For the Commission, by the Office of Municipal Securities, pursuant to delegated authority. 1
Jill M. Peterson,
Assistant Secretary.
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SECURITIES AND EXCHANGE COMMISSION
[SEC File No. 270–61,OMB Control No. 3235–0073]
Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension: Form S–3

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission (“Commission”) is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form S–3 (17 CFR 239.13) is a short form registration statement used by domestic issuers to register a public offering of their securities under the Securities Act of 1933 (15 U.S.C. 77a et seq.). Form S–3 takes approximately 466,4566 hours per response and is filed by approximately 1,651 issuers annually. We estimate that 25% of the 466,4566 hours per response (116,6141 hours) is prepared by the issuer for a total annual reporting burden of 192,530 hours (116,6141 hours per response × 1,651 responses).

Written comments are invited on: (a) Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency’s estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication by May 2, 2022.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct your written comment to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pazzullo, 100 F Street NE, Washington, DC 20549 or send an email to: PRA Mailbox@sec.gov.

Jill M. Peterson,
Assistant Secretary.
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SECURITIES AND EXCHANGE COMMISSION
Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 2, To Modify Certain Pricing Limitations for Companies Listing in Connection With a Direct Listing Primary Offering

February 24, 2022

On June 11, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 19b–4 thereunder, a proposed rule change to modify certain pricing limitations for companies listing in connection with a direct listing primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange. The proposed rule change was published for comment in the Federal Register on June 30, 2021. 4 On August 12, 2021, pursuant to Section 19(b)(2) of the Exchange Act,5 the Commission designated a longer period within which to either approve or disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. On September 24, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act7 to determine whether to approve or disapprove the proposed rule change.8 On December 20, 2021, the Commission extended the time period for approving or disapproving the proposal to February 25, 2022.9 On December 22, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as originally filed.10 Amendment No. 2 was published for comment in the Federal Register on January 12, 2022.11

This order disapproves the proposed rule change, as modified by Amendment No. 2, because, as discussed below, Nasdaq has not met its burden under the Exchange Act and the Commission’s Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and, in particular, the requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest.

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

Nasdaq Listing Rule IM–5315–2 provides listing requirements for Nasdaq’s Global Select Market for a company that has not previously had its common equity securities registered under the Exchange Act to list its common equity securities on the Exchange at the time of effectiveness of a registration statement12 pursuant to which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a “Direct Listing with a Capital Raise”).13

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

18 On December 21, 2021, Nasdaq submitted Amendment No. 1, which was subsequently withdrawn.
20 The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).
21 A Direct Listing with a Capital Raise includes listings where either: (i) Only the company itself is
Securities qualified for listing under Nasdaq Listing Rule IM-5315-2 must begin trading on the Exchange following the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9) and Nasdaq Rule 4753 for the opening auction, otherwise known as the Nasdaq Halt Cross. Currently, in the case of a Direct Listing with a Capital Raise, the Exchange will release the security for trading on the first day of listing if, among other things, the actual price calculated by the Nasdaq Halt Cross is at or above the lowest price and at or below the highest price of the price range established by the issuer in its effective registration statement (the “Pricing Range Limitation”). The Exchange has proposed to modify the Pricing Range Limitation to provide that the Exchange would release the security for trading if (a) the actual price calculated by the Nasdaq Halt Cross is at or above the price that is 20% below the lowest price, and at or below the price that is 20% above the highest price, of the disclosed price range; or (b) the actual price calculated by the Nasdaq Halt Cross is at a price above the price that is 20% above the highest price of such price range, provided that, among other things, the company has publicly disclosed and certified to the Exchange that the company’s registration statement contains a sensitivity analysis explaining how the registration statement contains a price range, provided that, as discussed further below. See Nasdaq Listing Rule IM-5315-2. “Pricing Range Limitation” means the process for determining the price at which Eligible Interest shall be executed at the open of trading for a halted security and for executing that Eligible Interest. See Nasdaq Rule 4753(a)(4). “Eligible Interest” means any quotation or any order that has been entered into the system and designated with a time-in-force that would allow the order to remain at the price at the time of the Nasdaq Halt Cross. See Nasdaq Rule 4753(a)(5). Pursuant to Nasdaq 4120, the Exchange will halt trading in a security that is the subject of an initial public offering (or direct listing), and terminate that halt when the Exchange releases the security for trading upon certain conditions being met, as discussed further below. See Nasdaq Rule 4120(a)(7) and (c)(8).

The Exchange states that references in the proposal to the price range established by the issuer in its effective registration statement refer to the price range disclosed in the prospectus in such effective registration statement. See Amended Notice, supra note 11, 87 FR at 1799 n.14. Throughout this order, we refer to this as the “disclosed price range.”

According to the Exchange, based on conversations it has had with companies and their advisors, the Exchange believes that some companies may be reluctant to use the existing rules for a Direct Listing with a Capital Raise because of concerns about the Pricing Range Limitation. The Exchange states that the Pricing Range Limitation imposed on a Direct Listing with a Capital Raise (but not on a traditional IPO) increases the probability of a failed offering, because the offering cannot proceed without some delay not only due to lack of investor interest, but also if investor interest is greater than the company and its advisors anticipated. According to the Exchange, the Exchange believes that there may be instances of offerings where the price determined by the Exchange’s opening auction will exceed the highest price of the price range disclosed in the company’s effective registration statement. The Exchange states that, under the existing rule, a security subject to a Direct Listing with a Capital Raise cannot be released for trading by the Exchange if the actual price calculated by the Nasdaq Halt Cross is above the highest price of the disclosed price range. The Exchange further states that, in this case, the Exchange would have to cancel or postpone the offering until the company amends its effective registration statement, and that, at a minimum, such a delay exposes the company to market risk of changing investor sentiment in the event of an adverse market event. In addition, the Exchange states that the determination of the opening auction price of a traditional IPO is not subject to limitations similar to the Pricing Range Limitation for a Direct Listing with a Capital Raise, which, in the Exchange’s view, could make companies reluctant to use this alternative method of going public despite its expected potential benefits.

The Exchange has proposed to modify the Pricing Range Limitation such that even if the actual price calculated by the
Nasdaq Halt Cross is outside the disclosed price range, the Exchange would release a security for trading if the actual price at which the Nasdaq Halt Cross would occur is at or above the price that is 20% below the lowest price of the disclosed price range and at or below the price that is 20% above the highest price of the disclosed price range, provided all other necessary conditions are satisfied, and that the company has specified the quantity of shares registered, as permitted by Securities Act Rule 457. In addition, under the proposal, the Exchange would release the security for trading, provided all other necessary conditions are satisfied, at a price more than 20% above the highest price of the disclosed price range, if the company publicly disclosed and has certified to the Exchange prior to the beginning of the Display Only Period that the company does not expect that such offering price would materially change the company’s previous disclosure in its effective registration statement, the company’s registration statement contains a sensitivity analysis explaining how the company’s plans would change if the actual proceeds from the offering exceed the amount assumed in the price range established by the issuer in its effective registration statement, and the price range in the preliminary prospectus included in its effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S–K. The Exchange states that the goal of the requirement is to have disclosure that allows investors to see how changes in share price ripple through critical elements of the disclosure.

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

The Exchange states that, for the purposes of this rule, the 20% threshold would be calculated based on the maximum offering price set forth in the registration fee table, and that this method of calculation is consistent with the SEC Staff’s guidance on Securities Act Rule 430A.

According to the Exchange, given that there may be a Direct Listing with a Capital Raise that could price outside of the disclosed price range and that there may be no upside limit above which the Nasdaq Halt Cross could not proceed, the Exchange proposes to enhance transparency by providing readily available, real time pricing information to investors. To that end, the Exchange states that it would disseminate, free of charge, the Current Reference Price on a public website, such as Nasdaq.com, during the Pre-Launch Period and indicate whether the Current Reference Price is within the disclosed price range. The Exchange also proposes to adopt a new Price Volatility Constraint and disseminate information about whether the Price Volatility Constraint has been satisfied, which will indicate whether the security may be ready to trade. The “Price Volatility Constraint” would require that the Current Reference Price has not deviated by 10% or more from any Current Reference Price within the previous 10 minutes. The Exchange states that the Price Volatility Constraint would provide investors with notice that the Nasdaq Halt Cross nears execution. The Pre-Launch Period would continue until the Price Volatility Constraint has been satisfied. Further, the Pre-Launch Period shall end, and the security shall be released for trading when the Exchange, in consultation with the financial advisor to the issuer, makes the determination that the security is ready to trade and the conditions in proposed Nasdaq Rule 4120(c)(9)(B)(vii) and (viii) are met. The Exchange also proposes to prohibit market orders (other than by the company through its CDL Order) from the opening of a Direct Listing with a Capital Raise. The Exchange states that this would assure that investors only purchase shares at a price at or better than the price they affirmatively set, after having the opportunity to review the company’s effective registration statement, including the sensitivity analysis describing how the company would use any additional proceeds raised.

In addition, the Exchange states that to protect investors and assure that they are informed about the attributes of a Direct Listing with a Capital Raise, the Exchange proposes to impose specific requirements on Nasdaq members with respect to a Direct Listing with a Capital Raise. These rules would require members to provide to a customer, before that customer places an order to be executed in the Nasdaq Halt Cross, a notice describing the mechanics of pricing a security subject to a Direct Listing with a Capital Raise in the proximity of the Current Reference Price.
Nasdaq Halt Cross, including information regarding the location of the public website where the Exchange would disseminate the Current Reference Price.\textsuperscript{45} The Exchange states that to assure that members have the necessary information to be provided to their customers, the Exchange proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing with a Capital Raise, an information circular to its members.\textsuperscript{46} This information circular would describe any special characteristics of the offering and the Exchange’s rules that apply to the initial pricing through the mechanism outlined in Nasdaq Rule 4120(c)(9)(B) and Nasdaq Rule 4753 for the opening auction, including information about the notice that members must provide to their customers.\textsuperscript{47} The information circular would also describe other requirements that: (a) Require members to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer; (b) require members in recommending transactions for a security subject to a Direct Listing with a Capital Raise to have a reasonable basis to believe that (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer’s investment objectives, financial situation, needs, and any other information known by such members, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security; and (c) require members not to accept market orders to be executed in the Nasdaq Halt Cross.\textsuperscript{48} The Exchange states that these member requirements are intended to remind members of their obligations to “know their customers,” increase transparency of the pricing mechanisms of a Direct Listing with a Capital Raise, and help assure that investors have sufficient price discovery information.\textsuperscript{49}

The Exchange represents that in each instance of a Direct Listing with a Capital Raise, the Exchange’s information circular would inform market participants that the auction could price up to 20\% below the lowest price of the price range and would specify that price. The Exchange also represents that it would indicate in such circular whether or not there is an upside limit above which the Nasdaq Halt Cross could not proceed, based on the company’s certification.\textsuperscript{50} The Exchange states that to assure that the issuer has the ability, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, the Exchange proposes to introduce to the operation of the Nasdaq Halt Cross a brief Post-Pricing Period, in circumstances where the actual price calculated by the Nasdaq Halt Cross is above the price that is 20\% above the highest price of the price range established by the issuer in its effective registration statement.\textsuperscript{51} Specifically, in such circumstances, the Exchange would initiate a “Post-Pricing Period” following the calculation of the actual price.\textsuperscript{52} During the Post-Pricing Period, the issuer must confirm to the Exchange that no additional disclosures are required under the federal securities laws based on the actual price calculated by the Nasdaq Halt Cross. Further, during this period no additional orders for the security could be entered in the Nasdaq Halt Cross, and no existing orders could be modified.\textsuperscript{53} The Exchange states that the security would be released for trading immediately following the Post-Pricing Period.\textsuperscript{54} However, if the Company cannot provide the required confirmation, the Exchange would postpone and reschedule the offering.\textsuperscript{55}

The Exchange also proposes to clarify several provisions of existing Nasdaq Rule 4120(c)(9) without changing them.\textsuperscript{56} Specifically, the Exchange proposes to clarify the mechanics of the Nasdaq Halt Cross by specifying that the Exchange will initiate a 10-minute Display Only Period only after the CDL Order has been entered and that the Exchange shall select price bands for purposes of applying the price validation test in the Nasdaq Halt Cross in connection with a Direct Listing with a Capital Raise.\textsuperscript{57} The Exchange proposes to clarify that the “actual price,” as the term is used in the rule, is the Current Reference Price at the time the system applies the price validation test.\textsuperscript{58}

Nasdaq Listing Rule IM–5315–2 provides that in determining whether a company listing in connection with a Direct Listing with a Capital Raise satisfies the Market Value of Unrestricted Publicly Held Shares\textsuperscript{59} for initial listing on the Nasdaq Global Select Market, the Exchange will deem such company to have met the applicable requirement\textsuperscript{60} if the amount of the company’s Unrestricted Publicly Held Shares before the offering, along with the market value of the shares to be sold by the company in the Exchange’s opening auction in the Direct Listing with a Capital Raise, is at least $110 million (or $100 million, if the company has stockholders’ equity of at least $110 million). For this purpose, under current rules, the Market Value of Unrestricted Publicly Held Shares will be calculated using a price per share equal to the lowest price of the disclosed price range.\textsuperscript{61} The Exchange states that because the Exchange proposes to allow the opening auction to price up to 20\% below the lowest price of the disclosed price range, the Exchange proposes to make a conforming change to Nasdaq Listing Rule IM–5315–2 to provide that the price used to determine such company’s compliance with the required Market Value of Unrestricted Publicly Held Shares would be the price per share equal to the price that is 20\% below the lowest price of the disclosed price range.\textsuperscript{62} The Exchange further states that this is the minimum price at which the company could qualify to be listed.\textsuperscript{63}

The Exchange states that any company listing in connection with a Direct Listing with a Capital Raise would continue to be subject to, and required to meet, all other applicable initial listing requirements, including the requirements to have the applicable number of shareholders and at least for an upper and lower price band set at zero. The Exchange represents that if a security does not pass the price validation test, the Exchange may select different price bands before recommencing the process to release the security for trading. See id. See id. See id. See id. See id. See id. See id. See id. See id. See id. See id. See id.
self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder that are applicable to such organization. The Commission shall disapprove a proposed rule change if it does not make such a finding. The Commission’s Rules of Practice, under Rule 700(b)(3), state that the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of the self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations. Moreover, “unquestioning reliance” on a self-regulatory organization’s representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.

For the reasons discussed below, the Commission is disapproving the proposed rule change because the information before the Commission is insufficient to support a finding that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission concludes that the Exchange has not met its burden to demonstrate that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act, and in particular the requirements that a national securities exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.

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

The Exchange proposes to modify its rules concerning pricing restrictions for the opening auction on the first day of trading for a Direct Listing with a Capital Raise. Instead of imposing the Pricing Range Limitation, which limits the price of the opening transaction to the price range disclosed in the issuer’s effective registration statement, the proposal would allow the opening auction to proceed at a price up to 20% above or below the disclosed price range, or at a price more than 20% above the disclosed price range if certain additional conditions are met.

The Exchange states that it believes that its proposal to modify the Pricing Range Limitation is consistent with the protection of investors and argues that the proposal is similar to the pricing flexibility that is permitted for a firm commitment underwritten IPO. However, in the context of a firm

II. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Exchange Act, the Commission shall approve a proposed rule change of a

See id. at 1801–02 (citing Nasdaq Listing Rules 5315(e)(1) and (2) and 5315(f)(1)).
68 See Nasdaq Rule 4753(a)(3) for a description of the “Order Imbalance Indicator.”
69 See Amended Notice, supra note 11, 87 FR at 1802.
72 See id. See id.
73 See id. See id.
74 See id.
commitment underwritten IPO, the IPO price is determined prior to the time of sale to the underwriters and initial investors, which takes place in advance of the opening transaction on the Exchange. Accordingly, issuers and underwriters have the ability to provide investors with any necessary additional disclosures prior to completing the offering, including those that are dependent on the price of the offering, and to delay the offering if necessary to provide any such disclosures. In contrast, in the context of a Direct Listing with a Capital Raise, the IPO price is the opening auction price on the Exchange, so that the IPO price and proceeds to the issuer are not known by the issuer and market participants until the securities are sold to investors in the opening transaction on the Exchange. The Exchange’s current rules for a Direct Listing with a Capital Raise require it to postpone and reschedule the offering if the opening auction price does not fall within the disclosed price range, so that issuers are able to update any disclosures if necessary before proceeding with an offering outside of the disclosed price range. However, as discussed below, the Exchange’s proposal to expand Direct Listings with a Capital Raise would not ensure, in all cases, that issuers conducting a Direct Listing with a Capital Raise would have an opportunity to convey additional material information to investors, if needed, prior to the time of sale.

As discussed above, in cases where the opening auction price will be more than 20% above the high end of the disclosed price range, an issuer would have to have previously certified to the Exchange and publicly disclosed, prior to the beginning of the Display Only Period, that it does not expect such price to materially change the issuer’s previous disclosure in its effective registration statement. In such cases, when the opening auction price will be more than 20% above the high end of the disclosed price range, the issuer would then need to confirm to the Exchange again, during the Post-Pricing Period. These additional disclosures are required under the federal securities laws based on the actual price calculated in the auction. If the issuer could not provide the required confirmation, the Exchange would postpone and reschedule the offering. However, the Exchange does not propose to apply these additional protections to a Direct Listing with a Capital Raise where the opening auction price will be outside of the disclosed price range, but up to 20% above the high end or 20% below the low end of such disclosed price range. In these cases, the Exchange has not proposed any mechanism by which an issuer or the Exchange could postpone or reschedule the offering, even if the disclosures included in the registration statement are not based on an opening auction price that is outside the disclosed price range.79 The Exchange argues that under its proposal an issuer in a Direct Listing with a Capital Raise would have the same ability as an issuer in a firm commitment underwritten IPO to delay an offering at any time.80 Under Nasdaq’s proposal, however, should concerns arise relating to the adequacy of the disclosure for an offering that prices within 20% of the disclosed price range, the Nasdaq procedures would not give the issuer the option to halt or delay the offering once the issuer submits its order. If the opening auction price would be up to 20% above the high end or 20% below the low end of the disclosed price range and the conditions in proposed Nasdaq Rule 4120(c)(9)(B)(vii)(a) and (b) and the Price Volatility Constraint are met, the opening auction would proceed.81 Accordingly, the Commission does not believe that the proposal adequately addresses how an issuer would be able to disclose any additional material information related to the final offering price prior to the time of sale in a Direct Listing with a Capital Raise where the actual price calculated in the opening auction is higher or lower than, but no more than 20% outside of, the disclosed price range.82 In these cases, the inability of an issuer to provide potentially material disclosures to investors in a timely manner prior to the sale of securities continues to raise investor protection concerns under Section 6(b)(5) of the Exchange Act.83 Therefore, the Exchange has not met its burden to demonstrate that its proposal is consistent with the Exchange Act. Similarly, in cases where the opening auction price will be more than 20% above the high end of the disclosed price range, the issuer would have to have included in its registration statement a sensitivity analysis explaining how the issuer’s plans would change if the actual proceeds from the offering exceeded the amount assumed in the disclosed price range. The Exchange states that requiring this sensitivity analysis is designed to protect investors because it allows investors to see how changes in the share price ripple through critical elements of the companies’ disclosure.84 However, this sensitivity analysis is not required under the Exchange’s proposal in cases where the actual price calculated in the opening auction for a Direct Listing with a Capital Raise is higher or lower than, but no more than 20% outside of, the disclosed price range. This could result in an offering proceeding without investors having the opportunity to receive additional material information, such as a sensitivity analysis, in these cases. As noted above, the Commission believes this could raise investor protection concerns under Section 6(b)(5) of the Exchange Act.

In addition, the Exchange proposes to establish a Price Volatility Constraint, which would require that the Current Reference Price and other order information, every second. See proposed Nasdaq Rule 4120(c)(9)(B)(iv).

79 Registration statements for initial public offerings typically provide disclosure based on an assumed offering price equal to the mid-point of the disclosed price range. They may or may not contain additional information explaining how the disclosure would change. Including how the issuer’s plans and financial condition would be affected, given specified changes in the assumed offering price. Moreover, the proposed Nasdaq rule would impose no such obligation on offerings that prices up to 20% above or 20% below the low end of the disclosed price range. As a result, if the opening auction price is substantially below the low end of the disclosed price range, depending on what information the issuer had provided prior to effectiveness of the registration statement, the issuer may need to provide additional disclosure relating to, among other things, changes in underwriting proceeds, liquidity, or material risk factors. See Letter from Nikolai Utuchkin, Counsel, Listing and Governance, Nasdaq (December 21, 2021), at 8 ("Nasdaq Letter")."See proposed Nasdaq Rule 4120(c)(9)(B)(iv) (stating "... Nasdaq shall postpone and reschedule the pricing of the security only if the conditions in paragraphs (vii) a. and b., above, are not met.")."

80 See also Note 8.

82 One commenter opposing the proposal raises concerns about the potential absence of material information concerning the final offering price prior to the time of the sale of shares in a Direct Listing with a Capital Raise. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (October 21, 2021), at 2 ("CII Letter"). This commenter states that its sensitivity to this lack of disclosure in the Exchange proposal is heightened by its broader concerns about the loss of investor protections relating generally, including the difficulties of investors in bringing claims under Section 11 of the Securities Act for material misstatements or omissions in direct listing registration statements. The commenter argues that investors in direct listings, including Direct Listings with a Capital Raise, are likely to continue to have “feWER legal rights than investors in a traditional initial public offering.” See id. at 4. The Exchange has not responded to this commenter’s concerns, including the concern relating to “tracing” share purchases for purposes of Section 11 claims, in its proposal. See OIP, supra Note 8.

83 See also Note 8.

84 One commenter opposing the proposal raises concerns about the potential absence of material information concerning the final offering price prior to the time of sale of shares in a Direct Listing with a Capital Raise. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (October 21, 2021), at 2 ("CII Letter"). This commenter states that its sensitivity to this lack of disclosure in the Exchange proposal is heightened by its broader concerns about the loss of investor protections relating generally, including the difficulties of investors in bringing claims under Section 11 of the Securities Act for material misstatements or omissions in direct listing registration statements. The commenter argues that investors in direct listings, including Direct Listings with a Capital Raise, are likely to continue to have “fewer legal rights than investors in a traditional initial public offering.” See id. at 4. The Exchange has not responded to this commenter’s concerns, including the concern relating to “tracing” share purchases for purposes of Section 11 claims, in its proposal. See OIP, supra Note 8.
Reference Price not deviate by 10% or more from any Current Reference Price in the previous 10 minutes, as a condition to the opening auction in a Direct Listing with a Capital Raise. Specifically, the Exchange’s proposal provides that “[t]he Pre-Launch Period shall continue until the Price Volatility Constraint is satisfied.” The Exchange also proposes to disseminate information about whether the Price Volatility Constraint has been satisfied, which, according to the Exchange, “will indicate whether the security is ready to trade.” and “will provide investors with notice that the Cross nears execution.” Once the Price Volatility Constraint is satisfied, however, there are additional conditions that must be met before the opening cross will occur and in the intervening period the expected opening auction price may change because orders can continue to be entered and cancelled. Specifically, the Exchange, in consultation with the financial advisor to the issuer, must make the determination that the security is ready to trade, and several additional conditions specified in proposed Nasdaq Rule 4120(c)(9)(B)(vii) and (viii) must be met, including the potential initiation and conclusion of a Post-Pricing Period. Thus, it would appear that there could be a substantial price change during the period of time between the Exchange’s dissemination of the fact that the Price Volatility Constraint has been satisfied and the actual execution of the opening cross for a Direct Listing with a Capital Raise. In such event, investors could be misled that the opening cross is “near execution” and that the disseminated Current Reference Price will likely be close to the opening auction price when, in fact, the auction may not occur for a considerable time and the opening auction price may differ substantially.

III. Conclusion

The Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Exchange Act. It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR–NASDAQ–2021–045), as modified by Amendment No. 2, be, and hereby is, Disapproved.

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

Eduardo Aleman, Assistant Secretary.

February 24, 2022.

AGENCY: Securities and Exchange Commission (“Commission” or “SEC”).

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

SUMMARY OF APPLICATION: Applicants request an order (“Order”) that permits: (a) ActiveShares ETFs (as described in the Reference Order (as defined below)) to issue shares (“Shares”) redeemable in large aggregations only (“creation units”); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; and (c) certain affiliated

Another commenter states that it believes the proposal would stimulate a vibrant ecosystem of data and analytics and fintech companies to further refine IPO pricing accuracy and broaden investor participation, thus improving competition in capital intermediation for U.S. markets. See Letter from Burke Dempsey, EVP Head of Investment Banking, Wedbush Securities Inc. (August 9, 2021). For the reasons discussed throughout, however, the Commission is disapproving the proposed rule change because it does not find that the proposed rule change is consistent with the Exchange Act.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34516; File No. 812–15282]

Northern Lights Fund Trust IV, et al.

February 24, 2022.

AGENCY: Securities and Exchange Commission (“Commission” or “SEC”).

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 2(a)(32), 5(a)(1) and 22(d) of the Act and rule 22c–1 under the Act and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

SUMMARY OF APPLICATION: Applicants request an order (“Order”) that permits: (a) ActiveShares ETFs (as described in the Reference Order (as defined below)) to issue shares (“Shares”) redeemable in large aggregations only (“creation units”); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; and (c) certain affiliated