5650, 5653 n.53 (Feb. 8, 2018) (SR-NYSE-2017-30) ("NYSE 2018 Order"); 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 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., NYSE 2020 Order, 85 FR at 85811 n.55; NYSE 2018 Order, 83 FR at 5653 n.53; Securities Exchange Act Release Nos. 87648 (Dec. 3, 2019), 84 FR 67308, 67314 n.42 (Dec. 9, 2019) (SR-NASDAQ-2019-059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395 n.22 (Apr. 27, 2020) (SR-NASDAQ-2020-001).

offering, of selling shares to raise capital alone or in conjunction with shares by selling shareholders.<sup>93</sup> The Exchange proposes to modify its rules concerning pricing limitations for the opening auction on the first day of trading for a Direct Listing with a Capital Raise. Instead of the current Pricing Range Limitation, which limits the price of the opening transaction to the price range disclosed in the issuer's effective registration statement,<sup>94</sup> the proposal would allow the opening auction to proceed at a price up to either 20% below or 80% above the disclosed price range if certain additional conditions are met. The Exchange also proposes changes to the opening procedures for a Direct Listing with a Capital Raise to accommodate the proposed changes to the Pricing Range Limitation.

As explained further below, the following aspects of the proposal, as modified by Amendment No. 3, demonstrate that the Exchange's proposal is consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act as well as the maintenance of fair and orderly markets: (i) by modifying the Pricing Range Limitation such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can be executed in the opening cross at a price that is above the highest price of the disclosed price range only if the execution price is at or below the 80% Upside Limit; (ii) by adding conditions that must be satisfied before the opening cross could proceed at a price outside of the disclosed price range that provide some assurance that issuers are complying with the disclosure

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<sup>93</sup> See Nasdaq Listing Rule IM-5315-2. See also 2021 Order, *supra* note 13. The Exchange's listing standards also allow for direct listings in connection with the sale of shares by selling shareholders only. See Nasdaq Listing Rules IM-5315-1, IM-5405-1, and IM-5505-1.

<sup>94</sup> The Commission previously approved Nasdaq's proposal to allow Direct Listings with a Capital Raise on Nasdaq's Global Select Market as long as the opening transaction occurred within the Pricing Range Limitation. See 2021 Order, *supra* note 13, 86 FR 28169 (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).



requirements under federal securities laws, including conditions that require an issuer to provide a certification to Nasdaq and include a sensitivity analysis in its registration statement, and the addition of a Post-Pricing Period; (iii) by adding procedures that help to inform investors that the security may be ready to trade and ensure that the opening price cannot deviate by more than 10% from the Near Execution Price after investors are informed the opening cross nears execution and of the Near Execution Price; (iv) by requiring that a company offering securities for sale in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement; and (v) by making clarifying changes regarding calculation of the 20% threshold below the disclosed price range.

The Commission discusses below the Exchange's proposed modifications to Direct Listings with a Capital Raise. First, the Commission addresses the modifications to the Pricing Range Limitation, and the certification process and other conditions, that would allow a Direct Listing with a Capital Raise to execute in the Nasdaq Halt Cross at a price that is outside the disclosed price range (i.e., up to 20% below the lowest price in the disclosed price range or no higher than the 80% Upside Limit). Second, the Commission addresses the inclusion of the Price Volatility Constraint and the 10% Price Collar. Third, the Commission addresses the Exchange's proposed requirement that a company offering securities for sale in connection with a Direct Listing with a Capital Raise must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement and addresses concerns about Section 11 liability and how requiring an underwriter may mitigate such concerns. Finally, the Commission discusses additional clarifications to the proposal. As discussed throughout this order, the Commission concludes that the Exchange has met its burden

to demonstrate that its proposal is consistent with the Exchange Act, and therefore finds the proposed rule change is consistent with the requirements of the Exchange Act.

A. Modification of Pricing Range Limitation and Required Certification

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. Provided that other requirements are satisfied, a Direct Listing with a Capital Raise will be able to be executed in the Nasdaq Halt Cross at a price that is at or above the price that is as low as 20% below the lowest price in the disclosed price range, or at a price that is as high as 80% above the highest price of the disclosed price range (i.e., at or below the 80% Upside Limit).

In all such cases where the execution price would be outside of the disclosed price range, the company will be required to specify the quantity of shares registered in its registration statement, as permitted by Securities Act Rule 457, and that registration statement will 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 range. The company must certify to Nasdaq that the registration statement contains the required sensitivity analysis.<sup>95</sup> The company will also be required to publicly disclose and certify to Nasdaq prior to the beginning of the Display Only Period that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement. If the company's certification submitted to Nasdaq in that regard includes a price limit that is below the 80% Upside Limit, Nasdaq will not execute the Nasdaq Halt Cross if it results in an offering price above such limit.

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<sup>95</sup> As the Exchange states, the sensitivity analysis would allow investors to see how changes in the share price ripple through critical elements of a company's disclosure.

The Exchange also proposes to require that the securities of a company listing in connection with a Direct Listing with a Capital Raise cannot price above the 80% Upside Limit (i.e., at a price that is more than 80% above the highest price of the disclosed price range). The Exchange believes this will incentivize the company and its named underwriter to take steps to help ensure the accuracy of the disclosed price range so as to avoid the consequences of a failed offering. In the OIP, the Commission asked questions about the potential usefulness and reliability of the price range disclosure in the registration statement if issuers could price up to 20% below and anywhere above the disclosed price range.<sup>96</sup> The changes that the Exchange made subsequent to the OIP, including the imposition of the 80% Upside Limit and the named underwriter requirement, is a reasonable response to address these concerns, and eliminates the open-ended nature of the original proposal that would have allowed the opening to occur at any price above the high end of the disclosed price range, with no limitations.

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 at or 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. Likewise, the Exchange's proposal to expand the Pricing Range Limitation for Direct Listings with a Capital Raise would not allow the Nasdaq Halt Cross to proceed if the company is unable to provide Nasdaq with the required certifications about the adequacy of the disclosure to allow the opening cross to execute at a price that is up to 20% below the low end of the disclosed price range or is up to the 80%

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<sup>96</sup> See OIP, supra note 8. One commenter raised similar concerns. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Aug. 8, 2022) (“CII Letter I”).

Upside Limit. If the issuer could not provide the required certifications, the Exchange would postpone and reschedule the offering.

Additionally, any time the opening price calculated by the Nasdaq Halt Cross is outside the disclosed price range (i.e., either up to 20% below the low end of the disclosed price range or above the high end of the disclosed price range up to the 80% Upside Limit) the issuer would have to confirm during the Post-Pricing Period that no additional disclosures are required under the federal securities laws. Because no orders may be entered or modified during the Post-Pricing Period, the opening price cannot change during the issuer's confirmation process on the disclosure. We believe these provisions, taken together, will provide an opportunity for an issuer to meet its disclosure obligations under the federal securities laws prior to the Nasdaq Halt Cross proceeding if the opening cross executes at a price that is up to 20% below the low end of the disclosed price range or is up to the 80% Upside Limit. Issuers also must comply with separate disclosure obligations under the federal securities laws, and compliance with the specific requirements of Nasdaq's proposed listing standards may not be sufficient to comply with the federal securities laws. In particular, an issuer using Rule 430A to omit pricing-related information would need to consider whether a post-effective amendment to a registration statement containing a price range would be required if a change in price materially alters the disclosure in the registration statement at effectiveness. In addition, for purposes of Securities Act Sections 12(a)(2) and 17(a)(2), information delivered to purchasers after the time of sale is not taken into account in determining whether there were material misstatements or omissions.<sup>97</sup> The Commission has interpreted Section 12(a)(2) and Section 17(a)(2) as reflecting a core

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<sup>97</sup> See Securities Act Rule 159. See also Securities Exchange Act Release No. 93119 (Sept. 23, 2021), 86 FR 54262, 54266 n.47 (Sept. 30, 2021).

concept of the Securities Act—that materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of the contract of sale, when they make their investment decisions.<sup>98</sup> Based on the above, the Commission believes that this aspect of the proposal is consistent with the investor protection and public interest provisions under Section 6(b)(5) of the Exchange Act.<sup>99</sup>

B. Price Volatility Constraint and 10% Price Collar

The Exchange also 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. Specifically, the Exchange’s proposal provides that “[t]he Pre-Launch Period shall continue until at least 5 minutes after the Price Volatility Constraint has been satisfied.”<sup>100</sup> The Exchange also proposes to introduce the Near Execution Price, which is the Current Reference Price at the time the Price Volatility Constraint has been satisfied, and to set the Near Execution Time as such time. The Exchange states that this will provide investors with notice that the Nasdaq Halt Cross nears execution and will allow a period of at least five minutes for investors to modify orders prior to the execution of the opening cross and the pricing of the offering. Finally, the Exchange proposes to require that, in addition to other conditions (as stated in proposed Nasdaq Rule 4120(c)(9)(B)(vii)), the opening cross may execute only if the actual

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<sup>98</sup> See Securities Offering Reform Proposing Release, Securities Act Release No. 8501 (Nov. 3, 2004) (proposing current Rule 159 as an interpretation of Section 12(a)(2) and Section 17(a)(2)) and Securities Offering Reform Adopting Release, Securities Act Release No. 8591 (Aug. 3, 2005) (adopting Rule 159 as proposed).

<sup>99</sup> See OIP, *supra* note 8.

<sup>100</sup> Proposed Nasdaq Rule 4120(c)(9)(B)(vii).

price calculated by the Nasdaq Halt Cross is no more than 10% above or below the Near Execution Price.

The requirement that the Pre-Launch Period will continue for at least five minutes after the Price Volatility Constraint has been satisfied will allow for a period during which investors can modify their orders, if needed, based on the Near Execution Price, prior to the execution of the opening cross. After the Near Execution Price is set, the Current Reference Price may change because buy and sell orders can continue to come in, or be cancelled. If the security is not released for trading within 30 minutes and the Current Reference Price is outside the 10% Price Collar at the end of the 30-minute countdown or at any time thereafter, the Price Volatility Constraint will reset and all requirements of the Pre-Launch Period must be satisfied. If however, the Current Reference Price at the end of the 30-minute countdown is within the 10% Price Collar, price formation may continue until such time that Nasdaq, in consultation with the named underwriter, makes the determination that the security is ready to trade.<sup>101</sup>

Nasdaq also proposes to enhance price discovery by providing readily available, real-time pricing information to investors by disseminating, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, during the Pre-Launch Period and indicating whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. Nasdaq will also disseminate the Near Execution Price, the Near Execution Time, and the 30-minute countdown from such time. Nasdaq also proposes to

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<sup>101</sup> Proposed Nasdaq Rule 4120(c)(9)(B)(vii) states the security shall be released for trading when Nasdaq, in consultation with the named underwriter, makes the determination that the security is ready to trade and the conditions in proposed Nasdaq Rule 4120(c)(9)(B)(vii)(a), (b), (c), and (d) are met. Among the conditions is that the actual price calculated by the Nasdaq Halt Cross is within the 10% Price Collar. See supra notes 45-59 and accompanying discussion.

distribute, at least one day prior to the commencement of trading of the security, an information circular to its members describing any special characteristics of the offering and Nasdaq's rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction.

As described above, the opening process for Direct Listings with a Capital Raise would include the dissemination of the Near Execution Price, establishment of the Near Execution Time, and the protections provided by the 10% Price Collar that ensures the opening price cannot deviate by more than 10% from the disseminated Near Execution Price. These proposed provisions should address any potential concerns that, when the Exchange disseminates information that the Price Volatility Constraint has been satisfied, investors could be misled about the opening auction price and that the opening cross nears execution at a time when buy and sell orders are still coming in because such orders could change the opening price and could cause the auction to not occur for a considerable time.<sup>102</sup>

Further, the Commission believes that the information Nasdaq proposes to make publicly available prior to the opening could help to provide investors with useful information relating to the pricing of the security and help to inform investors in making decisions about entering, modifying, or cancelling orders to participate in the opening cross. The requirement that investors cannot enter market orders and therefore will have to enter a limit price to their order will also provide a cap to an investor's financial obligation should its buy order be executed in the Nasdaq Halt Cross and prevent the buy order from executing at a price higher than the investor anticipated. Based on the above, the Commission finds these procedures are consistent

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<sup>102</sup> See, e.g., 2022 Order, supra note 32, 87 FR 11780 (Mar. 2, 2022) (order disapproving proposed rule change, in part, due to potential for opening process to mislead investors about opening time and price). See also supra note 31.

with the protection of investors, the public interest, and the other requirements of Section 6(b)(5) of the Exchange Act.

C. Addition of Named Underwriter Requirement in a Direct Listing with a Capital Raise and Securities Act Section 11 Standing

Given the broad definition of “underwriter” in the Securities Act,<sup>103</sup> parties, such as the issuers’ financial advisor, may, depending on the facts and circumstances including the nature and extent of that party’s activities, be deemed a statutory underwriter with respect to a direct listing, with attendant underwriter liabilities. In the OIP, the Commission asked several questions about potential issues related to the lack of a named underwriter (as opposed to a statutory underwriter) in a Direct Listing with a Capital Raise where an offering can price outside of the range established by the issuer in its effective registration statement.<sup>104</sup> The Commission questioned whether a party who may meet the statutory underwriter definition but is not named as an underwriter would review and adequately conduct due diligence on the information contained in the registration statement for a Direct Listing with a Capital Raise where the opening price is executed outside of the disclosed price range. The Commission also stated that 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

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<sup>103</sup> 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 any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.”

<sup>104</sup> See OIP, supra note 8. One commenter stated it was concerned, consistent with the statements in the OIP, about the lack of a named underwriter in a Direct Listing with a Capital Raise where the offering could price outside of the range established by the issuer in its effective registration statement and stated it also had concerns about challenges to bringing claims under Section 11 of Securities Act due to potential tracing issues. See CII Letter I, at 4.



advisors, are not subject to equivalent liability standards in the direct listings context as they would be in traditional firm commitment underwritten IPOs.<sup>105</sup>

In the proposed rule change as modified by Amendment No. 3, the Exchange proposes to require that a company offering securities for sale in connection with a Direct Listing with a Capital Raise retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.<sup>106</sup> The Exchange states that it believes that underwriters provide significant investor protections that are necessary in a Direct Listing with a Capital Raise where an offering can price outside of the range established by the issuer in its effective registration statement.<sup>107</sup> For example, the Exchange states that underwriters are exposed to potential Securities Act liability, which provides a strong incentive for them to take steps to help ensure the accuracy of disclosure in a registration statement.<sup>108</sup> The Exchange states that it “believes that these significant investor protections provisions are necessary in a Direct Listing with a Capital Raise if an offering can price outside the price range established in the issuer’s effective registration statement, subject to proposed limitations, because such provisions allow investors to make reasonable pricing decisions with clarity that the company’s underwriter would face statutory liability.”<sup>109</sup> Earlier in the amended proposal, the Exchange notes the Commission’s recent explanation that “[t]he civil liability provisions of the Securities Act reflect the unique position underwriters occupy in the chain of distribution of

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<sup>105</sup> See OIP, supra note 8.

<sup>106</sup> See Amendment No. 3, supra note 11, at 54.

<sup>107</sup> See id. at 16.

<sup>108</sup> See id. at 15.

<sup>109</sup> Id. at 16.

securities and provide strong incentives for underwriters to take steps to help ensure the accuracy of disclosure in a registration statement.”<sup>110</sup> Accordingly, the Exchange proposes to require named underwriters for listings of securities on the Exchange in connection with a Direct Listing with a Capital Raise.

The Commission believes that the Exchange’s proposed requirement that a company conducting a Direct Listing with a Capital Raise must retain and name an underwriter will help address the investor protection concerns discussed in the OIP that can arise in a Direct Listing with a Capital Raise that prices outside of the disclosed price range. With respect to disclosure, for example, for an offering to proceed at a price outside of the disclosed price range, the Exchange’s proposal would require the company to initially provide certifications to the Exchange and publicly disclose that the company does not expect that such a price would materially change its effective registration statement disclosure. The company’s registration statement also would need 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 range. In addition, the company would be required to certify to the Exchange that no additional disclosures are required under the federal securities laws based on the actual price. The required presence of named underwriters who are subject to Securities Act liability should help ensure the accuracy of these disclosures that potential investors receive in a Direct Listing with a Capital Raise. This disclosure includes information, such as the use of proceeds and the required sensitivity analysis, that becomes even more important when an offering prices outside of the range established by the company in its registration statement.

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<sup>110</sup> Id. at 15 (quoting Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Exchange Act Release No. 94546 (Mar. 30, 2022), 87 FR 29458 (May 13, 2022)).

Investors should also benefit from the knowledge that underwriters with Securities Act liability are required as companies consider the certifications they must provide the Exchange with respect to the impact of price changes on their registration statement disclosure and on their obligation to provide additional disclosures under the federal securities laws.

The Commission also asked questions in the OIP about shareholders' ability to pursue claims under Section 11 of the Securities Act due to potential traceability issues.<sup>111</sup> The Exchange states that it believes that the requirement to retain a named underwriter in a Direct Listing with a Capital Raise may mitigate traceability concerns because the underwriter "will be able to impose lock-up arrangements for the same reasons that make lock up agreements common in an IPO." The Commission agrees that the requirement to retain a named underwriter may help mitigate traceability concerns. However, the actual impact of the named underwriter requirement is far from certain, particularly because tracing is a judicially-developed doctrine and there is limited judicial precedent addressing tracing requirements in the context of direct listings. In addition, because of the many factors that go into an underwriter's decision to request or require lock-up arrangements in public offerings, whether, and if so to what extent, underwriters in Direct Listings with a Capital Raise would impose lock-up arrangements on all

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<sup>111</sup> See OIP, *supra* note 8. One commenter raised similar concerns. See CII Letter I and Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Oct. 19, 2022) ("CII Letter II"). This commenter also stated that the Exchange does not address how its proposal "might alleviate the poor corporate governance practices that appear endemic to companies that become public through a direct listing." CII Letter II. As the Commission stated previously, the Commission does not believe that investors will be precluded from raising concerns about governance structures in the context of direct listings; to the extent a company's corporate governance practices are of sufficient concern to investors, they may be able to influence companies' governance practices through signaling their unwillingness to purchase a company's shares through a direct listing. In this way, investors may be able to persuade companies to adopt preferred governance provisions, whether the company becomes listed through a direct listing or a firm commitment IPO. See 2021 Order, *supra* note 13, 86 FR at 28177.

company shareholders is unclear. Although the Commission's findings in this order are based on the specific proposed rule change filed with the Commission, including how the proposed rule operates under the circumstances discussed in this order, the Commission recognizes that, over time, those circumstances may change. Some of the circumstances that may change involve tracing and may include developments in case law involving tracing in the direct listing context.

In view of the totality of the Exchange's proposal, including the requirement that a company seeking to conduct a Direct Listing with a Capital Raise retain and name an underwriter, the Commission does not expect any such tracing challenges in this context to be of such magnitude as to render the proposal inconsistent with the Exchange Act.<sup>112</sup> The Commission therefore concludes that the proposed rule change, as modified by Amendment No. 3, is consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act.

D. Additional Clarifications

In the OIP, the Commission asked questions about how the Exchange would calculate the 20% threshold below the disclosed price range and whether the minimum price at which the opening auction could occur would be the same 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.<sup>113</sup> Subsequently, the Exchange revised its proposal to provide that the 20% threshold below the disclosed price range,

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<sup>112</sup> See Securities Exchange Act Release No. 90768 (Dec. 22, 2020), 85 FR 85807, 85816 (Dec. 29, 2020) (SR-NYSE-2019-67) (order setting aside action by delegated authority and approving a proposed rule change to modify the provisions relating to direct listings). See also 2021 Order, supra note 13, 86 FR at 28176.

<sup>113</sup> See OIP, supra note 8.

along with the 80% threshold used to determine the 80% Upper Limit, would be calculated based on the high end of the price range in the registration statement at the time of effectiveness.<sup>114</sup> In addition, the Exchange made clarifying changes to specify how the 20% threshold will be calculated for purposes of the listing standards and opening cross procedures.<sup>115</sup> The Commission finds that these changes will help ensure that the calculations are consistent throughout Nasdaq's rules and set forth a clear process for how the Exchange will calculate the 20% and 80% thresholds, thereby specifying for investors and market participants the lowest and highest price outside of the disclosed price range at which the opening cross can occur, consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act.

#### IV. Solicitation of Comments on Amendment No. 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 3 to the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2022-027 on the subject line.

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<sup>114</sup> See proposed Nasdaq Rule 4120(c)(9)(B). See also Amendment No. 3, *supra* note 11, at 43. Under the Exchange's original proposal, the 20% threshold would have been calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of the Securities Act.

<sup>115</sup> See proposed Nasdaq Rule 4753(a)(3)(A)(iv)c. and (b)(2)(D)(iii), and proposed Nasdaq Listing Rule IM-5315-2.

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].

V. Accelerated Approval of the Proposal, as Modified by Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the Federal Register. The Commission notes that the original proposal, Amendment No. 1, and Amendment No. 2 were published for comment in the Federal

Register.<sup>116</sup> By amending the proposal to provide that the 20% threshold below and the 80% threshold above the disclosed price range will be calculated based on the high end of the price range in the registration statement at the time of effectiveness, the Exchange removed reference to the maximum offering price set forth in the registration fee table. This change will provide a straightforward and clear way for investors and market participants to calculate the 20% and 80% thresholds that set forth the lowest and highest price (outside the disclosed price range) at which the opening auction can occur. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>117</sup> to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

#### VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>116</sup> See supra notes 3, 6, and 9.

<sup>117</sup> 15 U.S.C. 78s(b)(2).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>118</sup> that the proposed rule change (SR-NASDAQ-2022-027), as modified by Amendment No. 3 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>119</sup>

Sherry R. Haywood  
Assistant Secretary

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<sup>118</sup> Id.

<sup>119</sup> 17 CFR 200.30-3(a)(12).