

Via Email

January 13, 2021

Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

**Re: File Number SR-NASDAQ-2020-057<sup>1</sup>**

Dear Madam Secretary:

The Council of Institutional Investors (CII) appreciates the opportunity to comment on the Securities and Exchange Commission (SEC or Commission) staff's *Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Allow Companies To List in Connection With a Direct Listing With a Primary Offering In Which the Company Will Sell Shares Itself In the Opening Auction on the First Day of Trading on Nasdaq and To Explain How the Opening Transaction for Such a Listing Will Be Effected (Order)*.<sup>2</sup>

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.<sup>3</sup>

---

<sup>1</sup> See Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Allow Companies To List in Connection With a Direct Listing With a Primary Offering In Which the Company Will Sell Shares Itself In the Opening Auction on the First Day of Trading on Nasdaq and To Explain How the Opening Transaction for Such a Listing Will Be Effected, Exchange Act Release No. 87,864, 85 Fed. Reg. 84,025 (Dec. 17, 2020), <https://www.federalregister.gov/documents/2020/12/23/2020-28319/self-regulatory-organizations-the-nasdaq-stock-market-llc-order-instituting-proceedings-to-determine>.

<sup>2</sup> *Id.*

<sup>3</sup> For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

As indicated in the Order,<sup>4</sup> last October CII submitted a comment letter (CII Letter)<sup>5</sup> recommending that the Commission disapprove the Nasdaq’s Stock Market LLC (Nasdaq or Exchange) “proposed rule change to allow companies to list in connection with a primary offering in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange and to explain how the opening transaction for such a listing will be effected”(Proposal).<sup>6</sup>

The Order summarizes the CII Letter’s arguments for disapproval of the Proposal as follows:

[T]he proposed expansion of direct listings would compound problems that shareholders face in tracing their share purchases to a registration statement and may lead to a decline in effective governance at U.S. public companies. . . . [T]raceability concerns often arise when there have been successive offerings, as shareholders seek to establish their standing to litigate claims for material misstatements or omissions under federal securities law. . . . [I]nvestor concerns about the traceability of shares in a direct listing were drawn into sharp focus in current litigation involving a direct listing by Slack Technologies, Inc. (“Slack”), which is still under consideration. . . . [F]urther . . . independent of the Slack case, the Exchange’s proposal raises important investor issues that the Commission should consider before opening U.S. capital markets up to the potential for a vastly increased number of direct listings. . . . [T]he Commission [should] . . . explore updating its “proxy plumbing” regulations before approving an expanded direct listings regime.

In addition, . . . the Exchange’s proposal would result in . . . more direct listings [that] may lead to decline in the effective corporate governance of U.S. public companies to the detriment of long-term investors and the capital markets generally. The . . . direct listing of Palantir Technologies Inc. had a dual-class structure that is viewed by many market participants as inconsistent with effective governance.

Among the many prominent legal experts that share one or more of CII’s apprehensions about the expansion of direct listings is the corporate law firm Cleary Gottlieb<sup>7</sup> and Professor Steven

---

<sup>4</sup> See 85 Fed. Reg. at 84,027-28.

<sup>5</sup> See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission 6 (Oct. 8, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2020/October%208%202020%20Nasdaq%20direct%20listing%20\(final\)%20AB1.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2020/October%208%202020%20Nasdaq%20direct%20listing%20(final)%20AB1.pdf) (“we respectfully request that the Commission disapprove the Nasdaq Proposal”).

<sup>6</sup> 85 Fed. Reg. at 84,025; see Self-Regulatory Organizations; The Nasdaq Stock Market LLC, Notice of Filing of Proposed Rule Change to Allow Companies To List in Connection with a Direct Listing With a Primary Offering in Which the Company Will Sell Shares Itself in the Opening Auction on the First Day of Trading on Nasdaq and to Explain How the Opening Transaction for Such a Listing Will Be Effected, Exchange Act Release No. 89,878, 85 Fed. Reg. 59,349 (Sept. 15, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-21/pdf/2020-20702.pdf>.

<sup>7</sup> See Adam Fleisher et al., Cleary Gottlieb, Direct Listings 2.0 – Primary Direct Listings (Sept. 10, 2020), <https://www.clearygottlieb.com/news-and-insights/publication-listing/direct-listings-20-primary-direct-listings> (“the concern expressed by CII and other commenters . . . over liability and investor protection, and the interpretation of the Slack decision by other courts, are clearly areas for further discussion, litigation and jurisprudence.”).

Davidoff Solomon.<sup>8</sup> More recently, in opposing a New York Stock Exchange rule to expand direct listings,<sup>9</sup> SEC Commissioners Allison Herren Lee and Caroline A. Crenshaw stated:

Unfortunately, investors in primary direct listings under NYSE’s approach will face at least two significant and interrelated problems: first, the lack of a firm-commitment underwriter that is incentivized to impose greater discipline around the due diligence and disclosure process, and second, the potential inability of shareholders to recover losses for inaccurate disclosures due to so-called “traceability” problems.

....

We should have engaged in a deeper debate and analysis to consider options for mitigating the risks to investors before approving today’s order. . . . As it stands. . . [the] NYSE has not met its burden to show that that the proposed rule change is consistent with the Exchange Act.<sup>10</sup>

Beyond the broader investor protection questions surrounding about the expansion of direct listings, we note that in the Order the SEC staff raises an issue about the Proposal’s absence of an “upside limit on the price at which the opening auction could occur [and the lack of clarity] . . . on how the issuer could ensure that the issuer’s Securities Act registration statement covers the full amount of securities to be sold in the offering.”<sup>11</sup> On that issue, we share the staff’s concerns that the Proposal:<sup>12</sup>

[M]ay not provide adequate safeguards to ensure that issuers conducting a Direct Listing with a Capital Raise are able to comply with Section 5 of the Securities Act.<sup>13</sup> *The Exchange has not explained how this would be consistent with the*

---

<sup>8</sup> Andrew Ross Sorkin et al., DealBook Newsletter: Take It or Leave It, N.Y. Times, Oct. 1, 2020, <https://www.nytimes.com/2020/10/01/business/dealbook/palantir-direct-listing.html> (“Palantir has shown that anything is possible in corporate governance with a direct listing [and] [e]xpect other companies to take notice.”).

<sup>9</sup> See Self-Regulatory Organizations; New York Stock Exchange LLC; Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 90,768 (Dec. 22, 2020), <https://www.sec.gov/rules/other/2020/34-90768.pdf>.

<sup>10</sup> Commissioner Allison Herren Lee & Commissioner Caroline A. Crenshaw, Public Statement: Statement on Primary Direct Listings (Dec. 23, 2020), <https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23> (emphasis added).

<sup>11</sup> 85 Fed. Reg. at 84,028.

<sup>12</sup> See Adam Fleisher et al. (commenting on an earlier version of a Nasdaq proposal to expand direct listings: “One question that could be raised . . . is how the mechanics of the listing process would work in any out-of-range scenarios and under what circumstances an amendment to the Securities Act registration statement might be necessary.”).

<sup>13</sup> See 85 Fed. Reg. at 84,028 (“Section 5 of the Securities Act requires all of the related registration statements to be effective prior to the time of sale [and] [t]o the extent Nasdaq’s proposal may result in issuers needing to register additional securities beyond those included in an initial Securities Act registration statement, it is not apparent how an issuer could ensure that any additional required registration statement would be effective prior to the time of opening.”); see also SECTION 5 OF THE SECURITIES ACT OF 1933, 15 U.S.C. § 77e (1988), available at <http://www.columbia.edu/~hcs14/S5.htm> (“(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly-(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus

*investor protection requirements under Section 6(b)(5)[<sup>14</sup>] and other relevant provisions of the Exchange Act.<sup>15</sup>*

For this reason and CII's broader concerns about the impact of the expansion of direct listings on investor protections described previously, we continue to believe the Proposal should be disapproved.

\*\*\*\*\*

We appreciate the opportunity to comment on the Proposal.

Sincerely,



Jeffrey P. Mahoney  
General Counsel

---

or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.”).

<sup>14</sup> See National Securities Exchanges § 6(b)(5), 15 U.S.C. §78(f)(b)(5) (2010), available at <https://www.law.cornell.edu/uscode/text/15/78f> (“The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, . . . and, in general, to protect investors and the public interest . . .”).

<sup>15</sup> 85 Fed. Reg. at 84,028 (emphasis added).