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BLOG

SEC Greenlights Nasdaq Primary Direct Listings

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On May 19, 2021, the Securities and Exchange Commission (**SEC**) approved the Nasdaq Stock Market LLC's (**Nasdaq**) proposal to allow companies to directly list their equity securities on the exchange without a traditional underwritten offering. Listing Rule IM-5315-2 would "allow a company that has not previously had its common equity securities registered under the Exchange 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 will sell its shares in an opening auction on the first day of trading on the exchange" (which can run simultaneously with an opening auction of the same equity securities by selling shareholders), commonly referred to as a **Direct Listing with a Capital Raise**.

The table below provides a description of the new rules and requirements for Nasdaq's direct listing process, as well as a reference to the NYSE's "direct floor listing" process:

REQUIREMENT	NASDAQ	NYSE
Process	The Nasdaq process permits private companies to undergo a primary direct listing on the exchange, which is referred to as a "Direct Listing with a Capital Raise."	The NYSE process permits private companies to conduct a primary registered offering as part of a direct listing on the NYSE without conducting a firm commitment underwritten offering (a "Primary Direct Floor Listing"). For more information, please see Capital Markets Watch article on the NYSE process here.

REQUIREMENT	NASDAQ	NYSE
Market Value of Shares	A company must have a market value of at least $110 million (or $100 million if the company has stockholder equity of at least $110 million). Market value is calculated using a price per share equal to the lowest price in the price range disclosed in the registration statement.	A company must either (1) sell at least $100 million in market value of their shares in the opening auction on the first day of trading on the NYSE or (2) if they plan to sell less than $100 million, demonstrate that the aggregate market value of their shares that it will sell on the first day of trading and the shares that are publicly held immediately prior to list is equal to at least $250 million. Market value is calculated using a price per share equal to the lowest price in the price range disclosed in the registration statement.
Miscellaneous Listing Requirements	Companies are required to meet all applicable Nasdaq initial listing requirements at the time of the Direct Listing, including: (i) 450 round lot holders (or 2,200 total shareholders), (ii) 1.25 million unrestricted publicly held shares outstanding, and (iii) a price per share of at least $4.00.	Companies are still required to satisfy all other NYSE listing standards at the time of the Primary Direct Floor Listing, including: (i) 400 round lot holders, (ii) 1.1 million publicly held shares outstanding, and (iii) a price per share of at least $4.00.

The Nasdaq process requires that companies submit a Company Direct Listing Order (**CDL Order**) to the exchange for the number of shares that it would like to sell in the opening auction (as disclosed in the company's registration statement). Note, the CDL Order may not be cancelled or modified once entered, and it must be executed in full. Pricing for the number of shares included in the CDL Order will be determined by the Nasdaq Halt Cross (i.e., the exchange process for determining the price at which securities will be offered at the open of trading for a halted security), in accordance with Rule 4120(c)(9)(B), which includes a requirement "that the that the CDL Order is executed 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" (**Pricing Range Limitation**). All orders pricing during the opening auction that are priced at or above the price generated by the Halt Cross process must be fulfilled by the company.

Nasdaq originally proposed that the opening cross be at a price up to 20% below the price range disclosed in the issuer's registration statement (**First Proposal**). After the SEC instituted proceedings to determine whether to approve the proposed rule change, Nasdaq amended its proposal to what was ultimately approved: 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.

New Nasdaq Proposal

About a week after the SEC approved this new rule, Nasdaq submitted another proposal, similar to the First Proposal, which proposes to amend the Pricing Range Limitation such that the opening cross be at a price up to 20% below the price range disclosed in the issuer's registration statement (**Second Proposal**). Specifically, it proposes that "Nasdaq would release the security for trading…even if the actual price calculated by the [Halt] Cross is outside the price range established by the issuer in its effective registration statement; provided however that the actual price cannot be more than 20% below the lowest price and more than 20% above the highest price of such range … there would be no limitation on releasing the security for trading at a price above the price that is 20% above the highest price of the price range established by the issuer in its effective registration statement if the company has certified to Nasdaq that such offering price would not materially change the company's previous disclosure in its effective registration statement."

The SEC discussed the First Proposal in the order approving the Direct Listing with Capital Raise by saying that rejecting the First Proposal "ensur[es] that the actual price of the cross the number of shares offered will be consistent with the issuers' disclosures in its effective registration statement." It also stated that Nasdaq failed to explain how investors would know the minimum price at which the company could sell shares in the offering, and that the First Proposal was unclear that cross would not occur at a price that is below 20% the disclosed price range due to the application of an underwriters' ability to select price bands up to $0.50 outside of the expected cross price and still have the cross proceed if the actual price is within the price band.

In response, Nasdaq argued in its Second Proposal that after discussions with companies and their advisors, there is reluctance to use Direct Listing with a Capital Raise mechanism because of concerns regarding the Pricing Range Limitation. First, it argues that the Pricing Range Limitation increases the probability of a failed offering because of either lack of investor interest or because investor interest is greater than anticipated. Second, the pricing of a traditional IPO is not subject to anything similar to the Pricing Range Limitation. Further, it argues that the Second Proposal is consistent with other SEC rules and interpretation, which 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 in the registration statement.

Capital Markets & Securities Law Watch will continue to monitor developments in the Nasdaq direct listing process and provide updates to our readers as companies begin to utilize this new method for accessing the Nasdaq exchange.

5 Min Read

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