

Via Email

December 1, 2022

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

*Re: File Number SR-NYSE-2022-14.*

Dear Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), 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 \$40 trillion in assets under management.<sup>1</sup>

The purpose of this letter is to respond to the New York Stock Exchange LLC (Exchange) November 14, 2022, filing with the Securities and Exchange Commission’s (SEC) a proposal “to modify certain pricing limitations for securities listed on the Exchange Pursuant to a Primary Direct Floor Listing.”<sup>2</sup>

Under the proposed rule change, as modified by Amendment No. 2, the Exchange:

1. “[P]roposes to modify the Price Range Limitation to provide that a Direct Listing Auction for a Primary Direct Floor Listing may be conducted if the Auction Price is outside of the price range established by the issuer in its effective registration statement (the “Issuer Price Range”), but is at or above the price that is 20% below the lowest price of the Issuer Price Range and at or

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<sup>1</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>.

<sup>2</sup> Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 2, To Modify Certain Pricing Limitations for Securities Listed on the Exchange Pursuant to a Primary Direct Floor Listing, Exchange Act Release No. 96,272, 87 Fed. Reg. 68,558, 68,558 (Oct. 14, 2022), <https://www.federalregister.gov/documents/2022/11/15/2022-24767/self-regulatory-organizations-new-york-stock-exchange-llc-notice-of-filing-of-proposed-rule-change>.

below the price that is 80% above the highest price of the Issuer Price Range. The Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing could proceed in these circumstances at a price outside of the Issuer Price Range (whether lower or higher), provided that the issuer has specified the quantity of shares registered in its registration statement, as permitted by Securities Act Rule 457, and certified to the Exchange and publicly disclosed that: (i) it does not expect that the Auction Price would materially change the issuer's previous disclosure in its effective registration statement; (ii) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K; and (iii) such registration statement contains a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the offering differ from the amount assumed in the price range established by the issuer in its effective registration statement. In addition, if the issuer certifies to the Exchange a price limit that is below the price that is 80% above the highest price of the Issuer Price Range, the Exchange proposes that the Direct Listing Auction for a Primary Direct Floor Listing may not proceed if the Auction Price determined by the [Designated Market Maker] exceeds such price limit.<sup>3</sup>

2. "[P]roposes to require that a company offering securities for sale in a Primary Direct Floor Listing must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement."<sup>4</sup>

The Exchange states that it believes the above two proposed changes "address[] the concerns raised in the comment letter submitted by the Council of Institutional Investors . . . dated July 28, 2022" (CII Letter).<sup>5</sup> We respectfully disagree.

The CII Letter raised a number of issues in response to the Exchange's proposed rule change, as modified by Amendment No. 1.<sup>6</sup> Those issues included a reiteration of the following tracing problems identified by the SEC staff:

"Given the limited judicial precedent addressing tracing requirements in the context of direct listings, and the typical absence of lock-up arrangements in connection with direct listings to date, we are considering whether the Exchange has met its burden of establishing that the proposal to allow a direct listing to proceed at a price

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<sup>3</sup> *Id.* at 68,559 (footnotes omitted).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at n.17; see Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission (July 28, 2022), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2022/July%2028%202022%20NYSE%20letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2022/July%2028%202022%20NYSE%20letter%20(final).pdf).

<sup>6</sup> See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission at 5 n.20.

outside of the disclosed price range is consistent with Section 6(b)(5) of the Exchange Act that requires the rules of the Exchange be designed to protect investors and the public interest.”<sup>7</sup>

In response to those tracing issues the Exchange now states:

The Exchange . . . *believes* that the requirement to retain a named underwriter, as described above, *may* mitigate concerns raised by the Commission . . . regarding challenges to bringing claims under Section 11 of the Securities Act [of 1933<sup>8</sup> (Securities Act)] due to the potential assertion of tracing defenses because an underwriter *may* choose to impose lock-up arrangements . . .<sup>9</sup>

In our view, the Exchange’s *belief* that the proposed requirement to retain a named underwriter *may* mitigate traceability concerns that arise in a direct listing with a capital raise because an underwriter *may* choose to impose lock-up arrangements is insufficient. In effect, the Exchange is acknowledging that Section 11 of the Securities Act—arguably one of the most important investor protection provisions provided under the federal securities laws<sup>10</sup>—may be unavailable to investors who incur losses as a result of material misrepresentations or omissions contained in registration statements of a direct listing with a capital raise.

More specifically, CII continues to share the view of former SEC Commissioner Allison Herren Lee, current SEC Commissioner Caroline A. Crenshaw, and other market experts that a direct listing with a capital raise may “exacerbate an existing concern regarding traceability by facilitating the sale of both shares that are, and are not, subject to a registration statement in the same public offering.”<sup>11</sup> Earlier this year, Commissioner Crenshaw observed:

[D]irect listings. . . raise questions around traceability. Courts have traditionally held that shareholders seeking to recover damages for false or misleading statements in a registration statement must show that the shares they purchased

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<sup>7</sup> *Id.* at 4 (quoting Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Certain Pricing Limitations for Securities Listed on the Exchange Pursuant to a Primary Direct Floor Listing, Exchange Act Release No. 95,312, 87 Fed. Reg. 43,931, 43,914 n.79 (July 21, 2022), <https://www.federalregister.gov/documents/2022/07/22/2022-15656/self-regulatory-organizations-new-york-stock-exchange-llc-order-instituting-proceedings-to-determine>).

<sup>8</sup> See Civil liabilities on account of false registration statement, 15 U.S.C. § 77k (1998), *available at* <https://www.law.cornell.edu/uscode/text/15/77k>.

<sup>9</sup> 87 Fed. Reg. at 68,561 (emphasis added).

<sup>10</sup> See, e.g., Andrew F. Tuch & Joel Seligman, The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings 297, 299 (Jan. 2022) (Wash. U. in St. Louis Sch. of L. Legal Stud. Res. Paper Series Paper No. 22-01-0), *available at* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4020460](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4020460) (“Section 11 was instrumental in restoring confidence in U.S. capital markets in the wake of the Great Depression and has helped them become the world’s deepest and most liquid”).

<sup>11</sup> Commissioner Allison Herren Lee & Commissioner Caroline A. Crenshaw, Statement on Primary Direct Listings (Dec. 23, 2020), <https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23>; see, e.g., Nasdaq, Mayer|Brown, Morgan Stanley, Direct Listings, The New Offering Paradigm? 37 (Nov. 3, 2021), <https://www.mayerbrown.com/-/media/files/perspectives-events/events/2021/11/direct-listings.pdf> (“Primary direct listings could exacerbate existing challenges investors face in recovering losses for false or inaccurate statements made in public offerings.”).

were sold pursuant to the misleading registration statement. But, in direct listings, shares issued pursuant to exemptions (such as Rule 144) and not subject to the registration statement of the newly public company, may be sold immediately following the direct listing. This makes it nearly impossible to determine whether any given shareholder purchased shares pursuant to a registration statement. The question therefore becomes whether these shareholders have standing to sue for misleading registration statements. Last year, in *Pirani v. Slack Technologies*, 13 F.4th 940 (9th Cir. 2021) the Ninth Circuit held that the plaintiff did in fact have standing to bring Sections 11 and 12 claims even though he did not know if he had purchased registered or unregistered shares in a direct listing. Nonetheless, this was a case of first impression and other courts could weigh in differently on this subject, potentially eroding an important means of holding companies to account for misstatements in direct listings. But, these are just a few of the issues surrounding direct listings . . . .<sup>12</sup>

We note that the CII Letter also raised the issue that current data indicates that “among those three paths of entry to the public markets, direct listings may have the highest risk of creating public companies that violate a core principle of good corporate governance”;<sup>13</sup> the principle of one share, one vote.<sup>14</sup> And just last month, in remarks at the 2022 Cato Summit on Financial Regulation, SEC Commissioner Mark T. Uyeda confirmed CII’s view that “the financial impact on enterprise valuations for various factors in the “G” category – such as the use of dual-class stock . . . – have been known for a long time.”<sup>15</sup> And as indicated in the empirical evidence cited by Commissioner Uyeda, the financial impact of companies that do not adopt the principle of one share, one vote is decidedly negative for long-term investors.<sup>16</sup>

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<sup>12</sup> Commissioner Caroline A. Crenshaw, Remarks at Virtual Roundtable on the Future of Going Public and Expanding Investor Opportunities: A Comparative Discussion on IPOs and the Rise of SPACs n.39 (Apr. 28, 2022), <https://www.sec.gov/news/speech/crenshaw-remarks-spac-symposium-042822>.

<sup>13</sup> Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission at 5 n.17.

<sup>14</sup> See Council of Institutional Investors, Corporate Governance Policies § 3.3 Voting Rights (updated Sept. 21, 2022), [https://www.cii.org/files/09\\_21\\_22\\_corp\\_gov\\_policies.pdf](https://www.cii.org/files/09_21_22_corp_gov_policies.pdf) (“Each share of common stock should have one vote [and] [c]orporations should not have classes of common stock with disparate voting rights”); see generally Letter from Ash Williams, Chair, CII et al. to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc 1 (2018),

[https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf) (“We are writing on behalf of the Council of Institutional Investors (CII) to petition the New York Stock Exchange Stock Market to amend its listing standards to require the following on a forward-looking basis for companies going public that seek to list with multi-class common stock structures with differential voting rights: The company’s certificate of incorporation or equivalent document must specify provisions requiring the share structure to convert automatically to one-share, one vote no more than seven years after IPO date, subject to extension by additional terms of no more than seven years each, by vote of a majority of outstanding shares of each share class, voting separately, on a one-share, one-vote basis.”).

<sup>15</sup> Commissioner Mark T. Uyeda, Remarks at the 2022 Cato Summit on Financial Regulation (Nov. 17, 2022), <https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722>.

<sup>16</sup> See *id.* n.4 (citing Martijn Cremers, Beni Lauterbach and Anete Pajuste, The Life-Cycle of Dual Class Firm Valuation 45 (June 30, 2022) (ECGI – Fin. Working Paper No. 550/2018), available at [https://ecgi.global/sites/default/files/working\\_papers/documents/cremerslauterbachpajustefinal.pdf](https://ecgi.global/sites/default/files/working_papers/documents/cremerslauterbachpajustefinal.pdf) (“We document the dual class firms’ wedge increases in the years after the IPO, and show that such wedge increases hurt dual class firms’ valuations.”)).

We note that the Exchange does not address how the proposed changes might alleviate the poor corporate governance practices that appear endemic to companies that become public through a direct listing. We also note that the Exchange appears to concede that the number of direct listings could increase if the SEC approves the proposed changes.<sup>17</sup>

For the above reasons, and other reasons described in the CII Letter, we believe the proposed changes may not be consistent with Section 6(b)(5) of the Securities and Exchange Act of 1934 and should be disapproved.<sup>18</sup>

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We appreciate your consideration of our comments. Please let me know if you have any questions.

Sincerely,



Jeffrey P. Mahoney  
General Counsel

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<sup>17</sup> See 87 Fed. Reg. at 68,559 (“While many companies are interested in alternatives to traditional initial public offering . . . companies and their advisors may be reluctant to use the Primary Direct Floor Listing under current Exchange rules because of concerns about the Price Range Limitation”).

<sup>18</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, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange”).