

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90717; File No. SR-NASDAQ-2020-057)

December 17, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Allow Companies to List in Connection with a Direct Listing with a Primary Offering In Which the Company Will Sell Shares Itself In the Opening Auction on the First Day of Trading on Nasdaq and to Explain How the Opening Transaction for Such a Listing Will be Effected

I. Introduction

On September 4, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to allow companies 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 and to explain how the opening transaction for such a listing will be effected. The proposed rule change was published for comment in the Federal Register on September 21, 2020.³ On November 4, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020) (“Notice”). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057.htm>.

⁴ 15 U.S.C. 78s(b)(2).

the proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

Listing Rule IM-5315-1 provides additional listing requirements for listing a company that has not previously had its common equity securities registered under the Exchange Act on the Nasdaq Global Select Market at the time of effectiveness of a registration statement⁷ filed solely for the purpose of allowing existing shareholders to sell their shares (a “Selling Shareholder Direct Listing”). To allow a company to also sell shares on its own behalf in connection with its initial listing upon effectiveness of a registration statement, without a traditional underwritten public offering, the Exchange has proposed to adopt Listing Rule IM-5315-2. This proposed rule would allow a company that has not previously had its common equity securities registered under the Exchange 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 (a “Direct Listing with a Capital Raise”).⁸

⁵ See Securities Exchange Act Release No. 90331 (November 4, 2020), 85 FR 71708 (November 10, 2020). The Commission designated December 20, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).

⁸ See proposed IM-5315-2. A Direct Listing with a Capital Raise would include listings where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction. See *id.* The Commission notes that while the Exchange’s current rules also permit Selling Shareholder Direct Listings on the Nasdaq Global Market and Nasdaq Capital Market (see IM-5405-1 and IM-5505-1), the current

In considering a Selling Shareholder Direct Listing, Listing Rule IM-5315-1 currently provides that the Exchange will determine that such company has met the applicable Market Value of Unrestricted Publicly Held Shares⁹ requirements based on the lesser of: (i) an independent third party valuation of the company (a “Valuation”);¹⁰ and (ii) the most recent trading price for the company’s common stock in a Private Placement Market¹¹ where there has been sustained recent trading. For a security that has not had sustained trading in a Private Placement Market prior to listing, the Exchange will determine that such company has met the Market Value of Unrestricted Publicly Held Shares requirement if the company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement and provides a Valuation evidencing a Market Value of Publicly Held Shares of at least \$250,000,000.

With respect to a Direct Listing with a Capital Raise, the Exchange has proposed that, in determining whether a company satisfies the Market Value of Unrestricted Publicly Held Shares requirement for initial listing on the Nasdaq Global Select Market, the Exchange will deem such

proposal would only provide for a Direct Listing with a Capital Raise on the Nasdaq Global Select Market.

⁹ “Restricted Securities” means securities that are subject to resale restrictions for any reason, including, but not limited to, securities: (1) acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S, which cannot be resold within the United States; (4) subject to a lockup agreement or a similar contractual restriction; or (5) considered “restricted securities” under Rule 144. See Rule 5005(a)(37). “Unrestricted Securities” means securities that are not Restricted Securities. See Rule 5005(a)(46). “Unrestricted Publicly Held Shares” means the Publicly Held Shares that are Unrestricted Securities. See Rule 5005(a)(45). See also Rule 5005(a)(23) and (35) for definitions of “Market Value” and “Publicly Held Shares.”

¹⁰ IM-5315-1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

¹¹ The Exchange defines “Private Placement Market” in Listing Rule 5005(a)(34) as a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer.

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 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).¹² The Exchange has proposed to calculate the Market Value of Unrestricted Publicly Held Shares, for this purpose, 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 registration statement.¹³ The Exchange also proposes to determine whether the company has met the applicable bid price and market capitalization requirements based on the same share price.¹⁴

The Exchange states that, except as proposed for a Direct Listing with a Capital Raise, its listing rules generally do not include shares held by officers, directors, or owners of more than 10% of the company's common stock in calculations of Publicly Held Shares.¹⁵ In qualifying

¹² See proposed IM-5315-2.

¹³ See proposed IM-5315-2. The Exchange states that, for example, if the company is selling five million shares in the opening auction and there are 45 million shares issued and outstanding immediately prior to the listing that are eligible for inclusion as Unrestricted Publicly Held Shares based on disclosure in the company's registration statement, then the Exchange would calculate the Market Value of Unrestricted Publicly Held Shares based on a combined total of 50 million shares. If the lowest price of the price range disclosed in the company's registration statement is \$10 per share, the Exchange will attribute to the company a Market Value of Unrestricted Publicly Held Shares of \$400 million, based on an \$8 price per share, which is 20% below the bottom of the disclosed range. See Notice, supra note 3, 85 FR at 59350, n.7. The Exchange also states that, as described below, the opening auction would not execute at a price that is more than 20% below the bottom of the disclosed range, so this is the minimum price at which the company could list in connection with a Direct Listing with a Capital Raise. See Notice, supra note 3, 85 FR at 59350, n.6.

¹⁴ See proposed IM-5315-2.

¹⁵ See Notice, supra note 3, 85 FR at 59350. The Exchange states that these types of inside investors may purchase shares sold by the company in the opening auction, and purchase shares sold by other shareholders or sell their own shares in the opening auction and in

companies for listing in a Direct Listing with a Capital Raise, however, such officers, directors and owners of 10% or more of the company's common stock will be included in determining whether the company meets the Market Value of Publicly Held Shares requirement. According to the Exchange, such investors may acquire in secondary market trades shares sold by the issuer in a Direct Listing with a Capital Raise that were included when calculating whether the issuer meets the Market Value of Unrestricted Publicly Held Shares requirement for initial listing.¹⁶ The Exchange states, however, that a company listing in conjunction with a Direct Listing with a Capital Raise will be required to have a Market Value of Unrestricted Publicly Held Shares that is much higher than the Exchange's \$45 million Market of Unrestricted Publicly Held Shares requirement that applies to a traditional underwritten initial public offering ("IPO").¹⁷ The Exchange further states that this heightened requirement, along with the ability of all investors to purchase shares in the opening process on the Exchange, should result in companies using a Direct Listing with a Capital Raise having adequate public float and a liquid trading market after completion of the opening auction.¹⁸

trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. See id.

¹⁶ See Notice, supra note 3, 85 FR at 59350. The Exchange states that it expects that a company expecting to sell a significant portion of its shares to officers, directors, and existing significant shareholders would not undertake a public listing through a Direct Listing with a Capital Raise. See id. at 59352.

¹⁷ See Notice, supra note 3, 85 FR at 59350. The Exchange also states that, unlike a company listing in connection with a Selling Shareholder Direct Listing that could qualify for the price-based initial listing requirements based on a Valuation, a company listing in connection with a Direct Listing with a Capital Raise, like an IPO, must qualify for such requirements based on the minimum price at which it could sell shares in the offering. See id. at 59352.

¹⁸ See Notice, supra note 3, 85 FR at 59350.

The Exchange also states that it believes that it is consistent with the protection of investors to calculate the security's bid price and values derived from the security's price 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 registration statement.¹⁹ According to the Exchange, Commission rules and interpretations generally allow the sale of securities pursuant to an effective registration statement at a price that is 20% below the lowest price of the price range disclosed by the issuer in its registration statement.²⁰ The Exchange states that, as a result, the Exchange will allow the opening auction, otherwise known as the Nasdaq Halt Cross,²¹ to take place at a price as low as this price, but no lower, and so this is the minimum price at which a company could be listed.²²

The Exchange states that any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to, and be required to meet, all other applicable initial listing requirements. According to the Exchange, this would include 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.²³

¹⁹ See Notice, supra note 3, 85 FR at 59352.

²⁰ See Notice, supra note 3, 85 FR at 59352.

²¹ "Nasdaq Halt Cross" means the process for determining the price at which Eligible Interest shall be executed at the open of trading for a halted security and for executing that Eligible Interest. See Rule 4753(a)(4). "Eligible Interest" means any quotation or any order that has been entered into the system and designated with a time-in-force that would allow the order be in force at the time of the Halt Cross. See Rule 4753(a)(5). Pursuant to Rule 4120, the Exchange will halt trading in a security that is the subject of an IPO (or direct listing), and terminate that halt when the Exchange releases the security for trading upon certain conditions being met, as discussed further below. See Rule 4120(a)(7) and (c)(8).

²² See Notice, supra note 3, 85 FR at 59352.

²³ See Notice, supra note 3, 85 FR at 59351 (citing Rules 5315(e)(1) and (2), and 5315(f)).

In addition, the Exchange has proposed to amend Rule 4702 to add a new order type, the “Company Direct Listing Order” or “CDL Order,” which would be used by the issuer in a Direct Listing with a Capital Raise. This would be a market order entered for the quantity of shares offered by the issuer, as disclosed in an effective registration statement for the offering, that will execute at the price determined in the Nasdaq Halt Cross.²⁴ A CDL Order may be entered only on behalf of the issuer and the CDL Order may not be cancelled or modified. Only one Nasdaq member, representing the issuer, may enter a CDL Order during a Direct Listing with a Capital Raise. The CDL Order must be executed in full at the price determined in the Nasdaq Halt Cross, and all orders priced better than the price determined in the Nasdaq Halt Cross also would need to be satisfied.²⁵

The Exchange has proposed that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on the Exchange following the initial pricing through the Nasdaq Halt Cross, which is described in Rules 4120(c)(8) and Rule 4753. The Exchange further has proposed that, to allow such initial pricing, the company must, in accordance with Rule 4120(c)(9), have a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed, who is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an IPO.²⁶ The Exchange states that the requirement

²⁴ See proposed Rule 4702(b)(16)(A) and (B).

²⁵ See proposed Rule 4702(a)(16)(A); Notice, supra note 3, 85 FR at 59351.

²⁶ See proposed IM-5315-2. Rule 4120(c)(9) states that the process for halting and initial pricing of a security that is subject to an IPO is also available for the initial pricing of any other security that has not been listed on a national security exchange immediately prior to the initial pricing, if a broker-dealer serving in the role of financial to the issuer is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an IPO, and if more than one broker-dealer is serving in the role of financial advisor, the issuer must designate one to perform these functions. The

that the company begin trading of the company's securities following the initial pricing through the Nasdaq Halt Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of securities covered by the proposal.²⁷ In addition, the Exchange has proposed to amend Rule 4120(c)(9) to specify that any services provided by such financial advisor to the issuer of a security, including a company listing in connection with a Direct Listing with a Capital Raise, must provide such services in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.²⁸

With respect to the Nasdaq Halt Cross, the Exchange has proposed that, in the case of a Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the expected price at which the cross would occur (as defined in Rule 4120(c)(8)(A)(i)) 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.²⁹ This requirement would be in addition to the existing conditions described in Rule 4120(c)(8)(A)(i), (ii), and (iii), which would continue to apply.³⁰ The Exchange notes that, unlike in an IPO, a company listing through a Direct Listing with a Capital Raise would not have an underwriter to guarantee that a specified number of shares would be sold by the company at a price consistent with disclosure in the company's effective

Exchange proposes to renumber this provision as Rule 4120(c)(9)(A). See proposed Rule 4120(c)(9)(A).

²⁷ See Notice, supra note 3, 85 FR at 59352.

²⁸ See proposed Rule 4120(c)(9)(A).

²⁹ See proposed Rule 4120(c)(9)(B).

³⁰ Rule 4120(c)(8)(A) provides that a security will not be released for trading until Nasdaq receives notice from the underwriter of the IPO or financial advisor in the case of a Direct Listing that the security is ready to trade, the system verifies that all market orders will be executed in the cross, and the price determined in the cross satisfies a price validation test.

registration statement. However, the Exchange asserts that this would be achieved through the proposed requirements that (1) the Nasdaq Halt Cross occur only if the CDL Order, which must be equal to the total number of shares disclosed as being offered by the company in the effective registration statement, is executed in full, and (2) the Nasdaq Halt Cross occur at a price per share no less than 20% below the lowest price of the price range disclosed by the issuer in its registration statement.³¹

The Exchange states that, because the financial advisor would be responsible for determining when the security subject to the Nasdaq Halt Cross is ready to trade, the proposal would make the financial advisor responsible for determining whether the Nasdaq Halt Cross for a Direct Listing with a Capital Raise can proceed.³² According to the Exchange, if there is insufficient buy interest to satisfy the CDL Order as required by the proposal, the Nasdaq Halt Cross would not proceed and such security would not begin trading.³³ The Exchange represents that, if the Nasdaq Halt Cross cannot be conducted, the Exchange would notify market participants via a Trader Update that the Direct Listing with a Capital Raise has been cancelled and any orders for that security that had been entered on the Exchange, including the CDL Order, would be cancelled back to the entering firms.³⁴ The Exchange further states that, because the CDL Order will be a market order, if the Nasdaq Halt Cross proceeds, that order will execute in full in the Nasdaq Halt Cross, along with orders priced at or better than the price determined in the Nasdaq Halt Cross.³⁵ The Exchange notes that, while the Nasdaq Halt Cross would not

³¹ See Notice, supra note 3, 85 FR at 59352.

³² See Notice, supra note 3, 85 FR at 59351.

³³ See Notice, supra note 3, 85 FR at 59351.

³⁴ See Notice, supra note 3, 85 FR at 59351.

³⁵ See Notice, supra note 3, 85 FR at 59351.

proceed if the price calculated is 20% or more below the lowest price disclosed by the company in its effective registration statement, there would be no upper limit to the price determined in the Nasdaq Halt Cross.³⁶

Finally, the Exchange has proposed to make adjustments to how it would calculate the Current Reference Price, which is disseminated in the Nasdaq Order Imbalance Indicator, and the price at which the Nasdaq Halt Cross would execute, for a Direct Listing with a Capital Raise.³⁷ In each case, where there are multiple prices that would satisfy the conditions for determining the price, the Exchange would modify the fourth tie-breaker for a Direct Listing with a Capital Raise to use 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.³⁸

III. Summary of Comment Letters Received

One commenter recommended that the Commission disapprove the proposal because it believes that the proposed expansion of direct listings would compound problems that shareholders face in tracing their share purchases to a registration statement and may lead to a decline in effective governance at U.S. public companies.³⁹ The commenter stated that

³⁶ See Notice, supra note 3, 85 FR at 59351.

³⁷ See Rule 4853(a)(3) for a description of the “Current Reference Price” and “Order Imbalance Indicator.”

³⁸ See proposed Rule 4753(a)(3)(A)(iv)(c) and (b)(2)(D)(iii). The Exchange states that the fourth tie-breaker used to calculate the Current Reference Price for an IPO is the price that is closest to the issuer’s IPO price, and that a Direct Listing with a Capital Raise is similar to an IPO in that the company sells securities in the offering. See Notice, supra note 3, 85 FR at 59352. The Exchange also proposes non-substantive changes to renumber the other alternatives for the fourth tie-breaker. See proposed Rule 4753(a)(3)(A)(iv) and (b)(2)(D).

³⁹ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, at 2, 4 (October 8, 2020) (“CII Letter”). The commenter stated that on September 25, 2020, the Commission issued an order granting the Council of Institutional Investors’ petition for review of an order, issued by delegated authority, granting approval of a

traceability concerns often arise when there have been successive offerings, as shareholders seek to establish their standing to litigate claims for material misstatements or omissions under federal securities law.⁴⁰ The commenter stated that investor concerns about the traceability of shares in a direct listing were drawn into sharp focus in current litigation involving a direct listing by Slack Technologies, Inc. (“Slack”), which is still under consideration.⁴¹ The commenter further stated that, independent of the Slack case, the Exchange’s proposal raises important investor issues that the Commission should consider before opening U.S. capital markets up to the potential for a vastly increased number of direct listings.⁴² The commenter urged the Commission to explore updating its “proxy plumbing” regulations before approving an expanded direct listings regime.⁴³

proposed rule change by the New York Stock Exchange LLC relating to a proposed direct listing with a primary offering (“NYSE Proposal”). See id. at 1–2. See also Securities Exchange Act Release No. 90001 (September 25, 2020), 85 FR 61793 (September 30, 2020) (SR-NYSE-2019-67) (Order Granting Petition for Review, Scheduling Filing of Statements, and Denying New York Stock Exchange LLC’s Motion to Lift the Stay). This commenter stated that the Exchange’s current proposal is similar to the NYSE Proposal and cites its petition for review of the NYSE Proposal as further support for its recommendation that the Commission disapprove the Exchange’s proposal. See CII Letter, at 1–2 (citing Petition of Council of Institutional Investors for Review of an Order, Issued by Delegated Authority, Granting Approval of a Proposed Rule (September 8, 2020), available at <https://www.sec.gov/rules/sro/nyse/2020/34-89684-petition.pdf>).

⁴⁰ See CII Letter, supra note 39, at 2–3.

⁴¹ See CII Letter, supra note 39, at 3. The commenter stated with respect to this case that while the district court denied a motion to dismiss a Section 11 claim on the grounds that the plaintiff could not trace its purchases to Slack’s registration statement, the court of appeals has agreed to hear the matter on an interlocutory basis, so it is unclear whether the district court case will be upheld. See id. See also Pirani v. Slack Technologies, Inc., No. 20-16419 (9th Cir. July 23, 2020), Docket No. 1.

⁴² See CII Letter, supra note 39, at 3.

⁴³ See CII Letter, supra note 39, at 4.

In addition, this commenter stated that it is concerned that the Exchange's proposal would result in a significant increase in the use of direct listings, and that more direct listings may lead to a decline in the effective corporate governance of U.S. public companies to the detriment of long-term investors and the capital markets generally.⁴⁴ The commenter stated that a recent direct listing of Palantir Technologies Inc. had a dual-class structure that is viewed by many market participants as inconsistent with effective governance.⁴⁵

Another commenter simply stated support for the proposed method of opening the transaction.⁴⁶

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2020-057 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the proposal should be approved or disapproved.⁴⁷ Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency

⁴⁴ See CII Letter, supra note 39, at 4.

⁴⁵ See CII Letter, supra note 39, at 5.

⁴⁶ See Letter from Rahul Chaudhary (October 13, 2020).

⁴⁷ 15 U.S.C. 78s(b)(2)(B).

with the Exchange Act⁴⁸ and, in particular, with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.⁴⁹

The Commission has consistently recognized the importance of exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.⁵⁰

The Exchange proposal states that for a Direct Listing with a Capital Raise, the Nasdaq Halt Cross on the first day of trading for the security would not proceed unless the price would

⁴⁸ 15 U.S.C. 78f(b)(5).

⁴⁹ Id.

⁵⁰ The Commission has stated in approving exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., Securities Exchange Act Release Nos. 82627 (February 2, 2018), 83 FR 5650, 5653, n.53 (February 8, 2018) (SR-NYSE-2017-30) ("NYSE 2018 Order"); 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., NYSE 2018 Order, 83 FR at 5653, n.53; Securities Exchange Act Release Nos. 87648 (December 3, 2019), 84 FR 67308, 67314, n.42 (December 9, 2019) (SR-NASDAQ-2019-059); 88716 (April 21, 2020), 85 FR 23393, 23395, n.22 (April 27, 2020) (SR-NASDAQ-2020-001).

be 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.⁵¹ The proposal, however, has no maximum price above which the Nasdaq Halt Cross may not proceed.⁵² Therefore, the proposed rule would permit issuers to sell, in the opening, the quantity of shares disclosed as offered in the prospectus included in the effective registration statement at a price that is above the price range disclosed in the effective registration statement. As there is no proposed upside limit on the price at which the opening auction could occur, it is not clear how the issuer could ensure that the issuer's Securities Act registration statement covers the full amount of securities to be sold in the offering.⁵³ Although issuers may file additional Securities Act registration statements to register additional securities needed to complete an offering, Section 5 of the Securities Act requires all of the related registration statements to be effective prior to the time of sale. To the extent Nasdaq's proposal may result in issuers needing to register additional securities beyond those included in an initial Securities Act registration statement, it is not apparent how an issuer could ensure that any additional required registration statement would be effective prior to the time of opening. Nor is it apparent how an issuer would be able to determine whether an additional Securities Act registration statement would be required before the opening occurs. Thus, we have concerns that Nasdaq's proposed rule may not provide adequate safeguards to ensure that issuers conducting a Direct Listing with a Capital Raise are able to comply with Section 5 of the

⁵¹ See supra note 29 and accompanying text.

⁵² See supra note 36 and accompanying text.

⁵³ 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, pursuant to Rule 457(o). For issuers that register securities based on the proposed maximum aggregate offering amount, it is not clear how the issuer could ensure that the total amount sold by the issuer in the opening auction does not exceed the amount of securities registered under the Securities Act.

Securities Act. The Exchange has not explained how this would be consistent with the investor protection requirements under Section 6(b)(5) and other relevant provisions of the Exchange Act.

In addition, the Exchange states that “investors know the minimum price at which the company can sell shares in the offering.”⁵⁴ The Exchange has not explained how investors would know that price, as the opening could occur if the price obtained in the Nasdaq Halt Cross is up to 20% below the price range disclosed by the issuer in its effective registration statement.

Further, the Exchange asserts, throughout its proposal, that the Nasdaq Halt Cross will not occur at a price lower than 20% below the low end of the issuer’s disclosed price range, but it is unclear from the Exchange’s rules that this would always be the case. Specifically, proposed Rule 4120(c)(9)(B) states that the security will not be released for trading unless “the Expected Price is at or above the price that is 20% below the lowest price of the price range established” in the effective registration statement.⁵⁵ Rule 4120(c)(8), however, appears to permit the underwriter or financial advisor to select price bands of up to \$0.50 outside of the Expected Price, and provide that the Nasdaq system would view the price validation test as having been passed and permit the security to be released for trading, so long as the actual price calculated by the cross differs from the Expected Price by no more than the price band.⁵⁶ The Exchange has not explained this apparent inconsistency in its rules.

⁵⁴ Notice, supra note 3, 85 FR at 59350.

⁵⁵ “Expected Price” under Rule 4120(c)(8)(A)(i) means the Current Reference Price at the time the Exchange receives notice that the security is ready to trade from an underwriter or financial advisor.

⁵⁶ Under Nasdaq Rule 4120(c)(8)(B) a financial advisor in a Direct Listing with a Capital Raise would select “price bands” that are defined as the amounts by which the actual price may not be lower, or higher, than the Expected Price. The rule states that available price bands, set by Nasdaq, shall include \$0 but shall not be in excess of \$0.50. Under the proposal, the financial advisor in a Direct Listing with a Capital Raise is not restricted from selecting price bands in accordance with Rule 4120(c)(8)(B).

Finally, although the Exchange has proposed that the CDL Order may not be cancelled or modified, the Exchange's rules appear to permit the issuer's financial advisor broad discretion to postpone the offering, which would effectively cancel the CDL Order. Specifically, Rule 4120(c)(8) provides that the validation needed to open the security only occurs after the Expected Price is displayed to the financial advisor and the financial advisor then approves proceeding. Rule 4120(c)(8) also permits the financial advisor, with the concurrence of Nasdaq, to determine at any point during the Nasdaq Halt Cross process up through the conclusion of the pre-launch period to postpone and reschedule the offering. The financial advisor therefore could effectively "cancel" the CDL Order, on behalf of the issuer, by deciding not to proceed with the offering for a variety of reasons, including being dissatisfied with the Expected Price. The Exchange has not explained why its rules appear to allow the financial advisor this discretion in the case of a Direct Listing with a Capital Raise, or why doing so would be consistent with Section 6(b)(5) and other relevant provisions of the Exchange Act.

The Commission notes that, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the self-regulatory organization ['SRO'] that proposed the rule change."⁵⁷ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁵⁸ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make

⁵⁷ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁵⁸ See id.

an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.⁵⁹

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act⁶⁰ to determine whether the proposal should be approved or disapproved.

V. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁶¹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's

⁵⁹ See id.

⁶⁰ 15 U.S.C. 78s(b)(2)(B).

⁶¹ Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2020-057 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-2020-057. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying

information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2020-057 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶²

J. Matthew DeLesDernier,
Assistant Secretary.

⁶² 17 CFR 200.30-3(a)(57).