



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91205; File No. SR-NASDAQ-2020-057]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, 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

February 24, 2021.

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 (“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 Act,⁴ the Commission designated a longer period within which to either approve or disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 17, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the

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). 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).

⁵ See Securities Exchange Act Release No. 90331 (November 4, 2020), 85 FR 71708 (November 10, 2020).

Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On February 22, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed, and is described in Items I and II below, which Items have been prepared by the Exchange.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, as modified by Amendment No. 1, from interested persons.

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

The Exchange proposes 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 Nasdaq and to explain how the opening transaction for such a listing will be effected.

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

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

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

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

1. Purpose

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 90717 (December 17, 2020), 85 FR 84025 (December 23, 2020).

Nasdaq is filing this amendment to SR-NASDAQ-2020-057⁸ in order to: (i) require for the security to be released for trading 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; (ii) provide that the fourth tie-breaker used in calculating the Current Reference Price is the price that is closest to the lowest price of the price range disclosed by the issuer in its effective registration statement; (iii) provide that for purposes of qualifying a security under the Listing Rules Nasdaq will calculate the value of shares, and determine whether the company has met the applicable Market Value of Unrestricted Publicly Held Shares, bid price and market capitalization requirements, using a price per share equal to the lowest price in the price range disclosed by the issuer in its effective registration statement; (iv) provide that notwithstanding the provisions of Rule 4120(c)(8)(A), Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade and whether to reschedule the offering as described in Rule 4120(c)(8)(A); and make minor technical changes to improve the clarity of this proposal. Nasdaq believes that this amendment addresses the issues raised by the Commission in the OIP.⁹ This amendment supersedes and replaces the Initial Proposal in its entirety.

Nasdaq proposes to (i) adopt 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”)¹⁰;

⁸ Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020) (the “Initial Proposal”). The Commission issued an Order Instituting Proceedings to Determine Whether To Approve or Disapprove the Initial Proposal. See Securities Exchange Act Release No. 90717 (December 17, 2020), 85 FR 84025 (December 23, 2020) (the “OIP”).

⁹ Following approval of this proposed rule change Nasdaq intends to file a separate proposal with the Commission that will seek to modify the process for a Direct Listing with a Capital Raise so that it would operate in a manner similar to the Initial Proposal and will seek to address the remaining issues raised in the OIP.

¹⁰ 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)

(ii) amend Rule 4702 to add a new order type (the “Company Direct Listing Order”), which will be used during the Nasdaq Halt Cross for the shares offered by the company in a Direct Listing with a Capital Raise; and (iii) amend Rules 4120(c)(9), 4753(a)(3) and 4753(b)(2) to establish requirements for disseminating information, establishing the opening price and initiating trading through the Nasdaq Halt Cross in a Direct Listing with a Capital Raise.

Proposed Listing Rule IM-5315-2

Listing Rule IM-5315-1 provides additional initial listing requirements for listing a company that has not previously had its common equity securities registered under the Act on the Nasdaq Global Select Market at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares (a “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 proposes to adopt Listing Rule IM-5315-2.¹¹ This proposed rule would allow 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.

In considering the initial listing of a company in connection with a Direct Listing on the Nasdaq Global Select Market, 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

the company is selling shares and selling shareholders may also sell shares in such opening auction.

¹¹ The Commission did not identify any concerns with proposed Listing Rule IM-5315-2 in the OIP. Accordingly, the only change to proposed IM-5315-2 in this amendment is to reflect that the minimum price at which the company can sell shares is the lowest price in the price range disclosed by the issuer in its effective registration statement. In the Initial Proposal, Nasdaq proposed to allow the company to sell shares at up to a 20% discount to the lowest price in the price range disclosed in the effective registration statement and therefore also to calculate compliance with the listing requirements based on that same price.

Shares requirements based on the lesser of: (i) an independent third-party valuation of the company (a "Valuation");¹² and (ii) the most recent trading price for the company's common stock in a Private Placement Market where there has been sustained recent trading. For a security that has not had sustained recent trading in a Private Placement Market¹³ prior to listing, Nasdaq 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.

In contrast, when applying this requirement to a Direct Listing with a Capital Raise, the Exchange and investors know the minimum price at which the company can sell shares in the offering because it is included in the company's registration statement, and therefore Nasdaq is proposing the following:

- Nasdaq will calculate the value of shares, including those being sold by the company and those held by public shareholders immediately prior to the listing, using a price per share equal to the lowest price in the price range disclosed by the issuer in its registration statement.¹⁴ Nasdaq also will determine whether the company has met the applicable bid price and market capitalization requirements based on the same per share price.
- In determining whether the company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement if the amount of the

¹² IM-5315-1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

¹³ Nasdaq 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.

¹⁴ As described below, the Nasdaq Halt Cross would not execute at a price that is below the bottom of the disclosed range. Thus, this is the minimum price at which the company could list in connection with a Direct Listing with a Capital Raise.

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 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).¹⁵

Officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company in the opening auction, provided that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. In addition, in the same way as for shares of a company listing following a traditional underwritten IPO, such an insider owner may purchase shares sold by other shareholders or sell its own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. Shares held by these types of inside investors are not included in calculations of Publicly Held Shares for purposes of Exchange listing rules except that, as proposed with respect to a Direct Listing with a Capital Raise, all shares sold by the company in the offering and all shares held by Public Holders prior to the offering will be included in the calculation of Publicly Held Shares, even if some of these shares are purchased by inside investors.¹⁶ The Exchange notes that such investors may also acquire in secondary market trades shares sold by the issuer in a Direct Listing with a Capital Raise that

¹⁵ See Listing Rules 5315(f)(2)(A) and (B) that require the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, not in connection with an IPO, of at least \$110 million; or at least \$100 million, if the company has stockholders' equity of at least \$110 million, respectively. 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 Market Value of Unrestricted Publicly Held Shares will be calculated 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 \$500 million, based on a \$10 price per share.

¹⁶ Rule 5005(a)(35).

were included when calculating whether the issuer meets the Market Value of Unrestricted Publicly Held Shares requirement for initial listing. However, the Exchange notes 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 much higher than the Exchange's minimum \$45 million Market Value of Unrestricted Publicly Held Shares requirement for a traditional underwritten IPO.¹⁷ 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 the completion of the opening auction.

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.¹⁸

Proposed Listing Rule IM-5315-2 also requires that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Nasdaq Halt Cross, which is described in Rules 4120(c)(8) and 4753. 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

¹⁷ See Listing Rules 5315(f)(2)(C) that requires the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, in connection with an IPO, of at least \$45 million.

¹⁸ 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.

to an initial public offering.¹⁹ However, as described in detail below, Nasdaq proposes to modify Rule 4120(c)(9), in part related to certain functions that are performed by an underwriter in an IPO or a financial advisor in a Direct Listing, to require that in the case of a Direct Listing with a Capital Raise, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade and whether to postpone and reschedule the offering as described in Rule 4120(c)(8)(A).

Amendment to Rule 4702

The Exchange proposes to amend Rule 4702 to add a new order type, the “Company Direct Listing Order” or “CDL Order”, which will be used for the company’s order in a Direct Listing with a Capital Raise. This will 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. 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 price of the CDL Order will be set in accordance with Rule 4120(c)(9)(B) that requires, among other things, that the CDL Order is executed 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.

Under Nasdaq rules, a market order, such as the CDL Order, must be executed in full at the price determined in the Nasdaq Halt Cross. In addition, all orders priced better than the price determined in the Nasdaq Halt Cross also would need to be satisfied.²⁰

¹⁹ As noted below, the Exchange also proposes 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.

²⁰ The Commission did not identify any concerns with the proposed changes to Rule 4702 in the OIP. Accordingly, no changes to that proposed rule are proposed in this amendment. Nasdaq notes that the proposed CDL Order is similar in some respects to a

Amendments to Rules 4120(c)(9), 4753(a)(3) and 4753(b)(2)

Nasdaq proposes to amend Rules 4120(c)(9), 4753(a)(3) and 4753(b)(2) to establish requirements for disseminating information, establishing the opening price and initiating trading through the Nasdaq Halt Cross in a Direct Listing with a Capital Raise.

Under the proposal, in the case of the Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the actual price calculated by the cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement.²¹ 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, as modified by the proposed changes to Rule 4120(c)(9), as described below.²²

Rules 4120(c)(8) and (9) provide that the underwriter of the IPO, or the financial advisor in a Direct Listing, respectively, provide notice to Nasdaq that the security subject to the Nasdaq Halt Cross is “ready to trade.”²³ These rules also provide that the underwriter of the IPO, or the financial advisor in a Direct Listing, with concurrence of Nasdaq, may determine at any point during the Halt Cross process up through the conclusion of the pre-launch period to postpone and reschedule the pricing of the security subject to the Nasdaq Halt Cross.

limit order because it cannot execute at a price less than the lowest price in the price range disclosed by the issuer in its effective registration statement. As a market order, the CDL Order is guaranteed to execute in the Nasdaq Halt Cross.

²¹ See Proposed Rule 4120(c)(9)(B).

²² 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.

²³ Rule 4120(c)(8)(A)(i) provides that Nasdaq receives notice from the underwriter of the IPO that the security is ready to trade. The Nasdaq system will calculate the Current Reference Price at that time and display it to the underwriter. If the underwriter then approves proceeding, the Nasdaq system will conduct certain validation checks. Under this proposal, Nasdaq will take over these functions of the underwriter, as described in detail below.

However, Nasdaq proposes to require that in the case of a Direct Listing with a Capital Raise, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade and whether to postpone and reschedule the offering as described in Rule 4120(c)(8)(A). Specifically, Nasdaq auction technology displays the Current Reference Price, which is the price at which the auction can cross the largest number of securities subject to the Nasdaq Halt Cross. If the auction cannot match all the entered orders at the Current Reference Price, an imbalance on the buy or sell side is displayed and provided via Nasdaq data feeds. Nasdaq would determine that the security is ready to trade when Nasdaq believes, based on the displayed information referenced above, that a reasonable volume of securities will cross on the initial trade to minimize the immediate price volatility following the initial pricing.²⁴ Nasdaq may consult with the financial advisor to the issuer as to the reasonableness of such volume but can determine that the security is ready to trade without such consultation. Once Nasdaq has determined that the security is ready to trade, which will satisfy the requirement of Rule 4120(c)(8)(A)(i), Nasdaq shall release the security for trading if the conditions described in Rules 4120(c)(8)(A)(ii) and (iii) are met and the actual price calculated by the Cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement.

If there is insufficient buy interest to satisfy the CDL Order, and all other market orders, as required by this proposed rule, or if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement, the Cross would not proceed and such security would not begin trading. In such event, because the Cross cannot be

²⁴ Rules 4120(c)(8)(B) and (c)(9) provide that the financial advisor selects certain price bands for purposes of applying a price validation test that occurs once the financial advisor notifies Nasdaq that the security is ready to trade. Given that Nasdaq proposes that in connection with a Direct Listing with a Capital Raise Nasdaq, rather than the financial advisor, determines that the security is ready to trade, the financial advisor will have no purpose in setting the bands. Accordingly, because Nasdaq determines when the security is ready to trade, it is appropriate for Nasdaq to set the price bands. Nasdaq intends to set the price bands at zero.

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, including the CDL Order, would be cancelled back to the entering firms.

Because the CDL Order will be a market order, if the Halt Cross proceeds, that order will execute in full in the Halt Cross, along with orders priced at or better than the price determined in the Halt Cross. As noted above, the Halt Cross would not be allowed to proceed if the actual price calculated by the Cross is below the lowest price or above the highest price of the price range disclosed by the company in its effective registration statement.

Nasdaq also proposes changes to Rules 4753(a)(3) 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 Nasdaq Halt Cross will execute. In each case, where there are multiple prices that would satisfy the conditions for determining a price, Nasdaq proposes to modify the fourth tie-breaker for a Direct Listing with a Capital Raise, to use the lowest price of the price range disclosed by the issuer in its effective registration statement.

In this Amendment No. 1, Nasdaq also proposes changes to address concerns raised by the Commission in the OIP relating to Rule 4120. Specifically, consistent with Nasdaq's original intent, as revised, the price bands established by Rule 4120(c)(8) cannot act to cause the Halt Cross to occur outside of the price range disclosed by the issuer in its effective registration statement because the actual price calculated by the Cross is required to 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.²⁵

²⁵ In addition, in the OIP the Commission expressed concern that the financial advisor could, in effect, cancel the non-cancellable CDL Order by rescheduling the offering. To address this concern, this amendment modifies the rules to provide that Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade and whether to postpone and reschedule the offering

Finally, Nasdaq proposes to amend Rule 4120(c)(9) to specify that the activities performed by a financial advisor under Rule 4120(c)(8) must be conducted in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.²⁶ This change will apply to traditional Direct Listings, as described under IM-5315-1, IM-5405-1 and IM-5505-1, as well as to Direct Listings with a Capital Raise, as described under proposed IM-5315-2.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁸ 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 the listing requirements is consistent with the protection of investors. The proposal would require that a company completing a Direct Listing with a Capital Raise have an aggregate market value of unrestricted publicly-held shares immediately prior to listing together with the market value of shares the company sells in the opening auction total at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million), with such market value calculated using a price per share equal to the lowest price of the price range established by the issuer in its effective registration statement. While officers, directors or owners of more than 10% of the company's common

as described in Rule 4120(c)(8)(A). Finally, the proposed changes to Rule 4753 have been modified to reflect that the lowest price at which the Nasdaq Halt Cross can occur is the lowest price of the price range disclosed by the issuer in its effective registration statement.

²⁶ Rule 4120(c)(8) describes the activities performed by an underwriter in an IPO and by a financial advisor in a Direct Listing.

²⁷ 15 U.S.C. 78f(b).

²⁸ 15 U.S.C. 78f(b)(5).

stock prior to the opening auction may purchase shares sold by the company or other shareholders in the opening transaction on Nasdaq, in the event that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws, Nasdaq 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 but would raise capital in a private placement or a similar transaction instead. Nasdaq also notes that a company may list on the Global Select Market in connection with its initial public offering with a market value of unrestricted publicly held shares of \$45 million and that unlike a company listing in connection with a 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. The higher 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 the completion of the opening auction.

Nasdaq also 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 lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq will allow the Halt Cross to take place as low as this price, but no lower, and so this is the minimum price at which the company could be listed.

The proposed requirement that a company that lists on the Nasdaq Global Select Markets through a Direct Listing with a Capital Raise must begin trading of the company's securities following the initial pricing through the Halt Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of securities covered by the proposed rule change because a substantial number of buy and sell orders is expected to be

executed in the Halt Cross at a single price rather than in the secondary trading at fluctuating prices. Accordingly, Nasdaq believes these changes, as required by Section 6(b)(5) of the Exchange Act, are reasonably designed to protect investors and the public interest and promote just and equitable principles of trade for the opening of securities listing in connection with a Direct Listing with a Capital Raise on the Nasdaq Global Select Market.

Nasdaq also believes that the proposed adoption of the CDL Order type in Rule 4702 and the addition of requirements to the operation of the Nasdaq Halt Cross in Rule 4120(c)(9) will remove impediments to and perfect the mechanism of a free and open market and a national market system because it would guarantee that the Nasdaq Halt Cross would only occur within the specified price range, as described above, and, if the Halt Cross occurs, all shares offered by the company would be sold at such price. Unlike 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 registration statement. This certainty would be effected in two ways. First, the proposed CDL Order would be required to be equal to the total number of shares disclosed as being offered by the company in the prospectus included in the effective registration statement filed in connection with its listing. The Nasdaq Halt Cross would only occur if all of the shares in this market order could be executed. Second, the Nasdaq Halt Cross would be required to occur at a price per share that is within the price range disclosed by the issuer in its effective registration statement. Nasdaq further believes that these proposed changes would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are designed to function seamlessly with the existing process for the Nasdaq Halt Cross, including dissemination of information about the expected price.

Nasdaq believes that the CDL Order and related clarifications will clearly define the method by which the issuer participates in the opening auction, to prevent the issuer from being in a position to improperly influence the price discovery process, and to design an auction that is

otherwise consistent with the disclosures in the registration statement. Specifically, the CDL Order entered on the company's behalf could not be executed at a price below the low end or above the high end of the price range in the company's effective registration statement and, as a market order, the full quantity of shares in the CDL Order would have to be executed in the opening auction. In addition, the CDL Order cannot be modified and the financial advisor to the company will be unable to reschedule the offering once it begins. As such, Nasdaq believes that the proposed process provides reasonable assurance that the opening auction and subsequent trading promote fair and orderly markets and that the proposed rules are designed to prevent manipulative acts and practices, and protect investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act.

Nasdaq believes that it is consistent with the protection of investors and the public interest to require that in the case of a Direct Listing with a Capital Raise, Nasdaq, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade and whether to postpone and reschedule the offering as described in Rule 4120(c)(8)(A) because Nasdaq would determine that the security is ready to trade when Nasdaq believes, based on the available information, that a reasonable volume of securities will cross on the initial trade to minimize the immediate price volatility following the initial pricing. Nasdaq also believes that its ability to consult the financial advisor to the issuer is consistent with the protection of investors because the financial advisor would be expected to gather relevant information in connection with the Direct Listing with a Capital Raise by engaging in certain price discovery activities with potential buyers and sellers and such information could be shared with Nasdaq. Nasdaq believes that as part of their regular activities as full-service broker-dealer, such firm's capital markets and sales and trading desk personnel may contact or be contacted by potential investors and current holders of the securities subject to the Nasdaq Halt Cross in the normal course of their activities and may, in that capacity, inform and educate interested persons regarding the company and obtain information regarding pre-listing buying and selling interest in

such securities (including with regard to price, volume and timing expectations), which information may also be provided to Nasdaq in order to support an effective price discovery process by Nasdaq.

Nasdaq notes that, as described above, Nasdaq will be able to postpone and reschedule the offering only if there is insufficient buy interest to satisfy the CDL Order, and all other market orders, as required by this proposed rule, or if the actual price calculated by the Cross is outside the price range established by the issuer in its effective registration statement.

Nasdaq also believes that it is consistent with the protection of investors and the public interest to remind financial advisors in a Direct Listing, including Direct Listings with a Capital Raise, that activities in connection with the listing must be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.

Nasdaq believes that the proposed rule change to modify the fourth tie-breaker used in calculating the Current Reference Price disseminated in the Nasdaq Order Imbalance Indicator and the price at which the Nasdaq Halt Cross will occur, protects investors and the public interest. For a Direct Listing, in using the Halt Cross to initiate the initial trading in the company's securities, the Current Reference Price and price at which the Nasdaq Halt Cross will occur may be based on the most recent transaction price in a Private Placement Market where the security has had recent sustained trading in such a market over several months; otherwise the price will be determined by the Exchange in consultation with a financial advisor to the issuer. For an IPO, however, the fourth tie-breaker used in calculating the Current Reference Price, is the price that is closest to the Issuer's Initial Public Offering Price. Because a Direct Listing with a Capital Raise is similar to an IPO in that the company sells securities in the offering, the proposed rule change provides that the fourth tie-breaker in calculating the Current Reference Price for such security is the lowest price of the price range disclosed by the issuer in its effective registration statement, which is the minimum price at which the Halt Cross will occur.

Finally, while a commenter expressed concerns that that the expansion of direct listings would compound problems that shareholders face in tracing their share purchases to a registration statement²⁹, the Commission has previously considered and rejected these concerns.³⁰ In that regard, the Commission has determined that investor protection concerns relating to tracing challenges are not unique to direct listings, including where the company itself would sell shares in the opening auction on the first day of trading on the Exchange in addition to, or instead of, facilitating sales by selling shareholders (“Primary Direct Floor Listing”), and stated that it did not expect “any such tracing challenges in this context to be of such magnitude as to render the proposal inconsistent with the Act.”³¹ On the other hand, the Commission found that allowing a Primary Direct Floor Listing “will provide benefits to existing and potential investors relative to firm commitment underwritten offerings”³² because the structure “has the potential to broaden the scope of investors that are able to purchase securities in an initial public offering, at the initial public offering price, rather than in aftermarket trading” and “may allow for efficiencies in IPO pricing and allocation.”³³ Similarly, while the commenter expressed concern that that the expansion of direct listings may lead to a decline in effective governance at U.S. public companies, presumably because of the lack of an underwriter in the offering, Nasdaq believes that this concern is unsubstantiated and challenges in this context are not of such

²⁹ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission (October 8, 2020), available at <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057-7888884-224228.pdf>. See also Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission (January 13, 2021), available at <https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057-8241868-227781.pdf>.

³⁰ Securities Exchange Act Release No. 89684 (August 26, 2020), 85 FR 54454 (September 1, 2020) (approval by delegated authority of SR-NYSE-2019-67). On December 22, 2020, the Commission issued an order setting aside the action by delegated authority and approving the proposed rule change. Securities Exchange Act Release No. 90768 (December 22, 2020), 85 FR 85807 (December 29, 2020) (the “NYSE Approval”).

³¹ NYSE Approval at 85816.

³² Id.

³³ Id.

magnitude as to render the proposal inconsistent with the Act. Moreover, in approving the Primary Direct Floor Listing proposal the Commission concluded that it “does not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of a registered offering.”³⁴ As a result, consistent with the purposes of the Act, the proposed rule change may provide investors with additional investment opportunities and companies with more options for becoming publicly traded.

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. In that regard, the Commission recently approved a similar proposal to allow a Primary Direct Floor Listing on the New York Stock Exchange.³⁵ Allowing Nasdaq to have similar rules will give issuers interested in this pathway to access the capital markets a choice of listing venues, which will enhance competition among exchanges.

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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, 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

³⁴ Id. at 85815.

³⁵ See NYSE Approval, above footnote 30.

- Send an e-mail 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]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁶

³⁶ 17 CFR 200.30-3(a)(12).

J. Matthew DeLesDernier,

Assistant Secretary.

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