



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93119; File No. SR-NASDAQ-2021-045]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Modify Certain Pricing Limitations for Companies Listing in Connection with a Direct Listing Primary Offering

September 24, 2021.

I. Introduction

On June 11, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to modify certain pricing limitations for companies listing in connection with a direct listing primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange. The proposed rule change was published for comment in the Federal Register on June 30, 2021.³ On August 12, 2021, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ This order institutes proceedings under

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 92256 (June 24, 2021), 86 FR 34815 (June 30, 2021) (“Notice”). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2021-045/srnasdaq2021045.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92649 (August 12, 2021), 86 FR 46295 (August 18, 2021). The Commission designated September 28, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

Nasdaq Listing Rule IM-5315-2 provides listing requirements for Nasdaq's Global Select Market for a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on the Exchange at the time of effectiveness of a registration statement⁷ pursuant to which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a "Direct Listing with a Capital Raise").⁸ Securities qualified for listing under Nasdaq Listing Rule IM-5315-2 must begin trading on the Exchange following the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9) and Nasdaq Rule 4753 for the opening auction, otherwise known as the Nasdaq Halt Cross.⁹ Currently, in the case of a Direct Listing with a Capital Raise, the Exchange will release the security for trading on the first day of listing if, among other things, the actual price

⁶ 15 U.S.C. 78s(b)(2)(B).

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

⁸ A Direct Listing with a Capital Raise includes listings where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction. See Nasdaq Listing Rule IM-5315-2. See also Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (order approving rules to permit a Direct Listing with a Capital Raise and adopting related rules concerning how the opening transaction for such listing will be effected) ("2021 Order"). The Exchange's rules provide for a company listing pursuant to a Direct Listing with a Capital Raise to list only on the Nasdaq Global Select Market.

⁹ See Nasdaq Listing Rule IM-5315-2. "Nasdaq Halt Cross" means the process for determining the price at which Eligible Interest shall be executed at the open of trading for a halted security and for executing that Eligible Interest. See Nasdaq Rule 4753(a)(4). "Eligible Interest" means any quotation or any order that has been entered into the system and designated with a time-in-force that would allow the order to be in force at the time of the Nasdaq Halt Cross. See Nasdaq Rule 4753(a)(5). Pursuant to Nasdaq Rule 4120, the Exchange will halt trading in a security that is the subject of an initial public offering (or direct listing), and terminate that halt when the Exchange releases the security for trading upon certain conditions being met, as discussed further below. See Nasdaq Rule 4120(a)(7) and (c)(8).

calculated by the Nasdaq Halt Cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement¹⁰ (the “Pricing Range Limitation”). The Exchange has proposed to modify the Pricing Range Limitation to provide that the Exchange would release the security for trading if (a) the actual price calculated by the Nasdaq Halt Cross is at or above the price that is 20% below the lowest price, and at or below the price that is 20% above the highest price, of the disclosed price range; or (b) the actual price calculated by the Nasdaq Halt Cross is at a price above the price that is 20% above the highest price of such price range, provided that the company has certified to the Exchange that such price would not materially change the company’s previous disclosure in its effective registration statement.¹¹ The Exchange would use the high end of the price range in the prospectus at the time of effectiveness to measure the permitted 20% deviation from both the high end (in the case of an increase in the price) and low end (in the case of a decrease in the price) of the disclosed price range.¹² The Exchange has also proposed to make related conforming changes.

Currently Nasdaq Rule 4120(c)(9)(B) states that, notwithstanding the provisions of Nasdaq Rule 4120(c)(8)(A) and (c)(9)(A), in the case of a Direct Listing with a Capital Raise, for purposes of releasing securities for trading on the first day of listing, the Exchange, in consultation with the financial advisor to the issuer, will make the determination of whether the security is ready to trade. The Exchange will release the security for trading if: (i) all market orders will be executed in the Nasdaq Halt Cross; and (ii) the actual price calculated by the Nasdaq Halt Cross complies with the Pricing Range Limitation. The Exchange will postpone

¹⁰ The Exchange states that references in the proposal to the price range established by the issuer in its effective registration statement refer to the price range disclosed in the prospectus in such effective registration statement. See Notice, supra note 3, 86 FR at 34816 n.5. Throughout this order, we refer to this as the “disclosed price range.”

¹¹ See proposed Nasdaq Rule 4120(c)(9)(C).

¹² See id.

and reschedule the offering only if either or both of such conditions are not met.¹³ The Exchange states that if there is insufficient buy interest to satisfy the CDL Order¹⁴ and all other market orders, as required by the rule, or if the actual price calculated by the Nasdaq Halt Cross is outside the disclosed price range, the Nasdaq Halt Cross would not proceed and such security would not begin trading.¹⁵

According to the Exchange, based on conversations it has had with companies and their advisors, the Exchange believes that some companies may be reluctant to use the existing rules for a Direct Listing with a Capital Raise because of concerns about the Pricing Range Limitation.¹⁶ The Exchange states that the Pricing Range Limitation imposed on a Direct Listing with a Capital Raise (but not on a traditional IPO) increases the probability of a failed offering, because the offering cannot proceed without some delay not only due to lack of investor interest, but also if investor interest is greater than the company and its advisors anticipated.¹⁷ According to the Exchange, the Exchange believes that there may be instances of offerings where the price

¹³ See Nasdaq Rule 4120(c)(9)(B).

¹⁴ A “Company Direct Listing Order” or “CDL Order” is a market order that may be entered only on behalf of the issuer and may be executed only in the Nasdaq Halt Cross for a Direct Listing with a Capital Raise. The CDL Order is entered without a price (with a price later set in accordance with the requirements of Nasdaq Rule 4120(c)(9)(B)), must be for the quantity of shares offered by the issuer as disclosed in its effective registration statement, must be executed in full in the Nasdaq Halt Cross, and may not be canceled or modified. See Nasdaq Rule 4702(b)(16).

¹⁵ See Notice, *supra* note 3, 86 FR at 34816. The Exchange represents that in such event, because the Nasdaq Halt Cross cannot be conducted, the Exchange would postpone and reschedule the offering and notify participants via a Trader Update that the Direct Listing with a Capital Raise scheduled for that date has been cancelled and any orders for that security that have been entered on the Exchange would be cancelled back to the entering firms. See *id.*

¹⁶ See *id.* The Exchange states that a Direct Listing with a Capital Raise could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors, because, unlike in a traditional firm commitment underwritten public offering (“IPO”) the initial sale price is determined based on market interest and the matching of buy and sell orders in an auction open to all market participants. See *id.*

¹⁷ See *id.* The Exchange states that if an offering cannot be completed due to lack of investor interest, there is likely to be substantial amount of negative publicity for the company and the offering may be delayed or cancelled. See *id.*

determined by the Exchange's opening auction will exceed the highest price of the price range disclosed in the company's effective registration statement.¹⁸ The Exchange states that, under the existing rule, a security subject to a Direct Listing with a Capital Raise cannot be released for trading by the Exchange if the actual price calculated by the Nasdaq Halt Cross is above the highest price of the disclosed price range.¹⁹ The Exchange further states that, in this case, the Exchange would have to cancel or postpone the offering until the company amends its effective registration statement, and that, at a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event.²⁰ In addition, the Exchange states that the determination of the public offering price of a traditional IPO is not subject to limitations similar to the Pricing Range Limitation for a Direct Listing with a Capital Raise, which, in the Exchange's view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits.²¹

The Exchange has proposed to modify the Pricing Range Limitation such that even if the actual price calculated by the Nasdaq Halt Cross is outside the disclosed price range, the Exchange would release a security for trading if the actual price at which the Nasdaq Halt Cross would occur is at or above the price that is 20% below the lowest price of the disclosed price range and at or below the price that is 20% above the highest price of the disclosed price range, provided all other necessary conditions are satisfied, and that the company has specified the quantity of shares registered, as permitted by Securities Act Rule 457.²² In addition, under the proposal, the Exchange would release the security for trading, provided all other necessary conditions are satisfied, at a price more than 20% above the highest price of the disclosed price

¹⁸ See id.

¹⁹ See id. at 34816–17.

²⁰ See id. at 34817.

²¹ See id.

²² See id. See also infra notes 24 and 26 and accompanying text.

range, if the company has certified to the Exchange that such offering price would not materially change the company's previous disclosure in its effective registration statement.²³

The Exchange states that it believes that its proposed approach is consistent with Securities Act Rule 430A and staff guidance, which, according to the Exchange, generally allow a company to price a public offering 20% outside of the disclosed price range without regard to the materiality of the changes to the disclosure contained in the company's registration statement.²⁴ According to the Exchange, the Exchange 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.²⁵ The Exchange states that, accordingly, the Exchange believes that a company listing in connection with a Direct Listing with a Capital Raise can specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when an auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares

²³ See Notice, supra note 3, 86 FR at 34817.

²⁴ See id. The Exchange states that Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount, and that the Exchange expects that companies selling shares through a Direct Listing with a Capital Raise will register securities by specifying the quantity of shares registered and not a maximum offering amount. See id. at 34817 n.9. The Exchange also states that the Exchange believes that the proposed modification of the Pricing Range Limitation is consistent with the protection of investors, because, according to the Exchange, this approach is not substantively different from the pricing of an IPO where an issuer is permitted to price outside of the disclosed price range in accordance with the SEC Staff's guidance. See id. at 34818.

²⁵ See id. at 34817.

issued is not increased from the number of shares disclosed in the prospectus.²⁶ The Exchange proposes that the 20% threshold would be calculated using the high end of the disclosed price range and would be measured from either the high end (in the case of an increase in the price) or low end (in the case of a decrease in the price) of that range, and states that this method of calculation is consistent with the SEC Staff's guidance on Securities Act Rule 430A.²⁷

The Exchange represents that in each instance of a Direct Listing with a Capital Raise, the Exchange would issue an industry wide trader alert²⁸ to inform market participants that the auction could price up to 20% below the lowest price of the price range and would specify that price. The Exchange also represents that it would indicate in such trader alert whether or not there is an upside limit above which the Nasdaq Halt Cross could not proceed, based on the company's certification.²⁹ According to the Exchange, if there is no upside limit, the Exchange would caution market participants about the use of market orders and explain that, unlike a limit order, a market order can be executed at any price determined by the Nasdaq Halt Cross.³⁰

Nasdaq Listing Rule IM-5315-2 provides that in determining whether a company listing in connection with a Direct Listing with a Capital Raise satisfies the Market Value of Unrestricted Publicly Held Shares³¹ for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement³² if the amount of the company's Unrestricted Publicly Held Shares before the offering, along with the market value of

²⁶ See id.

²⁷ See proposed Nasdaq Rule 4120(c)(9)(C); Notice, supra note 3, 86 FR at 34817.

²⁸ The Exchange states that a trader alert is an industry-wide, subscription-based free service provided by the Exchange. See Notice, supra note 3, 86 FR at 34817 n.10.

²⁹ See id. at 34817.

³⁰ See id. The Exchange stated it believes that investors have become familiar with the approach of the pricing for a company conducting an IPO being outside of the price range stated in an effective registration statement. See id. at 34818.

³¹ See Nasdaq Listing Rule 5005(a)(23) and (45) for the definitions of "Market Value" and "Unrestricted Publicly Held Shares," respectively.

³² See Nasdaq Listing Rule 5315(f)(2).

the shares to be sold by the company in the Exchange's opening auction in the Direct Listing with a Capital Raise, is at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million). For this purpose, under current rules, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the disclosed price range.³³ The Exchange states that because the Exchange proposes to allow the opening auction to price up to 20% below the lowest price of the disclosed price range, the Exchange proposes to make a conforming change to Nasdaq Listing Rule IM-5315-2 to provide that the price used to determine such company's compliance with the required Market Value of Unrestricted Publicly Held Shares would be the price per share equal to the price that is 20% below the lowest price of the disclosed price range.³⁴ The Exchange further states that this is the minimum price at which the company could qualify to be listed.³⁵

The Exchange states that any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to, and required to meet, all other applicable initial listing requirements, including the requirements to have the applicable number of shareholders and at least 1,250,000 Unrestricted Publicly Held Shares outstanding at the time of initial listing, and the requirement to have a price per share of at least \$4.00 at the time of initial listing.³⁶

Finally, the Exchange has proposed to amend Nasdaq Rules 4753(a)(3)(A) and 4753(b)(2) to conform the requirements for disseminating information and establishing the opening price through the Nasdaq Halt Cross in a Direct Listing with a Capital Raise to the proposed amendment to allow the opening auction to price as much as 20% below the lowest price of the disclosed price range.³⁷ Specifically, the Exchange proposes changes to Nasdaq

³³ See Nasdaq Listing Rule IM-5315-2. The Exchange will determine that the company has met the applicable bid price and market capitalization requirements based on the same per share price. See *id.*

³⁴ See Notice, *supra* note 3, 86 FR at 34817.

³⁵ See *id.*

³⁶ See *id.* at 34818 (citing Nasdaq Listing Rules 5315(e)(1) and (2) and 5315(f)(1)).

³⁷ See proposed Nasdaq Rules 4753(a)(3)(A)(iv)c. and 4753(b)(2)(D)(iii).

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,³⁸ and to the calculation of the price at which the Nasdaq Halt Cross will execute, for a Direct Listing with a Capital Raise. Under these rules currently, where there are multiple prices that would satisfy the conditions for determining the price, the fourth tie-breaker for a Direct Listing with a Capital Raise is the price that is closest to the lowest price of the disclosed price range. The Exchange states that, to conform these rules to the proposed modification of the price range within which the opening auction would proceed, the Exchange proposes to modify the fourth tie-breaker for a Direct Listing with a Capital Raise to use the price closest to the price that is 20% below the lowest price of the disclosed price range.³⁹

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2021-045 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the proposal should be approved or disapproved.⁴⁰ Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of disapproval proceedings

³⁸ See Nasdaq Rule 4753(a)(3) for a description of the “Current Reference Price” and the “Order Imbalance Indicator.”

³⁹ See Notice, *supra* note 3, 86 FR at 34818. One commenter stated its general support for the proposal, including the proposed modifications to the pricing limitations in the opening auction of a Direct Listing with a Capital Raise. See Letter from Evan Damast, Global Head of Equity and Fixed Income Syndicate, Morgan Stanley (July 21, 2021). Another commenter stated in support of the proposal that it continues to support innovation in the capital markets that allow more transparency, fairness, and confidence of capital flows between investors and issuers, and that the proposed price flexibility would allow IPOs to be completed more seamlessly and provide both investor protections and issuer benefits. See Letter from Burke Dempsey, EVP Head of Investment Banking, Wedbush Securities Inc. (August 9, 2021). This commenter also stated that it believes the proposal would stimulate a vibrant ecosystem of data and analytics and fintech companies to further refine IPO pricing accuracy and broaden investor participation, thus improving capital intermediation for U.S. markets. See *id.*

⁴⁰ 15 U.S.C. 78s(b)(2)(B).

does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency with the Exchange Act and, in particular, with Section 6(b)(5)⁴¹ of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.⁴²

The Commission has consistently recognized the importance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.⁴³

⁴¹ 15 U.S.C. 78f(b)(5).

⁴² Id.

⁴³ The Commission has stated in approving national securities exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., 2021 Order, supra note 8, 86 FR at 28172 n.47; Securities Exchange Act Release Nos. 90768 (December 22, 2020), 85 FR 85807, 85811 n.55 (December 29, 2020) (SR-NYSE-2019-67) ("NYSE 2020 Order"); 82627 (February 2, 2018), 83 FR 5650, 5653 n.53 (February 8, 2018) (SR-NYSE-2017-30) ("NYSE 2018 Order"); 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., 2021 Order, supra note 8, 86 FR at 28172 n.47; NYSE 2020 Order, 85 FR at 85811 n.55;

The Exchange is proposing to modify the rules concerning the opening transaction on the first day of trading for a Direct Listing with a Capital Raise so that the opening transaction is not constrained by the Pricing Range Limitation, which limits the price of the opening transaction to the price range disclosed in the issuer's effective registration statement. Instead, the proposal would allow the opening transaction to proceed at a price up to 20% above or below the disclosed price range or at a price higher than 20% above the disclosed price range if the issuer certifies that the offering price would not materially change the issuer's disclosures in its effective registration statement.

The Exchange, in support of its proposal, states that the proposed modification to the pricing limitation is consistent with the protection of investors because this approach "is not substantively different" from the pricing flexibility provided to firm commitment underwritten IPOs.⁴⁴ The relevance of this comparison is unclear, particularly given the difference in timing of the determination of the IPO price, relative to the initiation of trading, between a firm commitment underwritten IPO and a Direct Listing with a Capital Raise. In a firm commitment underwritten IPO, the IPO price is determined prior to the time of sale to the underwriters and initial investors, which takes place in advance of the opening transaction on the Exchange. In contrast, in a Direct Listing with a Capital Raise, the IPO price is the opening price determined through the Nasdaq Halt Cross, which does not occur until after the Exchange receives bids to purchase the securities. The Exchange has not clearly addressed the differences in how information about the final offering price is communicated to investors in each type of offering or any differences in what information investors have at the time of their investment decisions about the final offering price or how much this price might deviate from the disclosed price

NYSE 2018 Order, 83 FR at 5653 n.53; Securities Exchange Act Release Nos. 87648 (December 3, 2019), 84 FR 67308, 67314 n.42 (December 9, 2019) (SR-NASDAQ-2019-059); 88716 (April 21, 2020), 85 FR 23393, 23395 n.22 (April 27, 2020) (SR-NASDAQ-2020-001).

⁴⁴ See Notice, supra note 3, 86 FR at 34818.

range. Therefore, we have concerns about whether the Exchange has adequately justified why its proposal is consistent with the protection of investors under Section 6(b)(5) and other relevant provisions of the Exchange Act, given the differing circumstances of a Direct Listing with a Capital Raise, as compared to a firm commitment underwritten IPO.

Further, in the context of a firm commitment underwritten IPO, if a determination is made following effectiveness of the related registration statement to price the offering outside of the disclosed price range, the issuer and underwriters have the ability, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering. In contrast, under the proposal, the Exchange would release a security for trading in a Direct Listing with a Capital Raise if the price calculated by the Nasdaq Halt Cross is within 20% of the disclosed price range (or more than 20% above the disclosed price range if the company provides the required certification). Under the Exchange's proposal, it is unclear how companies would be able to disclose any additional material information related to the final offering price prior to the time of sale. In support of its proposal, the Exchange asserts that companies can "generally . . . 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."⁴⁵ While Securities Act Rule 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability for potentially misleading disclosure under the federal securities laws.⁴⁶ The Exchange has not

⁴⁵ See *id.* at 34817.

⁴⁶ See Securities Act Release No. 7168 (May 11, 1995) at n.32. ("While no post-effective amendment is required to be filed, issuers continue to be responsible for evaluating the

explained how an issuer would be able, under the proposed rule, to provide any disclosure necessary to avoid any material misstatements or omissions, including what methods an issuer may use to provide such disclosures to potential purchasers.⁴⁷ In contrast, in a firm commitment underwritten IPO, the issuer has control over the timing of its initial sale, and can delay the offering, if necessary, to convey any additional material information necessary to provide accurate disclosure. The Exchange has not explained how the potential inability of an issuer to convey important material pricing information to investors in a timely manner under its proposal would be consistent with the investor protection requirements under Section 6(b)(5) of the Exchange Act.

We also have concerns that the Exchange has not explained how the proposal is consistent with or would operate in conjunction with Item 501(b)(3) of Regulation S-K, which requires non-reporting issuers to disclose a bona fide price range.⁴⁸ Under Item 501(b)(3), an issuer conducting a Direct Listing with a Capital Raise would be required to disclose a bona fide price range. We are concerned that if the actual IPO price could fall outside of the disclosed price range, potentially with no upside limit, investors may not have adequate information to inform efficient price discovery. The Exchange has not explained how this would be consistent with the investor protection requirements under Section 6(b)(5) and other relevant provisions of the Exchange Act.

effect of a volume change or price deviation on the accuracy and completeness of disclosure made to investors.”)

⁴⁷ For purposes of Sections 12(a)(2) and 17(a)(2) of the Securities Act, information conveyed to purchasers only after the time of sale will not be taken into account for purposes of determining whether a prospectus or oral statement, or a statement, respectively, included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading at the time of sale. See Securities Act Rule 159.

⁴⁸ Instruction 1(A) to Item 501(b)(3) of Regulation S-K provides that if a preliminary prospectus is circulated and the registrant is not subject to the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act, the registrant must provide a “bona fide estimate of the range of the maximum offering price and the maximum number of securities offered.” 17 C.F.R. 229.501(b)(3), Instruction 1(A) to paragraph 501(b)(3).

In addition, the Exchange's proposal provides that the actual price at which the Nasdaq Halt Cross may proceed may be over 20% higher than the disclosed price range, if the company has certified to the Exchange that such offering price would not materially change the company's previous disclosure in its effective registration statement. The Exchange has not explained when such certification would occur and, in particular, if the certification would occur prior to the start of the process for opening the security on the first day of trading under Nasdaq Rule 4120(c)(8) or before market orders can be entered by investors.⁴⁹ If certification would occur prior to the time the expected opening price in the Nasdaq Halt Cross is calculated, it is unclear how the company would be able to certify, in advance of knowing the expected opening price, that the opening price would not materially change the company's previous disclosure. The Exchange also has not explained what information would be included in the certification, including whether the certification would contain a representation about the potential opening price on the first day of trading on the Exchange and if it would contain detail about the factors that the company relied upon to make its materiality determination. Further, in addition to the lack of clarity in the proposal on the timing of the certification and the information that will be required, the Exchange has not explained what would happen if there were material developments relating to the company between the time the issuer makes its certification and the opening of trading. Given the potential that material news arising after a certification could impact the company's disclosure, it is unclear how the process as proposed would allow the company to meet its obligations under the federal securities laws. As a result, the proposed certification process raises concerns about the proposed rule change's consistency with investor protection and the public interest, and other relevant provisions, under Section 6(b)(5) of the Exchange Act.

⁴⁹ Under Nasdaq Rule 4120(c)(8), market participants may enter orders in a security that is the subject of an IPO beginning at 4:00 a.m. The process for opening the IPO begins with the commencement of a 10 minute Display Only Period followed by a Pre-Launch Period of indeterminate duration. See Nasdaq Rule 4120(c)(8).

The Exchange proposes to use the high end of the price range disclosed in the prospectus for purposes of calculating the permissible 20% deviation from both the high and low end of the disclosed price range.⁵⁰ This proposed provision, however, is not supported by the specific provisions of Securities Act Rule 430A. Specifically, the Instruction to paragraph (a) of Securities Act Rule 430A states, in part, that “any deviation from the low or high end of the [offering price] range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) . . . if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the ‘Calculation of Registration Fee’ table in the effective registration statement.”⁵¹ The proposal therefore raises investor protection concerns, among others, under Section 6(b)(5) of the Exchange Act.

Finally, the proposed rules would specify that the revised pricing limitation would apply “provided that the Company specifies the quantity of shares registered, as permitted by Securities Act Rule 457.”⁵² The Exchange states that it “expects 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.”⁵³ Given this stated “expectation” and the lack of a specific citation to Securities Act Rule 457(a) in proposed Nasdaq Rule 4120(c)(9)(C), it is not clear whether the Exchange would require companies in all cases to register a specified amount of securities pursuant to Securities Act Rule 457(a)⁵⁴ in order for proposed Nasdaq Rule 4120(c)(9)(C) to apply. Further, it is not clear whether a company selling shares through a Direct Listing with a Capital Raise could instead choose to register securities by the proposed

⁵⁰ The Exchange states that this part of its proposal, which it is requesting the Commission to approve under the Exchange Act, is consistent with SEC Staff guidance. See Notice, supra note 3, 86 FR at 34817.

⁵¹ See 17 C.F.R. 230.430A, Instruction to paragraph (a).

⁵² See proposed Nasdaq Rule 4120(c)(9)(C).

⁵³ Notice, supra note 3, 86 FR at 34817 n.9.

⁵⁴ Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount, pursuant to Rule 457(o).

maximum aggregate offering amount, as permitted by Securities Act Rule 457(o), provided that the company agreed that the opening transaction on the first day of trading would proceed pursuant to Nasdaq Rule 4120(c)(9)(B) and its use of the Pricing Range Limitation. To the extent that the opening transaction on the first day of trading for a Direct Listing with a Capital Raise could proceed under either Nasdaq Rule 4120(c)(9)(B) (utilizing the existing Pricing Range Limitation) or Nasdaq Rule 4120(c)(9)(C) (utilizing the modified pricing limitation), the Exchange has not explained how it would be consistent with the Exchange Act for the Exchange to use, in both contexts, the price that is 20% below the lowest price of the disclosed price range for purposes of Nasdaq Listing Rule IM-5315-2 and Nasdaq Rules 4753(a)(3)(A) and 4753(b)(2).⁵⁵

The Commission notes that, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the self-regulatory organization ['SRO'] that proposed the rule change."⁵⁶ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁵⁷ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.⁵⁸

⁵⁵ The proposal would modify Nasdaq Listing Rule IM-5315-2, regarding the price used to determine a company's compliance with the initial listing requirements concerning the Market Value of Publicly Held Shares, bid price, and market capitalization, and would modify the fourth tie-breaker in Nasdaq Rule 4753(a)(3)(A), regarding the calculation of the Current Reference Price as disseminated in the Nasdaq Order Imbalance Indicator, and Nasdaq Rule 4753(b)(2), regarding the calculation of the price at which the Nasdaq Halt Cross will execute.

⁵⁶ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁵⁷ See id.

⁵⁸ See id.

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act⁵⁹ to determine whether the proposal should be approved or disapproved.

IV. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁶⁰

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

⁵⁹ 15 U.S.C. 78s(b)(2)(B).

⁶⁰ Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2021-045 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2021-045. 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-2021-045 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶¹

J. Matthew DeLesDernier,

Assistant Secretary.

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⁶¹ 17 CFR 200.30-3(a)(57).