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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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-FINRA-2021-010 and should be submitted on or before June 15, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.\(^4\)

J. Matthew DeLesDernier, Assistant Secretary.

[FR Doc. 2021–10959 Filed 5–24–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, 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 Effective

May 19, 2021.

I. Introduction

On September 4, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)\(^1\) and Rule 19b–4 thereunder,\(^2\) a proposed rule change to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange and to explain how the opening transaction for such a listing will be effected. The proposed rule change was published for comment in the Federal Register on September 21, 2020.\(^3\) On November 4, 2020, pursuant to Section 19(b)(2)(B) 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.\(^5\) On December 17, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act\(^6\) 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.\(^8\) The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on March 2, 2021.\(^9\) On March 17, 2021, the Commission extended the time period for approving or disapproving the proposal to May 19, 2021.\(^10\) On April 30, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change, as modified by Amendment No. 1.\(^11\) The Commission is approving the proposed rule change, as modified by Amendment No. 2.

II. Description of the Proposal, as Modified by Amendment No. 2

Listing Rule IM–5315–1 provides additional listing requirements for listing a company that has not previously had its common equity securities registered under the Exchange Act on the Nasdaq Global Select Market at the time of effectiveness of a registration statement\(^12\) filed solely for the purpose of allowing existing shareholders to sell their shares (a “Selling Shareholder Direct Listing”). To allow a company to also sell shares on its own behalf in connection with its initial listing upon effectiveness of a registration statement, without a traditional underwritten public offering, the Exchange has proposed to adopt Listing Rule IM–5315–2. This proposed only if there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the actual price calculated by the cross is outside the price range established by the issuer in its effective registration statement; and (5) make minor technical changes to improve the clarity of the proposal. Amendment No. 1 to the proposed rule change is available on the Commission’s website at https://www.sec.gov/comments/sr-nasdaq-2020-057/ snasdaq20200507.htm.

\(^{12}\) The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).
rule would allow a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on the Nasdaq Global Select Market at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange (a “Direct Listing with a Capital Raise”).13

In considering a Selling Shareholder Direct Listing, Listing Rule IM–5315–1 currently provides that the Exchange will determine that such a company has met the applicable Market Value of Unrestricted Publicly Held Shares requirement if: (i) The company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction. See id. The Commission notes that while the Exchange’s current rules also permit Selling Shareholder Direct Listings on the Nasdaq Global Market and Nasdaq Capital Market (see Listing Rules 5315(a) and IM–5505–1), the current proposal would only provide for a Direct Listing with a Capital Raise on the Nasdaq Global Select Market.

“Restricted Securities” means securities that are subject to resale restrictions for any reason, including, but not limited to, securities: (1) Acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S; (4) acquired in reliance on Regulation S, which cannot be resold within the United States; (5) subject to a lockup agreement or a similar contractual restriction; or (5) considered “restricted securities” under Rule 501(a)(3). “Restricted Securities” means securities that are not Restricted Securities. See Listing Rule 501(a)(4). “Unrestricted Publicly Held Shares” means the Publicly Held Shares that are Unrestricted Securities. See Listing Rule 501(a)(4). See also Listing Rule 501(a)(23) and (35) for definitions of “Market Value” and “Publicly Held Shares.”

Listing Rule IM–5315–1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

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

In qualifying companies for listing in a Direct Listing with a Capital Raise, however, 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. According to the Exchange, such investors may acquire in secondary market trades shares sold by the issuer in a Direct Listing with a Capital Raise that were included when calculating whether the issuer met the Market Value of Unrestricted Publicly Held Shares requirement for initial listing. The Exchange states, however, that a company listing in conjunction with a Direct Listing with a Capital Raise will be required to have a Market Value of Unrestricted Publicly Held Shares that is much higher than the Exchange’s $45 million Market Value of Unrestricted Publicly Held Shares requirement that applies to a traditional underwritten initial public offering (“IPO”).22 The Exchange further states that this heightened requirement, along with the ability of all investors to purchase shares in the opening process on the Exchange, should result in companies using a Direct Listing with a Capital Raise having adequate public float and a liquid trading market after the completion of the opening auction.23

The Exchange also states that it believes that it is consistent with the protection of investors to calculate the security’s bid price and values derived from the security’s price using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.24 The Exchange states that it will allow the company to sell five million shares in the opening auction, and purchase shares sold by other shareholders or sell their 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. See id.

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

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

“Restricted Securities” means securities that are subject to resale restrictions for any reason, including, but not limited to, securities: (1) Acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (2) acquired through an employee stock benefit plan or as compensation for professional services; (3) acquired in reliance on Regulation S, which cannot be resold within the United States; (4) subject to a lockup agreement or a similar contractual restriction; or (5) considered “restricted securities” under Rule 501(a)(3). “Restricted Securities” means securities that are not Restricted Securities. See Listing Rule 501(a)(4). “Unrestricted Publicly Held Shares” means the Publicly Held Shares that are Unrestricted Securities. See Listing Rule 501(a)(4). See also Listing Rule 501(a)(23) and (35) for definitions of “Market Value” and “Publicly Held Shares.”

Listing Rule IM–5315–1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

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

Seesupposed Listing Rule IM–5315–2. See also Listing Rule 5315(f)(2)(A) and (B) requiring a Market Value of Unrestricted Publicly Held Shares for initial listing. The Exchange would calculate the Market Value of Unrestricted Publicly Held Shares, for this purpose, using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement. The Exchange also proposes to determine whether the company has met the applicable bid price and market capitalization requirements based on the same share price. The Exchange states that, except as proposed for a Direct Listing with a Capital Raise, its listing rules generally do not include shares held by officers, directors, or owners of more than 10% of the company’s common stock in calculations of Publicly Held Shares.

Seesupposed Listing Rule IM–5315–2. See also Listing Rule 5315(f)(2)(C) (requiring a Market Value of Unrestricted Publicly Held Shares for initial listing that applies to a traditional underwritten initial public offering (“IPO”), rather would raise capital in a private placement or a similar transaction instead. See id. at 2248.

Seesuppose note 9, 86 FR 12246. The Exchange also states that, unlike a company listing in connection with a Selling Shareholder Direct Listing or a similar transaction instead. See id. at 2248.

Seesuppose note 9, 86 FR 12246. The Exchange also states that, unlike a company listing in connection with a Selling Shareholder Direct Listing that could qualify for the price-based initial listing requirements based on a Valuation, a company listing in connection with a Direct Listing with a Capital Raise, like a company listing in connection with a Selling Shareholder Direct Listing that could qualify for such requirements based on the minimum price at which it could sell shares in the offering. See id. at 2248.

Seesuppose note 9, 86 FR 12246.
opening auction, otherwise known as the Nasdaq Halt Cross, to take place at a price as low as this price, but no lower, and so this is the minimum price at which a company could be listed.25 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. According to the Exchange, this would include the requirements to have the applicable number of shareholders and at least 1,250,000 Unrestricted Publicly Held Shares outstanding at the time of initial listing, and the requirement to have a price per share of at least $4.00 at the time of initial listing.26

The Exchange has proposed that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on the Exchange following the initial pricing through the Nasdaq Halt Cross, which is described in Rules 4120(c)(9) and 4753. As described in detail below, the Exchange has proposed to modify Rule 4120(c)(9) with respect to certain functions that are performed by an underwriter in an IPO or a financial advisor in a Selling Shareholder Direct Listing, to require that in the case of a Direct Listing with a Capital Raise, in consultation with the financial advisor to the issuer, would make the determination of whether the security is ready to trade and Nasdaq would determine whether to postpone and reschedule the offering as described in Rule 4120(c)(8)(A).27 The Exchange states that the requirement that the company begin trading of the company’s securities following the initial pricing through the Nasdaq Halt Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of securities covered by the proposal, because a substantial number of orders are expected to be executed in the Nasdaq Halt Cross at a single price rather than in the secondary trading at fluctuating prices.28 In addition, the Exchange has proposed to amend Rule 4120(c)(9) to specify that any services provided by a financial advisor to the issuer of a security under Rules 4120(c)(8) and 4120(c)(9)(A) and (B), including a company listing in connection with a Direct Listing with a Capital Raise, must be provided in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.29

With respect to the Nasdaq Halt Cross, the Exchange has proposed that, in the case of a Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the 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.30 This requirement would be in addition to the existing process described in Rule 4120(c)(6)(A)(i), (ii), and (iii), as modified by the proposed changes to Rule 4120(c)(9).31

Current Rules 4120(c)(8) and (9) provide that the underwriter of the IPO, or the financial advisor in a Selling Shareholder Direct Listing, respectively, provide notice to Nasdaq that the security subject to the Nasdaq Halt Cross is “ready to trade.” These rules also provide that the underwriter of the IPO, or the financial advisor in a Selling Shareholder Direct Listing, with concurrence of Nasdaq, may determine at any point during the Nasdaq Halt Cross process up through the conclusion of the pre-launch period to postpone and reschedule the price of the security subject to the Nasdaq Halt Cross. The Exchange has proposed to require 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, would make the determination of whether the

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25 “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 Eligible Interest. See Rule 4753(a)(4). “Eligible Interest” means any quoted or marketable interest 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 Halt Cross. See Rule 4753(a)(9). Pursuant to Rule 4120, the Exchange will halt trading in a security that is the subject of an IPO (or direct listing), and terminate that halt when the Exchange releases the security for trading upon certain conditions being met, as discussed further below. See Rule 4210(d)(7) and (c)(8).

26 See Notice, supra note 9, 86 FR 12248.

27 See Notice, supra note 9, 86 FR 12246 (citing Listing Rules 4120 and 5315(b)(1)).

28 See proposed Rule 4780(b)(10)(A) and (B).

29 Proposed Rule 4780(b)(10)(A). Notice, supra note 9, 86 FR 12247. The Exchange states that the proposed CDL Order is similar in some respects to a 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. The Exchange also states that, as a market order, the CDL Order is guaranteed to execute in the Nasdaq Halt Cross. See Notice, supra note 9, 86 FR 12247 n.20.

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

31 See Amendment No. 2, supra note 11 at 14 n.19. As discussed further below, Nasdaq will postpone and reschedule the offering if there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the actual price calculated by the cross is outside the price range established by the issuer in its effective registration statement.

32 See Notice, supra note 9, 86 FR 12248.
security is ready to trade.\textsuperscript{37} Once Nasdaq has determined that the security is ready to trade, Nasdaq shall 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 is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement. Nasdaq shall postpone and reschedule the offering only if either or both such conditions are not met.\textsuperscript{38}

According to the Exchange, if there is insufficient buy interest to satisfy the CDL Order, and all other market orders, as required by the proposal, or if the actual price calculated by the Nasdaq Halt Cross is outside the price range established by the issuer in its effective registration statement, the Nasdaq Halt Cross would not be allowed to proceed and such security would not begin trading.\textsuperscript{39} The Exchange represents that, if the Nasdaq Halt Cross cannot be conducted because these conditions are not met, 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.\textsuperscript{40} The Exchange further states that because the CDL Order will be a market order, if the Nasdaq Halt Cross proceeds, that order will execute in full in the Nasdaq Halt Cross, along with orders priced at or better than the price determined in the Nasdaq Halt Cross.

The Exchange states that, unlike in an IPO, a company listing through a Direct Listing with a Capital Raise would not have an underwriter to guarantee that a specified number of shares would be sold by the company at a price consistent with disclosure in the company’s effective registration statement. However, the Exchange states that this would be achieved through the proposed requirements that (1) the Nasdaq Halt Cross occur only if the CDL Order, which must be equal to the total number of shares disclosed as being offered by the company in the effective registration statement, is executed in full; and (2) the Nasdaq Halt Cross occur at a price per share that is within the price range disclosed by the issuer in its effective registration statement.\textsuperscript{41} The Exchange states that it believes that the CDL Order and related provisions would 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 assures an auction that is consistent with the disclosures in the registration statement.\textsuperscript{42} Finally, the Exchange has proposed to make adjustments to how it would calculate the Current Reference Price, which is disseminated in the Nasdaq Order Imbalance Indicator,\textsuperscript{43} and the price at which the Nasdaq Halt Cross would execute, for a Direct Listing with a Capital Raise. In each case, where there are multiple prices that would satisfy the conditions for determining the price, the Exchange would modify the fourth tie-breaker for a Direct Listing with a Capital Raise to use the lowest price of the price range disclosed by the issuer in its effective registration statement.\textsuperscript{44}

\textbf{III. Discussion and Commission Findings}

The Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.\textsuperscript{45} In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission has consistently recognized the importance and significance 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.\textsuperscript{46} The standards, collectively, also provide investors and market participants with some level of assurance that the listed company has the resources, policies, and procedures necessary to promote fair and orderly markets.

\begin{itemize}
\item \textsuperscript{37} See Notice, supra note 9, 86 FR 12249.
\item \textsuperscript{38} See Notice, supra note 9, 86 FR 12247.
\item \textsuperscript{39} See Notice, supra note 9, 86 FR 12247. The Exchange states that Nasdaq alone would make any determination to postpone and reschedule the offering and would do so only in the narrowly defined circumstances described in proposed Rule 4120(c)(9)(B).
\item \textsuperscript{40} See Amendment No. 2, supra note 11, at 15 n.19. The Exchange also states that the price bands established by Rule 4120(c)(9)(B) cannot act to cause the Nasdaq 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 Nasdaq Halt 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. See Notice, supra note 9, 86 FR 12248.
\item \textsuperscript{41} See Notice, supra note 9, 86 FR 12247–48.
\item \textsuperscript{42} See Notice, supra note 9, 86 FR 12249.
\item \textsuperscript{43} See Notice, supra note 9, 86 FR 12249. The Exchange states that, specifically, the CDL Order and related provisions would 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 assures an auction that is consistent with the disclosures in the registration statement.
\item \textsuperscript{44} See Notice, supra note 9, 86 FR 12249. The Exchange states that, if there is insufficient buy interest to satisfy the CDL Order, and all other market orders, as required by the proposal, or if the actual price calculated by the Nasdaq Halt Cross is outside the price range established by the issuer in its effective registration statement, the Nasdaq Halt Cross would not be allowed to proceed and such security would not begin trading.
\item \textsuperscript{45} See Notice, supra note 9, 86 FR 12249. The Exchange also states that Nasdaq alone would make any determination to postpone and reschedule the offering and would do so only in the narrowly defined circumstances described in proposed Rule 4120(c)(9)(B).
to comply with the requirements of the Exchange Act and Exchange rules.48

The Exchange’s listing standards currently provide the Exchange with discretion to list a company whose stock has not been previously registered under the Exchange Act, where such company is listing in connection with a Selling Shareholder Direct Listing.49 The Exchange has proposed to allow companies to list in connection with a Direct Listing with a Capital Raise, which would provide a company the option, without a firm commitment underwritten offering, of selling shares to raise capital in the opening auction upon initial listing on the Exchange.50 The Commission notes that recently it approved a proposal by the New York Stock Exchange to allow a direct listing with a primary offering.51

As explained further below, the following aspects of the proposal, as modified by Amendment No. 2, demonstrate that it is reasonably designed to be consistent with the protection of investors and the maintenance of fair and orderly markets, as well as the facilitation of capital formation: (i) Addition of the CDL Order type and other requirements that address how the issuer will participate in the opening auction; (ii) addition of the requirement that the opening price must occur 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; (iii) discussion of the role of financial advisors and addition of requirements providing that only Nasdaq, in consultation with the financial advisor, may determine that the security is ready to trade and limiting the circumstances pursuant to which Nasdaq could postpone or reschedule the offering; (iv) addition of language reminding financial advisors that specified activities are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements; and (v) clarification of how market value will be determined for qualifying the company’s securities for listing.

The Commission discusses below the Exchange’s proposal to allow a Direct Listing with a Capital Raise. First, the Commission addresses the Exchange’s proposed market value of unrestricted publicly-held shares requirement for a Direct Listing with a Capital Raise. Second, the Commission addresses concerns it raised in the Order Instituting Proceedings about the initial opening auction process for Direct Listings with a Capital Raise and the role of financial advisors in the Exchange’s proposed rule change, prior to the changes made by Amendment Nos. 1 and 2. As discussed below, in the amended proposal the Exchange made several modifications to its proposal that were designed to address these concerns.52 Finally, the Commission addresses a commenter’s concerns about whether the proposal is consistent with investor protection and the public interest given the lack of traditional underwriter involvement in a Direct Listing with a Capital Raise and concerns about Securities Act Section 11 liability.53 As discussed throughout this order, the Commission concludes that the Exchange has met its burden to demonstrate that its proposal is consistent with the Exchange Act, and therefore finds the proposed rule change to be consistent with the Exchange Act.

A. Aggregated Market Value of Unrestricted Publicly Held Shares Requirement

The Exchange has proposed that it will deem a company to have met the Market Value of Unrestricted Publicly Held Shares 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). The Exchange would calculate the Market Value of Unrestricted Publicly Held Shares using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement.54 According to the Exchange, a company may list in connection with a traditional underwritten IPO with a minimum $45 million Market Value of Unrestricted Publicly Held Shares. The Exchange states that the “heightened requirement” for a Direct Listing with a Capital Raise, “along with the ability of all investors to purchase shares in the opening process on the Exchange” should result in companies using a Direct Listing with a Capital Raise having adequate public float and a liquid trading market after completion of the opening auction.” 55

The Exchange has shown that the proposed aggregate Market Value of Unrestricted Publicly Held Shares requirement provides the Exchange with a reasonable level of assurance that


50 See proposed Listing Rule IM–5315–2. In contrast, Listing Rule IM–5315–1 states that it permits companies “to list on the Nasdaq Global Select Market, provided the Company meets all applicable initial listing requirements and lists at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell shares. This Interpretive Material describes when a Company whose stock is not previously registered under the Exchange Act may list on the Nasdaq Global Select Market, where such Company is listing without a related underwritten initial listing requirements and lists at the time of effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements.” Listing Rule IM–5315–1.

51 See supra notes 8 and 11. In the amended filing, the Exchange states that, following approval of this proposed rule change, the Exchange 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 the Exchange will summarize the remaining issues raised in the Order Instituting Proceedings. See Notice, supra note 9, 86 FR 12245 n.9. This approval order pertains only to Nasdaq’s current proposal; any new rules or changes to the rules being approved would require the Exchange to file a new proposed rule change pursuant to Section 19(b) of the Exchange Act.

52 See infra notes 8 and 11. In the amended filing, the Exchange states that, following approval of this proposed rule change, the Exchange 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 the Exchange will summarize the remaining issues raised in the Order Instituting Proceedings. See Notice, supra note 9, 86 FR 12245 n.9. This approval order pertains only to Nasdaq’s current proposal; any new rules or changes to the rules being approved would require the Exchange to file a new proposed rule change pursuant to Section 19(b) of the Exchange Act.
higher than the $45 million Market Value of Unrestricted Publicly Held Shares requirement applied to IPOs and spin-offs.59 Further, as described below, using the lowest price in the price range established by the issuer in its registration statement to determine the minimum market value is a reasonable and conservative approach because the Direct Listing with a Capital Raise will not proceed at a lower price.

B. Opening Auction Process for Direct Listing With a Capital Raise and Role of Financial Advisors

As discussed above, the Exchange has proposed to add the CDL Order as a new order type to be used in a Direct Listing with a Capital Raise. An issuer would be required to submit a CDL Order in the opening auction for the full quantity of offered shares, as reflected in the effective registration statement, and the CDL Order must be executed in full. Although the CDL Order would be entered as a market order, it would only execute at a price 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 CDL Order cannot be modified or cancelled by the issuer once entered.60

In the Order Instituting Proceedings, the Commission raised concerns about provisions in the original proposal regarding the price at which the Nasdaq Halt Cross could proceed on the first day of trading, and whether that price would be consistent with the disclosures in the issuer’s Securities Act registration statement.61 Specifically,

59 A significant number of exchange-listed IPOs in the recent years had proceeds that fell below the $110 million threshold. Using information from Thomson Reuters SDC Platinum New Issues database, the Commission staff concluded that, among 146 exchange-listed IPOs conducted during the 2019 calendar year, the median offer size was $106.7 million. Among 196 exchange-listed IPOs conducted during the 2020 calendar year, the median offer size was $175.4 million. Further, staff concluded that approximately 51.4 percent of the companies that went public via the IPO in 2019 and 33.7 percent of the companies that went public via the IPO in 2020 ($63.6 percent in 2019 and 34.6 percent in 2020 among NASDAQ IPOs only) had an offer size that fell below $110 million. Similarly, academic research finds that the median proceeds raised in exchange-listed IPOs in the United States were approximately $121 million during the 2019 calendar year and $175 million during the 2020 calendar year. See Jay R. Ritter, Initial Public Offerings: Updated Statistics tbl.4 (March 10, 2021), available at https://site.warrington.ufl.edu/ ritter/files/IPO-Statistics.pdf.

60 One commenter stated that it shared this concern. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 13, 2021) (“CII Letter II”). In the Order Instituting Proceedings, the Commission stated, among other things, that although issuers may file additional Securities Act registration statements to register additional securities needed to complete an offering, Section 5 of the Securities Act requires all of the related registration statements to be effective prior to the time of sale. To the extent Nasdaq’s original proposal may have resulted in issuers needing to register additional securities beyond those included in an initial Securities Act registration statement, it was not apparent how an issuer could ensure that any additional required registration statement would be effective prior to the time of opening.

61 The Commission expressed concern about the lack of a proposed maximum price, above which the cross could not proceed, and that, without an upside limit, it was not clear how the issuer could ensure that the issuer’s Securities Act registration statement would cover the full amount of securities to be sold in the offering.62 The Commission also expressed concern about a provision in the original proposal that would have allowed the opening cross to occur at a price up to 20% below the price range disclosed by the issuer in its effective registration statement, and that the Exchange had not explained how investors would know the minimum price at which the company could sell shares in the offering. Further, the Commission raised a concern that it was unclear from the proposed rules that the cross would not occur at a price that is below the price 20% below the disclosed price range due to the application of an existing provision that permits an underwriter or financial advisor to select price bands of up to $0.50 outside of the expected cross price and still have the cross proceed if the actual price is within the price band.

In the amended proposal, the Exchange modified the permissible price range for the opening cross and provided that Nasdaq would release a security for trading only if 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.63 The Commission expressed concern about whether the proposal was consistent with Section 6(b)(5) under the Exchange Act, including whether the proposal was designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.

62 The existing $45 million market value requirement in Listing Rule 5315(f)(2)(C) is a longstanding requirement that has supported the listing of companies on the Exchange that are suitable for listing and has existed since 2010. See Securities Exchange Act Release No. 61904 (April 14, 2010), 75 FR 20651 (April 20, 2010) (SR–NASDAQ–2010–047) (lowering the market value of publicly-held shares requirement for the listing of IPOs, affiliates, or spin-offs from $70 million to $45 million).

63 One commenter stated that it shared this concern. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 13, 2021) (“CII Letter II”). In the Order Instituting Proceedings, the Commission stated, among other things, that although issuers may file additional Securities Act registration statements to register additional securities needed to complete an offering, Section 5 of the Securities Act requires all of the related registration statements to be effective prior to the time of sale. To the extent Nasdaq’s original proposal may have resulted in issuers needing to register additional securities beyond those included in an initial Securities Act registration statement, it was not apparent how an issuer could ensure that any additional required registration statement would be effective prior to the time of opening.

64 See supra notes 28–29 and accompanying text. In addition, as discussed above, the Exchange proposes that it would modify the fourth tie-breaker used for the Current Reference Price disseminated in its Order Imbalance Indicator and for the price at which the Nasdaq Halt Cross will execute to equal the lowest price of the price range disclosed in the effective registration statement. See supra notes 43–44 and accompanying text. The Commission believes that this is a reasonable price to use because the auction cannot occur at a lower price.

65 If that price were not consistent with the disclosures in the issuer’s Securities Act registration statement, in addition to any issues under the Securities Act, there would be concerns about whether the proposal was consistent with Section 6(b)(5) under the Exchange Act, including whether the proposal was designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest.
Commission believes that the changes to the proposed pricing provisions that the Exchange made in the amended proposal ensure that the actual price of the cross and the number of shares offered will be consistent with the issuer’s disclosures in its effective registration statement. The Commission further believes that these changes adequately address the Commission’s concerns arising from the price at which the cross would proceed.

The CDL Order and related opening auction procedures proposed by the Exchange set forth the method by which the issuer participates in the opening auction, help to prevent the issuer from being in a position to improperly influence the price discovery process, and will help result in the Exchange conducting an auction that is otherwise consistent with the disclosures in the registration statement. Specifically, the issuer would be required to submit a CDL Order in the opening auction for the full quantity of offered shares, and the security would only be released for trading in the opening auction at a price that is within the disclosed price range, as reflected in the effective registration statement. Further, the CDL Order cannot be modified or cancelled by the issuer once entered. The Commission notes that it recently approved the use of a similar order for the opening process for a direct listing with primary offering on another national securities exchange, stating that an opening process using such order type provided reasonable assurance that the opening auction and subsequent trading promote fair and orderly markets, and that the proposed rules are designed to prevent fraud and manipulation and protect investors and the public interest, consistent with Section 6(b)(5) under the Exchange Act.65

In the Order Instituting Proceedings, the Commission also expressed concern that the proposed rules appeared to permit the issuer’s financial advisor broad discretion to postpone the offering, which would effectively cancel the CDL Order. In its original proposal, the Exchange contemplated that the financial advisor in a Direct Listing with a Capital Raise would determine when the security is ready to trade, similar to the role played by an underwriter in an IPO or a financial advisor in a Selling Shareholder Direct Listing, and could also postpone the offering at anytime prior to the offering.66

In the amended proposal, the Exchange proposed to modify its rules for the opening cross to provide that, for a Direct Listing with a Capital Raise, Nasdaq, in consultation with the financial advisor to the issuer, would make the determination of whether the security is ready to trade, and Nasdaq alone would make the determination of whether to postpone and reschedule the offering, rather than allowing the financial advisor to make these determinations. Nasdaq would postpone and reschedule the offering only if there is insufficient buy interest to satisfy the CDL Order and all other market orders, or if the actual price calculated by the cross is outside the price range established by the issuer in its effective registration statement. The Commission believes that providing Nasdaq exclusive discretion to determine whether to postpone or reschedule the offering, and limiting that discretion to cases where the CDL Order could not otherwise be executed, adequately addresses the concerns expressed in the Order Instituting Proceedings that the CDL Order, which by its terms may not be cancelled or modified, could indirectly be cancelled by virtue of the financial advisor’s broad discretion to postpone or reschedule the offering.67

This will help ensure that the offering will proceed consistent with the disclosures in the issuer’s Securities Act registration statement and, for the reasons noted above, consistent with Section 6(b)(5) of the Exchange Act.

In addition, the proposed rules contain a reminder to the financial advisor that any activities performed under Rules 4120(c)(8) and 4120(c)(9)(A) and (B) must be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.68

This provision will help to ensure compliance by participants in the direct listing process with these important provisions of the federal securities laws and that the proposed changes are consistent with preventing manipulative acts and practices, and protecting investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act.

C. Lack of Traditional Underwriter Involvement in a Direct Listing With a Capital Raise and Securities Act Section 11 Standing

One commenter recommended that the Commission disapprove the proposal because it believes that the proposed expansion of direct listings would compound problems that shareholders face in tracing their share purchases to a registration statement for purposes of claims under Section 11 of the Securities Act and may lead to a decline in effective corporate governance at U.S. public companies.69

This commenter stated that traceability concerns often arise when there have been successive offerings, as shareholders seek to establish their standing to litigate claims for material misstatements or omissions under Section 11 of the Securities Act.70

The commenter also stated that investor concerns about the traceability of shares in a direct listing were drawn into sharp focus in current litigation involving a


66 See supra note 60 and accompanying text. See also proposed Rule 4702(b)(10), which sets forth the requirements the issuer must follow in entering the CDL Order, and proposed Rule 4120(c)(9)(B), which sets forth the requirements for Nasdaq to release the security for trading in the opening auction for a Direct Listing with a Capital Raise.

67 See supra note 38–39 and accompanying text.

68 See supra note 60 and accompanying text. See also proposed Rule 4702(b)(10), which sets forth the requirements the issuer must follow in entering the CDL Order, and proposed Rule 4120(c)(9)(B), which sets forth the requirements for Nasdaq to release the security for trading in the opening auction for a Direct Listing with a Capital Raise.

69 See supra note 60 and accompanying text.

70 See CII Letter I, supra note 69, at 2–3.
In addition, the commenter stated that it is concerned that the Exchange’s proposal would result in a significant increase in the use of direct listings, and that more direct listings may lead to a decline in the effective corporate governance of U.S. public companies to the detriment of long-term investors and the capital markets generally. The commenter stated that a recent direct listing of Palantir Technologies Inc. had a multi-class structure that is viewed by many market participants as inconsistent with effective governance. In response, the Exchange stated that it believes that the concern about a decline in effective corporate governance is unsubstantiated and challenges in this context are not of such magnitude as to render the proposal inconsistent with the Exchange Act. The Exchange also pointed to the Commission’s prior conclusion that it did not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of a registered offering.

As the Commission stated previously, the Securities Act does not require the involvement of an underwriter in registered offerings. Moreover, given the broad definition of “underwriter” in the Securities Act, a financial advisor to an issuer engaged in a Direct Listing with a Capital Raise may, depending on the facts and circumstances including the nature and extent of the financial advisor’s activities, be deemed a statutory “underwriter” with respect to the securities offering, with attendant underwriter liabilities. Thus, the financial advisors to issuers in Direct Listings with a Capital Raise have incentives to engage in robust due diligence, given their reputational interests and potential liability, including as statutory underwriters under the broad definition of that term. Moreover, even absent the involvement of a statutory underwriter, investors would not be precluded from pursuing any claims they may have under the Securities Act for false or misleading offering documents, nor would the absence of a statutory underwriter affect the amount of damages investors may be entitled to recover.

In addition, issuers, officers, directors, and accountants, with their attendant liability, play important roles in assuring that disclosures provided to investors are materially accurate and complete. The Commission therefore does not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of a registered offering. Indeed, exchange-listed companies often engage in offerings that do not involve a firm commitment underwriting.

Moreover, as the Commission stated previously, the commenter’s concerns regarding shareholders’ ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in a direct listing with a primary offering, including the proposed Direct Listing with a Capital Raise. Rather, this issue is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market as those that are so subject. Where a registration statement, at the time of effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act provides a cause of action to “any person acquiring such security,” unless it is proved that at the time of the acquisition the person “knew of such untruth or omission.” In the context of conventional public offerings, courts have interpreted this statutory provision to permit aftermarket purchasers (i.e., those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the offering covered by the false or misleading registration statement.

Tracing is not set forth in Section 11 and is a judicially-developed doctrine. The application of this doctrine and, in particular, the pleading standards and factual proof that potential claimants must satisfy vary depending on the particular facts of the distribution and judicial district, and may be affected by pending litigation.
Although it is possible that aftermarket purchases following a Direct Listing with a Capital Raise may present tracing challenges, it is not yet known whether a court would find that this investor protection concern is applicable to a Direct Listing with a Capital Raise. We expect judicial precedent on traceability in the direct listing context to continue to evolve, but the Commission is not aware of any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims. The Commission is actively monitoring this issue and will be able to respond to such concerns when and if they arise.

With respect to the commenter’s concern that Nasdaq’s proposal could lead to a significantly increased use of direct listings, we acknowledge that the ability to raise capital in connection with a direct listing may lead more issuers to pursue this alternative method of becoming publicly traded. With respect to the commenter’s concerns the proposal could lead to a decline in effective corporate governance, the commenter suggests that the involvement of banks and underwriters in conventional IPOs may help investors encourage issuers to revise corporate governance arrangements, such as dual-class structures, that are not favored by such investors. The commenter cited as an example a recent secondary direct listing in which founders of the listed company, as a result of the company’s multi-class structure, would retain effective voting control over the company as long as they collectively own a specified minimum amount of the company’s shares. Under existing listing rules, nothing precludes companies with multi-class structures that give their founders disproportionate voting rights from listing on an exchange in connection with a traditional firm commitment IPO; indeed, such listings are not uncommon. Moreover, the Commission does not believe that investors will be precluded from raising concerns about governance structures in the context of direct listings; to the extent a company’s corporate governance structures are of sufficient concern to investors, they may be able to influence companies’ governance practices, notwithstanding the lack of a firm commitment.

underwriting, through signaling their unwillingness to purchase a company’s shares through a direct listing. In this way, investors may be able to persuade companies to adopt preferred governance provisions, whether the company becomes listed through a direct listing or a firm commitment IPO.

The Commission finds that the proposed rule change is consistent with the protection of investors. The proposed rule change will require all Direct Listings with a Capital Raise to be registered under the Securities Act, and thus subject to the existing liability and disclosure framework under the Securities Act for registered offerings. Among other disclosures, these registration statements will require both book fide price ranges and audited financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.

The Commission further believes that Direct Listings with a Capital Raise will provide benefits to existing and potential investors relative to firm commitment underwritten offerings. First, because the securities to be issued by the company in connection with a Direct Listing with a Capital Raise would be allocated based on matching buy and sell orders, in accordance with the proposed rules, some investors may be able to purchase securities in a Direct Listing with a Capital Raise who might not otherwise receive an initial allocation in a firm commitment underwritten offering. The proposed rule change therefore 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.

Second, because the price of securities issued by the company in a Direct Listing with a Capital Raise will be determined based on market interest and the matching of buy and sell orders, Direct Listings with a Capital Raise will provide an alternative way to price securities offerings that may allow for efficiencies in IPO pricing and allocation.


While the Commission acknowledges the possibility that some companies may pursue a Direct Listing with a Capital Raise instead of a traditional IPO, these two listing methods may not be substitutable in a wide variety of instances. For example, some issuers may require the assistance of underwriters to develop a broad investor base sufficient to support a liquid trading market; others may believe a traditional firm commitment IPO is preferable given the benchmark price that can result from roadshows and other marketing efforts that often accompany such offerings. Thus, we do not anticipate that all companies that are eligible to go public through a Direct Listing with a Capital Raise will choose to do so; the method chosen will depend on each issuer’s unique characteristics.
Capital Raise is consistent with the Exchange Act.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,94 that the proposed rule change (SR–NASDAQ–2020–057), as modified by Amendment No. 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.95

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations: NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the NYSE Arca Options Fee Schedule

May 19, 2021.

Pursuant to Section 19(b)(1)1 of the Securities Exchange Act of 1934 (the “Act”)2 and Rule 19b–4 thereunder,3 notice is hereby given that, on May 12, 2021, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 the NYSE Arca Options Fee Schedule (“Fee Schedule”) to adopt a new incentive program for Floor Brokers. The Exchange proposes to implement the fee change effective May 12, 2021.4 The proposed rule change is available on the Exchange’s website at www.nyse.com, 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 self-regulatory organization 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 those 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 parts of such statements.

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

1. Purpose

The purpose of this filing is to modify the Fee Schedule to introduce the Floor Broker Professional Customer Manual Program (the “Program”), a new incentive program intended to encourage Floor Brokers to increase their Professional Customer billable volume on the Exchange.5

Specifically, the Exchange proposes that the Program would offer Floor Brokers a credit of $0.13 per contract (the “Credit”) for Professional Customer transactions, which a Floor Broker must execute 60% over a Floor Broker’s Professional Customer Manual Transaction ADV in contract sides during the second half of 2020.7

To qualify for the proposed Program, a Floor Broker must execute 60% over the greater of:

(i) 20,000 ADV in contract sides, or
(ii) the Floor Broker’s Professional Customer Manual Transaction ADV in contract sides during the second half of 2020 (i.e., July–December 2020).7

The Exchange believes that a qualifying threshold of 60% over 20,000 contract sides in Professional Customer Manual Transaction ADV is reasonable for a Floor Broker, including one that may be new to the Exchange, to achieve based on the volume executed by Floor Brokers in 2020. Similarly, the Exchange believes that the alternative threshold of a 60% increase over a Floor Broker’s Professional Customer Manual Transaction ADV in contract sides during the second half of 2020 is reasonable for those Floor Brokers that achieve more than 20,000 ADV billable contract sides, given the increased options volume executed by Floor Brokers in the past year.

The Exchange believes the proposed Credit would encourage Floor Brokers to seek out, and increase, Professional Customer order flow for execution on the Exchange. The Exchange’s fees are constrained by intermarket competition, as OTP Holders and OTP Firms (collectively, “OTP Holders”) may direct their order flows to any of the exchanges, including those that may offer similar incentives. Thus, OTP Holders have a choice of where they direct their order flow. Fees and credits for Floor Broker activity are designed to encourage Floor Brokers to execute a variety of transaction types on the Exchange, and the Program is intended to augment those fees and credits by offering an incentive to encourage the execution of Professional Customer billable volume. The Exchange notes that all market participants stand to benefit from any increase in billable volume by Floor Brokers, which promotes market depth, facilitates tighter spreads, and enhances price discovery, and may lead to a

6 See id.
7 See id.