

December 14, 2022

VIA E-MAIL

Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SEC Release No. 34-94708 (SR-NYSE-2022-14)

Dear Secretary

NYSE LLC, Inc. filed the attached Amendment No. 2 to the above-referenced filing on November 8, 2022.

Sincerely,



Encl. (Amendment No. 2 to SR-NYSE-2022-14)

Martha Redding
Corporate Secretary

New York Stock Exchange
11 Wall Street
New York, NY 10005

ice.com

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2022 - * 14

Amendment No. (req. for Amendments *) 2

Filing by New York Stock Exchange LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) *

☐

Section 806(e)(2) *

☐

Security-Based Swap Submission pursuant to the
Securities Exchange Act of 1934

Section 3C(b)(2) *

☐

Exhibit 2 Sent As Paper Document

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Exhibit 3 Sent As Paper Document

☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name *	Le-Anh	Last Name *	Bui
Title *	Counsel		
E-mail *	<input type="text"/>		
Telephone *	<input type="text"/>	Fax	<input type="text"/>

Signature

Pursuant to the requirements of the Securities Exchange of 1934, New York Stock Exchange LLC has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 11/08/2022

(Title *)

By David De Gregorio

(Name *)

Associate General Counsel

David De
Gregorio

Digitally signed by David De
Gregorio
Date: 2022.11.08 10:58:42
-05'00'

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information *

Add Remove View

SR-NYSE-2022-14 Am No 2 19b4.doc

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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SR-NYSE-2022-14 Am No 2 Ex 1.doc

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2- Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

☐ Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

☐ Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

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SR-NYSE-2022-14 Am No 2 Ex 4.doc

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

SR-NYSE-2022-14 Am No 2 Ex 5.doc

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² New York Stock Exchange LLC (“NYSE” or the “Exchange”) proposes to modify certain pricing limitations for securities listed on the Exchange pursuant to a Primary Direct Floor Listing.

This Amendment No. 2 to SR-NYSE-2022-14 replaces SR-NYSE-2022-14 and Amendment No. 1 thereto as originally filed and supersedes such filings in their entirety.³

The text of the proposed rule change is set forth in Exhibit 5 attached hereto. A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1.

- (b) The Exchange does not believe that the proposed rule change would have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange’s governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.

The persons on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

David De Gregorio
Associate General Counsel
NYSE Group, Inc.
(212) 656-4166

Le-Anh Bui
Counsel
NYSE Group, Inc.
(212) 656-2225

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

- (a) Purpose

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange filed Amendment No. 1 to SR-NYSE-2022-14 on November 4, 2022 and withdrew such filing on November 8, 2022.

The Exchange recently amended Chapter One of the Listed Company Manual (the “Manual”) to modify the provisions relating to direct listings to permit a primary offering in connection with a direct listing and to specify how a direct listing qualifies for initial listing if it includes both sales of securities by the company and possible sales by selling shareholders (a “Primary Direct Floor Listing”).⁴ The Exchange also adopted Rule 7.31(c)(1)(D) defining the Issuer Direct Offering (“IDO”) Order for use by a company that wishes to sell its shares through a Primary Direct Floor Listing and modified Rule 7.35A to describe how the IDO Order would participate in a Direct Listing Auction, establish additional requirements for a DMM conducting a Direct Listing Auction for a Primary Direct Floor Listing, and specify how the Indication Reference Price would be determined for a security to be opened in a Direct Listing.⁵ Currently, under Rule 7.35A(g)(2), the DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if (i) the Auction Price⁶ would be outside of the price range specified by the company in its effective registration statement (the “Price Range Limitation”)⁷ and (ii) if there is insufficient interest to satisfy both the IDO Order and all better-priced sell orders in full.

In this Amendment No. 1 and as discussed further below, the Exchange proposes 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 Range⁸ and at or below the price that is 80% above the highest price of the Issuer Price Range.⁹

⁴ See Securities Exchange Act Release No. 90768 (December 22, 2020), 85 FR 85807 (December 29, 2020) (SR-NYSE-2019-67) (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) (the “Approval Order”).

⁵ Id.

⁶ See Rule 7.35(a)(6) (defining Auction Price as the price at which an Auction is conducted); Rule 7.35A (setting forth requirements relating to the determination of the Auction Price by the DMM). For purposes of this filing, “Auction Price” refers to the price at which trading would commence in a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing.

⁷ The Exchange notes that references in this rule filing to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement.

⁸ As discussed further below, the Exchange proposes to define the “Primary Direct Floor Listing Auction Price Range” in Rule 7.31(c)(1)(D)(ii) as the price range that includes 20% below the lowest price and 80% above the highest price of the Issuer Price Range.

⁹ As provided in proposed Rule 7.31(c)(1)(D)(ii) (discussed in further detail below), the Exchange proposes to calculate the 20% and 80% thresholds to determine the Primary

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 DMM exceeds such price limit. The Exchange also proposes 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. This Amendment No. 1 supersedes the original filing in its entirety.¹⁰

Background

The Exchange believes that, while many companies are interested in alternatives to the traditional initial public offering ("IPO"), 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.

One potential benefit of a Primary Direct Floor Listing as an alternative to a traditional

Direct Floor Listing Price Range based on the highest price of the Issuer Price Range. For example, if the Issuer Price Range is \$28.00 to \$30.00, the Primary Direct Floor Listing Price Range would be \$22.00 to \$54.00.

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The Exchange believes that this Amendment No. 1 addresses the issues raised by the Commission in its 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. See Securities Exchange Act Release No. 95312 (July 18, 2022), 87 FR 43914 (July 22, 2022) (the "OIP"). Specifically, the Exchange believes that its proposal addresses the potential lack of a named underwriter in a Primary Direct Floor Listing and the usefulness and reliability of the price range disclosure provided to investors, as further discussed below. The Exchange also believes that this Amendment No. 1 addresses the concerns raised in the comment letter submitted by the Council of Institutional Investors, which the Exchange believes raised concerns substantively similar to those raised by the Commission in the OIP. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated July 28, 2022, available at: <https://www.sec.gov/comments/sr-nyse-2022-14/srnyse202214-20135103-306084.pdf>.

IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO, where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, the initial sale price in a Primary Direct Floor Listing is determined based on market interest and the matching of buy and sell orders in an auction open to all market participants.

In that regard, the Commission noted in the Approval Order that:

[B]ecause the price of securities issued by a company in a Primary Direct Floor Listing will be determined based on market interest and the matching of buy and sell orders, Primary Direct Floor Listings will provide an alternative way to price securities offerings that may better reflect prices in the aftermarket, and thus may allow for efficiencies in IPO pricing and allocation. . . . The opening auction in a Primary Direct Floor Listing provides for a different price discovery method for IPOs which may reduce the spread between IPO price and subsequent market trades, a potential benefit to existing and potential investors.¹¹

A successful IPO of shares requires sufficient investor interest. If an offering cannot be completed due to lack of investor interest, a company is likely to receive negative publicity, and the offering may be delayed or cancelled. The Price Range Limitation—which is imposed on a Primary Direct Floor Listing but not on an IPO—increases the probability of a failed offering because it contemplates there also being too much investor interest. In other words, if investor interest is greater than the company and other advisors anticipated, an offering would need to be delayed or cancelled.

As the Commission has noted with respect to traditional firm commitment underwritten offerings, the IPO price, which is established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.¹² The Exchange believes that the price range in a company's effective registration statement for a Primary Direct Floor Listing is similarly determined by the company and other advisors and, therefore, there may be instances of offerings where the price determined by the Direct Listing Auction would exceed the highest price of the price range in the company's effective registration statement.

As described above, under current Exchange Rules, the DMM would not conduct a Direct Listing Auction for a security subject to a Primary Direct Floor Listing if the Auction Price determined is above the highest price of the price range established by the issuer in its effective registration statement. In this case, the offering would be cancelled or postponed until the company amends its effective registration statement. At a

¹¹ See Approval Order, 85 FR at 85816-17 (footnote omitted).

¹² See, e.g., Approval Order, 85 FR at 85816, n. 113.

minimum, such a delay could expose the company to risks associated with changing investor sentiment in the event of an adverse market event. As a result, the Exchange believes that companies may be reluctant to use this alternative method of going public despite its expected potential benefits because of the restrictions of the Price Range Limitation.

Proposed Rule Change

In light of the above, the Exchange proposes to modify the Price Range Limitation such that a Direct Listing Auction for a Primary Direct Floor Listing could proceed if the Auction Price is at or above the price that is 20% below the lowest price of the Issuer Price Range and at or below the price that is 80% above the highest price of such price range. In other words, the Exchange proposes that the DMM could conduct the Direct Listing Auction, provided all other necessary conditions are satisfied, even if the Auction Price is outside of the Issuer Price Range, if the Auction Price would not be more than 20% below the lowest price or more than 80% above the highest price of such range. In such cases (whether the Auction Price is lower or higher than the Issuer Price Range), the Exchange proposes that the company must have, in its effective registration statement, specified the quantity of shares registered, as permitted by Securities Act Rule 457.¹³

The Exchange further proposes that, when the Auction Price is outside of the Issuer Price Range but not more than 20% below such price range and not more than 80% above the highest price of such price range, the Direct Listing Auction would not proceed unless the company has publicly disclosed and certified to the Exchange that (i) the company does not expect that such offering price would materially change the company'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) the company's 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 assumed in the price range established by the issuer in its effective registration statement.¹⁴ In addition, if the company's certification submitted to the Exchange includes a price limit that is below the price that is 80% above the highest price of the Issuer Price Range, the Direct Listing Auction would not take place if the Auction Price is determined by the DMM to be above such limit. When the Auction Price is outside of the Issuer Price Range

¹³ Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount. The Exchange proposes to require that companies selling shares through a Primary Direct Floor Listing will register securities by specifying the quantity of shares registered and not a maximum offering amount.

¹⁴ Sensitivity analysis disclosure may include, but is not limited to, use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. A company could state, for example: "We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes."

(whether it is lower or higher than such price range), the Exchange also proposes to provide the issuer with the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering so that any such disclosures would be available to investors prior to the completion of the offering. Thus, the Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing would not take place until the issuer confirms to the Exchange that no additional disclosures are required under federal securities laws based on the Auction Price determined by the DMM.

The Exchange believes that the additional requirements to permit a Direct Listing Auction to take place at an Auction Price that is outside of the Issuer Price Range (whether it is lower or higher than such price range), as proposed, would provide sufficient disclosures to allow investors to evaluate whether to participate in the Direct Listing Auction for a Primary Direct Floor Listing, including the opportunity to see how changes in share price may impact the company's disclosures.

The Exchange believes that its proposal with respect to the Price Range Limitation for a Primary Direct Floor Listing can be analogized to SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which generally 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 contained in the company's registration statement.¹⁵ The Exchange believes such guidance would also allow for deviation of greater than 20% above the highest price of the price range in a company's registration, provided that such change would not materially change the previous disclosure. Accordingly, the Exchange believes that a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, if the Direct Listing Auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosures, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.

The Exchange notes that the Commission previously stated that while Securities Act 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability

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See Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at <https://www.sec.gov/corpfin/securities-act-rules>.

for potentially misleading disclosure under the federal securities laws.¹⁶ Accordingly, the burden of complying with the disclosures required under federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omissions, remains with the issuer. In that regard, the Exchange believes that, in circumstances where the Auction Price would be outside of the Issuer Price Range, providing the issuer with the opportunity, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, if any, and/or determine and confirm to the Exchange that no additional disclosures are required under federal securities laws based on the Auction Price determined by the DMM.

The Exchange believes that an underwriter plays an important role in a traditional IPO and, therefore, proposes to require that a company listing securities on the Exchange in connection with 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 registration statement. Describing the roles and responsibilities of an underwriter, the Commission recently explained that:

[a]s intermediaries between an issuer and the investing public, underwriters play a critical role as “gatekeepers” to the public markets. Historically, in initial public offerings, where the investing public might be unfamiliar with a particular issuer, financial firms that act as underwriters would lend their well-known name to support that issuer’s offering. Where public investors may not have been inclined to invest with the company seeking to conduct a public offering, they could take comfort in the fact that a large, well-known financial institution, acting as underwriter was including its name on the first page of the issuer’s prospectus...

An underwriter’s participation in an issuer’s offering also exposes the underwriter to potential liability under the Securities Act. The civil liability provisions of the Securities Act reflect the unique position underwriters occupy in the chain of distribution of securities and provide strong incentives for underwriters to take steps to help ensure the accuracy of disclosure in a registration statement. Section 11 of the Securities Act imposes on underwriters, among other parties identified in Section 11(a), civil liability for any part of the registration statement, at effectiveness, which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, to any person acquiring such security. Similarly, Section 12(a)(2) imposes liability upon anyone, including underwriters, who offers or sells a security, by means of a prospectus or oral communication, which includes an untrue statement of a material fact

¹⁶ Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021).

or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading, to any person purchasing such security from them. These provisions provide significant investor protections to those who acquire securities sold pursuant to a registration statement by providing tools to hold companies, underwriters, and other parties accountable for misstatements and omissions in connection with public offerings of securities. As a result, anyone who might be named as a potential defendant in these suits has strong incentives to take the necessary steps to avoid such liability.

One defense available to an underwriter in a distribution is the “due diligence” defense, which shields an underwriter from liability if it can establish that, after reasonable investigation, the underwriter had reasonable ground to believe and did believe, at the time the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.¹⁷

The Exchange believes that these significant investor protection provisions are necessary in a Primary Direct Floor Listing if an offering can price outside of the price range established in the issuer’s effective registration statement, subject to the proposed limitations, because such provisions allow investors to make reasonable pricing decisions with clarity that the company’s underwriter would face statutory liability, as described above. Accordingly, the Exchange proposes to require that a company listing securities on the Exchange through 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.

The Exchange also believes that the requirement to retain a named underwriter, as described above, may mitigate concerns raised by the Commission in the OIP regarding challenges to bringing claims under Section 11 of the Securities Act due to the potential assertion of tracing defenses because an underwriter may choose to impose lock-up arrangements, as described below.

As a preliminary matter, the Exchange notes that, in the Approval Order, the Commission explained that the issue of traceability:

is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market at those that are so subject. Where a registration statement, at the time of effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act

¹⁷ Special Purpose Acquisition Companies, Shell Companies, and Projections (Proposed Rule), 87 FR 29458 (May 13, 2022).

provides a cause of action to “any person acquiring such security,” unless it is proved at the time of the acquisition the person “knew of such untruth or omission.” Courts have interpreted this statutory provision to permit aftermarket purchases (i.e., those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the offering covered by the false or misleading registration statement. Tracing is not set forth in Section 11 and is judicially-developed doctrine. As such, the application of this doctrine and, in particular, the pleading standards and factual proof that potential claimants must satisfy vary depending on the particular facts of the distribution and judicial district.¹⁸

The Commission then reaffirmed its position that “concerns regarding shareholders’ ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in Primary Direct Floor Listings” and further stated that it “is not aware of...any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims.”¹⁹ The Exchange believes that no such precedent exists as of the date of this Amendment and that the modifications to the Price Range Limitation in this proposal do not, in any way, exacerbate the tracing issues.

However, as stated above, the Exchange believes that the requirement to retain a named underwriter may mitigate traceability concerns that could arise in the context of a Primary Direct Floor Listing. As in a traditional firm commitment underwritten IPO, in which lock-up arrangements are often imposed, an underwriter in connection with a Primary Direct Floor Listing, as required by the Amendment, would be able to impose lock-up agreements for the same reasons that make lock-up agreements common in an IPO.

The Exchange also believes that the requirement to retain a named underwriter, as described above, mitigates concerns raised by the Commission in the OIP regarding the usefulness of price range disclosure provided to investors in a Securities Act registration statement filed in connection with a Primary Direct Floor Listing. The Exchange believes that an underwriter retained in connection with a Primary Direct Floor Listing would perform substantially similar functions, including those related to establishing and adjusting the price range, to those performed by an underwriter in a typical IPO because the underwriter would be subject to similar liability and reputational risk.

To further mitigate concerns regarding the usefulness of price range disclosure provided to investors, the Exchange proposes to require that the securities of a company listing in connection with a Primary Direct Floor Listing cannot price above an “Upper Limit,” which would not be higher than 80% above the highest price of the Issuer Price Range.

¹⁸ See Approval Order, 85 FR at 85815-16 (internal citations omitted).

¹⁹ See *id.* at 85816.

The Upper Limit would incentivize the company and its underwriter to set the disclosed price range to avoid the failed offering consequences described above. The Upper Limit would also encourage an issuer to adjust the price range disclosed in their registration statement prior to effectiveness in response to pricing feedback received from market analysts and potential investors.

To determine an appropriate Upper Limit, the Exchange analyzed operation companies' IPOs on the NYSE and the Nasdaq Global Select Market for 2020 and 2021.²⁰ This analysis indicated that the vast majority of IPOs opened at a price above the highest price of the issuer's disclosed price range and, moreover, that 90% of these IPOs opened at a price that was no more than the Upper Limit. Based on this data, the Exchange believes that, on balance, capital formation and investor protection goals would be best served by a pricing limitation equal to the Upper Limit.

Given that, as proposed, there may be a Primary Direct Floor Listing that could price outside of the price range of the company's effective registration statement, subject to the Upper Limit above which the Direct Listing Auction could not proceed,²¹ the Exchange proposes to support price discovery transparency by providing readily available, real time pricing information to investors. Specifically, the DMM's pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing would continue to be published via the securities information processor ("SIP") and proprietary data feeds.²² In addition, the Exchange would make the Indication Reference Price available, free of charge, on a public website (such as www.nyse.com) on the day such Auction is anticipated to take place.²³

In addition, to protect investors and enhance disclosure in connection with a Primary Direct Floor Listing, the Exchange proposes to adopt certain requirements for member organizations with respect to Primary Direct Floor Listings. Specifically, the Exchange

²⁰ This data set included approximately 600 records and includes IPOs that took place between January 2020 and December 2021.

²¹ In addition, if the company's certification to the Exchange includes a price limit that is lower than the Upper Limit and the Auction Price determined by the DMM exceeds such lower price limit, the Exchange would not conduct the Direct Listing Auction.

²² The Exchange notes that its dissemination of pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing via the SIP and proprietary data feeds is consistent with the availability of the same for securities opened in IPOs and believes that interested investors have found pre-opening indications to be readily accessible and to provide useful real time pricing information to inform their participation in such auctions. The Exchange thus believes that its proposal addresses the concerns raised in the OIP regarding the sufficiency of price discovery transparency for investors.

²³ The Indication Reference Price for a security to be opened in a Primary Direct Floor Listing is the lowest price of the Primary Direct Floor Listing Price Range. See Rule 7.35A(d)(2)(A)(v).

proposes to require member organizations to provide to a customer, before that customer places an order to participate in the Direct Listing Auction for a Primary Direct Floor Listing, a notice describing the mechanics of pricing a security subject to a Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the availability of pre-opening indications via the SIP and proprietary data feeds and the location of the public website where the Exchange will disseminate information relating to the Indication Reference Price.

The Exchange further proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Primary Direct Floor Listing, a regulatory bulletin that describes any special characteristics of the offering and the Exchange rules that apply to the pricing of a Primary Direct Floor Listing. The regulatory bulletin would also include information about the notice that member organizations would be required to provide customers, as proposed, and remind member organizations of their obligations pursuant to the Exchange rules that:

- Require member organizations to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer (Rule 2090); and
- Require member organizations in recommending transactions for a security subject to a Direct Listing Auction for a Primary Direct Floor Listing to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member organizations, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security (Rule 2111).

These member organization requirements are intended to remind members of their obligations to "know their customers" and would also serve to increase transparency regarding the pricing mechanisms applicable to a Primary Direct Floor Listing and help provide investors with sufficient price discovery information.

For each Primary Direct Floor Listing, the Exchange proposes that its regulatory bulletin would also inform market participants that the Auction Price could be up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. The Exchange's regulatory bulletin would also indicate the price above which the Direct Listing Auction for the Primary Direct Floor Listing could not proceed (i.e., the Upper Limit or other lower price based on the company's certification as described above).

Amendments to the Manual

Section 102.01B(E) of the Manual provides that companies may be listed on the Exchange through a Primary Direct Floor Listing. More specifically, a company that has

not previously had its common equity securities registered under the Act may list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange. A Primary Direct Floor Listing is any such listing in which either (i) only the company itself is selling shares in the opening auction on the first day of trading or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

Section 102.01B(E) of the Manual also provides that, with respect to a Primary Direct Floor Listing, the Exchange will deem a company to have met the applicable aggregate market value of publicly-held shares requirement if the company will sell at least \$100,000,000 in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange. The Manual further provides that, where a company is conducting a Primary Direct Floor Listing and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the aggregate market value of the shares the company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using a price per share equal to the lowest price of the price range established by the issuer in its registration statement.

To effect the changes to the Price Range Limitation described above and facilitate the possibility of a Direct Listing Auction for a Primary Direct Floor Listing pricing up to 20% below the price range disclosed in an issuer's effective registration statement, the Exchange proposes to modify Section 102.01B(E) of the Manual to provide that the Exchange would calculate the market value of such company's shares using a price per share equal to the lowest price of the price range established by the issuer in its effective registration statement, minus an amount equal to 20% of the highest price included in such price range, which will be referred to as the "Primary Direct Floor Listing Minimum Price." As noted above, the Exchange proposes that a company listing its securities on the Exchange pursuant to a Primary Direct Floor Listing must have (1) specified the quantity of shares registered, as permitted by Securities Act Rule 457, in its effective registration statement, and (2) retained an underwriter with respect to the primary sales of shares by the company and identified the underwriter in its effective registration statement. Accordingly, the Exchange further proposes to amend Section 102.01B(E) to include this requirement.

Amendments to Exchange Rules

To implement the changes to the Price Range Limitation described above, the Exchange also proposes the following changes to Rules 7.31 and 7.35A.

Proposed Changes to Rule 7.31

The Exchange proposes to modify Rule 7.31(c)(1)(D), which defines the IDO Order. Rule 7.31(c)(1)(D) currently provides that an IDO Order is a Limit Order to sell that is to

be traded only in a Direct Listing Auction for a Primary Direct Floor Listing, and Rule 7.31(c)(1)(D)(ii) currently provides that the limit price of an IDO Order must be equal to the lowest price of the price range established by the issuer in its effective registration statement. The Exchange proposes to modify Rule 7.31(c)(1)(D)(ii) to provide that the limit price of an IDO Order would be equal to the lowest price of the “Primary Direct Floor Listing Auction Price Range” and to redefine the “Primary Direct Floor Listing Auction Price Range” as 20% below the lowest price and 80% above the highest price of the price range established by the issuer in its effective registration statement. The Exchange also proposes to define “Issuer Price Range” as the price range established by the issuer in its effective registration statement. Thus, Rule 7.31(c)(1)(D)(ii), as modified, would facilitate the proposed changes to the Price Range Limitation by providing that the limit price of an IDO Order would be equal to the price that is 20% below the lowest price of the Issuer Price Range.

The Exchange further proposes to specify in Rule 7.31(c)(D)(ii) that, for purposes of determining the Primary Direct Floor Listing Price Range, the 20% and 80% thresholds would be calculated based on the highest price of the Issuer Price Range.

Proposed Changes to Rule 7.35A

Rule 7.35A sets forth rules pertaining to Core Open Auctions and Trading Halt Auctions facilitated by a DMM. Rule 7.35A(d) sets forth Exchange rules relating to pre-opening indications published by a DMM in connection with a DMM-facilitated auction. This Rule currently provides that a pre-opening indication will include the security and the price range within which the Auction Price is anticipated to occur and that a pre-opening indication—including for a Direct Listing Auction for a Primary Direct Floor Listing—will be published via the securities information processor and proprietary data feeds.

Rule 7.35A(d)(2)(A) and the subparagraphs thereunder describe the Indication Reference Price for a security to be opened in a DMM-facilitated auction. The Exchange proposes to amend Rule 7.35A(d)(2)(A)(v), which currently provides that, for a security that is a Primary Direct Floor Listing, the Indication Reference Price will be the lowest price of the Primary Direct Floor Listing Auction Price Range. To effect the proposed requirement described above that the Exchange disseminate the Indication Reference Price on a public website, the Exchange proposes to add this requirement to Rule 7.35A(d)(2)(A)(v). The Exchange also notes that, based on the proposed revision to the definition of Primary Direct Floor Listing Auction Price Range in Rule 7.31(c)(1)(D)(ii), the Indication Reference Price for a Primary Direct Floor Listing would be the price that is 20% below the lowest price of the Issuer Price Range, consistent with the proposed changes to the Price Range Limitation described above.

Next, the Exchange proposes to modify Rule 7.35A(g)(2), which specifies the circumstances under which a DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing. Structurally, the Exchange proposes to amend Rule 7.35A(g)(2) such that the rule would specify requirements for a Direct Listing Auction for a Primary Direct Floor Listing to proceed, rather than specifying circumstances under

which a DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing.

Rule 7.35A(g)(2)(A) currently provides that the DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price would be below the lowest price or above the highest price of the Primary Direct Floor Listing Auction Price Range. The Exchange proposes to modify this rule to specify that the Auction Price for a Direct Listing Auction for a Primary Direct Floor Listing may not be lower than the price that is 20% below the lowest price of the Issuer Price Range or higher than the price that is 80% above the highest price of the Issuer Price Range. In other words, the Auction Price may not be outside of the Primary Direct Floor Listing Auction Price Range, as defined in amended Rule 7.31(c)(1)(D)(ii). The Exchange proposes that Rule 7.35A(g)(2)(A) would further provide that, if an issuer has certified to the Exchange a maximum Auction Price that is lower than 80% above the highest price of the Issuer Price Range, the Auction Price may not exceed such lower price.

The Exchange proposes to amend Rule 7.35A(g)(2)(B) to provide that a Direct Listing Auction could proceed when the Auction Price is outside of the Issuer Price Range but within the Primary Direct Floor Listing Auction Price Range (as described in proposed Rule 7.35A(g)(2)(A)) if the issuer has previously certified to the Exchange and publicly disclosed that:

- The issuer does not expect that the Auction Price would materially change its previous disclosure in its effective registration statement (proposed Rule 7.35A(g)(2)(B)(i)(a));
- 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 (proposed Rule 7.35A(g)(2)(B)(i)(b)); and
- The 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 (proposed Rule 7.35A(g)(2)(B)(i)(c)).

Proposed Rule 7.35A(g)(2)(B)(ii) would further provide that, when the Auction Price determined by the DMM is outside of the Issuer Price Range (whether lower or higher), the issuer would be required to confirm to the Exchange that no additional disclosures are required under the federal securities laws based on such price. This proposed change would permit issuers to comply with their disclosure obligations under federal securities laws and provide investors with access to the requisite disclosures before the offering would proceed, as detailed above. Upon receiving confirmation from the issuer that any such obligations have been met, the Exchange would relay that information to the DMM to proceed with the Direct Listing Auction.

Finally, the Exchange proposes to add new subparagraph (C) under Rule 7.35A(g)(2). Proposed Rule 7.35A(g)(2)(C)(i) would reflect the requirement set forth in current Rule 7.35A(g)(2)(B) that the DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing if there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full. The Exchange does not propose to change this requirement, other than adding clarifying text to specify that such orders would be satisfied at the Auction Price.

Proposed Rule 7.35A(g)(2)(C)(ii) would set forth an additional requirement that must be satisfied before the DMM could conduct a Direct Listing Auction for a Primary Direct Floor Listing. This proposed change would reflect the proposed requirements described above regarding the regulatory bulletin to be distributed by the Exchange. Proposed Rule 7.35A(g)(2)(C)(ii) would provide that the DMM would not proceed with a Direct Listing Auction for a Primary Direct Floor Listing until it has been notified by the Exchange that the additional conditions set forth in new Commentary .20 to Rule 7.35A have been satisfied. Proposed Commentary .20 to Rule 7.35A would provide that the Direct Listing Auction for a Primary Direct Floor Listing for a security may not be conducted until the Exchange has notified the DMM that, at least one business day prior to the commencement of trading in such security, the Exchange has distributed a regulatory bulletin describing any special characteristics of the offering and the Exchange rules that apply to the pricing of the Primary Direct Floor Listing; the obligations of member organizations pursuant to Exchange Rules 2090 and 2111; and the requirement that a member organization provide its customers with a notice with information regarding the Direct Listing Auction for a Primary Direct Floor Listing. This proposed change would (i) facilitate the requirements described above to provide member organizations with sufficient information so that they may in turn inform their customers, (ii) remind member organizations of their obligations to “know their customers,” (iii) increase transparency around the pricing mechanisms of a Primary Direct Floor Listing, and (iv) help provide investors with sufficient price discovery information.

Proposed Rule 7.35A(g)(2)(C)(iii) would provide that the DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price is outside of the Issuer Price Range and the issuer has not satisfied the conditions set forth in proposed Rules 7.35A(g)(2)(A), 7.35A(g)(2)(B)(i), and 7.35A(g)(2)(B)(ii). The Exchange proposes this rule to reinforce that a Direct Listing Auction for a Primary Direct Floor Listing could not proceed in these circumstances unless the Auction Price meets the requirements of proposed Rule 7.35A(g)(2)(A) and the issuer has made the requisite disclosures described in proposed Rule 7.35A(g)(2)(B).

(b) Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,²⁴ in general, and furthers the objectives of Section 6(b)(5) of the

²⁴

15 U.S.C. 78f(b).

Exchange Act,²⁵ in particular, in that it is designed 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed modification of the Price Range Limitation would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest because the proposed approach is similar to the pricing of an IPO, where the issuer is permitted to price outside of the price range disclosed in its effective registration statement in accordance with the SEC Staff's guidance, as described above.²⁶ Specifically, the Exchange believes that it is reasonable to permit the Direct Listing Auction for a Primary Direct Floor Listing to proceed if the Auction Price is as low as 20% below the lowest price of the Issuer Price Range or as high as 80% above the highest price of such price range (or as high as the upper price limit set by the issuer in its certification to the Exchange)—because a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when the Auction Price is outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.

In addition, in the event that the Auction Price is outside of the Issuer Price Range, the Exchange proposes that the Direct Listing Auction for a Primary Direct Floor Listing could still proceed, but would not be conducted until the issuer has met disclosure requirements that would help provide investors with additional information regarding the offering, including a requirement that the issuer's effective registration statement contain a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the Primary Direct Floor Listing are lower or higher than the amount assumed by the price range set forth in the registration statement. The Exchange also proposes to require that an issuer must have confirmed to the Exchange that no additional disclosures are required under the federal securities laws based on the Auction Price

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03, supra note 15. The Exchange also notes that, in a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. See <https://www.sec.gov/news/speech/gensler-healthy-markets-associationconference-120921> ("Gensler Speech").

determined. The issuer would thus have the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering prior to the completion of the offering. Accordingly, the Exchange believes that this proposed change is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market because it would allow an offering to proceed under certain circumstances when the Auction Price is outside of the Issuer Price Range—including where investor interest is greater than the company and its advisors anticipated (thereby promoting capital formation)—while protecting investors by requiring that a company listing shares through a Primary Direct Floor Listing make applicable disclosures under the federal securities laws. The Exchange also believes that its proposal to allow a Direct Listing Auction for a Primary Direct Floor Listing to price above the Issuer Price Range but below the Upper Limit is designed to promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because this approach is similar to, but more stringent than, that of pricing a traditional IPO. The Exchange also believes that the proposed Upper Limit and requirement that the securities of a company listing in connection with a Primary Direct Floor Listing cannot price above such Upper Limit is designed to protect investors and the public interest because it would incentivize the company, its underwriter, and other advisors to avoid a failed offering by taking steps to ensure the accuracy of price range disclosure in a registration statement, thereby providing the investing public with a useful and reliable price range in connection with the planned Primary Direct Floor Listing.

The Exchange also believes that the proposed requirement that a company offering securities for sale in connection with 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 would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest because the requirement would facilitate holding underwriters accountable for potential misstatements and omissions in connection with a Primary Direct Floor Listing. The Exchange also believes that an underwriter would be incentivized to take necessary steps to support accurate price range disclosure to avoid exposure to statutory liability, thereby offering the investing public greater assurances with respect to the reliability of the price range disclosure for a Primary Direct Floor Listing.

The Exchange also believes that the proposed change is designed to promote investor protection because the Exchange would support price discovery transparency by providing readily available, real time pricing information to investors by disseminating pre-opening indications via the SIP and proprietary data feeds on the day on which the Direct Listing Auction for a Primary Direct Floor Listing is anticipated to take place. Market participants would thus have ready access to up-to-date pricing information leading up to a Direct Listing Auction for a Primary Direct Floor Listing.

In particular, the Exchange believes that making pre-opening indications readily available to market participants would provide price transparency to the market in connection with

Primary Direct Floor Listings. Pre-opening indications, which are based on the DMM's assessment of interest eligible to participate in the Direct Listing Auction for a Primary Direct Floor Listing, would provide notice of when price volatility has subsided and price equilibrium has been met with respect to the orders that wish to participate in such Auction. In addition, Exchange rules establishing pre-opening indication procedures already include requirements supporting the precision and reliability of pre-opening indications, such as those set forth in Rule 7.35A(d)(4)(C), which provides that DMMs should aim to publish a pre-opening indication with a spread of less than \$1.00 before opening a security; Rule 7.35A(d)(4)(D), which provides that the DMM must wait for certain minimum specified periods after publishing a pre-opening indication and before opening a security; and Rule 7.35A(d)(4)(G), which provides that the DMM may not open a security outside of the last-published pre-opening indication. As the table below shows, the DMMs in the Selling Shareholder Direct Floor Listings that took place in 2020 and 2021 indicated very tight and reliable anticipated opening price ranges irrespective of the amount of time between the last indication and opening auction:

Date of Direct Listing Auction	Symbol	Last Pre-Opening Indication	Auction Price	Time Elapsed Between Last Pre-Opening Indication and Auction Open
9/30/2020	PLTR	9.95 - 10.05	10	10 minutes, 19 seconds
9/30/2020	ASAN	26.75 - 27	27	2 minutes, 24 seconds
3/10/2021	RBLX	64.25 - 64.75	64.5	3 minutes, 2 seconds
5/19/2021	SQSP	47.5 - 48	48	2 minutes, 31 seconds
5/26/2021	ZIP	19.75 - 20.25	20	16 minutes, 29 seconds
9/29/2021	WRBY	54 - 54.5	54.05	12 minutes, 31 seconds

The Exchange thus believes that its existing pre-opening indication process provides significant investor protection measures based on the Exchange rules governing the publishing of pre-opening indications and the judgment applied by the DMM in refining the anticipated price range of a security to be opened in a Direct Listing Auction as appropriate and in determining that the price has reached stability, such that the Direct Listing Auction should proceed.²⁷

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The Exchange believes that it would be appropriate to permit Market Orders and MOO Orders (as defined in Rules 7.31(a)(1) and 7.31(c)(1)(B)) to participate in a Direct Listing Auction for a Primary Direct Floor Listing, given the safeguards provided by the pre-opening indication process. Although Market Orders and MOO Orders are unpriced orders, the Exchange believes that Market Orders and MOO Orders that participate in a Direct Listing Auction for a Primary Direct Listing would not be subject to extreme price volatility due to the DMM's role in refining pre-opening indications and determining the Auction Price, as well as the DMM's obligation under Rule 7.35A(g) to fill all better-priced interest. Moreover, investors submitting Market Orders and MOO Orders would have the benefit of readily available, real time pricing information to inform their decision to participate in the Auction. The Exchange also notes that data from IPOs (which are not subject to the Price Range Limitation) that took place in the last six

The Exchange believes that its proposal to issue a regulatory bulletin as outlined above would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and promote investor protection because it would provide member organizations with the necessary information to share with their customers regarding the Primary Direct Floor Listing. Specifically, the proposed regulatory bulletin would be distributed at least one business day prior to the commencement of trading in a security to be listed in connection with a Direct Listing Auction for a Primary Direct Floor Listing and would describe any special characteristics of the offering, as well as the Exchange Rules that apply to the pricing of a Direct Listing Auction for a Primary Direct Floor Listing. The regulatory bulletin would inform prospective participants in the Direct Listing Auction that the Auction Price could be up to 20% below the lowest price of the Issuer Price Range (and specify what that price is) and indicate the price above which the Direct Listing Auction for a Primary Direct Floor Listing could not proceed, which would be either the Upper Limit or a lower limit based on the company's certification as described above. The Exchange also believes that the regulatory bulletin would further the protection of investors by reminding member organizations of their obligations pursuant to Exchange Rules 2090 and 2111 to "know their customers," providing member organizations and their customers with information regarding the pricing mechanism of a Direct Listing Auction for a Primary Direct Floor Listing, and helping investors receive sufficient price discovery information.

The Staff of the Commission in a Compliance and Disclosure Interpretation has indicated that pricing up to 20% below the lowest price and at a price above the highest price of the price range set forth in the company's effective registration statement is appropriate for a company conducting an IPO, notwithstanding that the price would be outside of the range stated in the company's effective registration. The Exchange believes that investors have become familiar with this approach at least since the Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.²⁸ Accordingly, the Exchange believes that allowing Direct Listing Auctions in connection with a Primary Direct Floor Listing to similarly price up to 20% below the lowest price and at a price not more than 80% above the highest price of the price range in the company's effective registration statement would be consistent with both Chair Gensler's recent call to treat "like cases alike"²⁹ and the protection of investors.

The Exchange also believes that the proposed changes to the Manual are consistent with the protection of investors. Specifically, the proposed change to Section 102.01B(E) to specify that a company offering securities for sale in connection with a Primary Direct

calendar months indicates that MOOs made up a significant portion of opening auction volume and thus believes that allowing MOOs to participate in a Direct Listing Auction for a Primary Direct Floor Listing could encourage investor participation.

²⁸ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03, supra note 15.

²⁹ See Gensler Speech, supra note 26.

Floor Listing must register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a), would promote investor protection because it would provide certainty regarding the number of shares available in connection with the Primary Direct Floor Listing, even if the Auction Price of such shares may be outside of the price range specified in the issuer's effective registration statement. The Exchange also believes that the proposed change to Section 102.01B(E) to specify that a company offering securities for sale in connection with 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 would support the protection of investors for the reasons described above. The Exchange also believes that the proposed change to Section 102.01B(E) to reflect that the market value calculation of a company's shares would be based on a price per share equal to the lowest price of the price range established by the issuer in its registration statement, less an amount equal to 20% of the highest price included in such price range, is consistent with the protection of investors because it would not modify any other applicable listing requirements and would update the Manual to align with the proposed changes to the Price Range Limitation described herein.

Finally, the Exchange believes that its proposed changes with respect to the Price Range Limitation would remove impediments to and perfect the mechanism of a free and open market and a national market system because they would not change the existing process for a DMM-facilitated Direct Listing Auction for a Primary Direct Floor Listing, but would eliminate a potential impediment to companies considering a Primary Direct Floor Listing, thereby encouraging capital formation. In addition, the proposed changes are designed to protect investors and the public interest because they would provide an expanded opportunity for a Primary Direct Floor Listing to proceed so that the issuer's securities can be listed and begin trading on the secondary market.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed change would increase competition by continuing to facilitate new pathways for companies to access the public markets.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated

Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

Exhibit 5 – Proposed Rule Text

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NYSE-2022-14, Amendment No. 2)

[Date]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Modify Certain Pricing Limitations for Securities Listed on the Exchange

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on November 8, 2022, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify certain pricing limitations for securities listed on the Exchange pursuant to a Primary Direct Floor Listing. This Amendment No. 2 to SR-NYSE-2022-14 replaces SR-NYSE-2022-14 and Amendment No. 1 thereto as originally filed and supersedes such filings in their entirety.⁴ The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ The Exchange filed Amendment No. 1 to SR-NYSE-2022-14 on November 4, 2022 and withdrew such filing on November 8, 2022.

Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange recently amended Chapter One of the Listed Company Manual (the “Manual”) to modify the provisions relating to direct listings to permit a primary offering in connection with a direct listing and to specify how a direct listing qualifies for initial listing if it includes both sales of securities by the company and possible sales by selling shareholders (a “Primary Direct Floor Listing”).⁵ The Exchange also adopted Rule 7.31(c)(1)(D) defining the Issuer Direct Offering (“IDO”) Order for use by a company that wishes to sell its shares through a Primary Direct Floor Listing and modified Rule 7.35A to describe how the IDO Order would participate in a Direct Listing Auction, establish additional requirements for a DMM conducting a Direct Listing Auction for a Primary Direct Floor Listing, and specify how the Indication Reference Price would be determined for a security to be opened in a Direct Listing.⁶ Currently, under Rule 7.35A(g)(2), the DMM will not conduct a Direct Listing Auction for a Primary

⁵ See Securities Exchange Act Release No. 90768 (December 22, 2020), 85 FR 85807 (December 29, 2020) (SR-NYSE-2019-67) (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) (the “Approval Order”).

⁶ Id.

Direct Floor Listing if (i) the Auction Price⁷ would be outside of the price range specified by the company in its effective registration statement (the “Price Range Limitation”)⁸ and (ii) if there is insufficient interest to satisfy both the IDO Order and all better-priced sell orders in full.

In this Amendment No. 1 and as discussed further below, the Exchange proposes 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 Range⁹ and at or below the price that is 80% above the highest price of the Issuer Price Range.¹⁰ 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

⁷ See Rule 7.35(a)(6) (defining Auction Price as the price at which an Auction is conducted); Rule 7.35A (setting forth requirements relating to the determination of the Auction Price by the DMM). For purposes of this filing, “Auction Price” refers to the price at which trading would commence in a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing.

⁸ The Exchange notes that references in this rule filing to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement.

⁹ As discussed further below, the Exchange proposes to define the “Primary Direct Floor Listing Auction Price Range” in Rule 7.31(c)(1)(D)(ii) as the price range that includes 20% below the lowest price and 80% above the highest price of the Issuer Price Range.

¹⁰ As provided in proposed Rule 7.31(c)(1)(D)(ii) (discussed in further detail below), the Exchange proposes to calculate the 20% and 80% thresholds to determine the Primary Direct Floor Listing Price Range based on the highest price of the Issuer Price Range. For example, if the Issuer Price Range is \$28.00 to \$30.00, the Primary Direct Floor Listing Price Range would be \$22.00 to \$54.00.

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 DMM exceeds such price limit. The Exchange also proposes 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. This Amendment No. 1 supersedes the original filing in its entirety.¹¹

Background

The Exchange believes that, while many companies are interested in alternatives to the traditional initial public offering ("IPO"), companies and their advisors may be reluctant to use

¹¹ The Exchange believes that this Amendment No. 1 addresses the issues raised by the Commission in its 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. See Securities Exchange Act Release No. 95312 (July 18, 2022), 87 FR 43914 (July 22, 2022) (the "OIP"). Specifically, the Exchange believes that its proposal addresses the potential lack of a named underwriter in a Primary Direct Floor Listing and the usefulness and reliability of the price range disclosure provided to investors, as further discussed below. The Exchange also believes that this Amendment No. 1 addresses the concerns raised in the comment letter submitted by the Council of Institutional Investors, which the Exchange believes raised concerns substantively similar to those raised by the Commission in the OIP. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated July 28, 2022, available at: <https://www.sec.gov/comments/sr-nyse-2022-14/srnyse202214-20135103-306084.pdf>.

the Primary Direct Floor Listing under current Exchange rules because of concerns about the Price Range Limitation.

One potential benefit of a Primary Direct Floor Listing as an alternative to a traditional IPO is that it could maximize the chances of more efficient price discovery of the initial public sale of securities for issuers and investors. Unlike an IPO, where the offering price is informed by underwriter engagement with potential investors to gauge interest in the offering, but ultimately decided through negotiations between the issuer and the underwriters for the offering, the initial sale price in a Primary Direct Floor Listing is determined based on market interest and the matching of buy and sell orders in an auction open to all market participants.

In that regard, the Commission noted in the Approval Order that:

[B]ecause the price of securities issued by a company in a Primary Direct Floor Listing will be determined based on market interest and the matching of buy and sell orders, Primary Direct Floor Listings will provide an alternative way to price securities offerings that may better reflect prices in the aftermarket, and thus may allow for efficiencies in IPO pricing and allocation. . . . The opening auction in a Primary Direct Floor Listing provides for a different price discovery method for IPOs which may reduce the spread between IPO price and subsequent market trades, a potential benefit to existing and potential investors.¹²

A successful IPO of shares requires sufficient investor interest. If an offering cannot be completed due to lack of investor interest, a company is likely to receive negative publicity, and the offering may be delayed or cancelled. The Price Range Limitation—which is imposed on a

¹² See Approval Order, 85 FR at 85816-17 (footnote omitted).

Primary Direct Floor Listing but not on an IPO—increases the probability of a failed offering because it contemplates there also being too much investor interest. In other words, if investor interest is greater than the company and other advisors anticipated, an offering would need to be delayed or cancelled.

As the Commission has noted with respect to traditional firm commitment underwritten offerings, the IPO price, which is established through negotiation between the underwriters and the issuer, is often lower than the price that the issuer could have obtained for the securities, based on a comparison of the IPO price to the closing price on the first day of trading.¹³ The Exchange believes that the price range in a company's effective registration statement for a Primary Direct Floor Listing is similarly determined by the company and other advisors and, therefore, there may be instances of offerings where the price determined by the Direct Listing Auction would exceed the highest price of the price range in the company's effective registration statement.

As described above, under current Exchange Rules, the DMM would not conduct a Direct Listing Auction for a security subject to a Primary Direct Floor Listing if the Auction Price determined is above the highest price of the price range established by the issuer in its effective registration statement. In this case, the offering would be cancelled or postponed until the company amends its effective registration statement. At a minimum, such a delay could expose the company to risks associated with changing investor sentiment in the event of an adverse market event. As a result, the Exchange believes that companies may be reluctant to use this alternative method of going public despite its expected potential benefits because of the restrictions of the Price Range Limitation.

¹³ See, e.g., Approval Order, 85 FR at 85816, n. 113.

Proposed Rule Change

In light of the above, the Exchange proposes to modify the Price Range Limitation such that a Direct Listing Auction for a Primary Direct Floor Listing could proceed if the Auction Price is at or above the price that is 20% below the lowest price of the Issuer Price Range and at or below the price that is 80% above the highest price of such price range. In other words, the Exchange proposes that the DMM could conduct the Direct Listing Auction, provided all other necessary conditions are satisfied, even if the Auction Price is outside of the Issuer Price Range, if the Auction Price would not be more than 20% below the lowest price or more than 80% above the highest price of such range. In such cases (whether the Auction Price is lower or higher than the Issuer Price Range), the Exchange proposes that the company must have, in its effective registration statement, specified the quantity of shares registered, as permitted by Securities Act Rule 457.¹⁴

The Exchange further proposes that, when the Auction Price is outside of the Issuer Price Range but not more than 20% below such price range and not more than 80% above the highest price of such price range, the Direct Listing Auction would not proceed unless the company has publicly disclosed and certified to the Exchange that (i) the company does not expect that such offering price would materially change the company'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) the company's registration statement contains a sensitivity analysis explaining how

¹⁴ Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount. The Exchange proposes to require that companies selling shares through a Primary Direct Floor Listing will register securities by specifying the quantity of shares registered and not a maximum offering amount.

the company'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.¹⁵ In addition, if the company's certification submitted to the Exchange includes a price limit that is below the price that is 80% above the highest price of the Issuer Price Range, the Direct Listing Auction would not take place if the Auction Price is determined by the DMM to be above such limit. When the Auction Price is outside of the Issuer Price Range (whether it is lower or higher than such price range), the Exchange also proposes to provide the issuer with the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering so that any such disclosures would be available to investors prior to the completion of the offering. Thus, the Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing would not take place until the issuer confirms to the Exchange that no additional disclosures are required under federal securities laws based on the Auction Price determined by the DMM.

The Exchange believes that the additional requirements to permit a Direct Listing Auction to take place at an Auction Price that is outside of the Issuer Price Range (whether it is lower or higher than such price range), as proposed, would provide sufficient disclosures to allow investors to evaluate whether to participate in the Direct Listing Auction for a Primary Direct Floor Listing, including the opportunity to see how changes in share price may impact the company's disclosures.

The Exchange believes that its proposal with respect to the Price Range Limitation for a

¹⁵ Sensitivity analysis disclosure may include, but is not limited to, use of proceeds; balance sheet and capitalization; and the company's liquidity position after the offering. A company could state, for example: "We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes."

Primary Direct Floor Listing can be analogized to SEC Rule 430A and question 227.03 of the SEC Staff's Compliance and Disclosure Interpretations, which generally 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 contained in the company's registration statement.¹⁶ The Exchange believes such guidance would also allow for deviation of greater than 20% above the highest price of the price range in a company's registration, provided that such change would not materially change the previous disclosure. Accordingly, the Exchange believes that a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, if the Direct Listing Auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosures, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.

The Exchange notes that the Commission previously stated that while Securities Act 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide

¹⁶ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03 at <https://www.sec.gov/corpfin/securities-act-rules>.

pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability for potentially misleading disclosure under the federal securities laws.¹⁷ Accordingly, the burden of complying with the disclosures required under federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omissions, remains with the issuer. In that regard, the Exchange believes that, in circumstances where the Auction Price would be outside of the Issuer Price Range, providing the issuer with the opportunity, prior to the completion of the offering, to provide any necessary additional disclosures that are dependent on the price of the offering, if any, and/or determine and confirm to the Exchange that no additional disclosures are required under federal securities laws based on the Auction Price determined by the DMM.

The Exchange believes that an underwriter plays an important role in a traditional IPO and, therefore, proposes to require that a company listing securities on the Exchange in connection with 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 registration statement. Describing the roles and responsibilities of an underwriter, the Commission recently explained that:

[a]s intermediaries between an issuer and the investing public, underwriters play a critical role as “gatekeepers” to the public markets. Historically, in initial public offerings, where the investing public might be unfamiliar with a particular issuer, financial firms that act as underwriters would lend their well-known name to support that issuer’s

¹⁷ Securities Exchange Act Release No. 93119 (September 24, 2021), 86 FR 54262 (September 30, 2021).

offering. Where public investors may not have been inclined to invest with the company seeking to conduct a public offering, they could take comfort in the fact that a large, well-known financial institution, acting as underwriter was including its name on the first page of the issuer's prospectus...

An underwriter's participation in an issuer's offering also exposes the underwriter to potential liability under the Securities Act. The civil liability provisions of the Securities Act reflect the unique position underwriters occupy in the chain of distribution of securities and provide strong incentives for underwriters to take steps to help ensure the accuracy of disclosure in a registration statement. Section 11 of the Securities Act imposes on underwriters, among other parties identified in Section 11(a), civil liability for any part of the registration statement, at effectiveness, which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, to any person acquiring such security. Similarly, Section 12(a)(2) imposes liability upon anyone, including underwriters, who offers or sells a security, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading, to any person purchasing such security from them. These provisions provide significant investor protections to those who acquire securities

sold pursuant to a registration statement by providing tools to hold companies, underwriters, and other parties accountable for misstatements and omissions in connection with public offerings of securities. As a result, anyone who might be named as a potential defendant in these suits has strong incentives to take the necessary steps to avoid such liability.

One defense available to an underwriter in a distribution is the “due diligence” defense, which shields an underwriter from liability if it can establish that, after reasonable investigation, the underwriter had reasonable ground to believe and did believe, at the time the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.¹⁸

The Exchange believes that these significant investor protection provisions are necessary in a Primary Direct Floor Listing if an offering can price outside of the price range established in the issuer’s effective registration statement, subject to the proposed limitations, because such provisions allow investors to make reasonable pricing decisions with clarity that the company’s underwriter would face statutory liability, as described above. Accordingly, the Exchange proposes to require that a company listing securities on the Exchange through 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.

The Exchange also believes that the requirement to retain a named underwriter, as

¹⁸ Special Purpose Acquisition Companies, Shell Companies, and Projections (Proposed Rule), 87 FR 29458 (May 13, 2022).

described above, may mitigate concerns raised by the Commission in the OIP regarding challenges to bringing claims under Section 11 of the Securities Act due to the potential assertion of tracing defenses because an underwriter may choose to impose lock-up arrangements, as described below.

As a preliminary matter, the Exchange notes that, in the Approval Order, the Commission explained that the issue of traceability:

is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market at those that are so subject. Where a registration statement, at the time of effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, Section 11(a) of the Securities Act provides a cause of action to “any person acquiring such security,” unless it is proved at the time of the acquisition the person “knew of such untruth or omission.” Courts have interpreted this statutory provision to permit aftermarket purchases (i.e., those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the offering covered by the false or misleading registration statement. Tracing is not set forth in Section 11 and is judicially-developed doctrine. As such, the application of this doctrine and, in particular, the pleading standards and factual proof that potential claimants must satisfy vary depending on the particular facts of

the distribution and judicial district.¹⁹

The Commission then reaffirmed its position that “concerns regarding shareholders’ ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues are not exclusive to nor necessarily inherent in Primary Direct Floor Listings” and further stated that it “is not aware of...any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims.”²⁰ The Exchange believes that no such precedent exists as of the date of this Amendment and that the modifications to the Price Range Limitation in this proposal do not, in any way, exacerbate the tracing issues.

However, as stated above, the Exchange believes that the requirement to retain a named underwriter may mitigate traceability concerns that could arise in the context of a Primary Direct Floor Listing. As in a traditional firm commitment underwritten IPO, in which lock-up arrangements are often imposed, an underwriter in connection with a Primary Direct Floor Listing, as required by the Amendment, would be able to impose lock-up agreements for the same reasons that make lock-up agreements common in an IPO.

The Exchange also believes that the requirement to retain a named underwriter, as described above, mitigates concerns raised by the Commission in the OIP regarding the usefulness of price range disclosure provided to investors in a Securities Act registration statement filed in connection with a Primary Direct Floor Listing. The Exchange believes that an underwriter retained in connection with a Primary Direct Floor Listing would perform substantially similar functions, including those related to establishing and adjusting the price range, to those performed by an underwriter in a typical IPO because the underwriter would be

¹⁹ See Approval Order, 85 FR at 85815-16 (internal citations omitted).

²⁰ See id. at 85816.

subject to similar liability and reputational risk.

To further mitigate concerns regarding the usefulness of price range disclosure provided to investors, the Exchange proposes to require that the securities of a company listing in connection with a Primary Direct Floor Listing cannot price above an “Upper Limit,” which would not be higher than 80% above the highest price of the Issuer Price Range. The Upper Limit would incentivize the company and its underwriter to set the disclosed price range to avoid the failed offering consequences described above. The Upper Limit would also encourage an issuer to adjust the price range disclosed in their registration statement prior to effectiveness in response to pricing feedback received from market analysts and potential investors.

To determine an appropriate Upper Limit, the Exchange analyzed operation companies’ IPOs on the NYSE and the Nasdaq Global Select Market for 2020 and 2021.²¹ This analysis indicated that the vast majority of IPOs opened at a price above the highest price of the issuer’s disclosed price range and, moreover, that 90% of these IPOs opened at a price that was no more than the Upper Limit. Based on this data, the Exchange believes that, on balance, capital formation and investor protection goals would be best served by a pricing limitation equal to the Upper Limit.

Given that, as proposed, there may be a Primary Direct Floor Listing that could price outside of the price range of the company’s effective registration statement, subject to the Upper Limit above which the Direct Listing Auction could not proceed,²² the Exchange proposes to support price discovery transparency by providing readily available, real time pricing

²¹ This data set included approximately 600 records and includes IPOs that took place between January 2020 and December 2021.

²² In addition, if the company’s certification to the Exchange includes a price limit that is lower than the Upper Limit and the Auction Price determined by the DMM exceeds such lower price limit, the Exchange would not conduct the Direct Listing Auction.

information to investors. Specifically, the DMM's pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing would continue to be published via the securities information processor ("SIP") and proprietary data feeds.²³ In addition, the Exchange would make the Indication Reference Price available, free of charge, on a public website (such as www.nyse.com) on the day such Auction is anticipated to take place.²⁴

In addition, to protect investors and enhance disclosure in connection with a Primary Direct Floor Listing, the Exchange proposes to adopt certain requirements for member organizations with respect to Primary Direct Floor Listings. Specifically, the Exchange proposes to require member organizations to provide to a customer, before that customer places an order to participate in the Direct Listing Auction for a Primary Direct Floor Listing, a notice describing the mechanics of pricing a security subject to a Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the availability of pre-opening indications via the SIP and proprietary data feeds and the location of the public website where the Exchange will disseminate information relating to the Indication Reference Price.

The Exchange further proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Primary Direct Floor Listing, a regulatory bulletin that describes any special characteristics of the offering and the Exchange

²³ The Exchange notes that its dissemination of pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing via the SIP and proprietary data feeds is consistent with the availability of the same for securities opened in IPOs and believes that interested investors have found pre-opening indications to be readily accessible and to provide useful real time pricing information to inform their participation in such auctions. The Exchange thus believes that its proposal addresses the concerns raised in the OIP regarding the sufficiency of price discovery transparency for investors.

²⁴ The Indication Reference Price for a security to be opened in a Primary Direct Floor Listing is the lowest price of the Primary Direct Floor Listing Price Range. See Rule 7.35A(d)(2)(A)(v).

rules that apply to the pricing of a Primary Direct Floor Listing. The regulatory bulletin would also include information about the notice that member organizations would be required to provide customers, as proposed, and remind member organizations of their obligations pursuant to the Exchange rules that:

- Require member organizations to use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer (Rule 2090); and
- Require member organizations in recommending transactions for a security subject to a Direct Listing Auction for a Primary Direct Floor Listing to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member organizations, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security (Rule 2111).

These member organization requirements are intended to remind members of their obligations to "know their customers" and would also serve to increase transparency regarding the pricing mechanisms applicable to a Primary Direct Floor Listing and help provide investors with sufficient price discovery information.

For each Primary Direct Floor Listing, the Exchange proposes that its regulatory bulletin would also inform market participants that the Auction Price could be up to 20% below the lowest price of the price range in the company's effective registration statement and specify what that price is. The Exchange's regulatory bulletin would also indicate the price above which the

Direct Listing Auction for the Primary Direct Floor Listing could not proceed (i.e., the Upper Limit or other lower price based on the company's certification as described above).

Amendments to the Manual

Section 102.01B(E) of the Manual provides that companies may be listed on the Exchange through a Primary Direct Floor Listing. More specifically, a company that has not previously had its common equity securities registered under the Act may list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company itself will sell shares in the opening auction on the first day of trading on the Exchange. A Primary Direct Floor Listing is any such listing in which either (i) only the company itself is selling shares in the opening auction on the first day of trading or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction.

Section 102.01B(E) of the Manual also provides that, with respect to a Primary Direct Floor Listing, the Exchange will deem a company to have met the applicable aggregate market value of publicly-held shares requirement if the company will sell at least \$100,000,000 in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange. The Manual further provides that, where a company is conducting a Primary Direct Floor Listing and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the aggregate market value of the shares the company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using a price per share equal to the lowest price of the price range established by the issuer in its registration statement.

To effect the changes to the Price Range Limitation described above and facilitate the possibility of a Direct Listing Auction for a Primary Direct Floor Listing pricing up to 20% below the price range disclosed in an issuer's effective registration statement, the Exchange proposes to modify Section 102.01B(E) of the Manual to provide that the Exchange would calculate the market value of such company's shares using a price per share equal to the lowest price of the price range established by the issuer in its effective registration statement, minus an amount equal to 20% of the highest price included in such price range, which will be referred to as the "Primary Direct Floor Listing Minimum Price." As noted above, the Exchange proposes that a company listing its securities on the Exchange pursuant to a Primary Direct Floor Listing must have (1) specified the quantity of shares registered, as permitted by Securities Act Rule 457, in its effective registration statement, and (2) retained an underwriter with respect to the primary sales of shares by the company and identified the underwriter in its effective registration statement. Accordingly, the Exchange further proposes to amend Section 102.01B(E) to include this requirement.

Amendments to Exchange Rules

To implement the changes to the Price Range Limitation described above, the Exchange also proposes the following changes to Rules 7.31 and 7.35A.

Proposed Changes to Rule 7.31

The Exchange proposes to modify Rule 7.31(c)(1)(D), which defines the IDO Order. Rule 7.31(c)(1)(D) currently provides that an IDO Order is a Limit Order to sell that is to be traded only in a Direct Listing Auction for a Primary Direct Floor Listing, and Rule 7.31(c)(1)(D)(ii) currently provides that the limit price of an IDO Order must be equal to the lowest price of the price range established by the issuer in its effective registration statement.

The Exchange proposes to modify Rule 7.31(c)(1)(D)(ii) to provide that the limit price of an IDO Order would be equal to the lowest price of the “Primary Direct Floor Listing Auction Price Range” and to redefine the “Primary Direct Floor Listing Auction Price Range” as 20% below the lowest price and 80% above the highest price of the price range established by the issuer in its effective registration statement. The Exchange also proposes to define “Issuer Price Range” as the price range established by the issuer in its effective registration statement. Thus, Rule 7.31(c)(1)(D)(ii), as modified, would facilitate the proposed changes to the Price Range Limitation by providing that the limit price of an IDO Order would be equal to the price that is 20% below the lowest price of the Issuer Price Range.

The Exchange further proposes to specify in Rule 7.31(c)(D)(ii) that, for purposes of determining the Primary Direct Floor Listing Price Range, the 20% and 80% thresholds would be calculated based on the highest price of the Issuer Price Range.

Proposed Changes to Rule 7.35A

Rule 7.35A sets forth rules pertaining to Core Open Auctions and Trading Halt Auctions facilitated by a DMM. Rule 7.35A(d) sets forth Exchange rules relating to pre-opening indications published by a DMM in connection with a DMM-facilitated auction. This Rule currently provides that a pre-opening indication will include the security and the price range within which the Auction Price is anticipated to occur and that a pre-opening indication—including for a Direct Listing Auction for a Primary Direct Floor Listing—will be published via the securities information processor and proprietary data feeds.

Rule 7.35A(d)(2)(A) and the subparagraphs thereunder describe the Indication Reference Price for a security to be opened in a DMM-facilitated auction. The Exchange proposes to amend Rule 7.35A(d)(2)(A)(v), which currently provides that, for a security that is a Primary

Direct Floor Listing, the Indication Reference Price will be the lowest price of the Primary Direct Floor Listing Auction Price Range. To effect the proposed requirement described above that the Exchange disseminate the Indication Reference Price on a public website, the Exchange proposes to add this requirement to Rule 7.35A(d)(2)(A)(v). The Exchange also notes that, based on the proposed revision to the definition of Primary Direct Floor Listing Auction Price Range in Rule 7.31(c)(1)(D)(ii), the Indication Reference Price for a Primary Direct Floor Listing would be the price that is 20% below the lowest price of the Issuer Price Range, consistent with the proposed changes to the Price Range Limitation described above.

Next, the Exchange proposes to modify Rule 7.35A(g)(2), which specifies the circumstances under which a DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing. Structurally, the Exchange proposes to amend Rule 7.35A(g)(2) such that the rule would specify requirements for a Direct Listing Auction for a Primary Direct Floor Listing to proceed, rather than specifying circumstances under which a DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing.

Rule 7.35A(g)(2)(A) currently provides that the DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price would be below the lowest price or above the highest price of the Primary Direct Floor Listing Auction Price Range. The Exchange proposes to modify this rule to specify that the Auction Price for a Direct Listing Auction for a Primary Direct Floor Listing may not be lower than the price that is 20% below the lowest price of the Issuer Price Range or higher than the price that is 80% above the highest price of the Issuer Price Range. In other words, the Auction Price may not be outside of the Primary Direct Floor Listing Auction Price Range, as defined in amended Rule 7.31(c)(1)(D)(ii). The Exchange proposes that Rule 7.35A(g)(2)(A) would further provide that, if an issuer has certified

to the Exchange a maximum Auction Price that is lower than 80% above the highest price of the Issuer Price Range, the Auction Price may not exceed such lower price.

The Exchange proposes to amend Rule 7.35A(g)(2)(B) to provide that a Direct Listing Auction could proceed when the Auction Price is outside of the Issuer Price Range but within the Primary Direct Floor Listing Auction Price Range (as described in proposed Rule 7.35A(g)(2)(A)) if the issuer has previously certified to the Exchange and publicly disclosed that:

- The issuer does not expect that the Auction Price would materially change its previous disclosure in its effective registration statement (proposed Rule 7.35A(g)(2)(B)(i)(a));
- 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 (proposed Rule 7.35A(g)(2)(B)(i)(b)); and
- The 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 (proposed Rule 7.35A(g)(2)(B)(i)(c)).

Proposed Rule 7.35A(g)(2)(B)(ii) would further provide that, when the Auction Price determined by the DMM is outside of the Issuer Price Range (whether lower or higher), the issuer would be required to confirm to the Exchange that no additional disclosures are required under the federal securities laws based on such price. This proposed change would permit issuers to comply with their disclosure obligations under federal securities laws and provide investors with access to the requisite disclosures before the offering would proceed, as detailed

above. Upon receiving confirmation from the issuer that any such obligations have been met, the Exchange would relay that information to the DMM to proceed with the Direct Listing Auction.

Finally, the Exchange proposes to add new subparagraph (C) under Rule 7.35A(g)(2). Proposed Rule 7.35A(g)(2)(C)(i) would reflect the requirement set forth in current Rule 7.35A(g)(2)(B) that the DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing if there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full. The Exchange does not propose to change this requirement, other than adding clarifying text to specify that such orders would be satisfied at the Auction Price.

Proposed Rule 7.35A(g)(2)(C)(ii) would set forth an additional requirement that must be satisfied before the DMM could conduct a Direct Listing Auction for a Primary Direct Floor Listing. This proposed change would reflect the proposed requirements described above regarding the regulatory bulletin to be distributed by the Exchange. Proposed Rule 7.35A(g)(2)(C)(ii) would provide that the DMM would not proceed with a Direct Listing Auction for a Primary Direct Floor Listing until it has been notified by the Exchange that the additional conditions set forth in new Commentary .20 to Rule 7.35A have been satisfied. Proposed Commentary .20 to Rule 7.35A would provide that the Direct Listing Auction for a Primary Direct Floor Listing for a security may not be conducted until the Exchange has notified the DMM that, at least one business day prior to the commencement of trading in such security, the Exchange has distributed a regulatory bulletin describing any special characteristics of the offering and the Exchange rules that apply to the pricing of the Primary Direct Floor Listing; the obligations of member organizations pursuant to Exchange Rules 2090 and 2111; and the requirement that a member organization provide its customers with a notice with information regarding the Direct Listing Auction for a Primary Direct Floor Listing. This proposed change

would (i) facilitate the requirements described above to provide member organizations with sufficient information so that they may in turn inform their customers, (ii) remind member organizations of their obligations to “know their customers,” (iii) increase transparency around the pricing mechanisms of a Primary Direct Floor Listing, and (iv) help provide investors with sufficient price discovery information.

Proposed Rule 7.35A(g)(2)(C)(iii) would provide that the DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price is outside of the Issuer Price Range and the issuer has not satisfied the conditions set forth in proposed Rules 7.35A(g)(2)(A), 7.35A(g)(2)(B)(i), and 7.35A(g)(2)(B)(ii). The Exchange proposes this rule to reinforce that a Direct Listing Auction for a Primary Direct Floor Listing could not proceed in these circumstances unless the Auction Price meets the requirements of proposed Rule 7.35A(g)(2)(A) and the issuer has made the requisite disclosures described in proposed Rule 7.35A(g)(2)(B).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,²⁵ in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²⁶ in particular, in that it is designed 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 is not designed to permit

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed modification of the Price Range Limitation would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest because the proposed approach is similar to the pricing of an IPO, where the issuer is permitted to price outside of the price range disclosed in its effective registration statement in accordance with the SEC Staff's guidance, as described above.²⁷ Specifically, the Exchange believes that it is reasonable to permit the Direct Listing Auction for a Primary Direct Floor Listing to proceed if the Auction Price is as low as 20% below the lowest price of the Issuer Price Range or as high as 80% above the highest price of such price range (or as high as the upper price limit set by the issuer in its certification to the Exchange)—because a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, when the Auction Price is outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% noted in Rule 430A if such deviation would not materially change the previous disclosure, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.

²⁷ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03, supra note 16. The Exchange also notes that, in a recent speech, SEC Chair Gary Gensler emphasized that an overarching principle of regulation is that like activities ought to be treated alike. See <https://www.sec.gov/news/speech/gensler-healthy-markets-associationconference-120921> (“Gensler Speech”).

In addition, in the event that the Auction Price is outside of the Issuer Price Range, the Exchange proposes that the Direct Listing Auction for a Primary Direct Floor Listing could still proceed, but would not be conducted until the issuer has met disclosure requirements that would help provide investors with additional information regarding the offering, including a requirement that the issuer's effective registration statement contain a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the Primary Direct Floor Listing are lower or higher than the amount assumed by the price range set forth in the registration statement. The Exchange also proposes to require that an issuer must have confirmed to the Exchange that no additional disclosures are required under the federal securities laws based on the Auction Price determined. The issuer would thus have the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering prior to the completion of the offering. Accordingly, the Exchange believes that this proposed change is designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market because it would allow an offering to proceed under certain circumstances when the Auction Price is outside of the Issuer Price Range—including where investor interest is greater than the company and its advisors anticipated (thereby promoting capital formation)—while protecting investors by requiring that a company listing shares through a Primary Direct Floor Listing make applicable disclosures under the federal securities laws. The Exchange also believes that its proposal to allow a Direct Listing Auction for a Primary Direct Floor Listing to price above the Issuer Price Range but below the Upper Limit is designed to promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because this approach is similar to, but more stringent than, that of pricing a traditional IPO. The Exchange also believes

that the proposed Upper Limit and requirement that the securities of a company listing in connection with a Primary Direct Floor Listing cannot price above such Upper Limit is designed to protect investors and the public interest because it would incentivize the company, its underwriter, and other advisors to avoid a failed offering by taking steps to ensure the accuracy of price range disclosure in a registration statement, thereby providing the investing public with a useful and reliable price range in connection with the planned Primary Direct Floor Listing.

The Exchange also believes that the proposed requirement that a company offering securities for sale in connection with 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 would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest because the requirement would facilitate holding underwriters accountable for potential misstatements and omissions in connection with a Primary Direct Floor Listing. The Exchange also believes that an underwriter would be incentivized to take necessary steps to support accurate price range disclosure to avoid exposure to statutory liability, thereby offering the investing public greater assurances with respect to the reliability of the price range disclosure for a Primary Direct Floor Listing.

The Exchange also believes that the proposed change is designed to promote investor protection because the Exchange would support price discovery transparency by providing readily available, real time pricing information to investors by disseminating pre-opening indications via the SIP and proprietary data feeds on the day on which the Direct Listing Auction for a Primary Direct Floor Listing is anticipated to take place. Market participants would thus have ready access to up-to-date pricing information leading up to a Direct Listing Auction for a

Primary Direct Floor Listing.

In particular, the Exchange believes that making pre-opening indications readily available to market participants would provide price transparency to the market in connection with Primary Direct Floor Listings. Pre-opening indications, which are based on the DMM's assessment of interest eligible to participate in the Direct Listing Auction for a Primary Direct Floor Listing, would provide notice of when price volatility has subsided and price equilibrium has been met with respect to the orders that wish to participate in such Auction. In addition, Exchange rules establishing pre-opening indication procedures already include requirements supporting the precision and reliability of pre-opening indications, such as those set forth in Rule 7.35A(d)(4)(C), which provides that DMMs should aim to publish a pre-opening indication with a spread of less than \$1.00 before opening a security; Rule 7.35A(d)(4)(D), which provides that the DMM must wait for certain minimum specified periods after publishing a pre-opening indication and before opening a security; and Rule 7.35A(d)(4)(G), which provides that the DMM may not open a security outside of the last-published pre-opening indication. As the table below shows, the DMMs in the Selling Shareholder Direct Floor Listings that took place in 2020 and 2021 indicated very tight and reliable anticipated opening price ranges irrespective of the amount of time between the last indication and opening auction:

Date of Direct Listing Auction	Symbol	Last Pre-Opening Indication	Auction Price	Time Elapsed Between Last Pre-Opening Indication and Auction Open
9/30/2020	PLTR	9.95 - 10.05	10	10 minutes, 19 seconds
9/30/2020	ASAN	26.75 - 27	27	2 minutes, 24 seconds
3/10/2021	RBLX	64.25 - 64.75	64.5	3 minutes, 2 seconds
5/19/2021	SQSP	47.5 - 48	48	2 minutes, 31 seconds
5/26/2021	ZIP	19.75 - 20.25	20	16 minutes, 29 seconds
9/29/2021	WRBY	54 - 54.5	54.05	12 minutes, 31 seconds

The Exchange thus believes that its existing pre-opening indication process provides significant investor protection measures based on the Exchange rules governing the publishing of pre-opening indications and the judgment applied by the DMM in refining the anticipated price range of a security to be opened in a Direct Listing Auction as appropriate and in determining that the price has reached stability, such that the Direct Listing Auction should proceed.²⁸

The Exchange believes that its proposal to issue a regulatory bulletin as outlined above would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and promote investor protection because it would provide member organizations with the necessary information to share with their customers regarding the Primary Direct Floor Listing. Specifically, the proposed regulatory bulletin would be distributed at least one business day prior to the commencement of trading in a security to be listed in connection with a Direct Listing Auction for a Primary Direct Floor Listing and would describe any special characteristics of the offering, as well as the Exchange Rules that apply to the pricing of a Direct Listing Auction for a Primary Direct Floor Listing. The regulatory bulletin would inform prospective participants in the Direct Listing Auction that the Auction Price could be up

²⁸ The Exchange believes that it would be appropriate to permit Market Orders and MOO Orders (as defined in Rules 7.31(a)(1) and 7.31(c)(1)(B)) to participate in a Direct Listing Auction for a Primary Direct Floor Listing, given the safeguards provided by the pre-opening indication process. Although Market Orders and MOO Orders are unpriced orders, the Exchange believes that Market Orders and MOO Orders that participate in a Direct Listing Auction for a Primary Direct Listing would not be subject to extreme price volatility due to the DMM's role in refining pre-opening indications and determining the Auction Price, as well as the DMM's obligation under Rule 7.35A(g) to fill all better-priced interest. Moreover, investors submitting Market Orders and MOO Orders would have the benefit of readily available, real time pricing information to inform their decision to participate in the Auction. The Exchange also notes that data from IPOs (which are not subject to the Price Range Limitation) that took place in the last six calendar months indicates that MOOs made up a significant portion of opening auction volume and thus believes that allowing MOOs to participate in a Direct Listing Auction for a Primary Direct Floor Listing could encourage investor participation.

to 20% below the lowest price of the Issuer Price Range (and specify what that price is) and indicate the price above which the Direct Listing Auction for a Primary Direct Floor Listing could not proceed, which would be either the Upper Limit or a lower limit based on the company's certification as described above. The Exchange also believes that the regulatory bulletin would further the protection of investors by reminding member organizations of their obligations pursuant to Exchange Rules 2090 and 2111 to "know their customers," providing member organizations and their customers with information regarding the pricing mechanism of a Direct Listing Auction for a Primary Direct Floor Listing, and helping investors receive sufficient price discovery information.

The Staff of the Commission in a Compliance and Disclosure Interpretation has indicated that pricing up to 20% below the lowest price and at a price above the highest price of the price range set forth in the company's effective registration statement is appropriate for a company conducting an IPO, notwithstanding that the price would be outside of the range stated in the company's effective registration. The Exchange believes that investors have become familiar with this approach at least since the Staff last revised Compliance and Disclosure Interpretation 227.03 in January 2009.²⁹ Accordingly, the Exchange believes that allowing Direct Listing Auctions in connection with a Primary Direct Floor Listing to similarly price up to 20% below the lowest price and at a price not more than 80% above the highest price of the price range in the company's effective registration statement would be consistent with both Chair Gensler's recent call to treat "like cases alike"³⁰ and the protection of investors.

²⁹ See Compliance & Disclosure Interpretation of Securities Act Rules #227.03, supra note 16.

³⁰ See Gensler Speech, supra note 27.

The Exchange also believes that the proposed changes to the Manual are consistent with the protection of investors. Specifically, the proposed change to Section 102.01B(E) to specify that a company offering securities for sale in connection with a Primary Direct Floor Listing must register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a), would promote investor protection because it would provide certainty regarding the number of shares available in connection with the Primary Direct Floor Listing, even if the Auction Price of such shares may be outside of the price range specified in the issuer's effective registration statement. The Exchange also believes that the proposed change to Section 102.01B(E) to specify that a company offering securities for sale in connection with 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 would support the protection of investors for the reasons described above. The Exchange also believes that the proposed change to Section 102.01B(E) to reflect that the market value calculation of a company's shares would be based on a price per share equal to the lowest price of the price range established by the issuer in its registration statement, less an amount equal to 20% of the highest price included in such price range, is consistent with the protection of investors because it would not modify any other applicable listing requirements and would update the Manual to align with the proposed changes to the Price Range Limitation described herein.

Finally, the Exchange believes that its proposed changes with respect to the Price Range Limitation would remove impediments to and perfect the mechanism of a free and open market and a national market system because they would not change the existing process for a DMM-facilitated Direct Listing Auction for a Primary Direct Floor Listing, but would eliminate a potential impediment to companies considering a Primary Direct Floor Listing, thereby

encouraging capital formation. In addition, the proposed changes are designed to protect investors and the public interest because they would provide an expanded opportunity for a Primary Direct Floor Listing to proceed so that the issuer's securities can be listed and begin trading on the secondary market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed change would increase competition by continuing to facilitate new pathways for companies to access the public markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR- NYSE-2022-14 on the subject line.

Paper comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2022-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2022-14 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Eduardo A. Aleman
Deputy Secretary

³¹ 17 CFR 200.30-3(a)(12).

Additions: Underlined

Deletions: [Bracketed]

Marked Additions: Double Underlined

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NYSE Listed Company Manual

102.01B

A Company must demonstrate an aggregate market value of publicly-held shares of \$40,000,000 for companies that list either at the time of their initial public offerings (“IPO”) (C) or as a result of spin-offs or under the Affiliated Company standard or, for companies that list at the time of their Initial Firm Commitment Underwritten Public Offering (C), and \$100,000,000 for other companies (D) (E). A company must have a closing price or, if listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, an IPO or Initial Firm Commitment Underwritten Public Offering price per share of at least \$4 at the time of initial listing. A company listing a common equity security upon completion of an exchange of such security for a listed Equity Investment Tracking Stock must demonstrate an aggregate market value of publicly-held shares of \$100,000,000 and a closing price per share of \$4.00 and may demonstrate that it has met these requirements by reference to the trading price and publicly-held shares outstanding (D) of the Equity Investment Tracking Stock which is the subject of the exchange, basing those calculations on the exchange ratio between the two securities.

(E) Generally, the Exchange expects to list companies in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spin-off. However, the Exchange recognizes that some companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in one or more private placements, may wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements (a “Selling Shareholder Direct Floor Listing”). In addition, in certain cases, a company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders (any such listing in which either (i) only the company itself is selling shares in the opening auction on the first day of trading or (ii) the company is selling shares and

selling shareholders may also sell shares in such opening auction, is referred to herein as a “Primary Direct Floor Listing”). Consequently, the Exchange will, on a case by case basis, exercise discretion to list companies that are listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.

In exercising this discretion with respect to Selling Shareholder Direct Floor Listings, the Exchange will determine that such company has met the \$100,000,000 aggregate market value of publicly-held shares requirement based on a combination of both (i) an independent third-party valuation (a “Valuation”) of the company and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer (a “Private Placement Market”). The Exchange will attribute a market value of publicly-held shares to the company equal to the lesser of (i) the value calculable based on the Valuation and (ii) the value calculable based on the most recent trading price in a Private Placement Market. Alternatively, in the absence of any recent trading in a Private Placement Market, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the company provides a Valuation evidencing a market value of publicly-held shares of at least \$250,000,000.

In exercising the above-referenced discretion with respect to a Primary Direct Floor Listing, the Exchange will deem such company to have met the applicable aggregate market value of publicly-held shares requirement if the company will sell at least \$100,000,000 in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange. Market value for this purpose will be calculated using a price per share equal to the lowest price of the price range established by the issuer in its effective registration statement minus an amount equal to 20% of the highest price included in of such price range (the “Primary Direct Floor Listing Minimum Price”). A Company offering securities for sale in connection with a Primary Direct Floor Listing must (1) register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a), and (2) retain an underwriter with respect to the primary sales of shares by the Company and identify the underwriter in its effective registration statement.

Where a company is conducting a Primary Direct Floor Listing and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the aggregate market value of the shares the company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using [a price per share equal to the lowest price of the price range established by the issuer in its registration statement] the Primary Direct Floor Listing Minimum Price.

Rules of the New York Stock Exchange LLC

Rule 7P EQUITIES TRADING

Section 3. Exchange Trading

Rule 7.31. Orders and Modifiers

- (c) Auction-Only Order. A Limit or Market Order that is to be traded only in an auction pursuant to the Rule 7.35 Series (for Auction-Eligible Securities) or routed pursuant to Rule 7.34 (for UTP securities). MOO, MOC, LOC, IDO, and Closing IO Orders are not available to DMMs.
- (1) The Exchange will accept the following Auction-Only Orders designated for an opening or reopening auction only before the Core Trading Session begins (for the Core Open Auction) or during a halt or pause (for a Trading Halt Auction) and any quantity of such orders that are not traded in the designated auction will be cancelled.

(D) An Issuer Direct Offering Order (“IDO Order”). An IDO Order is a Limit Order to sell that is to be traded only in a Direct Listing Auction for a Primary Direct Floor Listing.

- (i) Only one IDO Order may be entered on behalf of the issuer and only by one member organization.
- (ii) The limit price of the IDO Order must be equal to the lowest price of the “Primary Direct Floor Listing Auction Price Range,” which is 20% below the lowest price and 2080% above the highest price of the price range established by the issuer in its effective registration statement (the “Issuer Price Range”) [(“Primary Direct Floor Listing Auction Price Range”). For purposes of determining the Primary Direct Floor Listing Auction Price Range, the 20% and 80% thresholds will be calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A highest price of the Issuer Price Range.

- (iii) The IDO Order must be for the quantity of shares offered by the issuer, as disclosed in the prospectus in the effective registration statement.
- (iv) An IDO Order may not be cancelled or modified.
- (v) An IDO Order must be executed in full in the Direct Listing Auction.

Rule 7.35 Series. Auctions

Rule 7.35A. DMM-Facilitated Core Open and Trading Halt Auctions

(d) *Pre-Opening Indications.* A pre-opening indication will include the security and the price range within which the Auction Price is anticipated to occur. A pre-opening indication will be published via the securities information processor and proprietary data feeds.

(2) Indication Reference Price.

- (A) The Indication Reference Price for a security, other than an American Depositary Receipt (“ADR”), will be:

- (v) for a security that is a Primary Direct Floor Listing, the lowest price of the Primary Direct Floor Listing Auction Price Range. The Exchange will disseminate, free of charge, the Indication Reference Price on a public website, such as nyse.com.

(g) *Determining an Auction Price.* The DMM is responsible for determining the Auction Price for a Core Open Auction or Trading Halt Auction. If there is an Imbalance of any size, the DMM must select an Auction Price at which all better-priced orders on the Side of the Imbalance can be satisfied.

(2) ~~[The DMM will not conduct]~~ When facilitating a Direct Listing Auction for a Primary Direct Floor Listing ~~[if]~~ When facilitating a Direct Listing Auction for a Primary Direct Floor Listing:

(A) ~~[t]~~ The Auction Price [would] may not be below the price that is 20% below the lowest price of the Issuer Price Range for above the price that is 80% above the highest price of the Issuer Price Range (i.e., outside of the Primary Direct Floor Listing Auction Price Range); or]. If the issuer certifies to the Exchange a maximum Auction Price that is below the price that is 80% above the highest price of the Issuer Price Range, the Auction Price may not be above such price.

(B) The Auction Price may be outside of the Issuer Price Range but at or within the Primary Direct Floor Listing Auction Price Range but outside of the Issuer Price Range, or above the highest price of the Primary Direct Floor Listing Auction Price Range, only if the issuer meets the following requirements:

(i) the issuer has previously certified to the Exchange and publicly disclosed that:

(a) the issuer does not expect that the Auction Price would materially change the issuer's previous disclosure in its effective registration statement;

(b) 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

(c) the effective 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; and

(ii) the issuer has confirmed to the Exchange that no additional disclosures are required under the federal securities laws to open the Direct Listing Auction at such a price, which information the Exchange will relay to the DMM.

(C) The DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if:

(i) there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full[.] at the Auction Price;

(ii) the DMM has been notified by the Exchange that the conditions set forth in Commentary .20 to this Rule for a Primary Direct Floor Listing to proceed have not been satisfied; or

(iii) the Auction Price would be outside of the Issuer Price Range and the issuer has not satisfied the conditions set forth in subparagraphs (g)(2)(A) and (g)(2)(B)(i) and (ii) of this Rule.

Commentary:

.10 In connection with a Selling Shareholder Direct Floor Listing, the financial advisor to the issuer of the security being listed (“financial advisor”) and the DMM assigned to such security are reminded that any consultation that the financial advisor provides to the Exchange as required by paragraph (d)(2)(A)(iv) of this Rule and any consultation between the DMM and financial advisor as required by paragraph (g)(1) of this Rule are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.

.20 In connection with a Primary Direct Floor Listing, the Direct Listing Auction may not proceed until the Exchange has notified the DMM that, at least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing Auction for a Primary Direct Floor Listing, the Exchange has distributed a regulatory bulletin to its member organizations describing any special characteristics of the offering and the Exchange rules that apply to the pricing of the Primary Direct Floor Listing pursuant to Rule 7.31(c)(1)(D) and this Rule, as well as the requirements below:

- (1) Member organizations must use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of each customer (Rule 2090);
- (2) Member organizations in recommending transactions for a security subject to a Direct Listing Auction for a Primary Direct Floor Listing must have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer’s investment objectives, financial situation, needs, and any other information known by such member organizations, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security (Rule 2111); and
- (3) Member organizations must provide to a customer, before that customer places an order to be executed in the Direct Listing Auction, a notice describing the mechanics of pricing a security subject to Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the dissemination of the

Indication Reference Price on a public website and the availability of the pre-opening indications via the securities information processor and proprietary data feeds.

Additions: Underlined

Deletions: [Bracketed]

NYSE Listed Company Manual

102.01B

A Company must demonstrate an aggregate market value of publicly-held shares of \$40,000,000 for companies that list either at the time of their initial public offerings (“IPO”) (C) or as a result of spin-offs or under the Affiliated Company standard or, for companies that list at the time of their Initial Firm Commitment Underwritten Public Offering (C), and \$100,000,000 for other companies (D) (E). A company must have a closing price or, if listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, an IPO or Initial Firm Commitment Underwritten Public Offering price per share of at least \$4 at the time of initial listing. A company listing a common equity security upon completion of an exchange of such security for a listed Equity Investment Tracking Stock must demonstrate an aggregate market value of publicly-held shares of \$100,000,000 and a closing price per share of \$4.00 and may demonstrate that it has met these requirements by reference to the trading price and publicly-held shares outstanding (D) of the Equity Investment Tracking Stock which is the subject of the exchange, basing those calculations on the exchange ratio between the two securities.

(E) Generally, the Exchange expects to list companies in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spin-off. However, the Exchange recognizes that some companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in one or more private placements, may wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements (a “Selling Shareholder Direct Floor Listing”). In addition, in certain cases, a company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company will sell shares itself in the opening auction on the first day of trading on the Exchange in addition to or instead of facilitating sales by selling shareholders (any such listing in which either (i) only the company itself is selling shares in the opening auction on the first day of trading or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction, is referred to herein as a “Primary Direct Floor Listing”). Consequently, the Exchange will, on a case by case basis, exercise discretion to list companies that are listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.

In exercising this discretion with respect to Selling Shareholder Direct Floor Listings, the Exchange will determine that such company has met the \$100,000,000 aggregate market value of publicly-held shares requirement based on a combination of both (i) an independent third-party valuation (a "Valuation") of the company and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer (a "Private Placement Market"). The Exchange will attribute a market value of publicly-held shares to the company equal to the lesser of (i) the value calculable based on the Valuation and (ii) the value calculable based on the most recent trading price in a Private Placement Market. Alternatively, in the absence of any recent trading in a Private Placement Market, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the company provides a Valuation evidencing a market value of publicly-held shares of at least \$250,000,000.

In exercising the above-referenced discretion with respect to a Primary Direct Floor Listing, the Exchange will deem such company to have met the applicable aggregate market value of publicly-held shares requirement if the company will sell at least \$100,000,000 in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange. Market value for this purpose will be calculated using a price per share equal to the lowest price of the price range established by the issuer in its effective registration statement minus an amount equal to 20% of the highest price of such price range (the "Primary Direct Floor Listing Minimum Price"). A Company offering securities for sale in connection with a Primary Direct Floor Listing must (1) register securities by specifying the quantity of shares registered, as permitted by Securities Act Rule 457(a), and (2) retain an underwriter with respect to the primary sales of shares by the Company and identify the underwriter in its effective registration statement.

Where a company is conducting a Primary Direct Floor Listing and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the aggregate market value of the shares the company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using [a price per share equal to the lowest price of the price range established by the issuer in its registration statement] the Primary Direct Floor Listing Minimum Price.

Rules of the New York Stock Exchange LLC

Rule 7P EQUITIES TRADING

Section 3. Exchange Trading

Rule 7.31. Orders and Modifiers

(c) Auction-Only Order. A Limit or Market Order that is to be traded only in an auction pursuant to the Rule 7.35 Series (for Auction-Eligible Securities) or routed pursuant to Rule 7.34 (for UTP securities). MOO, MOC, LOC, IDO, and Closing IO Orders are not available to DMMs.

- (1) The Exchange will accept the following Auction-Only Orders designated for an opening or reopening auction only before the Core Trading Session begins (for the Core Open Auction) or during a halt or pause (for a Trading Halt Auction) and any quantity of such orders that are not traded in the designated auction will be cancelled.

(D) An Issuer Direct Offering Order (“IDO Order”). An IDO Order is a Limit Order to sell that is to be traded only in a Direct Listing Auction for a Primary Direct Floor Listing.

- (i) Only one IDO Order may be entered on behalf of the issuer and only by one member organization.
- (ii) The limit price of the IDO Order must be equal to the lowest price of the “Primary Direct Floor Listing Auction Price Range,” which is 20% below the lowest price and 80% above the highest price of the price range established by the issuer in its effective registration statement (the “Issuer Price Range”) [(“Primary Direct Floor Listing Auction Price Range”)]. For purposes of determining the Primary Direct Floor Listing Auction Price Range, the 20% and 80% thresholds will be calculated based on the highest price of the Issuer Price Range.
- (iii) The IDO Order must be for the quantity of shares offered by the issuer, as disclosed in the prospectus in the effective registration statement.
- (iv) An IDO Order may not be cancelled or modified.

- (v) An IDO Order must be executed in full in the Direct Listing Auction.

Rule 7.35 Series. Auctions

Rule 7.35A. DMM-Facilitated Core Open and Trading Halt Auctions

(d) *Pre-Opening Indications.* A pre-opening indication will include the security and the price range within which the Auction Price is anticipated to occur. A pre-opening indication will be published via the securities information processor and proprietary data feeds.

(2) Indication Reference Price.

- (A) The Indication Reference Price for a security, other than an American Depositary Receipt (“ADR”), will be:

- (v) for a security that is a Primary Direct Floor Listing, the lowest price of the Primary Direct Floor Listing Auction Price Range. The Exchange will disseminate, free of charge, the Indication Reference Price on a public website, such as nyse.com.

(g) *Determining an Auction Price.* The DMM is responsible for determining the Auction Price for a Core Open Auction or Trading Halt Auction. If there is an Imbalance of any size, the DMM must select an Auction Price at which all better-priced orders on the Side of the Imbalance can be satisfied.

- (2) [The DMM will not conduct]When facilitating a Direct Listing Auction for a Primary Direct Floor Listing [if]:

- (A) [t]The Auction Price [would]may not be below the price that is 20% below the lowest price of the Issuer Price Range or above the price that is 80% above the highest price of the Issuer Price Range (i.e., outside of the Primary Direct Floor Listing Auction Price Range)[; or]. If the issuer certifies to the Exchange a maximum Auction Price

that is below the price that is 80% above the highest price of the Issuer Price Range, the Auction Price may not be above such price.

(B) The Auction Price may be outside of the Issuer Price Range but at or within the Primary Direct Floor Listing Auction Price Range only if the issuer meets the following requirements:

(i) the issuer has previously certified to the Exchange and publicly disclosed that:

(a) the issuer does not expect that the Auction Price would materially change the issuer's previous disclosure in its effective registration statement;

(b) 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

(c) the effective 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; and

(ii) the issuer has confirmed to the Exchange that no additional disclosures are required under the federal securities laws to open the Direct Listing Auction at such a price, which information the Exchange will relay to the DMM.

(C) The DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if:

(i) there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full[.] at the Auction Price;

(ii) the DMM has been notified by the Exchange that the conditions set forth in Commentary .20 to this Rule for a Primary Direct Floor Listing to proceed have not been satisfied; or

(iii) the Auction Price would be outside of the Issuer Price Range and the issuer has not satisfied the conditions set forth in subparagraphs (g)(2)(A) and (g)(2)(B) of this Rule.

Commentary:

.10 In connection with a Selling Shareholder Direct Floor Listing, the financial advisor to the issuer of the security being listed ("financial advisor") and the DMM assigned to such security

are reminded that any consultation that the financial advisor provides to the Exchange as required by paragraph (d)(2)(A)(iv) of this Rule and any consultation between the DMM and financial advisor as required by paragraph (g)(1) of this Rule are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.

.20 In connection with a Primary Direct Floor Listing, the Direct Listing Auction may not proceed until the Exchange has notified the DMM that, at least one business day prior to the commencement of trading of a security listing in connection with a Direct Listing Auction for a Primary Direct Floor Listing, the Exchange has distributed a regulatory bulletin to its member organizations describing any special characteristics of the offering and the Exchange rules that apply to the pricing of the Primary Direct Floor Listing pursuant to Rule 7.31(c)(1)(D) and this Rule, as well as the requirements below:

- (1) Member organizations must use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of each customer (Rule 2090);
- (2) Member organizations in recommending transactions for a security subject to a Direct Listing Auction for a Primary Direct Floor Listing must have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member organizations, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security (Rule 2111); and
- (3) Member organizations must provide to a customer, before that customer places an order to be executed in the Direct Listing Auction, a notice describing the mechanics of pricing a security subject to Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the dissemination of the Indication Reference Price on a public website and the availability of the pre-opening indications via the securities information processor and proprietary data feeds.
