

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 46	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No.* SR - 2020 - * 095	Amendment No. (req. for Amendments *)
Filing by The Nasdaq Stock Market LLC Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934				
Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>
			Section 19(b)(3)(B) * <input type="checkbox"/>	
			Rule	
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)
Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010			Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934	
Section 806(e)(1) * <input type="checkbox"/>		Section 806(e)(2) * <input type="checkbox"/>	Section 3C(b)(2) * <input type="checkbox"/>	
Exhibit 2 Sent As Paper Document <input type="checkbox"/>		Exhibit 3 Sent As Paper Document <input type="checkbox"/>		
<b>Description</b>				
Provide a brief description of the action (limit 250 characters, required when Initial is checked *).				
<div style="border: 1px solid black; padding: 5px;">         Proposal to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq and to explain how the opening transaction for such a listing will be effected       </div>				
<b>Contact Information</b>				
Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.				
First Name *	Nikolai	Last Name *	Utochkin	
Title *	Counsel Listing and Governance			
E-mail *	nikolai.utochkin@nasdaq.com			
Telephone *	(301) 978-8029	Fax	<input type="text"/>	
<b>Signature</b>				
Pursuant to the requirements of the Securities Exchange Act of 1934,				
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.				
(Title *)				
Date	12/22/2020	EVP and Chief Legal Officer		
By	John Zecca	<input type="text"/>		
		(Name *)		
NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.				
<input type="button" value="john.zecca@nasdaq.com"/>				

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq and to explain how the opening transaction for such a listing will be effected.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange (the “Board”) on November 5, 2020. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Nikolai Utochkin  
Counsel – Listing and Governance  
Nasdaq, Inc.  
(301) 978-8029

or

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Arnold Golub  
Deputy General Counsel  
Nasdaq, Inc.  
301-978-8075

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

a. Purpose

Nasdaq proposes to (1) adopt Listing Rule IM-5315-2 to permit a company to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a "Direct Listing with a Capital Raise")<sup>3</sup>; (2) amend Rule 4702 to add a new order type (the "Company Direct Listing Order"), which will be used during the Nasdaq Halt Cross for the shares offered by the company in a Direct Listing with a Capital Raise; and (3) amend Rules 4120(c)(9), 4573(a)(3) and 4753(b)(2) to establish requirements for disseminating information, establishing the opening price and initiating trading through the Nasdaq Halt Cross in a Direct Listing with a Capital Raise.<sup>4</sup>

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<sup>3</sup> A Direct Listing with a Capital Raise includes situations where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

<sup>4</sup> On September 4, 2020, Nasdaq filed with the Commission a proposed rule change to allow companies to list in connection with a direct listing with a primary offering in which the company will sell shares itself in the opening auction in the first day of trading on Nasdaq and to explain how the opening transaction for such a listing will be effected. See Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020). On December 17, 2020, the Commission instituted proceedings to determine whether to approve or disapprove a proposed rule change. Securities Exchange Act Release No. 90717 (December 17, 2020) (Federal Register publication pending). Nasdaq intends to amend that filing to reflect the changes resulting from the immediate effectiveness of this proposed rule change.

The Commission recently found that a Direct Listing 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, as described below, 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.<sup>5</sup>

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 Listing with a Capital Raise will provide an alternative way to price securities offerings that may better reflect prices in the aftermarket, and thus may allow for efficiencies in IPO pricing allocation. In a firm commitment underwritten offering, the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering. The underwriters then sell the securities to the initial purchasers at the public offering price. When the securities begin trading on the listing exchange, however, the price often varies from the IPO price. The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and

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<sup>5</sup> See Final Order at page 37.

subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.<sup>6</sup>

*Proposed Listing Rule IM-5315-2*

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

In considering the initial listing of a company in connection with a Direct Listing on the Nasdaq Global Select Market, Listing Rule IM-5315-1 currently provides that the Exchange will determine that such company has met the applicable Market Value of Unrestricted Publicly Held Shares requirements based on the lesser of: (i) an independent third-party valuation of the company (a “Valuation”);<sup>7</sup> and (ii) the most recent trading

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<sup>6</sup> See Final Order at page 38.

<sup>7</sup> IM-5315-1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

price for the company's common stock in a Private Placement Market where there has been sustained recent trading. For a security that has not had sustained recent trading in a Private Placement Market prior to listing, Nasdaq will determine that such Company has met the Market Value of Unrestricted Publicly Held Shares requirement if the Company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement and provides a Valuation evidencing a Market Value of Publicly Held Shares of at least \$250,000,000.

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

- Nasdaq will calculate the value of shares, including those being sold by the company and those held by public shareholders immediately prior to the listing, using a price per share equal to the lowest price in the price range disclosed by the issuer in its registration statement.<sup>8</sup> Nasdaq also will determine whether the company has met the applicable bid price and market capitalization requirements based on the same per share price.
- In determining whether the company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement if the Company will sell at least \$110 million (or \$100 million, if the Company has

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<sup>8</sup> As described below, the Nasdaq Halt Cross would not execute at a price that is below the bottom of the disclosed range. Thus, this is the minimum price at which the company could list in connection with a Direct Listing with a Capital Raise.

- stockholders' equity of at least \$110 million) in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange.
- Where a company is conducting a Direct Listing with a Capital Raise and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such Company has met its Market Value of Unrestricted Publicly Held Shares requirement if the Company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement and the aggregate market value of the shares the Company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000.<sup>9</sup>

Officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company in the opening auction, provided that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. In addition, in the same way as for shares of a company listing following a traditional underwritten IPO, such an insider owner may purchase shares sold by other shareholders or sell its own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities

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<sup>9</sup> For example, if the company is selling five million shares in the opening auction and there are 45 million shares issued and outstanding immediately prior to the listing that are eligible for inclusion as unrestricted publicly-held shares based on disclosure in the company's registration statement, then the market value of unrestricted publicly-held shares will be calculated based on a combined total of 50 million shares. If the lowest price of the price range disclosed in the company's registration statement is \$10 per share, the Exchange will attribute to the company a market value of unrestricted publicly-held shares of \$450 million, based on a \$10 price per share, which is the bottom of the disclosed range.

laws. Except as proposed for a Direct Listing with a Capital Raise, shares held by these types of inside investors are not included in calculations of Publicly Held Shares for purposes of Exchange listing rules.<sup>10</sup> The Exchange notes that such investors may acquire in secondary market trades shares sold by the issuer in a Direct Listing with a Capital Raise that were included when calculating whether the issuer meets the Market Value of Unrestricted Publicly Held Shares requirement for initial listing. However, the Exchange notes that because of the higher Market Value of Unrestricted Publicly Held Shares requirement and enhanced Market Value of Publicly Held Shares requirement, a company listing in conjunction with a Direct Listing with a Capital Raise will be required to have a Market Value of Unrestricted Publicly Held Shares much higher than the Exchange's minimum \$45 million Market Value of Unrestricted Publicly Held Shares requirement for a traditional underwritten IPO. 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 a Capital Raise having adequate public float and a liquid trading market after the completion of the opening auction.

Any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to and meet all other applicable initial listing requirements, including the requirements to have the applicable number of Total Holders 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.<sup>11</sup>

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<sup>10</sup> Rule 5005(a)(35).

<sup>11</sup> See Listing Rules 5315(e) and (f).

Proposed Listing Rule IM-5315-2 also requires that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Nasdaq Halt Cross, which is described in Rules 4120(c)(8) and 4753. To allow such initial pricing, the company must, in accordance with Rule 4120(c)(9), have a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed, who is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering.<sup>12</sup>

*Amendment to Rule 4702*

The Exchange proposes to amend Rule 4702 to add a new order type, the “Company Direct Listing Order” or “CDL Order”, which will be used for the company’s order in a Direct Listing with a Capital Raise. This will be a Limit Order to sell entered for the quantity of shares offered by the issuer, as disclosed in an effective registration statement for the offering that will execute at the price determined in the Nasdaq Halt Cross. As further proposed, a Direct Listing with a Capital Raise could be effected only if (i) the Current Reference Price would be not less than the lowest price and not higher than the highest price in the price range established by the issuer in its effective registration statement, and (ii) the full quantity of the CDL Order, i.e., the shares that the company seeks to sell in the Direct Listing with a Capital Raise, can be sold within that price range. In addition, all better-priced sell orders would need to be satisfied in such

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<sup>12</sup> As noted below, the Exchange also proposes to amend Rule 4120(c)(9) to specify that any services provided by such financial advisor to the issuer of a security listing in connection with a Direct Listing with a Capital Raise must provide such services in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.

Halt Cross as required by proposed Rule 4120(c)(9)(B), and the shares being sold by the company would have priority over at-priced orders. Only one CDL Order may be entered on behalf of the issuer and the CDL Order may not be cancelled or modified. Only one Nasdaq member, representing the issuer, may enter a CDL Order during a Direct Listing with a Capital Raise.

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

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

Nasdaq proposes to add Rule 4120(c)(9)(B) to specify that in the case of the Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq unless the following conditions, along with the conditions described in Rule 4120(c)(8)(A)(i), (ii), and (iii),<sup>13</sup> are all met:

- the expected price at which the cross would occur (as defined in Rule 4120(c)(8)(A)(i)) 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; and
- there is sufficient buy interest to satisfy both the CDL Order and all better-priced sell orders in full.

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<sup>13</sup> Rule 4120(c)(8)(A) provides that a security will not be released for trading until Nasdaq receives notice from the underwriter of the IPO or financial advisor in the case of a Direct Listing that the security is ready to trade, the system verifies that all market orders will be executed in the cross, and the price determined in the cross satisfies a price validation test.

Because the financial advisor is responsible for determining when the security subject to the Nasdaq Halt Cross is ready to trade, these proposed rule changes would make the financial advisor responsible for determining whether the Halt Cross for a Direct Listing with a Capital Raise can proceed. If there is insufficient buy interest to satisfy the CDL Order as required by this proposed rule, the cross would not proceed and such security would not begin trading. If the cross cannot be conducted, the Exchange would notify market participants via a Trader Update that the Direct Listing with a Capital Raise has been cancelled and any orders for that security that have been entered on the Exchange, including the CDL Order, would be cancelled back to the entering firms.

Nasdaq also proposes changes to Rules 4573(a)(3) and 4753(b)(2) to make adjustments to the calculation of the Current Reference Price, which is disseminated in the Nasdaq Order Imbalance Indicator, in the case of a Direct Listing with a Capital Raise and for how the price at which the Nasdaq Halt Cross will execute. In each case, where there are multiple prices that would satisfy the conditions for determining a price, Nasdaq proposes to modify the fourth tie-breaker for a Direct Listing with a Capital Raise, to use the lowest price of the price range disclosed by the issuer in its effective registration statement.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>15</sup> in particular,

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<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendment to the listing requirements is consistent with the protection of investors. The 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 bona 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 proposal would also require that a company completing a Direct Listing with a Capital Raise (1) sell at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million) in market value of shares in the Exchange's opening auction, or (2) have an aggregate market value of publicly-held shares immediately prior to listing together with the market value of shares the company sells in the opening auction total at least \$250 million, with such market value calculated using a price per share equal to the lowest price of the price range established by the issuer in its registration statement. While officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company or other shareholders in the opening transaction on Nasdaq, in the event that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws, Nasdaq expects that a company expecting to sell

a significant portion of its shares to officers, directors and existing significant shareholders would not undertake a public listing through a Direct Listing with a Capital Raise. Nasdaq also notes that a company may list on the Global Select Market in connection with its initial public offering with a market value of unrestricted publicly held shares of \$45 million and that unlike a company listing in connection with a Direct Listing that could qualify for the price-based initial listing requirements based on a Valuation, a company listing in connection with a Direct Listing with a Capital Raise, like an IPO, must qualify for such requirements based on the minimum price at which it could sell shares in the offering. The higher requirement, along with the ability of all investors to purchase shares in the opening process on the Exchange, should result in companies using a Direct Listing a Capital Raise having adequate public float and a liquid trading market after the completion of the opening auction.

Nasdaq also believes that it is consistent with the protection of investors to calculate the security's bid price and values derived from the security's price using a price per share equal to the price that is the lowest price of the price range disclosed by the issuer in its registration statement. As a result, Nasdaq will allow the Halt Cross to take place as low as this price, but no lower, and so this is the minimum price at which the company could be listed.

The proposed requirement that a company that lists on the Nasdaq Global Select Markets through a Direct Listing with a Capital Raise must begin trading of the company's securities following the initial pricing through the Halt Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of securities covered by the proposed rule change. Accordingly, Nasdaq believes these

changes, as required by Section 6(b)(5) of the Exchange Act, are reasonably designed to protect investors and the public interest and promote just and equitable principles of trade for the opening of securities listing in connection with a Direct Listing on the Nasdaq Global or Capital Markets.

Nasdaq also believes that the proposed adoption of the CDL Order type in Rule 4702 and the addition of requirements to the operation of the Nasdaq Halt Cross in Rule 4120(c)(9) will remove impediments to and perfect the mechanism of a free and open market and a national market system because it would guarantee that the Nasdaq Halt Cross would only occur above a minimum specified price, as described above, and, if the Halt Cross occurs, all shares offered by the company would be sold at no less than such minimum price. Unlike an IPO, a company listing through a Direct Listing with a Capital Raise would not have an underwriter to guarantee that a specified number of shares would be sold by the company within a price range established in the company's effective registration statement. To ensure that the Direct Listing with a Capital Raise auction is conducted consistent with an issuer's effective registration statement, the Exchange proposes that such auction would not proceed unless the quantity of shares specified in CDL Order would be sold in such auction within a price range specified by the company in its registration statement. This certainty would be effected in two ways. First, the proposed CDL Order would be required to be equal to the total number of shares disclosed as being offered by the company in the prospectus included in the effective registration statement filed in connection with its listing. The Nasdaq Halt Cross would only occur if all of the shares in this market order could be executed. Second, the Nasdaq Halt Cross would be required to occur within the price range established by the

issuer in its effective registration statement. Nasdaq further believes that these proposed changes would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are designed to function seamlessly with the existing process for the Nasdaq Halt Cross, including dissemination of information about the expected price.

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

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

Reference Price for such security is the price that is closest to the lowest price of the price range disclosed by the issuer in its effective registration statement, which is the minimum price at which the Halt Cross will occur.

Nasdaq believes that the proposal will facilitate the orderly distribution and trading of shares, as well as foster competition, which is consistent with the purposes of the Exchange Act. The orderly distribution of, and trading of shares, promotes fair and orderly markets, and is one of the important roles of a national securities exchange in ensuring that its rules prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade and protect investors and the public interest.

In view of the above, Nasdaq believes that the proposed rule change is designed to, among other things, prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments would not impose any burden on competition, but would rather increase competition by providing new pathways for companies to access the public markets. Nasdaq also believes that the proposal also fosters competition by providing an alternate method for companies of sufficient size that decide they would rather not conduct a firm commitment underwritten offering to list on the Exchange, thereby removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)<sup>16</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>17</sup> in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

Nasdaq believes that the proposed rule change does not significantly affect the protection of investors or the public interest. Nasdaq listing standards currently provide for companies to list in connection with a Direct Listing. This proposed rule change would allow companies to list in connection with a Direct Listing with a Capital Raise, which would for the first time 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. Nasdaq believes that the following aspects result in a proposal

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

for a Direct Listing with a Capital Raise that is reasonably designed to be consistent with the protection of investors: (i) addition of the CDL Order type and other requirements which address how the issuer will participate in the opening auction; (ii) discussion of the role of financial advisors; (iii) reminder 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 (iv) clarification of how market value will be determined for qualifying the company's securities for listing. In addition, this proposed rule change is based on NYSE's SR-NYSE-2019-67, which the Commission recently approved and found it to be 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 protect investors and the public interest.<sup>18</sup> Nasdaq's proposal herein is virtually identical to that of the NYSE and does not raise any policy issues that were not considered by the Commission in approving the NYSE proposal.<sup>19</sup> In particular, the

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<sup>18</sup> Securities Exchange Act Release No. 89684 (August 26, 2020) 85 FR 54454 (September 1, 2020). On August 26, 2020, after consideration of the record for the proposed rule change, the Division of Trading and Markets, pursuant to delegated authority, approved the proposed rule change ("Approval Order"). On August 31, 2020, pursuant to Commission Rule of Practice 430, the Council of Institutional Investors ("CII") filed with the Commission a notice of intention for review of the Approval Order. September 25, 2020, the Commission granted the petition for review of the Approval Order of CII. On December 22, 2020, the Commission issued an order setting aside action by delegated authority and approving the proposed rule change ("Final Order") Securities Exchange Act Release No. 90768 (December 22, 2020) (Federal Register publication pending), available at: <https://www.sec.gov/rules/other/2020/34-90768.pdf>.

<sup>19</sup> Any differences between Nasdaq's proposal and the NYSE proposal that was approved by the Commission are related to the particular structure and terminology used in the Nasdaq rulebook and Nasdaq market, and any policy issues are resolved in a manner consistent with the SEC's approval of the NYSE proposal. See "Commission Guidance and Amendment to the Rules Relating to Organization and Program Management Concerning Proposed Rule Changes

Commission stated that a Direct Listing with a Capital Raise “will provide benefits to existing and potential investors relative to firm commitment underwritten offerings.”<sup>20</sup>

Nasdaq also believes that the proposed rule change does not impose any significant burden on competition. First, the proposal fosters competition by providing an alternate method for companies of sufficient size that decide they would rather not conduct a firm commitment underwritten offering to list on Nasdaq, thereby removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.<sup>21</sup> In addition, the proposal would increase completion by allowing Nasdaq to compete with NYSE for companies that wish to list in connection with a Direct Listing with a Capital Raise. As such, Nasdaq’s proposal does not impose any significant burden on competition and allowing it to become immediately effective would foster competition, which is consistent with the purposes of the Act, and would be consistent with prior Commission guidance.

Furthermore, Rule 19b-4(f)(6)(iii)<sup>22</sup> requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.<sup>23</sup>

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Filed by Self-Regulatory Organizations”, Exchange Act Release No. 58092 (July 3, 2008), 73 Fed. Reg. 40143 (July 11, 2008).

<sup>20</sup> Final Order at page 37.

<sup>21</sup> See id. at page 39.

<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>23</sup> On December 11 2020, Nasdaq submitted a pre-filing, which is substantively identical to this proposal, except for the addition of discussions based on the Final Order.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. Rule 19b-4(f)(6)(iii), however, permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii) so that Nasdaq could list companies in connection with a Direct Listing with a Capital Raise without delay. As described above, Nasdaq believes that the proposed rule change does not significantly affect the protection of investors or the public interest. In addition, this proposed rule change is based on NYSE's SR-NYSE-2019-67, which the Commission recently approved and found it to be 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 protect investors and the public interest.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable. The proposal is similar to SR-NYSE-2019-67, except for the differences related to market structure and the auction mechanics that Nasdaq and NYSE previously adopted.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

5. Text of the proposed rule change.

**EXHIBIT 1**

## SECURITIES AND EXCHANGE COMMISSION

(Release No. \_\_\_\_\_ ; File No. SR-NASDAQ-2020-095)

December \_\_, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of 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 Nasdaq and to Explain How the Opening Transaction for Such a Listing will be Effected

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 22, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on Nasdaq and to explain how the opening transaction for such a listing will be effected.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

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

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

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

1. Purpose

Nasdaq proposes to (1) adopt Listing Rule IM-5315-2 to permit a company to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a "Direct Listing with a Capital Raise")<sup>3</sup>; (2) amend Rule 4702 to add a new order type (the "Company Direct Listing Order"), which will be used during the Nasdaq Halt Cross for the shares offered by the company in a Direct Listing with a Capital Raise; and (3) amend Rules 4120(c)(9), 4573(a)(3) and 4753(b)(2) to establish requirements for disseminating information,

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<sup>3</sup> A Direct Listing with a Capital Raise includes situations where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

establishing the opening price and initiating trading through the Nasdaq Halt Cross in a Direct Listing with a Capital Raise.<sup>4</sup>

The Commission recently found that a Direct Listing 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, as described below, 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.<sup>5</sup>

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 Listing with a Capital Raise will provide an alternative way to price securities offerings that may better reflect prices in the aftermarket, and thus may

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<sup>4</sup> On September 4, 2020, Nasdaq filed with the Commission a proposed rule change to allow companies to list in connection with a direct listing with a primary offering in which the company will sell shares itself in the opening auction in the first day of trading on Nasdaq and to explain how the opening transaction for such a listing will be effected. See Securities Exchange Act Release No. 89878 (September 15, 2020), 85 FR 59349 (September 21, 2020). On December 17, 2020, the Commission instituted proceedings to determine whether to approve or disapprove a proposed rule change. Securities Exchange Act Release No. 90717 (December 17, 2020) (Federal Register publication pending). Nasdaq intends to amend that filing to reflect the changes resulting from the immediate effectiveness of this proposed rule change.

<sup>5</sup> See Final Order at page 37.

allow for efficiencies in IPO pricing allocation. In a firm commitment underwritten offering, the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering. The underwriters then sell the securities to the initial purchasers at the public offering price. When the securities begin trading on the listing exchange, however, the price often varies from the IPO price. The opening auction in a Direct Listing with a Capital Raise provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.<sup>6</sup>

*Proposed Listing Rule IM-5315-2*

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

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<sup>6</sup> See Final Order at page 38.

pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange.

In considering the initial listing of a company in connection with a Direct Listing on the Nasdaq Global Select Market, Listing Rule IM-5315-1 currently provides that the Exchange will determine that such company has met the applicable Market Value of Unrestricted Publicly Held Shares requirements based on the lesser of: (i) an independent third-party valuation of the company (a "Valuation");<sup>7</sup> and (ii) the most recent trading price for the company's common stock in a Private Placement Market where there has been sustained recent trading. For a security that has not had sustained recent trading in a Private Placement Market prior to listing, Nasdaq will determine that such Company has met the Market Value of Unrestricted Publicly Held Shares requirement if the Company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement and provides a Valuation evidencing a Market Value of Publicly Held Shares of at least \$250,000,000.

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

- Nasdaq will calculate the value of shares, including those being sold by the company and those held by public shareholders immediately prior to the listing, using a price per share equal to the lowest price in the price range disclosed by the

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<sup>7</sup> IM-5315-1 describes the requirement for a Valuation, including the experience and independence of the entity providing the Valuation.

issuer in its registration statement.<sup>8</sup> Nasdaq also will determine whether the company has met the applicable bid price and market capitalization requirements based on the same per share price.

- In determining whether the company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement if the Company will sell at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million) in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange.
- Where a company is conducting a Direct Listing with a Capital Raise and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such Company has met its Market Value of Unrestricted Publicly Held Shares requirement if the Company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement and the aggregate market value of the shares the Company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000.<sup>9</sup>

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<sup>8</sup> As described below, the Nasdaq Halt Cross would not execute at a price that is below the bottom of the disclosed range. Thus, this is the minimum price at which the company could list in connection with a Direct Listing with a Capital Raise.

<sup>9</sup> For example, if the company is selling five million shares in the opening auction and there are 45 million shares issued and outstanding immediately prior to the listing that are eligible for inclusion as unrestricted publicly-held shares based on disclosure in the company's registration statement, then the market value of unrestricted publicly-held shares will be calculated based on a combined total of 50 million shares. If the lowest price of the price range disclosed in the

Officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company in the opening auction, provided that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. In addition, in the same way as for shares of a company listing following a traditional underwritten IPO, such an insider owner may purchase shares sold by other shareholders or sell its own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. Except as proposed for a Direct Listing with a Capital Raise, shares held by these types of inside investors are not included in calculations of Publicly Held Shares for purposes of Exchange listing rules.<sup>10</sup> The Exchange notes that such investors may acquire in secondary market trades shares sold by the issuer in a Direct Listing with a Capital Raise that were included when calculating whether the issuer meets the Market Value of Unrestricted Publicly Held Shares requirement for initial listing. However, the Exchange notes that because of the higher Market Value of Unrestricted Publicly Held Shares requirement and enhanced Market Value of Publicly Held Shares requirement, a company listing in conjunction with a Direct Listing with a Capital Raise will be required to have a Market Value of Unrestricted Publicly Held Shares much higher than the Exchange's minimum \$45 million Market Value of Unrestricted Publicly Held Shares requirement for a traditional underwritten IPO. This heightened requirement, along with

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company's registration statement is \$10 per share, the Exchange will attribute to the company a market value of unrestricted publicly-held shares of \$450 million, based on a \$10 price per share, which is the bottom of the disclosed range.

<sup>10</sup> Rule 5005(a)(35).

the ability of all investors to purchase shares in the opening process on the Exchange, should result in companies using a Direct Listing a Capital Raise having adequate public float and a liquid trading market after the completion of the opening auction.

Any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to and meet all other applicable initial listing requirements, including the requirements to have the applicable number of Total Holders 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.<sup>11</sup>

Proposed Listing Rule IM-5315-2 also requires that securities listing in connection with a Direct Listing with a Capital Raise must begin trading on Nasdaq following the initial pricing through the Nasdaq Halt Cross, which is described in Rules 4120(c)(8) and 4753. To allow such initial pricing, the company must, in accordance with Rule 4120(c)(9), have a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed, who is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering.<sup>12</sup>

*Amendment to Rule 4702*

The Exchange proposes to amend Rule 4702 to add a new order type, the “Company Direct Listing Order” or “CDL Order”, which will be used for the company’s

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<sup>11</sup> See Listing Rules 5315(e) and (f).

<sup>12</sup> As noted below, the Exchange also proposes to amend Rule 4120(c)(9) to specify that any services provided by such financial advisor to the issuer of a security listing in connection with a Direct Listing with a Capital Raise must provide such services in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.

order in a Direct Listing with a Capital Raise. This will be a Limit Order to sell entered for the quantity of shares offered by the issuer, as disclosed in an effective registration statement for the offering that will execute at the price determined in the Nasdaq Halt Cross. As further proposed, a Direct Listing with a Capital Raise could be effected only if (i) the Current Reference Price would be not less than the lowest price and not higher than the highest price in the price range established by the issuer in its effective registration statement, and (ii) the full quantity of the CDL Order, i.e., the shares that the company seeks to sell in the Direct Listing with a Capital Raise, can be sold within that price range. In addition, all better-priced sell orders would need to be satisfied in such Halt Cross as required by proposed Rule 4120(c)(9)(B), and the shares being sold by the company would have priority over at-priced orders. Only one CDL Order may be entered on behalf of the issuer and the CDL Order may not be cancelled or modified. Only one Nasdaq member, representing the issuer, may enter a CDL Order during a Direct Listing with a Capital Raise.

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

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

Nasdaq proposes to add Rule 4120(c)(9)(B) to specify that in the case of the Direct Listing with a Capital Raise, a security shall not be released for trading by Nasdaq

unless the following conditions, along with the conditions described in Rule 4120(c)(8)(A)(i), (ii), and (iii),<sup>13</sup> are all met:

- the expected price at which the cross would occur (as defined in Rule 4120(c)(8)(A)(i)) 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; and
- there is sufficient buy interest to satisfy both the CDL Order and all better-priced sell orders in full.

Because the financial advisor is responsible for determining when the security subject to the Nasdaq Halt Cross is ready to trade, these proposed rule changes would make the financial advisor responsible for determining whether the Halt Cross for a Direct Listing with a Capital Raise can proceed. If there is insufficient buy interest to satisfy the CDL Order as required by this proposed rule, the cross would not proceed and such security would not begin trading. If the cross cannot be conducted, the Exchange would notify market participants via a Trader Update that the Direct Listing with a Capital Raise has been cancelled and any orders for that security that have been entered on the Exchange, including the CDL Order, would be cancelled back to the entering firms.

Nasdaq also proposes changes to Rules 4573(a)(3) and 4753(b)(2) to make adjustments to the calculation of the Current Reference Price, which is disseminated in

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<sup>13</sup> Rule 4120(c)(8)(A) provides that a security will not be released for trading until Nasdaq receives notice from the underwriter of the IPO or financial advisor in the case of a Direct Listing that the security is ready to trade, the system verifies that all market orders will be executed in the cross, and the price determined in the cross satisfies a price validation test.

the Nasdaq Order Imbalance Indicator, in the case of a Direct Listing with a Capital Raise and for how the price at which the Nasdaq Halt Cross will execute. In each case, where there are multiple prices that would satisfy the conditions for determining a price, Nasdaq proposes to modify the fourth tie-breaker for a Direct Listing with a Capital Raise, to use the lowest price of the price range disclosed by the issuer in its effective registration statement.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>15</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposed amendment to the listing requirements is consistent with the protection of investors. The 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 bona 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.

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<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

The proposal would also require that a company completing a Direct Listing with a Capital Raise (1) sell at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million) in market value of shares in the Exchange's opening auction, or (2) have an aggregate market value of publicly-held shares immediately prior to listing together with the market value of shares the company sells in the opening auction total at least \$250 million, with such market value calculated using a price per share equal to the lowest price of the price range established by the issuer in its registration statement. While officers, directors or owners of more than 10% of the company's common stock prior to the opening auction may purchase shares sold by the company or other shareholders in the opening transaction on Nasdaq, in the event that such purchases are not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws, Nasdaq expects that a company expecting to sell a significant portion of its shares to officers, directors and existing significant shareholders would not undertake a public listing through a Direct Listing with a Capital Raise. Nasdaq also notes that a company may list on the Global Select Market in connection with its initial public offering with a market value of unrestricted publicly held shares of \$45 million and that unlike a company listing in connection with a Direct Listing that could qualify for the price-based initial listing requirements based on a Valuation, a company listing in connection with a Direct Listing with a Capital Raise, like an IPO, must qualify for such requirements based on the minimum price at which it could sell shares in the offering. The higher requirement, along with the ability of all investors to purchase shares in the opening process on the Exchange, should result in

companies using a Direct Listing a Capital Raise having adequate public float and a liquid trading market after the completion of the opening auction.

Nasdaq also believes that it is consistent with the protection of investors to calculate the security's bid price and values derived from the security's price using a price per share equal to the price that is the lowest price of the price range disclosed by the issuer in its registration statement. As a result, Nasdaq will allow the Halt Cross to take place as low as this price, but no lower, and so this is the minimum price at which the company could be listed.

The proposed requirement that a company that lists on the Nasdaq Global Select Markets through a Direct Listing with a Capital Raise must begin trading of the company's securities following the initial pricing through the Halt Cross will promote fair and orderly markets by protecting against volatility in the pricing and initial trading of securities covered by the proposed rule change. Accordingly, Nasdaq believes these changes, as required by Section 6(b)(5) of the Exchange Act, are reasonably designed to protect investors and the public interest and promote just and equitable principles of trade for the opening of securities listing in connection with a Direct Listing on the Nasdaq Global or Capital Markets.

Nasdaq also believes that the proposed adoption of the CDL Order type in Rule 4702 and the addition of requirements to the operation of the Nasdaq Halt Cross in Rule 4120(c)(9) will remove impediments to and perfect the mechanism of a free and open market and a national market system because it would guarantee that the Nasdaq Halt Cross would only occur above a minimum specified price, as described above, and, if the Halt Cross occurs, all shares offered by the company would be sold at no less than such

minimum price. Unlike an IPO, a company listing through a Direct Listing with a Capital Raise would not have an underwriter to guarantee that a specified number of shares would be sold by the company within a price range established in the company's effective registration statement. To ensure that the Direct Listing with a Capital Raise auction is conducted consistent with an issuer's effective registration statement, the Exchange proposes that such auction would not proceed unless the quantity of shares specified in CDL Order would be sold in such auction within a price range specified by the company in its registration statement. This certainty would be effected in two ways. First, the proposed CDL Order would be required to be equal to the total number of shares disclosed as being offered by the company in the prospectus included in the effective registration statement filed in connection with its listing. The Nasdaq Halt Cross would only occur if all of the shares in this market order could be executed. Second, the Nasdaq Halt Cross would be required to occur within the price range established by the issuer in its effective registration statement. Nasdaq further believes that these proposed changes would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are designed to function seamlessly with the existing process for the Nasdaq Halt Cross, including dissemination of information about the expected price.

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

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

Nasdaq believes that the proposal will facilitate the orderly distribution and trading of shares, as well as foster competition, which is consistent with the purposes of the Exchange Act. The orderly distribution of, and trading of shares, promotes fair and orderly markets, and is one of the important roles of a national securities exchange in ensuring that its rules prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade and protect investors and the public interest.

In view of the above, Nasdaq believes that the proposed rule change is designed to, among other things, prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments would not impose any burden on competition, but would rather increase competition by providing new pathways for companies to access the public markets. Nasdaq also believes that the proposal also fosters competition by providing an alternate method for companies of sufficient size that decide they would rather not conduct a firm commitment underwritten offering to list on the Exchange, thereby removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant

to Section 19(b)(3)(A)(iii) of the Act<sup>16</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2020-095 on the subject line.

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2020-095. 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 Web site (<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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2020-095 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined.

**The Nasdaq Stock Market Rules**

\* \* \* \* \*

**4120. Limit Up-Limit Down Plan and Trading Halts**

(a) – (b) No change.

(c) Procedure for Initiating and Terminating a Trading Halt

(1) – (8) No change.

(9) (A) For purposes of this Rule and Rule 4753, the process for halting and initial pricing of a security that is the subject of an initial public offering shall also be 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, provided that a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering. If more than one broker dealer is serving in the role of financial advisor, the issuer must designate one to perform the functions under Rule 4120(c)(8). The financial advisor is reminded that any activities performed under Rule 4120(c)(8) are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.

(B) In the case of a Direct Listing with a Capital Raise (as defined in Listing Rule IM-5315-2), a security shall not be released for trading by Nasdaq unless the following conditions, along with the conditions described in paragraphs (c)(8)(A)(i), (ii), and (iii) above, are all met:

(i) the Expected Price 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; and

(ii) there is sufficient buy interest to satisfy both the CDL Order and all better-priced sell orders in full.

(10) No change.

\* \* \* \* \*

**4702. Order Types**

(a) No change.

(b) Except where stated otherwise, the following Order Types are available to all Participants:

(1) - (15) No change.

(16) (A) A “Company Direct Listing Order” or “CDL Order” is a Limit Order to sell that may be executed only in the Nasdaq Halt Cross for a Direct Listing with a Capital Raise (as defined in Listing Rule IM-5315-2). Only one CDL Order may be entered on behalf of the issuer and only by one member. A CDL Order must be executed in full in the Nasdaq Halt Cross. A CDL Order may not be cancelled or modified. A CDL Order has priority over other orders at the same price.

(B) The following Order Attributes may be assigned to a CDL Order:

- Price. The limit price of the CDL Order must be equal to the lowest price of the price range established by the issuer, as disclosed in its effective registration statement.
- Size. The CDL Order must be for the quantity of shares offered by the issuer, as disclosed in its effective registration statement.
- Time-in-Force. A CDL Order may execute only in the Nasdaq Halt Cross.

\* \* \* \* \*

#### **4753. Nasdaq Halt Cross**

(a) Definitions.

For the purposes of this rule the term:

(1) – (2) No change.

(3) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) "Current Reference Price" shall mean:

(i) - (iii) No change.

(iv) If more than one price exists under subparagraph (iii), the Current Reference Price shall mean:

a. – b. No change.

c. In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the lowest price of the price range disclosed by the issuer in its effective registration statement;

[c]d. In the case of another halt type in which the security has already traded during normal market hours on that trading day, the price that is closest to the last Nasdaq execution prior to the trading halt;

[d]e. In the case of another halt type in which the security has not already traded during normal market hours on that trading day, the price that is closest to the previous Nasdaq Official Closing Price; and

[e]f. In the case of the initial pricing of a security that traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing, the price that is closest to the most recent transaction price in that market.

Notwithstanding the foregoing, the Order Imbalance Indicator will not include the Current Reference Price if there is a Market Order Imbalance.

(B) – (G) No change.

(4) – (6) No change.

(b) Processing of Nasdaq Halt Cross. For Nasdaq-listed securities that are the subject of a trading halt or pause initiated pursuant to Rule 4120(a)(1), (4), (5), (6), (7) or (11), the Nasdaq Halt Cross shall occur at the time specified by Nasdaq pursuant to Rule 4120, and Market hours trading shall commence when the Nasdaq Halt Cross concludes.

(1) No change.

(2)

(A) – (C) No change.

(D) If more than one price exists under subparagraph (C), the Nasdaq Halt Cross shall occur at:

(i) - (ii) No change.

(iii) In the case of the initial pricing of a security listing under Listing Rule IM-5315-2, the price that is closest to the lowest price

of the price range disclosed by the issuer in its effective registration statement;

(iv) In the case of another halt type in which the security has already traded during normal market hours on that trading day, the price that is closest to the last Nasdaq execution prior to the trading halt;

([iv]v) In the case of another halt type in which the security has not already traded during normal market hours on that trading day, the price that is closest to the previous Nasdaq Official Closing Price; and

([v]vi) In the case of the initial pricing of a security that traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing, the price that is closest to the most recent transaction price in that market.

(E) No change.

(3) – (4) No change.

(c) – (d) No change.

\* \* \* \* \*

### **IM-5315-2. Determination of Price-Based Requirements for Direct Listings with a Capital Raise**

As described in Listing Rule IM-5315-1, Nasdaq recognizes that some companies that have sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing, may wish to list those securities on Nasdaq. Such companies may list on the Nasdaq Global Select Market without an attendant initial public offering of equity securities by the Company if the Company meets the applicable initial listing requirements and the additional requirements in Listing Rule IM-5315-1.

In addition, in certain cases, a Company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the Company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders. Any such listing is referred to as a “Direct Listing with a Capital Raise” 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.

In determining whether such a Company satisfies the Market Value of Unrestricted Publicly Held Shares for initial listing on the Nasdaq Global Select Market, the Exchange will deem such Company to have met the applicable requirement if the Company will sell

at least \$110 million (or \$100 million, if the Company has stockholders' equity of at least \$110 million) in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange.

Where a Company is conducting a Direct Listing with a Capital Raise and will sell shares in the opening auction with a market value of less than \$100 million, the Exchange will deem that such Company has met its Market Value of Unrestricted Publicly Held Shares requirement if the Company satisfies the applicable Market Value of Unrestricted Publicly Held Shares requirement (\$110 million, or \$100 million if the Company has stockholders' equity of at least \$110 million) and the aggregate market value of the shares the Company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using a price per share equal to the lowest price of the price range disclosed by the issuer in its effective registration statement. Nasdaq will determine that the Company has met the applicable bid price and market capitalization requirements based on the same per share price.

Securities qualified for listing under this IM-5315-2 must begin trading on Nasdaq following the initial pricing through the mechanism outlined in Rule 4120(c)(8) and Rule 4753. To allow such initial pricing, the Company must, in accordance with Rule 4120(c)(9), have a broker-dealer serving in the role of financial advisor to the issuer of the securities being listed, who is willing to perform the functions under Rule 4120(c)(8) that are performed by an underwriter with respect to an initial public offering.

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