

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94592; File No. SR-NASDAQ-2022-027)

April 4, 2022

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 with a Capital Raise

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 March 21, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II 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 with a Capital Raise in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In 2021, Nasdaq 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”);³ 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.⁴ 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 Limitation⁵ such that, provided other requirements are satisfied, a Direct Listing with a Capital Raise can also be executed in the Cross

³ 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.

⁴ See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (the “Approval Order”).

⁵ On February 24, 2022, the Commission issued an order disapproving a similar proposal by Nasdaq. Securities Exchange Act Release No. 94311 (February 24, 2022), 87 FR

at a price that is at or above the price that is as low as 20% below the lowest price in the price range established by the issuer in its effective registration statement;⁶ or at a price above the highest price of such price range. Specifically, to execute at a price outside of the price range, the company's registration statement must contain a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering were less than or exceeded the amount assumed in such price range 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.

Current Direct Listing with a Capital Raise Requirements

Currently, 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 4753.⁷

Currently, in addition to pricing within the Pricing Range Limitation,⁸ 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. In addition, under Rule 4120(c)(9)(B) Nasdaq will release the security for trading only if all market orders

11780 (March 2, 2022) (the "Disapproval Order"). Nasdaq believes that this proposal addresses the issues raised by the Commission in the Disapproval Order.

⁶ 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 below the lowest price in the price range will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A.

⁷ See Listing Rule IM-5315-2.

⁸ See Rule 4120(c)(9)(B).

will be executed in the Cross. If there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the Pricing Range Limitation is not satisfied, the Cross would not proceed and such security would not begin trading. 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.⁹

Proposed Change to Rule 4120(c)(9)

While many companies are interested in alternatives to 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:

⁹ Nasdaq will postpone and reschedule the offering only if either or both such conditions are not met.

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.¹⁰

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.¹¹ 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.

¹⁰ See Approval Order, 86 FR at 28177.

¹¹ 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. This reluctance could result in denying investors and companies the benefits of this different price discovery method.

Accordingly, Nasdaq proposes to modify the Pricing Range Limitation such that in the case of the Direct Listing with a Capital Raise, a security could be released for trading by Nasdaq if the actual price at which the Cross would occur is as much as 20% below the lowest price of the price range established by the issuer in its effective registration statement. In addition, a security could be released for trading by Nasdaq if the actual price at which the Cross would occur was above the highest price in the price range established by the issuer in its effective registration statement.¹² In such cases (whether lower or higher than the price range) the company will be required to specify the quantity of shares registered in its registration statement,

¹² In the prior proposal, Nasdaq proposed different requirements based on whether the Cross would occur at a price that was within 20% of the price range. See Disapproval Order. Nasdaq is eliminating this proposed distinction and is proposing herein to treat all prices outside of the price range the same.

as permitted by Securities Act Rule 457,¹³ and that registration statement will be required to contain a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the price range established by the issuer in its effective registration statement.¹⁴ In addition, the company will be required to publicly disclose and certify 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. The goal of these requirements is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.¹⁵

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.¹⁶

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>.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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

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 the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus. 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 430A.¹⁷

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. Prior to releasing a security for trading, Nasdaq allows a “Pre-Launch Period” of indeterminate length, during which price discovery takes place.

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>.

¹⁷ Nasdaq believes that applying additional protections related to the disclosure requirements in the registration statement and the certifications to Nasdaq, as described above, to all instances where the Cross is executed outside the disclosed price range addresses an issue the Commission raised in the Disapproval Order. See footnote 5 above.

The Price Volatility Constraint requires that the Current Reference Price has not deviated by 10% or more from any Current Reference Price during the Pre-Launch Period within the previous 10 minutes. The Pre-Launch Period will continue until at least five minutes after the Price Volatility Constraint has been satisfied. Nasdaq will also introduce the Near Execution Price which is the Current Reference Price at the time the Price Volatility Constraint has been satisfied; and set the Near Execution Time as such time. This change will provide investors with notice that the Cross nears execution and allows a period of at least five minutes for investors to modify their orders, if needed, based on the Near Execution Price, prior to the execution of the Cross and the pricing of the offering. Further, to assure that the Near Execution Price is a meaningful benchmark for investors, and that the offering price does not deviate substantially from the Near Execution Price, Nasdaq proposes to require, in addition to other the existing conditions stated in proposed Rule 4120(c)(9)(B)(vii), that the Cross may execute only if the actual price calculated by the Cross is no more than 10% below or above the Near Execution Price (the “10% Price Collar”).

Nasdaq notes that imbalance between the buy and sell orders could sometimes cause the Current Reference Price to fall outside the 10% Price Collar after the Price Volatility Constraint has been satisfied. Such price fluctuations could be temporary, and the Current Reference Price may return to and remain within the 10% Price Collar. The price fluctuation could also be lasting such that the Current Reference Price remains outside the 10% Price Collar. Given this, Nasdaq proposes to assess the Current Reference Price vis-à-vis the 10% Price Collar 30 minutes after the Near Execution Time. If at that time the Current Reference Price is outside the 10% Price

Collar, all requirements of the Pre-Launch Period shall reset and must be satisfied again.¹⁸ Once the Price Volatility Constraint has been satisfied anew, the Current Reference Price at such time will become the updated Near Execution Price and such time will become the updated Near Execution Time. This process will continue iteratively, if new resets are triggered, until the Cross is executed, or the offering is postponed.

If the Current Reference Price 30 minutes after the Near Execution Time is within the 10% Price Collar, price formation may continue without limitations until Nasdaq, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade (and certain existing conditions restated in proposed Rule 4120(c)(9)(B)(vii) are met). However, if at any time 30 minutes after the Near Execution Time the Current Reference Price is outside the 10% Price Collar, all requirements of the Pre-Launch Period shall reset and must be satisfied again, in the same manner as described in the immediately preceding paragraph.

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 and indicate whether the Current

¹⁸ For the avoidance of doubt, while the Price Volatility Constraint cannot initially be satisfied sooner than ten minutes after the beginning of the Pre-Launch Period, if it is subsequently reset, the Price Volatility Constraint can be satisfied again in less than ten minutes because it would look back at prior pricing during the Pre-Launch Period (including pricing prior to the reset) to determine if the Current Reference Price has deviated by 10% or more from any Current Reference Price within the previous 10 minutes.

Reference Price is within the price range established by the issuer in its effective registration statement. Once the Price Volatility Constraint has been satisfied, Nasdaq will also disseminate the Near Execution Price, the Near Execution Time and the 30-minute countdown from such time. The disclosure will indicate that the Near Execution Price and the Near Execution Time may be reset, as described above, if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is more than 10% below or more than 10% above the Near Execution Price.

In this way, investors interested in participating in the opening auction will be informed when volatility has settled to a range that will allow the open to take place and they will be informed of the price range at which the auction would take place. If the price moves outside, and remains outside this range, 30 minutes after the original range was set they will be informed of the new range and will have at least five minutes to reevaluate their investment decision.¹⁹

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 protect investors by assuring that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the Company's effective registration

¹⁹ Nasdaq believes that the introduction, as described above, of the 10% Price Collar, the Near Execution Price, the Near Execution Time, the 30-minute reset and the five minute prohibition on executing the Cross after the Price Volatility Constraint has been satisfied addresses concerns the Commission raised in the Disapproval Order. See footnote 5 above. Specifically, in the Disapproval Order, the Commission stated that, as previously proposed, "investors could be misled that the opening cross 'nears execution' and that the disseminated Current Reference Price will likely be close to the opening auction price when, in fact, the auction may not occur for a considerable time and the opening auction price may differ substantially." As revised, the opening auction price must remain within 10% of the price publicly announced as the Near Execution Price for the auction to occur and investors will have enhanced disclosure about the possibility that the Price Volatility Constraint could be reset.

statement including the sensitivity analysis describing how the Company will use any additional proceeds raised. Accordingly, an investor participating in a Direct Listing with a Capital Raise will make their initial investment decision prior to the launch of the offering by setting the price in their limit order above which they will not buy shares in the offering, but will also have an opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price. Under the proposed rule, such investor will have at least five minutes once the Near Execution Price has been set and before the offering may be priced by Nasdaq to modify their order, if needed. As described above, all relevant price formation information will be disseminated by Nasdaq on a public website in real time.

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 circular²⁰ 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

²⁰ The Information circular is an industry wide free service provided by Nasdaq.

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 outside 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.

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 Shares²¹ for initial listing on the Nasdaq Global Select Market, the Exchange will

²¹ See Listing Rules 5005(a)(23) and 5005(a)(45).

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 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. Nasdaq will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price. This price is the minimum price at which the company could sell its shares in the Direct Listing with a Capital Raise transaction and so assures that the company will satisfy these requirements at any price at which the auction successfully executes.

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.²²

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 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.²³

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

²² 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.

²³ 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.

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.²⁴

Lastly, Nasdaq proposes to clarify several provisions of the existing rules by restating the provisions of Rules 4120(c)(8)(A) and (c)(9)(A) in a clear and direct manner without substantively 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 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.²⁵ 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.

²⁴ 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 23 above because \$10.15 is the price that is closest to either.

²⁵ 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.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁷ 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 disclosed by the issuer in its effective registration statement in accordance with the SEC's Staff guidance, as described above.²⁸ 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 the instructions to Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) when there is a deviation above the price range beyond the 20% threshold noted in the instructions to Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(5).

²⁸ 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>.

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 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 at or above the price that is 20% below the lowest price and below the lowest price of the price range established by the issuer in its effective registration statement; or is 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, with such confirmation ending the Post-Pricing Period. 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 and that investors receive all required information.

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 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.

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 at least five minutes after the Price Volatility Constraint has been satisfied. Nasdaq will also introduce the Near Execution Price which is the Current Reference Price at the time the Price Volatility Constraint has been satisfied; and set the Near Execution Time at such time. This change will provide investors with notice that the Cross nears execution and a period of at least five minutes to modify their orders, if needed, based on the Near Execution Price, prior to the execution of the Cross and the pricing of the offering. Further, to help assure that the offering price does not deviate substantially from the Near Execution Price, Nasdaq proposes to require, in addition to other conditions described above, that the Cross may execute only if the actual price calculated by the Cross is within the 10% Price Collar. Nasdaq believes that these changes are designed to protect investors and the public interest because an investor participating in a Direct Listing with a Capital Raise will make their initial investment decision prior to the launch of the offering by setting the price in their limit order above which they will not buy shares in the offering, but will also have an opportunity to reevaluate their initial investment decision during the price formation process of the Pre-Launch Period based on the Near Execution Price. Under the proposed rule, such investor will have at least five minutes once the Near Execution Price has been set and before the offering may be priced by Nasdaq to modify their order, if needed. While the auction may take longer than this five minute period to complete, investors are protected during this time because the Price Volatility Constraint will reset if the actual price calculated by the Cross is

more than 10% below or above the Near Execution Price. Once the Price Volatility Constraint has been satisfied, Nasdaq proposes to disseminate the Near Execution Price and the Near Execution Time on a public website, such as Nasdaq.com.

Nasdaq believes that the proposal to reset the Price Volatility Constraint, the Near Execution Price and the Near Execution Time in the circumstances described above 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 in certain circumstances an imbalance between the buy and sell orders could sometimes cause the Current Reference Price to fall outside the 10% Price Collar after the Price Volatility Constraint has been satisfied. These provisions will protect investors by increasing the information available to them in connection with the price formation process during the opening auction.

To protect investors and increase transparency, Nasdaq also proposes to disseminate on a public website, such as Nasdaq.com, the 30-minute countdown from the Near Execution Time and indicate that the Near Execution Price and the Near Execution Time may be reset, as described above, if the security is not released for trading within 30 minutes of the Near Execution Time and the Current Reference Price at such time (or at any time thereafter) is outside the 10% Price Collar.

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 2009.²⁹ 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."³⁰

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 price that is 20% below such lowest price, making it more difficult to meet the requirements. 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

²⁹ <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.

³⁰ See <https://www.sec.gov/news/speech/gensler-healthy-markets-association-conference-120921>.

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. 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.

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 up to 90 days (i) as the Commission may designate 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 will: (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-2022-027 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2022-027. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of

the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2022-027, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

J. Matthew DeLesDernier
Assistant Secretary

³¹ 17 CFR 200.30-3(a)(12).