

SEC relaxes NYSE pricing restrictions for primary direct listings

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On the heels of a similar rule change for Nasdaq, the SEC approved rule changes relaxing price range limitations for primary direct listings on the NYSE. The modified rule allows the opening auction to proceed at a price up to either 20% below or 80% above the disclosed price range subject to specified conditions.

On December 15, 2022, the SEC [approved](#) the NYSE's proposed rule changes relaxing price range limitations for primary direct listings. The existing rule requires that the opening auction price be within the price range disclosed in the company's effective registration statement. The modified rule allows the opening auction to proceed at a price up to either 20% below or 80% above the disclosed price range, subject to specified conditions. The SEC approved the rule changes after several amendments and on the heels of a similar rule change for primary direct listings on Nasdaq that we discussed in a [client update](#) earlier this month.

There has not been a primary direct listing to date on either the NYSE or Nasdaq. While the rule changes on both exchanges remove one obstacle to primary direct listings, other hurdles remain, including the absence of no-action relief under Regulation M for primary direct listings with a secondary component, as well as the inability to change the number of primary shares to be offered absent the filing of a post-effective amendment with the SEC. Even so, we believe these rule changes are a step in the right direction to make direct listings with a primary offering a more viable alternative to traditional underwritten IPOs.

Pricing flexibility for primary direct listings

The existing NYSE rule details the auction process for a primary direct listing, which requires that a company disclose a price range and the number of shares to be sold in the registration statement, and that the opening auction price be within the disclosed price range. As a result, a company participating in a primary direct listing on the NYSE would not have the ability to open trading at a price below the bottom end of the price range or above the top end of the price range without filing an amendment to the registration statement, unlike a traditional IPO where such changes would be possible within existing safe harbors. Mirroring the related Nasdaq rule approved earlier this month, the modified rule allows the opening auction to proceed at a price up to either 20% below or 80% above the disclosed price range subject to specified requirements.

Disclosure and certification requirements

The modified rule includes additional requirements where the execution price would be outside the disclosed price range:

- **NYSE certification and public disclosure.** A listing company must publicly disclose and certify to the NYSE that:

- *No material change to disclosure.* It does not expect that the offering price would materially change the company's previous disclosure in its effective registration statement.
 - *Bona fide price range.* The price range in the preliminary prospectus included in the effective registration statement is a bona fide price range under Item 501(b)(3) of Regulation S-K.
 - *Sensitivity analysis.* The effective registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering differ from the amount disclosed and assumed in the registration statement.
- **No additional disclosures required.** A listing company must also confirm to the NYSE that no additional disclosures are required under federal securities laws based on the auction price determined by the NYSE's designated market maker, or DMM.

The modified rule clarifies that the market value-related listing requirements must be calculated using a price per share that is 20% (calculated based on the high end of the price range) below the low end of the disclosed price range. These requirements do not change, and are in addition to, other applicable disclosure considerations under federal securities laws, just as they would apply in traditional underwritten IPOs.

Issuer must retain and name an underwriter

The NYSE's modified rule, like Nasdaq's, puts any doubt to rest as to statutory underwriter liability in a primary direct listing. As amended, the modified rule requires a listing company offering securities for sale in connection with a direct listing to retain an underwriter with respect to the primary sales of shares, notwithstanding the fact that there would be no actual underwriting, and to identify the underwriter in its effective registration statement.

Price discovery transparency

To support price discovery transparency, the NYSE will provide investors access to real-time pricing information, and make readily available the indication reference price (the lowest price in the primary direct listing price range) on a public website. While the NYSE did not adopt new rules intended to address price volatility, an auction would benefit from the NYSE's existing pre-opening indication procedures that address volatility-related concerns and could help inform investors' decision to participate in the auction.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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