Nasdaq

December 21, 2021

Ms. Vanessa Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number SR-NASDAQ-2021-045 (the "Proposal")[1]

Dear Ms. Countryman:

The NASDAQ Stock Market LLC ("Nasdaq" or the "Exchange") is pleased to respond to the Securities and Exchange Commission ("Commission") request for additional analysis and input in its Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposal (the "Order").[2] Concurrent with the submission of this letter, Nasdaq is filing Amendment No. 1 (the "Amendment") to the Proposal to address several of the issues raised in the Order. This letter provides a description of the modifications proposed in the amendment and addresses other concerns raised by the Commission in the Order.

Nasdaq Listing Rule IM-5315-2 provides listing requirements for Nasdaq's Global Select Market for a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on the Exchange at the time of effectiveness of a registration statement 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" or "DLCR"). Securities qualified for listing under Nasdaq Listing Rule IM-5315-2 must begin trading on the Exchange via the Nasdaq Halt Cross outlined in Nasdaq Rule 4120(c)(9) and Nasdaq Rule 4753. Currently, in the case of a Direct Listing with a Capital Raise, the Exchange will release the security for trading 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 (the "Pricing Range Limitation").[3]

---

1 Securities Exchange Act Release No. 92256 (June 24, 2021), 86 FR 34815 (June 30, 2021).

2 Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021).

3 In the Amendment, Nasdaq proposes to clarify that the price range in the preliminary prospectus included in the effective registration statement must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

In the Proposal, Nasdaq proposes to modify the Pricing Range Limitation to release the security for trading if: (a) the actual price calculated by the Nasdaq Halt Cross is at or above the price that is 20% below the lowest price, and at or below the price that is 20% above the highest price, of the disclosed price range; or (b) the actual price calculated by the Nasdaq Halt Cross is at a price above the price that is 20% above the highest price of such price range ("120% Limit"), provided that the company has certified to the Exchange that such price would not materially change the company's previous disclosure in its effective registration statement. The Exchange proposed to use the high end of the price range in the prospectus at the time of effectiveness to measure the permitted 20% deviation from both the high end (in the case of an increase in the price) and low end (in the case of a decrease in the price) of the disclosed price range. The Commission raised a number of issues in the Order.

To address these issues, Nasdaq is proposing the following amendments to the Proposal and additional explanations of the Proposal:

I. Amendments

1. Requirement to Specify the Quantity of Shares Registered in the Registration Statement.

2. Additional Requirements for Pricing Above the 120% Limit:

   a. Requirement that the Registration Statement Contains Sensitivity Analysis;

   b. Introduction of the Post-Pricing Period; and

   c. Requirement of the Post-Pricing Certification.

3. Elimination of Market Orders from the Cross.

4. Dissemination of Free Price Discovery Data.

5. Dissemination of Notice that the Cross Nears Execution.

6. Member Notification Requirements.

7. Alignment of 20% Price Range Deviation Calculation.

II. Additional Explanations

1. Investment Decision Prior to Pricing an IPO and a DLCR.

2. Disclosure Update Prior to the Completion of the Offering.

3. Use of Tie-Breaker in the Cross.

4. Calculation of Price-Based Listing Requirements.

I. Amendments to the Proposal

Amendment 1: Requirement to Specify the Quantity of Shares Registered in the Registration Statement

Nasdaq proposes to require 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). Nasdaq is amending the Proposal because the Commission questioned whether it is appropriate for Nasdaq to simply "expect" 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. Nasdaq believes this amendment is appropriate because this approach is permitted by Securities Act Rule 457.

Amendment 2a: Requirement that the Registration Statement Contains Sensitivity Analysis

Nasdaq proposes to revise the certification process such that the Company must confirm in its initial certification that its registration statement contains a sensitivity analysis. In the Order the Commission raises questions about the operation of the certification, which would be required from a Company selling shares above the 120% Price Limit. In its initial certification to Nasdaq, which would be publicly disclosed and provided to Nasdaq prior to the beginning of the Display Only Period, the Company must confirm that its registration statement contains a sensitivity analysis explaining how the Company's plans would change if the actual proceeds from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement. Nasdaq believes this amendment is designed to protect investors because it helps ensure that companies that may sell shares at a price above the 120% Price Limit provide disclosure that allows investors to see how changes in the share price ripple through critical elements of their disclosure.

Amendments 2b and 2c: Introduction of the Post-Pricing Period and the Post-Pricing Certification

Nasdaq proposes to add to the operation of the Cross, in certain circumstances, a Post-Pricing Period. Specifically, if the actual price calculated by the Cross is above the 120% Price Limit, Nasdaq will initiate a brief Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified or cancelled. The Post-Pricing Period will end and the security will be released for trading immediately after the issuer provides such confirmation to Nasdaq. If the Company cannot provide the required confirmation, Nasdaq will postpone and reschedule the offering. These provisions will help assure that if a determination is made following effectiveness of the related registration statement to price the offering above the price that is 20% above the highest price of the disclosed price range, the issuer has the ability, prior to the completion of the offering and sale of the shares, to provide any necessary additional disclosures that are dependent on the price of the offering. Nasdaq believes these amendments are appropriate because they help ensure that the offering may proceed to pricing given that no additional disclosures are required under federal securities laws.

Amendment 3: Elimination of Market Orders from the Cross

Nasdaq proposes to prohibit market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise. In the Order, the Commission asks a number of questions concerning how investors would be informed that the price in the auction could be outside of the range in the registration statement (the "Pricing Transparency Concern"). Nasdaq believes that elimination of market orders from the Cross is designed to protect investors because it will assure that investors only purchase shares at a price that is 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 will use any additional proceeds raised.

Amendments 4 and 5: Dissemination of Free Price Discovery Data and Notice that Cross Nears Execution

In addition, to further address the Pricing Transparency Concern, Nasdaq undertakes to disseminate in real time, free of charge, the Current Reference Price on a public website such as Nasdaq.com during the Pre-Launch Period (as described in the Proposal) and to indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. This will enhance price discovery transparency by making the relevant information readily available to investors. Nasdaq also proposes in the Amendment to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied. Nasdaq believes these amendments are designed to protect investors because this change will provide investors with notice that the Cross nears execution and thus help assure that investors have real time pricing information to help them determine whether their initial investment decision, based on the limit order they placed, requires a modification.

Amendment 6: Member Notification Requirements

Nasdaq also proposes in the Amendment to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise to assure that investors are informed about the attributes of a Direct Listing with a Capital Raise. These rules will require members not to accept market orders and to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price by Nasdaq on a public website such as Nasdaq.com.

Pursuant to the Amendment, Nasdaq will also 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and

- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

Nasdaq believes these member requirements are designed to protect investors because they will remind members of its obligations to “know their customers,” help assure that investors are informed about the attributes of a Direct Listing with a Capital Raise, increase transparency of the pricing mechanisms of a Direct Listing with a Capital Raise, and help assure that investors have sufficient price discovery information.

Amendment 7: Alignment of 20% Price Range Deviation Calculation

Nasdaq proposes to calculate the 20% deviation from the range based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A, because of a concern raised in the Order. Specifically, the Commission expressed concern with respect to Nasdaq’s proposal to use the high end of the price range disclosed in the prospectus for purposes of calculating the permissible 20% deviation from both the high and low end of the disclosed price range given that the proposed calculation was based on Staff’s guidance rather than the Commission’s rule. Nasdaq believes the proposed mechanics of calculation are appropriate because they are based on the Commission’s rule.

The Commission expresses concern in the Order with respect to Nasdaq’s proposal to use the high end of the price range disclosed in the prospectus for purposes of calculating the permissible 20% deviation from both the high and low end of the disclosed price range. The Commission states that Nasdaq’s proposal “is not supported by the specific provisions of Securities Act Rule 430A. Specifically, the Instruction to paragraph (a) of Securities Act Rule 430A states, in part, that ‘any deviation from the low or high end of the [offering price] range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) . . . if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the 'Calculation of Registration Fee' table in the effective registration statement.'"

Nasdaq notes that it crafted its proposal based on published interpretations by Staff of the Division of Corporation Finance. Specifically, Compliance and Disclosure Interpretation 627.01 under Securities Act Rules states: "The instruction to paragraph (a) of Rule 430A provides that changes in volume and price representing no more than a 20% change in the maximum offering price set forth in the registration statement fee table may be made pursuant to a Rule 424(b)(1) prospectus supplement. *The 20% threshold may be calculated using* the high end of the range in the prospectus at the time of effectiveness and may be measured from either the high end (in the case of an increase in the offering price) *or low end (in the case of a decrease in the offering price) of that range*." [Emphasis added].

II. Additional Explanations of the Proposal, as modified by the Amendment

Explanations 1 and 2: Investment Decision Prior to Pricing an IPO and a DLCR and Disclosure Update Prior to the Completion of the Offering

In the Order, the Commission questioned Nasdaq's comparison of an IPO and a Direct Listing with a Capital Raise pointing out that in a firm commitment underwritten IPO, the IPO price is determined prior to the time of sale to the underwriters and initial investors, which takes place in advance of the opening transaction on the Exchange. In contrast, in a Direct Listing with a Capital Raise, the IPO price is the opening price determined through the Nasdaq Halt Cross, which does not occur until after the Exchange receives bids to purchase the securities. The Commission requested Nasdaq to address the differences in how information about the final offering price is communicated to investors in each type of offering and any differences in the information investors have at the time of their investment decisions about the final offering price, including how much this price might deviate from the disclosed price range.

The Commission also pointed out that in the context of a firm commitment underwritten IPO, if a determination is made following effectiveness of the related registration statement to price the offering outside of the disclosed price range, the issuer and underwriters have 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 Commission requested Nasdaq to explain how companies would be able to disclose any additional material information related to the final offering price prior to the time of sale; and how the potential inability of an issuer to convey important material pricing information to investors in a timely manner under its proposal would be consistent with the investor protection requirements under Section 6(b)(5) of the Exchange Act.

.

The Commission also raised a number of concerns with respect to the communication of price-related information to investors in a Direct Listing with a Capital Raise, especially in circumstances when the opening price determined through the Nasdaq Halt Cross falls outside the price range disclosed in the issuer's most recent preliminary prospectus on file with the Commission.

Nasdaq notes that the principal method by which price-related information (the initial public offering price and the number of shares offered) is communicated to investors in a traditional IPO is an oral communication from a broker who is an underwriter to their customer informing the customer of the pricing details of the offering and confirming the customer's purchase order for shares as to which the customer had provided the broker an indication of interest in purchasing. That communication takes place after pricing. That same type of communication will take place with a Direct Listing with a Capital Raise. The opening price determined through the Nasdaq Halt Cross will be established, this price will be communicated publicly to brokers, and brokers will communicate the price to their customers confirming the customer's purchase order. Further, Nasdaq notes that this process will be the same whether the Nasdaq Halt Cross falls within the price range (as is currently allowed) or outside the price range. In addition, because market orders will not be permitted in a Direct Listing with a Capital Raise, every investor will already be aware of the maximum price at which they could acquire shares.

Further, as indicated above, Nasdaq will provide investors with access to price discovery information from the beginning stages of price formation to the final offering price. Specifically, Nasdaq will disseminate, free of charge, the Current Reference Price on a public website such as Nasdaq.com during the Pre-Launch Period. Then, Nasdaq will publicly indicate when the Price Volatility Constraint has been met, thus providing investors with real time information that the price discovery process nears completion and the security is ready to trade shortly. Nasdaq will disseminate the final offering price determined by the Cross. Nasdaq believes that these steps will help assure that investors have access to real time price discovery information and ability to cancel or modify their limit orders prior to the final pricing if the price discovery process led to a price that is contrary to the investor's original investment decision (in setting the price limit in the order to buy or sell securities). Finally, the requirement for members to provide to a customer, before that customer places an order to be executed in the Cross, an information circular describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross is designed to help assure that that every investor that entered an order to buy or sell securities in the Cross is aware of the pricing mechanics and knows that the price discovery information will be available to them.

Nasdaq also notes that preliminary prospectuses generally contain disclosure based on the midpoint of the price range and a sensitivity analysis which provides information with respect to the impact of an IPO price that is above and below that midpoint. This sensitivity analysis usually provides information for every $1.00 increase or decrease of the IPO price from the midpoint. Generally, this sensitivity analysis is added in response to the Instruction to paragraph (a) of Securities Act Rule 430A that states: "A decrease in the volume of securities offered or change in the bona fide estimate of the maximum offering price range from that indicated in the form of prospectus filed as part of a registration statement that is declared effective may be disclosed in the form of prospectus filed with the Commission pursuant to § 230.424(b) or § 230.497(h) under the Securities Act so long as the decrease in the volume or change in the price range would not materially change the disclosure contained in the registration statement at effectiveness." In an IPO, if an issuer prices outside of the bona fide price range then they need to make a determination that such change would not materially change the disclosure contained in the registration statement at effectiveness. Similarly, in a Direct Listing with a Capital Raise an issuer that wishes to be able to price more than 20% above the high end of the range would be required by Nasdaq rules to have included the sensitivity analysis and if the issuer prices above the price range then they will still need to make that same determination in accordance with Rule 430A. Nasdaq will also require that an issuer whose securities could price more than 20% above the high end of the price range certify to Nasdaq and publicly disclose, prior to the beginning of the Display Only Period, that the issuer does not expect that a price that is 20% above the end of the price range would materially change the disclosure contained in the registration statement at effectiveness. If pricing of a Direct Listing with a Capital Raise results in a price that is above the price that is 20% above the highest price of the price range, the issuer also would be required, before the offering is completed, to confirm that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross.

In that regard, the Commission stated that an issuer in a traditional IPO has control over the timing of its offering and can delay the offering in order to convey additional material information to provide accurate disclosure. As modified by the Amendment, an issuer in a Direct Listing with a Capital Raise will have the same ability to delay an offering at any time, including after effectiveness of the Securities Act registration statement. In each case (whether a traditional IPO or a Direct Listing with a Capital Raise), the issuer would be in a position to file a post-effective amendment to its registration statement, which would be subject to review and comments by Commission Staff. If the issuer cannot provide confirmation that no additional disclosures are required based on the price determined through the Nasdaq Halt Cross, then the Direct Listing with a Capital Raise will be postponed. Nasdaq believes that this confirmation should address the Commission's expressed concerns relating to the adequacy of information provided to investors in a Direct Listing with a Capital Raise.

Nasdaq believes that the changes proposed in the Amendment to eliminate the market orders from the operation of the Cross, to provide additional price discovery transparency through publication of the Current Reference price during the Display-Only Period and to allow investors to reassess their initial investment decision by providing investors with a notice that the price discovery process is in its final stages through the introduction of the Price Volatility Constraint is consistent with Section 6(b)(5) of the Act because it is designed to protect investors. Similarly, Nasdaq believes that the requirement for members not to accept market orders and to provide a notice to customers who entered an order to be executed in the Cross describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website such as Nasdaq.com, is consistent with Section 6(b)(5) of the Act because it is designed to protect investors and assure that they have sufficient information about the operation of the Direct Listing with a Capital Raise.

Explanations 3 and 4: Use of Tie-Breaker in the Cross and Calculation of Price-based Listing Requirements

In the Order, the Commission stated that:

> it is not clear whether a company selling shares through a Direct Listing with a Capital Raise could … choose to register securities by the proposed maximum aggregate offering amount, as permitted by Securities Act Rule 457(o), provided that the company agreed that the opening transaction on the first day of trading would proceed pursuant to Nasdaq Rule 4120(c)(9)(B) and its use of the Pricing Range Limitation. To the extent that the opening transaction on the first day of trading for a Direct Listing with a Capital Raise could proceed under either Nasdaq Rule 4120(c)(9)(B) (utilizing the existing Pricing Range Limitation) or Nasdaq Rule 4120(c)(9)(C) (utilizing the modified pricing limitation), the Exchange has not explained how it would be consistent with the Exchange Act for the Exchange to use, in both contexts, the price that is 20% below the lowest price of the disclosed price range for purposes of Nasdaq Listing Rule IM-5315-2 and Nasdaq Rules 4753(a)(3)(A) and 4753(b)(2).

As explained above, Nasdaq is proposing to modify the Proposal to require 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. However, Nasdaq believes that to the extent that the opening transaction on the first day of trading for a Direct Listing with a Capital Raise could proceed utilizing the existing Pricing Range Limitation or utilizing the modified pricing limitation, it is consistent with the Exchange Act for Nasdaq to use, in both contexts, the price that is 20% below the lowest price of the disclosed price range for purposes of Nasdaq Listing Rule IM-5315-2 and Nasdaq Rules 4753(a)(3)(A) and 4753(b)(2). Doing so will use a lower, more conservative price, in calculating compliance with the listing requirements and will provide investors in the opening transaction with the more beneficial price, where the auction could otherwise occur at multiple prices.

Using either the bottom of the price range or the price that is 20% below the bottom of the price range as a tie-breaker will have the same effect on the auction if the opening transaction proceeds based on alternative possible price points that are within the range. To illustrate, consider a hypothetical example: The bottom of the range is $10 and the top of the range is $12. More than one price exists within the range under the previous set of tie-breakers such that both $10.15 and $10.25, satisfy all other requirements. The operation of the fourth tie breaker will result in the same auction price ($10.15) regardless of whether bottom of the price range is used ($10) as the tie-breaker or the price that is 20% below $10 because $10.15 is the price that is closer to either than $10.25 would be.

However, if a second price point is below the bottom of the range - for example, $9.65 and $10.25, then the tie-breaker that is 20% below the range will result in the auction pricing at $9.65. Accordingly, Nasdaq believes it is appropriate to rely on the lowest possible offering price as a tie-breaker because it results in a more conservative offering price. Further, because the tie-breaker, as just illustrated, may determine whether the opening transaction on the first day of trading for a Direct Listing with a Capital Raise will proceed utilizing the procedures surrounding the existing Pricing Range Limitation or the modified pricing limitation the tie-breaker cannot vary based on that which it causes. Therefore, it is necessary to use the same tie-breaker in determining whether or not the Direct Listing with a Capital Raise is within or below the range. Nasdaq believes that the proposal to resolve a potential tie among the prices that satisfy all other requirements in the Cross, by choosing the price that is closest to the price that is 20% below the range, is consistent with Section 6(b)(5) of the Act because it is designed to protect investors by providing them with the most advantageous offering price among possible alternative prices. Moreover, by utilizing this same, lower, price in calculating compliance with the listing requirements, Nasdaq and investors are assured that the company will satisfy all listing requirements, even if the offering proceeds at the lowest permissible price.

* * * * *

In a recent speech at the Healthy Markets Association Conference, SEC Chair Gary Gensler emphasized that the overarching principle of regulation ought to be to treat like cases alike.[4]

On December 10, 2021 Barron reported,[5] based on Dealogic data, that 942 companies have gone public in 2021, including 383 IPOs and 599 SPACs, but there were only seven direct listings. Notably, missing from these statistics is even a single company listing in connection with a Direct Listing with a Capital Raise. Nasdaq believes that this is largely due to the Price Range Limitation, which prevents companies from selling shares at a price outside of the range on their effective registration statement, like they could in a traditional IPO. Nasdaq believes the Proposal, as amended, would address this discrepancy, while maintaining important investor protections currently available in the context of an IPO, and result in treating these "like cases" alike.

For reasons described in the Proposal, Nasdaq believes that a Direct Listing with a Capital Raise is an alternative method to go public that would increase competition in the U.S. capital markets and is aligned with all three of the SEC's guiding principles of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. Nasdaq believes that the Proposal, as modified by the Amendment would create a regulatory regime that treats IPOs and Direct Listings with a Capital Raise alike and respectfully asks that the Commission approve the

[4] Available at: https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921

[5] Available at: https://www.barrons.com/articles/ipos-direct-listings-51639188598

Proposal without delay. If you have any questions or need additional information, please contact me at [redacted].

Sincerely,

Nikolai Utochkin

Counsel, Listing and Governance

U.S. SECURITIES AND
EXCHANGE COMMISSION

Comments received from:

Full Name: Nasdaq, Inc.
Mailing Addre : 805 King Farm Blvd.
City: Rockville
State: Maryland
ZipCode: 20850
Country: United States
Email: [redacted]
Phone Number: [redacted]
isThirdParty: False

Comments:

Comments Attached

Attachment 1: SR-NASDAQ-2020-045 A-1 Rule Filing Submission.pdf

Attachment 2: SR-NASDAQ-2020-045 A-1 Comment Letter.pdf

Thank you for submitting a comment to the U.S. Securities and Exchange Commission. This auto-reply message is your notification that we have received your comment letter.

The SEC po t comment on the SEC' Internet Web ite (http ://www. ec.gov). Comment are also available for website viewing and printing in the SEC's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00pm. We reserve the right, but shall have no obligation, to review, to refuse to post or to remove any or all of your submission from www.sec.gov that is deemed to be inappropriate for publication, including, but not limited to, ob cene language, per onally identifiable information, copyrighted material, and irrelevant content. When multiple comments are submitted with identical or near-identical content, only the first copy of the comment received is posted publicly, along with a running total number of that comment received. We may redact personally identifiable information from submissions, but have no obligation to do so. You hould ubmit only information that you wi h to make available publicly. We generally po t comments within 3 to 5 business days after we receive them electronically.

Plea e review our privacy policy at: http ://www. ec.gov/privacy.htm.

You should not use the rule-comments mailbox to submit a tip or complaint (including a whistleblower complaint). If you wish to submit a tip or complaint regarding a potential violation of the federal ecuritie law , plea e u e our online form at https://www.sec.gov/complaint/select.shtml, or mail your information to the SEC Complaint Center at the following address: SEC Complaint Center, 100 F Street NE, Washington, D.C. 20549-0213. You can also send a fax to 703-813-6965.

If you are an investor, check out the "Investor Information" section of our website, at https://www.sec.gov/investor.shtml, to find helpful information and tools. If you have a securities-related question, please visit our website at https://www.sec.gov/answers.shtml to find fa t an wer to your que tion and olution to common inve tment problem . If you are a securities professional needing assistance on technical matters, please check the "SEC Divisions" and "Information For" pages on the top right of our website, www.sec.gov.

We appreciate your taking the time to communicate your thought on our propo ed rule .

Sincerely,
Office of the Secretary
U.S. Securities and Exchange Commission

http //www ec gov/cgi bin/ruling comment

How to Submit Comments

Modified: October 2, 2020

NIKOLAI UTOCHKIN
COUNSEL – LISTING AND GOVERNANCE
805 KING FARM BLVD
ROCKVILLE, MD 20850
P: [redacted]
E: [redacted]

December 22, 2021

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Amendment No. 2 (SR-NASDAQ-2021-045)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC filed the above-referenced filing on December 22, 2021.

Sincerely,

Nikolai Utochkin

Nikolai Utochkin
Counsel – Listing and Governance

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 71

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2021 - * 045
Amendment No. (req. for Amendments *) 2

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
☐	☑	☐	☑	☐	☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐

Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Nikolai   Last Name * Utochkin

Title * Counsel - Listings and Governance

E-mail * [redacted]

Telephone * [redacted]   Fax

Signature

Pursuant to the requirements of the Securities Exchange of 1934, The Nasdaq Stock Market LLC has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 12/22/2021

By John Zecca
(Name *)

(Title *)
EVP and Chief Legal Officer

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

[redacted]

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information * Add Remove View SR-NASDAQ-2021-045 19b-4 A-2.doc	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change * Add Remove View SR-NASDAQ-2021-045 Exhibit 1 A-2.	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2- Notices, Written Comments, Transcripts, Other Communications Add Remove View	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G. ☐ Exhibit Sent As Paper Document
Exhibit 3 - Form, Report, or Questionnaire Add Remove View	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change. ☐ Exhibit Sent As Paper Document
Exhibit 4 - Marked Copies Add Remove View SR-NASDAQ-2021-045 Exhibit 4 A-2.(	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View SR-NASDAQ-2021-045 Exhibit 5 A-2.(	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] is filing with the Securities and Exchange Commission ("SEC" or "Commission") an amended proposal to modify certain pricing limitations for companies listing in connection with a Direct Listing primary offering in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq. This Amendment No. 2 supersedes the original filing in its entirety.[3]

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the "Board") on November 5, 2020. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Nikolai Utochkin
Counsel – Listing and Governance

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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

Nasdaq, Inc.
[redacted]

or

Arnold Golub
Deputy General Counsel
Nasdaq, Inc.
[redacted]

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

Summary of Amendment

Nasdaq is filing this amendment to SR-NASDAQ-2021-045[4] in order to address the issues the Commission raised in the OIP and make other modifications to clarify the proposed rule language.

As a preliminary matter, in this Amendment No. 2 (the "Amendment") Nasdaq proposes to clarify how the main provisions of Rules 4120(c)(8)(A) and (c)(9)(A) apply to a Direct Listing with a Capital Raise by restating the provisions of these rule in a clear and direct manner. This change will make the rules easier to understand and apply.

Also in this Amendment, Nasdaq proposes to modify the Initial Proposal to require 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). Nasdaq also proposes to clarify that the price range in the preliminary prospectus included in the effective registration

---

4 Securities Exchange Act Release No. 92256 (June 24, 2021), 86 FR 34815 (June 30, 2021) (the "Initial Proposal"). The Commission issued an Order Instituting Proceedings to Determine Whether To Approve or Disapprove the Initial Proposal. See Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021) (the "OIP").

statement must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

Nasdaq also proposes to revise the certification process described in the Initial Proposal such that two certifications would be required in certain circumstances. In its initial certification to Nasdaq, which would be publicly disclosed and provided to Nasdaq prior to the beginning of the Display Only Period, the Company must confirm that its registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed or are less than the amount assumed in the price range established by the issuer in its effective registration statement.

Further, Nasdaq proposes to add to the operation of the Cross, in certain circumstances, a Post-Pricing Period. Specifically, if the actual price calculated by the Cross is not at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement, Nasdaq will initiate a brief Post-Pricing Period following the calculation of the actual price. In instances where the Post-Pricing Period is triggered, the issuer must confirm to Nasdaq during the Post-Pricing Period that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The Post-Pricing Period will end and the security will be released for trading immediately after the issuer provides such confirmation to Nasdaq. If the Company cannot provide the required confirmation, Nasdaq will postpone and reschedule the offering.

In the Amendment, Nasdaq proposes to prohibit market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise. In addition, Nasdaq undertakes to disseminate, free of charge, the Current Reference Price, on a public website, such as Nasdaq.com, during the Pre-Launch Period and to indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied.

Nasdaq also proposes in this Amendment to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price by Nasdaq on a public website such as Nasdaq.com.

Nasdaq also proposes to provide that it will 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

Nasdaq also proposes to make minor technical changes to improve the clarity of this proposal. Nasdaq believes that this amendment addresses the issues raised by the Commission in the OIP. This amendment supersedes and replaces the Initial Proposal in its entirety.

Description of Proposed Rule, as Amended

Nasdaq recently adopted Listing Rule IM-5315-2 to permit a company to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a “Direct Listing with a

Capital Raise");[5] created a new order type (the "CDL Order"), which is used during the Nasdaq Halt Cross (the "Cross") for the shares offered by the company in a Direct Listing with a Capital Raise; and established requirements for disseminating information, establishing the opening price and initiating trading through the Cross in a Direct Listing with a Capital Raise.[6] For a Direct Listing with a Capital Raise, Nasdaq rules currently require that the actual price calculated by the Cross be 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 (the "Pricing Range Limitation").

Nasdaq now proposes to modify the Pricing Range Limitation such that a Direct Listing with a Capital Raise can be executed in the Cross at a price that is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement.[7] In addition, Nasdaq proposes to modify the Pricing Range Limitation such that a Direct Listing with a Capital Raise can be executed in the Cross at a price above the price that is 20% above the highest price of such price range, provided that the

---

5 A Direct Listing with a Capital Raise includes situations 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.

6 See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (the "Approval Order").

7 References in this proposal to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement. Separately, as explained in more details below, Nasdaq proposes to prescribe that the 20% threshold will be calculated using the high end of the price range in the prospectus at the time of effectiveness and may be measured from either the high end (in the case of an increase in the price) or low end (in the case of a decrease in the price) of that range.

company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed the amount assumed in such price range and the company has publicly disclosed and certified to Nasdaq that the company does not expect that such price would materially change the company's previous disclosure in its effective registration statement. Nasdaq also proposes to make related conforming changes.

Listing Rule IM-5315-2 requires that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Cross, which is described in Rules 4120(c)(9) and 4753. Rule 4120(c)(9) requires that in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade.

Currently, in the case of the Direct Listing with a Capital Raise, a security is not released for trading by Nasdaq unless the actual price calculated by the 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.[8] Specifically, under Rule 4120(c)(9)(B) Nasdaq shall release the security for trading only if: (i) all market orders will be executed in the Cross; and (ii) the actual price calculated by the Cross complies with the Pricing Range Limitation. If there is insufficient buy interest to satisfy the CDL Order and all other market orders, as required by the current rule, or if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration

8 See Rule 4120(c)(9)(B).

statement, the Cross would not proceed and such security would not begin trading. Nasdaq shall postpone and reschedule the offering only if either or both such conditions are not met. In such event, because the Cross cannot be conducted, the Exchange would postpone and reschedule the offering and notify market 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.

Proposed Change to Rule 4120(c)(9)

While many companies are interested in alternatives to the traditional IPOs, based on conversations with companies and their advisors Nasdaq believes that there may be a reluctance to use the existing Direct Listing with a Capital Raise rules because of concerns about the Pricing Range Limitation.

One potential benefit of a Direct Listing with a Capital Raise as an alternative to a traditional IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, in a Direct Listing with a Capital Raise 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. In that regard, in the Approval Order the Commission stated that:

> The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread

> between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.[9]

A successful initial public offering of shares requires sufficient investor interest. 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. The Pricing Range Limitation imposed on a Direct Listing with a Capital Raise (but not on a traditional IPO) increases the probability of such a failed offering because the offering cannot proceed without some delay not only for the lack of investor interest, but also if investor interest is greater than the company and its advisors anticipated. In the Approval Order, the Commission noted a frequent academic observation of traditional firm commitment underwritten offerings that the IPO price, established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.[10] Nasdaq believes that the price range in a company's effective registration statement for a Direct Listing with a Capital Raise would similarly be determined by the company and its advisors and, therefore, there may be instances of offerings where the price determined by the Nasdaq opening auction will exceed the highest price of the price range in the company's effective registration statement.

---

[9] See Approval Order, 86 FR at 28177.

[10] See Approval Order, footnote 91.

As explained above, under the existing rule a security subject to a Direct Listing with a Capital Raise cannot be released for trading by Nasdaq if the actual price calculated by the Cross is above the highest price of the price range established by the issuer in its effective registration statement. In this case, Nasdaq would have to cancel or postpone the offering until the company amends its effective registration statement. At a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event. In addition, as explained above, 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 Nasdaq's view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits.

Accordingly, Nasdaq proposes to modify the Pricing Range Limitation such that in the case of the Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the actual price at which the Cross would occur is at or above the price that is 20% below the lowest price of the price range established by the issuer in its effective registration statement and at or below the price that is 20% above the highest price of the price range. In other words, Nasdaq would release the security for trading, provided all other necessary conditions are satisfied, even if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement; provided however that the actual price cannot be more than 20% below the lowest price or more than 20% above the highest price of such range; and the company specified the quantity of shares registered, as permitted by Securities Act Rule 457, as explained below. In addition, there would be no limitation on releasing the security for trading at a price above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement if the company publicly disclosed and has certified to Nasdaq prior to 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 and the company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement.[11] The goal of the requirement is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.[12]

Nasdaq believes that this approach is consistent with SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which 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.[13] Nasdaq believes such guidance also allows deviation

[11] The price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

[12] Sensitivity analysis disclosure may include but is not limited to: use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. An example of this disclosure could be: We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes.

[13] 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. Nasdaq 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

above the price range beyond the 20% threshold if such change or deviation does not materially change the previous disclosure. Accordingly, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. For purposes of this rule, the 20% threshold will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430.

Finally, given that, as proposed, there may be a Direct Listing with a Capital Raise that could price outside the price range of the company's effective registration statement and that there may be no upside limit above which the Cross could not proceed, Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, during the Pre-Launch Period (as described in the Proposal) and indicate whether the Current

---

amount. See also Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

Reference Price is within the price range established by the issuer in its effective registration statement. Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied. This change will provide investors with notice that the Cross nears execution.

Nasdaq 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. This will assure that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the Company's effective registration statement including the sensitivity analysis describing how the Company will use any additional proceeds raised.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the location of the public website where Nasdaq will disseminate the Current Reference Price.

To assure that members have the necessary information to be provided to their customers, Nasdaq 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

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.

In each instance of a Direct Listing with a Capital Raise, Nasdaq's information circular[14] will inform the market participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular whether or not there is an upside limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also remind the market participants that Nasdaq prohibits market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise.

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, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement. Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering.

---

14 The Information circular is an industry wide free service provided by Nasdaq.

<u>Proposed Conforming Changes to Listing Rule IM-5315-2</u>

Listing Rule IM-5315-2 allows a company that has not previously had its common equity securities registered under the Act to list its common equity securities on the Nasdaq Global Select Market at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange.

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[15] for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement 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).

Listing Rule IM-5315-2 further provides that, for this purpose, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.

Because Nasdaq proposes to allow the opening auction to price up to 20% below the lowest price of the price range established by the issuer in its effective registration statement, Nasdaq proposes to make a conforming change to Listing Rule IM-5315-2 to provide that the price used to determine such company's compliance with the Market

---

15 <u>See</u> Listing Rules 5005(a)(23) and 5005(a)(45).

Value of Unrestricted Publicly Held Shares is the price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement as this is the minimum price at which the company could qualify to be listed. Nasdaq will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price.

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.[16]

Proposed Conforming Changes to Rules 4753(a)(3)(A) and 4753(b)(2)

Nasdaq proposes to amend Rules 4753(a)(3)(A) and 4753(b)(2) to conform the requirements for disseminating information and establishing the opening price through the 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 price range established by the issuer in its effective registration statement.

Specifically, Nasdaq proposes changes to Rules 4753(a)(3)(A) and 4753(b)(2) to make adjustments to the calculation of the Current Reference Price, which is

---

16 See Listing Rules 5315(f)(1), (e)(1) and (2), respectively. Rule 5315(f)(1) requires a security to have: (A) at least 550 total holders and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or (B) at least 2,200 total holders; or (C) a minimum of 450 round lot holders and at least 50% of such round lot holders must each hold unrestricted securities with a market value of at least $2,500.

disseminated in the Nasdaq Order Imbalance Indicator, in the case of a Direct Listing with a Capital Raise and for how the price at which the Cross will execute. These rules currently provide that where there are multiple prices that would satisfy the conditions for determining a 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 price range disclosed by the issuer in its effective registration statement.[17]

To conform these rules to the modification of the Pricing Range Limitation change, as described above, Nasdaq 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 price range disclosed by the issuer in its effective registration statement.[18]

Lastly, Nasdaq proposes to clarify several provisions of the existing rules without changing them. Specifically, Nasdaq proposes to clarify the mechanics of the Cross by specifying that Nasdaq will initiate a 10-minute Display Only Period only after the CDL Order had been entered. This clarification simply states what is already implied by the rule because the Cross and the offering may not proceed without the company's order to sell the securities in a Direct Listing with a Capital Raise. Similarly, Nasdaq proposes to

---

[17] To illustrate: The bottom of the range is $10. More than one price exists within the range under the previous set of tie-breakers such that both $10.15 and $10.25, satisfy all other requirements. The operation of the fourth tie-breaker will result in the auction price of $10.15 because it is the price that is closest to $10.

[18] Note that using the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement as a tie-breaker (rather than the price representing the bottom of the range) does not change the outcome in the example in footnote 17 above because $10.15 is the price that is closest to either.

clarify without changing the existing rule that Nasdaq shall select price bands for purposes of applying the price validation test in the Cross in connection with a Direct Listing with a Capital Raise. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero. If a security does not pass the price validation test, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.[19] Nasdaq also proposes to clarify that the "actual price," as the term is used in the rule, is the Current Reference Price at the time the system applies the price bands test.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[20] in general, and furthers the objectives of Section 6(b)(5) of the Act,[21] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendment to modify the Pricing Range Limitation is consistent with the protection of investors because this approach is similar to the pricing of an IPO where an issuer is permitted to price outside of the price range

---

19 This function is provided by the underwriter in an IPO and by a Financial Advisor in a Direct Listing. The Commission previously approved Nasdaq performing this function. See Approval Order.

20 15 U.S.C. 78f(b).

21 15 U.S.C. 78f(b)(5).

disclosed by the issuer in its effective registration statement in accordance with the SEC's Staff guidance, as described above.[22] Specifically, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. As a result, Nasdaq will allow the Cross to take place as low as 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement, but no lower, and so this is the minimum price at which the company could be listed. In addition, to better inform investors and market participants, Nasdaq will issue an industry wide circular to inform the participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular whether or not there is an upside limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also

---

22 In a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. See https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921.

remind the market participants that Nasdaq prohibits market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise.

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, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement. Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering. Nasdaq believes that this modification is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market because it will help assure that a company listing in connection with a Direct Listing with a Capital Raise complies with the disclosure requirements under federal securities laws.

Nasdaq believes that the proposal to allow a Direct Listing with a Capital Raise to price above any price above the price range of the company's effective registration statement is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market investors because this approach is similar to that of pricing a traditional IPO. In addition, to protect investors Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will 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 price range established by the issuer in its effective registration statement. Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied. This change will provide investors with notice that the Cross nears execution.

Nasdaq believes that the provision prohibiting market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise is designed to protect investors because this provision will assure that investors only purchase shares at a price that is 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 will use any additional proceeds raised.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise.

These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website such as Nasdaq.com.

To assure that members have the necessary information to be provided to their customers, Nasdaq 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and

(ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

These member requirements are consistent with the protection of investors because they are designed to remind members of its 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.

Nasdaq believes that the Commission Staff has already concluded that pricing up to 20% below the lowest price and at a price above the highest price of the price range in the company's effective registration statement is appropriate for a company conducting an initial public offering notwithstanding it being outside of the range stated in an effective registration statement, and investors have become familiar with this approach at least since the Commission Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.[23] Allowing Direct Listings with a Capital Raise to similarly price up to 20% below the lowest price and at a price above the highest price of the price range in the company's effective registration statement would be consistent with Chair Gensler's recent call to treat "like cases alike."[24]

Nasdaq believes that the proposed amendments to Listing Rule IM-5315-2 and Rules 4753(a)(3)(A) and 4753(b)(2) to conform these rules to the modification of the Pricing Range Limitation is consistent with the protection of investors. These amendments would simply substitute Nasdaq's reliance on the price equal to the lowest

---

23 https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

24 See https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921.

price of the price range disclosed by the issuer in its effective registration statement to the price that is 20% below such lowest price. In the case of Listing Rule IM-5315-2, a company listing in connection with a Direct Listing with a Capital Raise would still need to meet all applicable initial listing requirements based on the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. In the case of the Rules 4753(a)(3)(A) and 4753(b)(2) such price, which is the minimum price at which the Cross will occur, will serve as the fourth tie-breaker where there are multiple prices that would satisfy the conditions for determining the auction price, as described above. Nasdaq believes that this proposal to resolve a potential tie among the prices that satisfy all other requirements in the Cross, by choosing the price that is closest to the price that is 20% below the range, is consistent with Section 6(b)(5) of the Act because it is designed to protect investors by providing them with the most advantageous offering price among possible alternative prices.

Nasdaq also believes that the proposal, by eliminating an impediment to companies using a Direct Listing with a Capital Raise, will help removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.

Finally, Nasdaq believes that the proposal to clarify several provisions of the existing rules without changing them is designed to remove impediments to and perfect the mechanism of a free and open market because such changes make the rules easier to understand and apply without changing their substance.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the

Act. The proposed amendments would not impose any burden on competition, but would rather increase competition. Nasdaq believes that allowing listing venues to improve their rules enhances competition among exchanges. Nasdaq also believes that this proposed change will give issuers interested in this pathway to access the capital markets additional flexibility in becoming a public company, and in that way promote competition among service providers, such as underwriters and other advisors, to such companies.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. ; File No. SR-NASDAQ-2021-045 A-2)

December__, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to modify Certain Pricing limitations for Companies Listing in Connection with a Direct Listing Primary Offering in Which the Company Will Sell Shares Itself in the Opening Auction on the First Day of Trading on Nasdaq

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b-4 thereunder,[2] notice is hereby given that on December 22, 2021, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify certain pricing limitations for companies listing in connection with a Direct Listing primary offering in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq. This Amendment No. 2 supersedes the original filing in its entirety.[3]

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] On December 21, 2021, Nasdaq submitted Amendment No. 1, which was subsequently withdrawn.

The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Summary of Amendment

Nasdaq is filing this amendment to SR-NASDAQ-2021-045[4] in order to address the issues the Commission raised in the OIP and make other modifications to clarify the proposed rule language.

As a preliminary matter, in this Amendment No. 2 (the "Amendment") Nasdaq proposes to clarify how the main provisions of Rules 4120(c)(8)(A) and (c)(9)(A) apply to a Direct Listing with a Capital Raise by restating the provisions of these rule in a clear and direct manner. This change will make the rules easier to understand and apply.

---

4 Securities Exchange Act Release No. 92256 (June 24, 2021), 86 FR 34815 (June 30, 2021) (the "Initial Proposal"). The Commission issued an Order Instituting Proceedings to Determine Whether To Approve or Disapprove the Initial Proposal. See Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021) (the "OIP").

Also in this Amendment, Nasdaq proposes to modify the Initial Proposal to require 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). Nasdaq also proposes to clarify that the price range in the preliminary prospectus included in the effective registration statement must be a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

Nasdaq also proposes to revise the certification process described in the Initial Proposal such that two certifications would be required in certain circumstances. In its initial certification to Nasdaq, which would be publicly disclosed and provided to Nasdaq prior to the beginning of the Display Only Period, the Company must confirm that its registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed or are less than the amount assumed in the price range established by the issuer in its effective registration statement.

Further, Nasdaq proposes to add to the operation of the Cross, in certain circumstances, a Post-Pricing Period. Specifically, if the actual price calculated by the Cross is not at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement, Nasdaq will initiate a brief Post-Pricing Period following the calculation of the actual price. In instances where the Post-Pricing Period is triggered, the issuer must confirm to Nasdaq during the Post-Pricing Period that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The Post-Pricing Period will end and the security will be released for trading immediately after the issuer provides such confirmation to Nasdaq. If the Company cannot provide the required confirmation, Nasdaq will postpone and reschedule the offering.

In the Amendment, Nasdaq proposes to prohibit market orders (other than by the company) from the opening of a Direct Listing with a Capital Raise. In addition, Nasdaq undertakes to disseminate, free of charge, the Current Reference Price, on a public website, such as Nasdaq.com, during the Pre-Launch Period and to indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied.

Nasdaq also proposes in this Amendment to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price by Nasdaq on a public website such as Nasdaq.com.

Nasdaq also proposes to provide that it will 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

Nasdaq also proposes to make minor technical changes to improve the clarity of this proposal. Nasdaq believes that this amendment addresses the issues raised by the Commission in the OIP. This amendment supersedes and replaces the Initial Proposal in its entirety.

Description of Proposed Rule, as Amended

Nasdaq recently adopted Listing Rule IM-5315-2 to permit a company to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a "Direct Listing with a Capital Raise");[5] created a new order type (the "CDL Order"), which is used during the Nasdaq Halt Cross (the "Cross") for the shares offered by the company in a Direct Listing with a Capital Raise; and established requirements for disseminating information, establishing the opening price and initiating trading through the Cross in a Direct Listing with a Capital Raise.[6] For a Direct Listing with a Capital Raise, Nasdaq rules currently require that the actual price calculated by the Cross be 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 (the "Pricing Range Limitation").

Nasdaq now proposes to modify the Pricing Range Limitation such that a Direct Listing with a Capital Raise can be executed in the Cross at a price that is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement.[7] In addition, Nasdaq proposes to modify the Pricing Range Limitation such

---

[5] A Direct Listing with a Capital Raise includes situations 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.

[6] See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (the "Approval Order").

[7] References in this proposal to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement. Separately, as explained in more details below, Nasdaq proposes to prescribe that the 20% threshold will be calculated using the

that a Direct Listing with a Capital Raise can be executed in the Cross at a price above the price that is 20% above the highest price of such price range, provided that the company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed the amount assumed in such price range and the company has publicly disclosed and certified to Nasdaq that the company does not expect that such price would materially change the company's previous disclosure in its effective registration statement. Nasdaq also proposes to make related conforming changes.

Listing Rule IM-5315-2 requires that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Cross, which is described in Rules 4120(c)(9) and 4753. Rule 4120(c)(9) requires that in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade.

Currently, in the case of the Direct Listing with a Capital Raise, a security is not released for trading by Nasdaq unless the actual price calculated by the 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.[8] Specifically, under Rule 4120(c)(9)(B) Nasdaq shall release the security for trading only if: (i) all market orders will be executed

---

high end of the price range in the prospectus at the time of effectiveness and may be measured from either the high end (in the case of an increase in the price) or low end (in the case of a decrease in the price) of that range.

8 See Rule 4120(c)(9)(B).

in the Cross; and (ii) the actual price calculated by the Cross complies with the Pricing Range Limitation. If there is insufficient buy interest to satisfy the CDL Order and all other market orders, as required by the current rule, or if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement, the Cross would not proceed and such security would not begin trading. Nasdaq shall postpone and reschedule the offering only if either or both such conditions are not met. In such event, because the Cross cannot be conducted, the Exchange would postpone and reschedule the offering and notify market 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.

Proposed Change to Rule 4120(c)(9)

While many companies are interested in alternatives to the traditional IPOs, based on conversations with companies and their advisors Nasdaq believes that there may be a reluctance to use the existing Direct Listing with a Capital Raise rules because of concerns about the Pricing Range Limitation.

One potential benefit of a Direct Listing with a Capital Raise as an alternative to a traditional IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, in a Direct Listing with a Capital Raise 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. In that regard, in the Approval Order the Commission stated that:

> The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.[9]

A successful initial public offering of shares requires sufficient investor interest. 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. The Pricing Range Limitation imposed on a Direct Listing with a Capital Raise (but not on a traditional IPO) increases the probability of such a failed offering because the offering cannot proceed without some delay not only for the lack of investor interest, but also if investor interest is greater than the company and its advisors anticipated. In the Approval Order, the Commission noted a frequent academic observation of traditional firm commitment underwritten offerings that the IPO price, established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.[10] Nasdaq believes that the price range in a company's effective registration statement for a Direct

---

[9] See Approval Order, 86 FR at 28177.

[10] See Approval Order, footnote 91.

Listing with a Capital Raise would similarly be determined by the company and its advisors and, therefore, there may be instances of offerings where the price determined by the Nasdaq opening auction will exceed the highest price of the price range in the company's effective registration statement.

As explained above, under the existing rule a security subject to a Direct Listing with a Capital Raise cannot be released for trading by Nasdaq if the actual price calculated by the Cross is above the highest price of the price range established by the issuer in its effective registration statement. In this case, Nasdaq would have to cancel or postpone the offering until the company amends its effective registration statement. At a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event. In addition, as explained above, 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 Nasdaq's view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits.

Accordingly, Nasdaq proposes to modify the Pricing Range Limitation such that in the case of the Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the actual price at which the Cross would occur is at or above the price that is 20% below the lowest price of the price range established by the issuer in its effective registration statement and at or below the price that is 20% above the highest price of the price range. In other words, Nasdaq would release the security for trading, provided all other necessary conditions are satisfied, even if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement; provided however that the actual price cannot be more than 20% below the lowest price or more than 20% above the highest price of such range; and the company specified the quantity of shares registered, as permitted by Securities Act Rule 457, as explained below. In addition, there would be no limitation on releasing the security for trading at a price above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement if the company publicly disclosed and has certified to Nasdaq prior to 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 and the company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement.[11] The goal of the requirement is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.[12]

Nasdaq believes that this approach is consistent with SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which 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

---

11 The price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K.

12 Sensitivity analysis disclosure may include but is not limited to: use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. An example of this disclosure could be: We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes.

company's registration statement.[13] Nasdaq believes such guidance also allows deviation above the price range beyond the 20% threshold if such change or deviation does not materially change the previous disclosure. Accordingly, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. For purposes of this rule, the 20% threshold will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430.

Finally, given that, as proposed, there may be a Direct Listing with a Capital Raise that could price outside the price range of the company's effective registration statement and that there may be no upside limit above which the Cross could not proceed, Nasdaq proposes to enhance price discovery transparency by providing readily available,

---

13 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. Nasdaq 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 also Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

real time pricing information to investors. To that end Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, during the Pre-Launch Period (as described in the Proposal) and indicate whether the Current Reference Price is within the price range established by the issuer in its effective registration statement. Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied. This change will provide investors with notice that the Cross nears execution.

Nasdaq 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. This will assure that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the Company's effective registration statement including the sensitivity analysis describing how the Company will use any additional proceeds raised.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the location of the public website where Nasdaq will disseminate the Current Reference Price.

To assure that members have the necessary information to be provided to their customers, Nasdaq 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

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.

In each instance of a Direct Listing with a Capital Raise, Nasdaq's information circular[14] will inform the market participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular whether or not there is an upside limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also remind the market participants that Nasdaq prohibits market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise.

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, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement. Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for

[14] The Information circular is an industry wide free service provided by Nasdaq.

trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering.

Proposed Conforming Changes to Listing Rule IM-5315-2

Listing Rule IM-5315-2 allows a company that has not previously had its common equity securities registered under the Act to list its common equity securities on the Nasdaq Global Select Market at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange.

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[15] for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement 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).

Listing Rule IM-5315-2 further provides that, for this purpose, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.

Because Nasdaq proposes to allow the opening auction to price up to 20% below the lowest price of the price range established by the issuer in its effective registration

15 See Listing Rules 5005(a)(23) and 5005(a)(45).

statement, Nasdaq proposes to make a conforming change to Listing Rule IM-5315-2 to provide that the price used to determine such company's compliance with the Market Value of Unrestricted Publicly Held Shares is the price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement as this is the minimum price at which the company could qualify to be listed. Nasdaq will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price.

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.[16]

Proposed Conforming Changes to Rules 4753(a)(3)(A) and 4753(b)(2)

Nasdaq proposes to amend Rules 4753(a)(3)(A) and 4753(b)(2) to conform the requirements for disseminating information and establishing the opening price through the 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 price range established by the issuer in its effective registration statement.

---

16 See Listing Rules 5315(f)(1), (e)(1) and (2), respectively. Rule 5315(f)(1) requires a security to have: (A) at least 550 total holders and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or (B) at least 2,200 total holders; or (C) a minimum of 450 round lot holders and at least 50% of such round lot holders must each hold unrestricted securities with a market value of at least $2,500.

Specifically, Nasdaq proposes changes to 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, in the case of a Direct Listing with a Capital Raise and for how the price at which the Cross will execute. These rules currently provide that where there are multiple prices that would satisfy the conditions for determining a 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 price range disclosed by the issuer in its effective registration statement.[17]

To conform these rules to the modification of the Pricing Range Limitation change, as described above, Nasdaq 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 price range disclosed by the issuer in its effective registration statement.[18]

Lastly, Nasdaq proposes to clarify several provisions of the existing rules without changing them. Specifically, Nasdaq proposes to clarify the mechanics of the Cross by specifying that Nasdaq will initiate a 10-minute Display Only Period only after the CDL Order had been entered. This clarification simply states what is already implied by the rule because the Cross and the offering may not proceed without the company's order to

---

[17] To illustrate: The bottom of the range is $10. More than one price exists within the range under the previous set of tie-breakers such that both $10.15 and $10.25, satisfy all other requirements. The operation of the fourth tie-breaker will result in the auction price of $10.15 because it is the price that is closest to $10.

[18] Note that using the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement as a tie-breaker (rather than the price representing the bottom of the range) does not change the outcome in the example in footnote 17 above because $10.15 is the price that is closest to either.

sell the securities in a Direct Listing with a Capital Raise. Similarly, Nasdaq proposes to clarify without changing the existing rule that Nasdaq shall select price bands for purposes of applying the price validation test in the Cross in connection with a Direct Listing with a Capital Raise. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero. If a security does not pass the price validation test, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.[19] Nasdaq also proposes to clarify that the "actual price," as the term is used in the rule, is the Current Reference Price at the time the system applies the price bands test.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[20] in general, and furthers the objectives of Section 6(b)(5) of the Act,[21] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendment to modify the Pricing Range Limitation is consistent with the protection of investors because this approach is similar

---

19 This function is provided by the underwriter in an IPO and by a Financial Advisor in a Direct Listing. The Commission previously approved Nasdaq performing this function. See Approval Order.

20 15 U.S.C. 78f(b).

21 15 U.S.C. 78f(b)(5).

to the pricing of an IPO where an issuer is permitted to price outside of the price range disclosed by the issuer in its effective registration statement in accordance with the SEC's Staff guidance, as described above.[22] Specifically, Nasdaq believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. As a result, Nasdaq will allow the Cross to take place as low as 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement, but no lower, and so this is the minimum price at which the company could be listed. In addition, to better inform investors and market participants, Nasdaq will issue an industry wide circular to inform the participants that the auction could price up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. Nasdaq will also indicate in such circular whether or not there is an upside limit above which the Cross could not proceed, based on the company's certification, as described above. Nasdaq will also

---

22 In a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. See https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921.

remind the market participants that Nasdaq prohibits market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise.

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, Nasdaq proposes to introduce to the operation of the Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Cross is above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement. Specifically, in such circumstances, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation, then Nasdaq will postpone and reschedule the offering. Nasdaq believes that this modification is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market because it will help assure that a company listing in connection with a Direct Listing with a Capital Raise complies with the disclosure requirements under federal securities laws.

Nasdaq believes that the proposal to allow a Direct Listing with a Capital Raise to price above any price above the price range of the company's effective registration statement is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market investors because this approach is similar to that of pricing a traditional IPO. In addition, to protect investors Nasdaq proposes to enhance price discovery transparency by providing readily available, real time pricing information to investors. To that end Nasdaq will 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 price range established by the issuer in its effective registration statement. Nasdaq also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Pre-Launch Period will continue until the Price Volatility Constraint has been satisfied. This change will provide investors with notice that the Cross nears execution.

Nasdaq believes that the provision prohibiting market orders (other than by the Company) from the opening of a Direct Listing with a Capital Raise is designed to protect investors because this provision will assure that investors only purchase shares at a price that is 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 will use any additional proceeds raised.

In addition, to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, Nasdaq proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise.

These rules will require members to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website such as Nasdaq.com.

To assure that members have the necessary information to be provided to their customers, Nasdaq 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 that describes 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, including information about the notice they must provide customers and other Nasdaq rules that:

- require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; and
- require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and

(ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security.

These member requirements are consistent with the protection of investors because they are designed to remind members of its 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.

Nasdaq believes that the Commission Staff has already concluded that pricing up to 20% below the lowest price and at a price above the highest price of the price range in the company's effective registration statement is appropriate for a company conducting an initial public offering notwithstanding it being outside of the range stated in an effective registration statement, and investors have become familiar with this approach at least since the Commission Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.[23] Allowing Direct Listings with a Capital Raise to similarly price up to 20% below the lowest price and at a price above the highest price of the price range in the company's effective registration statement would be consistent with Chair Gensler's recent call to treat "like cases alike."[24]

Nasdaq believes that the proposed amendments to Listing Rule IM-5315-2 and Rules 4753(a)(3)(A) and 4753(b)(2) to conform these rules to the modification of the Pricing Range Limitation is consistent with the protection of investors. These amendments would simply substitute Nasdaq's reliance on the price equal to the lowest price of the price range disclosed by the issuer in its effective registration statement to the

---

23 https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

24 See https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921.

price that is 20% below such lowest price. In the case of Listing Rule IM-5315-2, a company listing in connection with a Direct Listing with a Capital Raise would still need to meet all applicable initial listing requirements based on the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. In the case of the Rules 4753(a)(3)(A) and 4753(b)(2) such price, which is the minimum price at which the Cross will occur, will serve as the fourth tie-breaker where there are multiple prices that would satisfy the conditions for determining the auction price, as described above. Nasdaq believes that this proposal to resolve a potential tie among the prices that satisfy all other requirements in the Cross, by choosing the price that is closest to the price that is 20% below the range, is consistent with Section 6(b)(5) of the Act because it is designed to protect investors by providing them with the most advantageous offering price among possible alternative prices.

Nasdaq also believes that the proposal, by eliminating an impediment to companies using a Direct Listing with a Capital Raise, will help removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.

Finally, Nasdaq believes that the proposal to clarify several provisions of the existing rules without changing them is designed to remove impediments to and perfect the mechanism of a free and open market because such changes make the rules easier to understand and apply without changing their substance.

B. <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments would not impose any burden on competition, but would rather increase competition. Nasdaq believes that allowing listing venues to improve their rules enhances competition among exchanges. Nasdaq also believes that this proposed change will give issuers interested in this pathway to access the capital markets additional flexibility in becoming a public company, and in that way promote competition among service providers, such as underwriters and other advisors, to such companies.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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-2021-045 A-2 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-2021-045 A-2. 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 Web site (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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2021-045 A-2 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier
Assistant Secretary

---

[25] 17 CFR 200.30-3(a)(12).

EXHIBIT 4

Changes to the Proposed Rule Text

Text is marked to show changes to proposed rule language in the original filing. Additions to original filing are double underlined; deletions from original filing are ~~stricken through~~.

The Nasdaq Stock Market Rules

* * * * *

4120. Limit Up-Limit Down Plan and Trading Halts

(a) – (b) No change.

(c) Procedure for Initiating and Terminating a Trading Halt

(1) – (8) No change.

(9) (A) No change.

(B) **Direct Listing with a Capital Raise.** Notwithstanding the provisions of Rules 4120(c)(8)(A) and (c)(9)(A), in the case of a Direct Listing with a Capital Raise (as defined in Listing Rule IM-5315-2)[, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. Nasdaq shall release the security for trading if: (i) all market orders will be executed in the Cross; and, (ii) the actual price calculated by the 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. Nasdaq shall postpone and reschedule the offering only if either or both of such conditions are not met.] a trading halt in a security initiated under Rule 4120(a)(7) shall be terminated when the conditions described in this rule are satisfied and Nasdaq releases the security for trading. 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).

(i) 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, Nasdaq will distribute an information circular to its members that describes 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, including the rules that:

a. require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer;

b. require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security; and

c. require members not to accept market orders to be executed in the Cross and to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a capital raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website, such as Nasdaq.com, as provided by paragraph (v) below.

(ii) Beginning at 4:00 a.m., market participants may enter orders, which will be accepted and entered into the system. Market participants may not enter market orders to buy or sell securities, except for the Company Direct Listing Order (as defined in Rule 4702(b)(16)(A)). Market orders other than the CDL Order will be rejected by the system.

(iii) After 9:30am, at the time determined by Nasdaq, prior to terminating the halt, Nasdaq will initiate a 10-minute Display Only Period, which shall not begin until after the CDL Order has been entered. During the Display Only Period market participants may continue to enter orders in the security in Nasdaq systems.

(iv) At the beginning of the Display Only Period and continuing through the resumption of trading, Nasdaq shall disseminate by electronic means certain information pursuant to Rule 4753(a)(3), including the Current Reference Price, every second.

(v) After the conclusion of the 10-minute Display Only Period, the security will enter a "Pre-Launch Period" of indeterminate duration. Market participants may continue to enter orders and order cancellations for participation in the cross auction during the Pre-Launch Period up to the point that the cross auction process commences. During the Pre-Launch Period, to provide price discovery transparency, Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, and indicate whether it is within the price range established by the issuer in its effective registration statement.

Nasdaq will also disseminate information about whether the Price Volatility Constraint (as defined in paragraph (vii) below) has been satisfied, which indicates that the security may be ready to trade.

(vi) Prior to the conclusion of the Pre-Launch Period, Nasdaq shall select price bands for purposes of applying the price validation test in paragraph (vii)b. below. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero.

(vii) The Pre-Launch Period shall continue until the Price Volatility Constraint has been satisfied. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The failure to satisfy The Price Volatility Constraint or the conditions of this paragraph (vii), below, will result in a delay of the release of the security for trading, and a continuation of the Pre-Launch Period, until all conditions have been satisfied. If a security does not pass the price validation test, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.

The Pre-Launch Period shall end, and the security shall be released for trading (except as provided for by paragraph (viii) below), when Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade and the following conditions are all met:

a. The Nasdaq system determines that the CDL Order will be executed in full in the Cross;

b. the difference between the Expected Price and the actual price calculated by the Cross, if any, is within the price bands previously selected by Nasdaq. The actual price is the Current Reference Price at the time of this test; and

c. 1. the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of such price range; or

2. the actual price calculated by the Cross is at a price above the price that is 20% above the highest price of such price range, provided that the Company has initially certified to Nasdaq and publicly disclosed, prior to beginning of the Display Only Period, that (i) the Company does not expect that a price above the price that is 20% above the highest price of such price range would materially change the Company's previous disclosure in its effective registration statement, (ii) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K and (iii) such registration statement contains a sensitivity analysis explaining how the Company's plans would change if the actual proceeds

from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement.
3. For purposes of paragraphs c.1. and c.2. above, the 20% threshold will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

(viii) a. If the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement, Nasdaq shall postpone and reschedule the pricing of the securities subject to a Direct Listing with a Capital Raise only if the conditions in paragraphs (vii)a. and b., above, are not met.

b. If the actual price calculated by the Cross is above the price that is that is 20% above the highest price of the price range established by the issuer in its effective registration statement and the conditions in paragraphs (vii)a., b., and c., above, are met, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation then Nasdaq will postpone and reschedule the offering.

c. If the actual price calculated by the Cross is below the price that is 20% below the lowest price of the price range established by the issuer in its effective registration statement, pursuant to paragraph (vii), above, Nasdaq will postpone and reschedule the offering.

~~(C) Notwithstanding the requirement in paragraph (B) above that the actual price calculated by the Cross must be 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, Nasdaq will also release the security for trading in the following circumstances, provided that the Company specifies the quantity of shares registered, as permitted by Securities Act Rule 457:~~

~~(i)~~ ~~if the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of such price range; or~~
~~(ii)~~ ~~if the actual price calculated by the Cross is at a price above the~~

~~price that is 20% above the highest price of such price range, provided that the Company has certified to Nasdaq that such price would not materially change the Company's previous disclosure in its effective registration statement.~~

~~For purposes of this paragraph (C), the 20% threshold will be calculated using the high end of the price range in the prospectus at the time of effectiveness and will be measured from either the high end (in the case of an increase in the price) or low end (in the case of a decrease in the price) of that range.~~

(10) No change.

* * * * *

4753. Nasdaq Halt Cross

(a) Definitions.

For the purposes of this rule the term:

(1) – (2) No change.

(3) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) "Current Reference Price" shall mean:

(i) – (iii) No change.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean:

a. – b. No change.

c. In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to <u>the price that is 20% below</u> the lowest price of the price range disclosed by the issuer in its effective registration statement;

d. - f. No change.

Notwithstanding the foregoing, the Order Imbalance Indicator will not include the Current Reference Price if there is a Market Order Imbalance.

(B) – (G) No change.

(4) – (6) No change.

(b) Processing of Nasdaq Halt Cross. For Nasdaq-listed securities that are the subject of a trading halt or pause initiated pursuant to Rule 4120(a)(1), (4), (5), (6), (7) or (11), the Nasdaq Halt Cross shall occur at the time specified by Nasdaq pursuant to Rule 4120, and Market hours trading shall commence when the Nasdaq Halt Cross concludes.

(1) No change.

(2)

(A) – (C) No change.

(D) If more than one price exists under subparagraph (C), the Nasdaq Halt Cross shall occur at:

(i) - (ii) No change.

(iii) In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement;

(iv) - (vi) No change.

(E) No change.

(3) – (4) No change.

(c) – (d) No change.

* * * * *

IM-5315-2. Determination of Price-Based Requirements for Direct Listings with a Capital Raise

As described in Listing Rule IM-5315-1, Nasdaq recognizes that some companies that have sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing, may wish to list those securities on Nasdaq. Such companies may list on the Nasdaq Global Select Market without an attendant initial public offering of equity securities by the Company if the Company meets the applicable initial listing requirements and the additional requirements in Listing Rule IM-5315-1.

In addition, in certain cases, a Company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders. Any such listing is referred to as a "Direct Listing with a Capital Raise" 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.

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).

In determining whether such a Company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement 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, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq will determine that the Company has met the applicable bid price and market capitalization requirements based on the same per share price.

Securities qualified for listing under this IM-5315-2 must satisfy the additional requirements of Rule 4120(c)(9)(B) and begin trading on Nasdaq following the initial pricing through the mechanism outlined in Rule 4120(c)(9)(B) and Rule 4753.

* * * * *

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market Rules

* * * * *

4120. Limit Up-Limit Down Plan and Trading Halts

(a) – (b) No change.

(c) Procedure for Initiating and Terminating a Trading Halt

(1) – (8) No change.

(9) (A) No change.

(B) **Direct Listing with a Capital Raise.** Notwithstanding the provisions of Rules 4120(c)(8)(A) and (c)(9)(A), in the case of a Direct Listing with a Capital Raise (as defined in Listing Rule IM-5315-2)[, for purposes of releasing securities for trading on the first day of listing, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. Nasdaq shall release the security for trading if: (i) all market orders will be executed in the Cross; and, (ii) the actual price calculated by the 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. Nasdaq shall postpone and reschedule the offering only if either or both of such conditions are not met.] a trading halt in a security initiated under Rule 4120(a)(7) shall be terminated when the conditions described in this rule are satisfied and Nasdaq releases the security for trading. 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).

(i) 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, Nasdaq will distribute an information circular to its members that describes 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, including the rules that:

a. require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer;

b. require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security; and

c. require members not to accept market orders to be executed in the Cross and to provide to a customer, before that customer places an order to be executed in the Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a capital raise in the Cross, including information regarding the dissemination of the Current Reference Price on a public website, such as Nasdaq.com, as provided by paragraph (v) below.

(ii) Beginning at 4:00 a.m., market participants may enter orders, which will be accepted and entered into the system. Market participants may not enter market orders to buy or sell securities, except for the Company Direct Listing Order (as defined in Rule 4702(b)(16)(A)). Market orders other than the CDL Order will be rejected by the system.

(iii) After 9:30am, at the time determined by Nasdaq, prior to terminating the halt, Nasdaq will initiate a 10-minute Display Only Period, which shall not begin until after the CDL Order has been entered. During the Display Only Period market participants may continue to enter orders in the security in Nasdaq systems.

(iv) At the beginning of the Display Only Period and continuing through the resumption of trading, Nasdaq shall disseminate by electronic means certain information pursuant to Rule 4753(a)(3), including the Current Reference Price, every second.

(v) After the conclusion of the 10-minute Display Only Period, the security will enter a "Pre-Launch Period" of indeterminate duration. Market participants may continue to enter orders and order cancellations for participation in the cross auction during the Pre-Launch Period up to the point that the cross auction process commences. During the Pre-Launch Period, to provide price discovery transparency, Nasdaq will disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, and indicate whether it is within the price range established by the issuer in its effective registration statement. Nasdaq will also disseminate information about whether the Price Volatility Constraint (as defined in paragraph (vii) below) has been satisfied, which indicates that the security may be ready to trade.

(vi) Prior to the conclusion of the Pre-Launch Period, Nasdaq shall select price bands for purposes of applying the price validation test in paragraph (vii)b. below. Under the price validation test, the System compares the Expected Price with the actual price calculated by the Cross to ascertain that the difference, if any, is within the price bands. Nasdaq shall select an upper price band and a lower price band. The default for an upper and a lower price band is set at zero.

(vii) The Pre-Launch Period shall continue until the Price Volatility Constraint has been satisfied. The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The failure to satisfy The Price Volatility Constraint or the conditions of this paragraph (vii), below, will result in a delay of the release of the security for trading, and a continuation of the Pre-Launch Period, until all conditions have been satisfied. If a security does not pass the price validation test, Nasdaq may, but is not required to, select different price bands before recommencing the process to release the security for trading.

The Pre-Launch Period shall end, and the security shall be released for trading (except as provided for by paragraph (viii) below), when Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade and the following conditions are all met:

a. The Nasdaq system determines that the CDL Order will be executed in full in the Cross;

b. the difference between the Expected Price and the actual price calculated by the Cross, if any, is within the price bands previously selected by Nasdaq. The actual price is the Current Reference Price at the time of this test; and

c. 1. the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of such price range; or

2. the actual price calculated by the Cross is at a price above the price that is 20% above the highest price of such price range, provided that the Company has initially certified to Nasdaq and publicly disclosed, prior to beginning of the Display Only Period, that (i) the Company does not expect that a price above the price that is 20% above the highest price of such price range would materially change the Company's previous disclosure in its effective registration statement, (ii) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K and (iii) such registration statement contains a sensitivity analysis explaining how the Company's plans would change if the actual proceeds from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement.

3. For purposes of paragraphs c.1. and c.2. above, the 20% threshold will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

(viii) a. If the actual price calculated by the Cross is at or above the price that is 20% below the lowest price and at or below the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement, Nasdaq shall postpone and reschedule the pricing of the securities subject to a Direct Listing with a Capital Raise only if the conditions in paragraphs (vii)a. and b., above, are not met.

b. If the actual price calculated by the Cross is above the price that is that is 20% above the highest price of the price range established by the issuer in its effective registration statement and the conditions in paragraphs (vii)a., b., and c., above, are met, Nasdaq will initiate a Post-Pricing Period following the calculation of the actual price. During the Post-Pricing Period the issuer must confirm to Nasdaq that no additional disclosures are required under federal securities laws based on the actual price calculated by the Cross. During the Post-Pricing Period no additional orders for the security may be entered in the Cross and no existing orders in the Cross may be modified. The security shall be released for trading immediately following the Post-Pricing Period. If the Company cannot provide the required confirmation then Nasdaq will postpone and reschedule the offering.

c. If the actual price calculated by the Cross is below the price that is 20% below the lowest price of the price range established by the issuer in its effective registration statement, pursuant to paragraph (vii), above, Nasdaq will postpone and reschedule the offering.

(10) No change.

* * * * *

4753. Nasdaq Halt Cross

(a) Definitions.

For the purposes of this rule the term:

(1) – (2) No change.

(3) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) "Current Reference Price" shall mean:

(i) – (iii) No change.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean:

a. – b. No change.

c. In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to <u>the price that is 20% below </u>the lowest price of the price range disclosed by the issuer in its effective registration statement;

d. - f. No change.

Notwithstanding the foregoing, the Order Imbalance Indicator will not include the Current Reference Price if there is a Market Order Imbalance.

(B) – (G) No change.

(4) – (6) No change.

(b) Processing of Nasdaq Halt Cross. For Nasdaq-listed securities that are the subject of a trading halt or pause initiated pursuant to Rule 4120(a)(1), (4), (5), (6), (7) or (11), the Nasdaq Halt Cross shall occur at the time specified by Nasdaq pursuant to Rule 4120, and Market hours trading shall commence when the Nasdaq Halt Cross concludes.

(1) No change.

(2)

(A) – (C) No change.

(D) If more than one price exists under subparagraph (C), the Nasdaq Halt Cross shall occur at:

(i) - (ii) No change.

(iii) In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to <u>the price that is 20% below </u>the lowest price of the price range disclosed by the issuer in its effective registration statement;

(iv) - (vi) No change.

(E) No change.

(3) – (4) No change.

(c) – (d) No change.

* * * * *

IM-5315-2. Determination of Price-Based Requirements for Direct Listings with a Capital Raise

As described in Listing Rule IM-5315-1, Nasdaq recognizes that some companies that have sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing, may wish to list those securities on Nasdaq. Such companies may list on the Nasdaq Global Select Market without an attendant initial public offering of equity securities by the Company if the Company meets the applicable initial listing requirements and the additional requirements in Listing Rule IM-5315-1.

In addition, in certain cases, a Company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders. Any such listing is referred to as a "Direct Listing with a Capital Raise" 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.

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).

In determining whether such a Company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement 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, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the price that is 20% below the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq will determine that the Company has met the applicable bid price and market capitalization requirements based on the same per share price.

Securities qualified for listing under this IM-5315-2 must satisfy the additional requirements of Rule 4120(c)(9)(B) and begin trading on Nasdaq following the initial pricing through the mechanism outlined in Rule 4120(c)(9)(B) and Rule 4753.

* * * * *