

SEC approves Nasdaq's relaxed pricing limits for primary direct listings

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The SEC approved rule changes relaxing price range limitations for primary direct listings on Nasdaq. Prior to this change, the rules required 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.

On December 2, 2022, the SEC approved Nasdaq's proposed [rule changes](#) relaxing price range limitations for direct listings with a capital raise. 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 that addressed disclosure and related concerns and added certain procedural protections. The New York Stock Exchange has filed a similar rule change proposal but has only sought approval for pricing up to 20% below or 20% above (as opposed to 80% above) the disclosed price range.

There has not been a primary direct listing to date on either Nasdaq or the New York Stock Exchange. While the Nasdaq rule change removes one obstacle to primary direct listings, other hurdles remain, including the absence of no-action relief under Regulation M similar to, but appropriately modified from, the relief obtained for secondary direct listings 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, these are welcome rule changes that we believe will make direct listings with a primary offering a more viable alternative to traditional underwritten IPOs.

Pricing flexibility for primary direct listings

Nasdaq's Listing Rule IM-5315-2 permits direct listings with a capital raise on the Nasdaq Global Select Market subject to certain conditions as discussed in our May 2021 [client update](#). The existing rule requires that the listing company disclose a price range and the number of shares to be sold in the SEC registration statement for a primary direct listing, and that the opening auction price be within the price range disclosed in the company's effective registration statement. As a result, a company participating in a primary direct listing on Nasdaq 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. This means that if the actual price were to fall outside the disclosed price range, under the existing rule Nasdaq would delay the offering, which would in turn expose the listing company to market risk. The modified rule allows the opening auction to proceed at a price up to either 20% below or 80% above the disclosed price range if specified conditions are met. These percentage thresholds are calculated based on the high end of the price range in the registration statement at the time of effectiveness.

Disclosure, certification and post-pricing conditions

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

- **Sensitivity analysis.** A listing company must include a sensitivity analysis in the registration statement to address how the company’s use of proceeds would change if the actual proceeds from the offering are less than or exceed the amount assumed in the disclosed price range.
- **Nasdaq certification.** A listing company must certify to Nasdaq that the registration statement contains the required sensitivity analysis discussed above. The company is also required to publicly disclose and certify to Nasdaq that the company does not expect the offering price to materially change its previous disclosure in its effective registration statement.
- **Post-pricing reconfirmation.** If the opening price calculated by the Nasdaq Halt Cross (the pricing mechanism under Nasdaq rules for the opening auction) is outside the disclosed price range, the listing company is required to confirm to Nasdaq during the post-pricing period, which is a period following the calculation of the actual price, that no additional disclosures are required under federal securities laws.

These requirements are in addition to other applicable disclosure requirements and considerations under federal securities laws, just as they would apply in traditional underwritten IPOs.

Requirement to retain an underwriter for the sale of primary shares

The SEC has previously noted that financial advisors to companies in direct listings “may” be deemed to be statutory underwriters depending on the nature and extent of their activities and on the particular facts and circumstances. The modified rule 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.

Procedures to mitigate volatility risk and enhance pricing transparency

The modified rule would establish a new “Price Volatility Constraint,” which would require that the current reference price (as defined under Nasdaq rules) not deviate by 10% or more from any current reference price in the previous 10 minutes as a condition to the opening auction, and that the pre-launch period (period during which price discovery takes place) continue until at least five minutes after the Price Volatility Constraint is satisfied. In addition, the modified rule introduces the concept of a “Near Execution Price,” which is the current reference price at the time the Price Volatility Constraint has been satisfied, and to set a “Near Execution Time” as such time, so that investors have notice that the Nasdaq Halt Cross nears execution and are allowed a period of at least five minutes to modify their orders prior to the execution of the opening cross and the pricing of the offering.

The modified rule also requires that the opening cross execute only if the actual price calculated by the Nasdaq Halt Cross is no more than 10% above or below the Near Execution Price, a protection to which Nasdaq refers as the 10% Price Collar. In addition, if the current reference price is outside the 10% Price Collar at or after the 30-minute period after the Near Execution Time (assuming the security is not released for trading), the pre-launch period process discussed above effectively resets. If the current reference price is within the 10% Price Collar at the end of that period, Nasdaq would determine when the security is ready to trade in consultation with the named underwriter.

To ensure investors have access to real-time pricing information, Nasdaq would disseminate information such as the current reference price on a public website during the pre-launch period, and indicate if the current reference price is within the price range disclosed in the registration statement. Nasdaq would also disseminate the Near Execution Price, Near Execution Time and the 30-minute countdown from such time.

Clarifications to listing requirements

Because the modified rule would allow an opening auction price up to 20% below the bottom of the disclosed price range, Nasdaq made related conforming changes to provide that the price used to calculate the market value of unrestricted publicly held shares under its listing rules is the price per share equal to the price that is 20% below the low end of the

disclosed price range. This is to ensure that the listing company will satisfy the related listing requirements at any price at which the opening auction executes. A listing company would continue to be subject to all other applicable initial listing requirements under Nasdaq rules.

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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