

May 20, 2021

## SEC Approves Nasdaq Rule Change Permitting Primary Direct Floor Listings

On May 19, 2021, the SEC approved Nasdaq's proposed rule change<sup>1</sup> to permit primary direct floor listings. This will permit companies to undertake an initial public offering and concurrent Nasdaq listing without the use of underwriters to market the shares (a "Direct Listing with a Capital Raise"). Prior to the rule change, direct listings were available only for secondary offerings by existing shareholders. The rule change allows for primary direct listings to occur alone or together with a secondary direct listing. Primary direct floor listings have been permitted on the NYSE since December 2020.

We summarize below Nasdaq's rule change.

### Listing Requirements

Companies undertaking a Direct Listing with a Capital Raise will be deemed to meet the applicable Market Value of Unrestricted Publicly Held Shares requirement if the aggregate market value of unrestricted publicly held shares immediately prior to listing, together with the market value of shares the company sells in the opening auction, total at least \$110 million (or \$100 million, if the company has stockholders' equity of at least \$110 million), with such market value calculated using a price per share equal to the price that is equal to the lowest price of the range disclosed by the issuer in its effective Securities Act registration statement.

The company listing via a Direct Listing with a Capital Raise will be required to comply with all other initial listing requirements, namely having the applicable minimum number of shareholders,<sup>2</sup> at least 1,250,000 unrestricted publicly held shares outstanding at the time of initial listing, and a price per share of at least \$4.00 at the time of initial listing.

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<sup>1</sup> Amendment No. 2 (available [here](#)) to Nasdaq's proposal entirely superseded and replaced in entirety Nasdaq's original proposal (available [here](#)) as it had been amended by Amendment No. 1 (available [here](#)). For a discussion of Nasdaq's original proposal, please see our prior client alert, [SEC Publishes Nasdaq Proposal for Direct Listings with a Capital Raise](#).

<sup>2</sup> Nasdaq Listing Rule 5315(f)(1) requires a security to have: (A) at least 550 total holders and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month; or (B) at least 2,200 total holders; or (C) a minimum of 450 round lot holders and at least 50% of such round lot holders must each hold unrestricted securities with a market value of at least \$2,500.

### **Initial Pricing and Initiation of Trading**

Securities listed in connection with the Direct Listing with a Capital Raise will begin trading on Nasdaq following the initial pricing through the Nasdaq Halt Cross. The initial pricing would be facilitated by a broker-dealer appointed by the company to serve as a financial advisor to the company and to perform the functions typically assigned to an underwriter in a traditional initial public offering (as contemplated by Rule 4120(c)(8)). New rule 4120(c)(9) specifies that the activities performed by a financial advisor under Rules 4120(c)(8) and 4120(c)(9) must be conducted in a manner consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.

New Rule 4120(c)(9)(B) specifies that a security must not be released for trading on Nasdaq unless the expected price at which the cross would occur is at or above the lowest price and at or below the highest price of the price range established by the company in its effective Securities Act registration statement and all orders will be executed in the cross. Nasdaq, in consultation with the financial advisor to the company, would be responsible for determining whether the security is ready to trade.

Rules 4753(a)(3) and 4753(b)(2) have been modified to make adjustments to the calculation of the Current Reference Price<sup>3</sup> and the determination of the price at which the Nasdaq Halt Cross would execute. If multiple prices existed that would satisfy the condition for determining the price, Nasdaq has modified the fourth tie-breaker for a Direct Listing with a Capital Raise to use the price closest to the lowest price of the price range disclosed by the company in its effective Securities Act registration statement.

### *Company Direct Listing Orders*

A company undertaking a Direct Listing with a Capital Raise will have to use a new order type, the “Company Direct Listing Order” or “CDL Order,” that will be a market order entered for the quantity of shares offered by the company as specified in the Securities Act registration statement. The CDL order will be subject to the following conditions:

- it may be entered only on behalf of the company and by only one Nasdaq member representing the company;

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<sup>3</sup> “Current Reference Price” means:

- The single price at which the maximum number of shares of Eligible Interest can be paired.
- If more than one price exists under subparagraph (i), the Current Reference Price shall mean the price that minimizes any Imbalance.
- If more than one price exists under subparagraph (ii), the Current Reference Price shall mean the entered price at which shares will remain unexecuted in the cross.

- it cannot be canceled or modified;
- it can only be executed in full, in the Nasdaq Halt Cross, at the price determined by the Halt Cross; and
- all orders placed better than the price determined in the Nasdaq Halt Cross would have to be satisfied.

**Transactions by officers, directors and 10% owners**

Officers, directors and owners of 10% or more of a company's common shares prior to the opening auction will be permitted to purchase shares sold by the company as well as other shareholders or sell their own shares as long as such purchases and sales comply with general anti-manipulation provisions, Regulation M and other applicable securities laws.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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