

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the

New York Stock Exchange LLC

Regarding an Order Approving a

Proposed Rule Change, as Modified by
Amendment No. 2, to Modify Chapter One of
the Listed Company Manual to Modify the
Provisions Relating to Direct Listings (File No.
SR-NYSE-2019-67)

THE NEW YORK STOCK EXCHANGE LLC'S STATEMENT IN SUPPORT OF
ORDER APPROVING PROPOSED RULE CHANGE

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The New York Stock Exchange LLC (“NYSE” or the “Exchange”) respectfully submits this statement in support of the order approving its proposed rule change to modify provisions relating to direct listings in NYSE’s Listed Company Manual (the “Approval Order”).¹

PRELIMINARY STATEMENT

In the Approval Order, the Division of Trading and Markets (the “Division”), pursuant to delegated authority, correctly approved NYSE’s proposed changes to its direct listing rules (the “Rule Changes”), which will permit issuers to raise capital by directly listing newly issued shares on the Exchange. This change expands upon existing NYSE rules—which the Commission approved over two years ago—that already allow an issuer to directly list existing shares held by its selling shareholders. As the Division properly determined, the Rule Changes are fully consistent with the provisions of the Securities Exchange Act of 1934 (the “Exchange Act”)—including Section 6(b)(5)—and the rules promulgated thereunder. The well-reasoned analysis in the Approval Order demonstrates that the Rule Changes meet Section 6(b)(5)’s requirements and, as relevant here, that the concerns raised by the Council of Institutional Investors (“CII” or “Petitioner”) regarding the adequacy of investor protections under the Rule Changes lack merit. Accordingly, the Commission should affirm the Approval Order.

The 26-page Approval Order reflects the Division’s thorough and deliberate consideration informed by repeated rounds of comments from interested market participants, as well as NYSE’s amendments to the proposed rule changes in response to the Division’s feedback. Through the lens of Section 6(b)(5), the Division considered the adequacy of the Rule Changes in detail and concluded that they were reasonably designed to be consistent with the protection of investors and the maintenance of fair and orderly markets, as well as the facilitation

¹ Order Approving Proposed Rule Change as Modified, Securities Exchange Act Release No. 89684, File No. SR-NYSE-2019-67 (Aug. 26, 2020), 85 FR 54454 (Sept. 1, 2020).

of capital formation. Among other things, the Division specifically determined that by affording issuers the option of raising capital through a direct stock listing, the Rule Changes stand to benefit investors by expanding access to U.S. equity markets, increasing transparency and efficiency, and enhancing investor choice. These findings are undisputed, and fully support the Division's well-reasoned order.

Contrary to Petitioner's primary concern, the Division carefully considered and correctly rejected the argument that investors who participate in direct listings contemplated by the Rule Changes may lack adequate protections under Section 11 of the Securities Act of 1933 (the "Securities Act"). As is undisputed, the Rule Changes expressly require a registration statement pursuant to the Securities Act to be in effect as a condition for a primary direct listing. Thus, Section 11 will apply to such listings no less than to any other kind of securities offering.

Moreover, the Division correctly rejected the concern that the Rule Changes will dilute the efficacy of Section 11. Petitioner has expressed concerns that investors in primary direct listings authorized by the Rule Changes may have difficulty tracing their shares back to the registration statement to establish standing to sue under Section 11. But as the Division found, this issue is far from unique to direct listings, and exists whenever an issuer conducts a registered offering for less than all of its shares. Indeed, the same tracing issue will be present any time an issuer sells its common shares in successive offerings subject to different registration statements. Even in the context of an initial offering, Petitioner's concerns do not flow from direct listings or the Rule Changes themselves. To the contrary, the source of Petitioner's concerns is that some issuers may decide not to enter into "lockup" agreements with their insider shareholders, who can then sell exempt, unregistered shares contemporaneously with the issuer. Lockup agreements, however, are not required by any law or regulation even in traditional underwritten

offerings. Rather, underwriters typically request such agreements as a means of limiting post-offering share price volatility—an interest that issuers in primary direct listings may well share. And even in the absence of lockup agreements, nothing compels insider shareholders to sell their preexisting unregistered shares while the direct listing is proceeding. Here, the Rule Changes neither require nor prohibit lockups for direct listings and pose no impediment to issuers and their insider shareholders from entering into such agreements if they choose to. Indeed, just last month, a direct listing issuer *did* require its insider shareholders to lock up a portion of their shares. Thus, nothing about the Rule Changes predetermines that purchasers of newly issued shares in primary direct listings will be unable to satisfy Section 11’s tracing requirement—a conclusion consistent with the only Section 11 cases that have been decided to date in the direct listing context.

Finally, the Commission should not, as Petitioner suggests, indefinitely defer the expansion of direct listings under the Rules Changes until the Commission considers and implements unspecified “proxy plumbing” reforms that might facilitate shareholders’ ability to trace their shares, for instance by using theoretical blockchain technology. For years CII has lobbied for such reforms in contexts entirely divorced from the direct listing rules at issue here. Moreover, there is not even a concrete “proxy plumbing” proposal for share tracing currently before the Commission, and one can only speculate whether and when such a proposal will ever take form (much less whether the Commission would approve it). Petitioner’s argument effectively amounts to a request that the Commission shelve the Rule Changes indefinitely in favor of an entirely unrelated reform agenda that is in the most nascent stages. The only question relevant to the Commission’s review of the Approval Order is whether the Rule Changes are consistent with the Exchange Act and rules promulgated thereunder. And the Division’s well-

reasoned Approval Order shows that the Rule Changes undoubtedly pass muster under that standard.

For these reasons, and others discussed herein, the Commission should affirm the Approval Order.

BACKGROUND

A. The Existing Direct Listing Landscape

Direct listing of securities on the Exchange has been available to issuers as an alternative to the traditional process of listing via a firm commitment underwritten initial public offering (“IPO”) for nearly three years. In February 2018, the Division approved, pursuant to delegated authority, changes to NYSE’s Listed Company Manual (the “Manual”) to allow companies that have not previously had their common equity securities registered under the Exchange Act or traded in a trading system for unregistered securities to list on the Exchange securities already held by existing shareholders at the time a registration statement becomes effective (“Selling Shareholder Direct Floor Listings”).² Petitioner enthusiastically supported these rule changes at the time, noting that Selling Shareholder Direct Floor Listings “may provide a broader range of institutional investors and retail investors with the opportunity to invest in the equity of a certain class of companies . . . which traditionally have been limited to a narrow group of institutional investors” and therefore could “potentially facilitate the continued and important role of public stock markets in democratizing access to equity while providing necessary investor protections.”³ In approving Selling Shareholder Direct Floor Listings, the Commission’s order

² Order Granting Accelerated Approval of Proposed Rule Change, Securities Exchange Act Release No. 82627, File No. SR-NYSE-2017-30 (Feb. 2, 2018), 83 FR 5650 (Feb. 8, 2018) (“NYSE 2018 Order”) at 3-10, 19-20.

³ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Securities and Exchange Commission (Feb. 22, 2018) at 2.

found that the new listing standards were “reasonably designed to protect investors and the public interest and promote just and equitable principles of trade.”⁴

Since the Selling Shareholder Direct Floor Listing rules took effect, the Exchange has established a solid track record of successful direct listings, which includes the recent listings of Palantir Technologies (“Palantir”) and Asana, Inc. on September 30, 2020, as well as those of Spotify Technology S.A. and Slack Technologies, Inc. (“Slack”), which listed in 2018 and 2019, respectively.⁵

B. NYSE’s Proposed Rule Changes

On December 11, 2019, NYSE filed a proposal to broaden the scope of its direct listing rule to allow companies to directly list newly issued shares as well (a “Primary Direct Floor Listing”). The proposal would, for the first time, provide a company the option of selling newly issued shares to raise capital in the opening auction upon initial listing on the Exchange without a firm commitment underwritten offering. Like the NYSE direct listing rules the Commission approved in 2018, the proposed rule expressly conditions a Primary Direct Floor Listing on the

⁴ NYSE 2018 Order at 16.

⁵ Theodore Schleifer, *First Spotify, now Slack: Wall Street may be losing its iron grip on Silicon Valley*, Vox, June 20, 2019, available at <https://www.vox.com/recode/2019/6/20/18693327/slack-direct-listing-silicon-valley-wall-street-ipo> (“At the very least, the last two direct listings seem to suggest there is no obvious negative for companies pondering disruption of the Wall Street model. And so that may inspire more direct listings in the future”); Ben Sisario & Matt Phillips, *Spotify’s Wall Street Debut Is a Success*, N.Y. Times, Apr. 3, 2018, available at <https://www.nytimes.com/2018/04/03/business/media/spotify-s-wall-street-debut-is-a-success.html> (“Spotify is a hit.”); Alex Konrad, *Asana Shares Trade Up Modestly After Direct Listing In Successful Challenge To The ‘IPO Pop’*, Forbes, Sept. 30, 2020, available at <https://www.forbes.com/sites/alexkonrad/2020/09/30/asana-successful-direct-listing-challenges-ipo-pop/#2cce82a56cf0>; Corrie Driebusch & Maureen Farrell, *Palantir Grabs \$21 Billion Valuation, but Debut Comes With a Hiccup*, Wall Street Journal, Sept. 30, 2020, available at <https://www.wsj.com/articles/palantir-asana-direct-listing-ipo-11601479305?mg=prod/com-wsj> (“[T]he listings seemed to go off without a hitch from an exchange perspective, with both stocks opening smoothly and not experiencing much volatility throughout the trading day.”).

existence of an effective registration statement pursuant to the Securities Act.⁶ The proposed rule, as modified by Amendment No. 1, was published for comment in the Federal Register on December 30, 2019.⁷ The Commission subsequently extended the period within which to approve, disapprove, or institute proceedings with respect to whether to approve or disapprove the proposed rule changes.⁸

After reviewing comments submitted in response to the proposal, on March 26, 2020, the Commission instituted proceedings to allow for additional analysis and input concerning the proposed rule changes' consistency with the Exchange Act.⁹ In response, NYSE filed Amendment No. 2 to the proposed rule changes, which was published for comment in the Federal Register on June 30, 2020.¹⁰ The amendment addressed the issues raised by the Commission by, among other things, clarifying how market value would be determined for qualifying the company's securities for listing and eliminating the grace period for meeting other listing requirements.

In the Notice of Amended Proposed Rule Change, the Commission expressed its view that the proposed rule changes, as amended, were "consistent with Section 6(b) of the Exchange Act, in general, and further the objectives of Section 6(b)(5) of the Exchange Act."¹¹ The

⁶ Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 89148, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39246 (June 30, 2020) ("Notice of Amended Proposed Rule Change"), Ex. 4, Proposed Section 102.01B, Note (E).

⁷ Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 87821, File No. SR-NYSE-2019-67 (Dec. 20, 2019), 84 FR 72065 (Dec. 30, 2019).

⁸ See Notice of Designation of Longer Period for Commission Action, Securities Exchange Act Release No. 88190, File No. SR-NYSE-2019-67 (Feb. 13, 2020), 85 FR 9891 (Feb. 20, 2020).

⁹ Order Instituting Proceedings, Securities Exchange Act Release No. 88485, File No. SR-NYSE-2019-67 (Mar. 26, 2020), 85 FR 18292 (Apr. 1, 2020).

¹⁰ Notice of Amended Proposed Rule Change.

¹¹ *Id.* at 16.

Commission provided yet another opportunity for interested parties to submit written comments on the amended proposal and extended the time to approve or disapprove the proposed rule changes until August 26, 2020 pursuant to Section 19(b)(2) of the Exchange Act, which permits the Commission to extend the 180-day period within which the Commission must approve a self-regulatory organization’s proposed rule changes by no more than 60 days.¹²

During the eight-month rulemaking process, a number of interested parties filed comment letters with the Commission. Commenters, including leading securities underwriters and the largest NYSE Designated Market Maker (“DMM”) by number of listings, expressed their support for the proposed expansion of direct listings, noting that the benefits of Primary Direct Floor Listings would include diversifying listings options for issuers and investment opportunities for investors.¹³ CII submitted three comment letters—after the publication of the proposed rule in the Federal Register, after the Commission instituted proceedings, and after NYSE amended the proposed rule changes.¹⁴ While CII acknowledged that it “has generally

¹² *Id.* at 20; Notice of Designation of Longer Period for Commission Action, Securities Exchange Act Release No. 89147, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39226 (June 30, 2020) at 2-3.

¹³ *See* Letter from Paul Abrahamzadeh and Russell Chong, Co-Heads, U.S. Equity Capital Markets, Citigroup Capital Markets Inc. (Feb. 26, 2020) at 1 (“[The direct listing] format would afford broad participation in the capital formation process and help establish a shareholder base that has a long-term interest in partnering with management teams.”); Letter from Stephen John Berger, Managing Director and Global Head of Government & Regulatory Policy, Citadel Securities, LLC (Feb. 18, 2020) at 1 (“[P]roviding companies with viable alternatives for accessing U.S. public equity markets will increase and diversify the investment opportunities available to public investors.”); Letter from David Ludwig, Head of Americas Equity Capital Markets, Goldman Sachs Group, Inc. (Feb. 7, 2020) at 1 (direct listings “will enable and encourage more companies to participate in public equity markets in the United States” and “provid[e] companies greater choice in their path to going public”).

¹⁴ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (July 16, 2020) (“CII Letter III”); Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Apr. 16, 2020) (“CII Letter II”); Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Jan. 16, 2020) (“CII Letter I”).

supported permitting direct listings,” it expressed concerns with respect to NYSE’s proposal, including its view that “shareholder legal rights under Section 11 of the Securities Act of 1933 (Section 11) . . . may be particularly vulnerable in the case of direct listings”¹⁵ because investors “may not be able to” directly trace their shares to an allegedly defective registration statement so as to establish Section 11 standing.¹⁶

C. Approval Order by Division of Trading and Markets

On August 26, 2020, the Commission issued the Approval Order, which concluded that the proposed rule changes, as modified by Amendment No. 2, were consistent with the requirements of the Exchange Act and the rules and regulations thereunder, and approved the Rule Changes pursuant to the authority delegated to the Division. The Division stated that it “believe[d] that Primary Direct Floor Listings may provide benefits” to investors “relative to firm commitment underwritten offerings” including by potentially “broaden[ing] the scope of investors that are able to purchase securities” in an initial listing and providing a method of price discovery that may yield more appropriate results.¹⁷ The Approval Order also noted that several commenters had expressed support for the Rule Changes because Primary Direct Floor Listings would give issuers listing “choices that match their objectives” and because “allowing for multiple pathways for companies to achieve exchange listing would encourage more companies to participate in public equity markets and provide investors a broader array of attractive investment opportunities.”¹⁸

¹⁵ CII Letter I at 1-2 (footnote omitted).

¹⁶ CII Letter II at 2; *see also* CII Letter I at 2; CII Letter III at 3. While CII raised additional matters in its prior letters, CII advances only the issue of traceability of shares in Primary Direct Floor Listings and the potential impact on Section 11 claims in its Petition. Pet. at 6, 8-15.

¹⁷ Approval Order at 25.

¹⁸ *Id.* at 14-15.

As part of its analysis of the Rule Changes, the Approval Order considered CII’s concern that investors might face difficulties in pursuing Section 11 claims in the context of direct listings due to potential issues in tracing their shares back to the registration statement covering the direct listing shares—assuming that selling insider shareholders did not enter into lockup agreements with the issuer and decided to sell preexisting shares that are exempt from registration under SEC Rule 144 concurrently with the direct listing.¹⁹ The Division specifically addressed these concerns, concluding that “[t]he Commission does not believe that the proposed rule change to permit Primary Direct Floor Listings poses a heightened risk to investors, and finds that the proposed rule change is consistent with investor protection.”²⁰

D. CII’s Petition for Review

CII notified the Commission on August 31, 2020 that it intended to petition for review of the Approval Order pursuant to Rule 430(b)(1) of the Commission’s Rules of Practice (the “Notice”),²¹ and subsequently filed its petition (the “Petition” or “Pet.”) on September 8, 2020.²²

On September 25, 2020, the Commission issued an order granting the Petition and denying NYSE’s motion to lift the automatic stay that took effect pursuant to Rule of Practice 431(e) when the Notice was filed.²³ The Commission ordered that interested persons file written statements in support of or opposition to the Approval Order on or before October 16, 2020.

¹⁹ *Id.* at 26.

²⁰ *Id.*

²¹ *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Aug. 31, 2020).

²² *See* Petition of Council of Institutional Investors for Review of an Order, Issued by Delegated Authority, Granting Approval of a Proposed Rule (Sept. 8, 2020).

²³ Order Granting Petition for Review, Scheduling of Filing Statements, and Denying New York Stock Exchange LLC’s Motion to Lift the Stay, Securities Exchange Act Release No. 90001, File No. SR-NYSE-2019-67 (Sept. 25, 2020), 85 FR 61793 (Sept. 30, 2020).

ARGUMENT

The Commission should affirm the Approval Order pursuant to Section 19 of the Exchange Act and Rule of Practice 431(a).²⁴ Section 19 of the Exchange Act requires that the Commission “*shall approve* a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of” the Exchange Act and the rules and regulations issued thereunder that are applicable to such organization.²⁵ Section 6(b)(5) of the Exchange Act requires that rules of an exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange.”²⁶ The Rule Changes satisfy this standard.

I. The Division Properly Determined That the Rule Changes Meet the Requirements of Section 6(b)(5) of the Exchange Act and the Rules Promulgated Thereunder

The Division’s Approval Order thoroughly considered each of the requirements of Section 6(b)(5) and concluded, based on well-reasoned analysis, that the Rule Changes are

²⁴ 17 C.F.R. § 201.431(a) (the Commission may “affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, any action made pursuant to [delegated authority]”). The Commission has reviewed actions taken by the Division pursuant to delegated authority on a *de novo* basis. See Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change, Securities Exchange Act Release No. 88008, File No. SR-BatsBZX-2017-34 (Jan. 21, 2020), 85 FR 4726 (Jan. 27, 2020) at 4.

²⁵ 15 U.S.C. § 78s(b)(2)(C) (emphasis added).

²⁶ *Id.* § 78f(b)(5).

“consistent with the [Exchange] Act.”²⁷ More specifically, the Division determined that the Rule Changes set forth in Amendment No. 2 were “reasonably designed to be consistent with the protection of investors and the maintenance of fair and orderly markets, as well as the facilitation of capital formation.”²⁸ This determination was clearly correct and, in fact, is largely undisputed by Petitioner.

With respect to “facilitating transactions in securities” and perfecting the “mechanism of a free and open market,”²⁹ the Division found “that Primary Direct Floor Listings may provide benefits” to investors “relative to firm commitment underwritten offerings,” including by potentially “broaden[ing] the scope of investors that are able to purchase securities” in an initial listing and providing a method of price discovery that may yield more appropriate results.³⁰ The Approval Order also stated that several commenters believed Primary Direct Floor Listings would provide issuers listing “choices that match their objectives” and “allow[] for multiple pathways for private companies to achieve exchange listing,” which “would encourage more companies to participate in public equity markets and provide investors a broader array of attractive investment opportunities.”³¹

The Division similarly determined that the changes set forth in Amendment No. 2 supported its finding that the proposal was consistent with the other requirements of Section 6(b)(5). For instance, the Division determined that NYSE’s Rule Changes concerning the aggregate market value of publicly held shares provide a “reasonable level of assurance that the

²⁷ Approval Order at 15.

²⁸ *Id.*

²⁹ 15 U.S.C. § 78f(b)(5).

³⁰ Approval Order at 25.

³¹ *Id.* at 14-15.

company's market value supports listing on the Exchange and the maintenance of fair and orderly markets.”³² As the Division found, NYSE's Rule Changes impose a substantially *higher* capitalization requirement for Primary Direct Floor Listings than Exchange rules require for traditional IPOs. Specifically, NYSE generally requires companies listing on the Exchange in connection with an IPO to have publicly held shares with a market value of at least \$40 million,³³ whereas the Rule Changes require a direct listing company to either (1) sell at least \$100 million of its listed securities in the opening auction, or (2) have an aggregate market value of publicly held shares immediately prior to listing, together with the market value of shares the company sells in the opening auction, of at least \$250 million.³⁴

The Division also concluded that Amendment No. 2 effectively mitigated concerns that, in a Direct Floor Listing, an issuer could be in a position to uniquely influence the price discovery process. Specifically, the Rule Changes require that the issuer submit a limit order (an “Issuer Direct Offering Order” or “IDO Order”) with a limit price at the low end of the auction range established in the issuer's registration statement.³⁵ The Division reviewed the IDO Order requirements in detail and concluded that they “provide[d] some reasonable assurance that the opening auction and subsequent trading promote fair and orderly markets and that the proposed rules are designed to prevent manipulative acts and practices, and protect investors and the public interest.”³⁶

³² *Id.* at 15-17.

³³ *Id.* at 16-17; *see also* Manual § 102.01B.

³⁴ Approval Order at 16-17.

³⁵ *Id.* at 18.

³⁶ *Id.* at 19.

The Division also determined that Amendment No. 2 took other reasonable steps to help assure compliance with the federal securities laws and the consistency of the Rule Changes with preventing manipulative acts and practices, and protecting investors.³⁷ These measures included reminding financial advisors to issuers and the DMM that consultations with a financial adviser “must be conducted in a manner consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements,”³⁸ and retaining FINRA to monitor such compliance.³⁹

Finally, the Division concluded that the Rule Changes were consistent with Section 6(b)(5)’s requirement that exchange rules promote investor protection.⁴⁰ In this regard, the Division thoroughly addressed the concerns of several commenters that the lack of “traditional underwriter involvement” in direct listings could “create[] a loophole” in the regulatory regime that governs offerings of securities to the public.⁴¹ The Division found that a firm commitment underwriting is not “necessary to provide adequate investor protection in the context of a registered offering,” observing that the Securities Act does not require underwriter participation in the public capital-raising process, and that exchange-listed offerings often “do not involve a firm commitment underwriting.”⁴² Due diligence would not suffer, the Division determined, because the due diligence process in Primary Direct Floor Listings would still be the responsibility of gatekeepers who participate in the transaction such as directors, senior

³⁷ *Id.* at 20.

³⁸ *Id.* at 19-20.

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 25.

⁴¹ *Id.* at 20, 22.

⁴² *Id.* at 24.

management, and accountants.⁴³ Moreover, the Division noted that, in light of the broad definition of “underwriter” under the Securities Act, a financial advisor engaged by an issuer in a Primary Direct Floor Listing potentially may—depending on the advisor’s conduct in light of the facts and circumstances of a given listing—nevertheless be deemed a “statutory ‘underwriter’ . . . with attendant underwriter liabilities,” which would incentivize such financial advisors to “engage in robust due diligence” as well.⁴⁴

Petitioner does not dispute any of the Divisions’ foregoing findings, and instead focuses exclusively on the Division’s conclusion that, with respect to protection under Section 11, the Rule Changes do not pose “a heightened risk to investors” and are consistent with investor protection.⁴⁵ But as set forth in more detail below (*infra* Point II), the Division’s conclusion on this point was also clearly correct.

Accordingly, contrary to CII’s assertions, no aspect of the Approval Order is deficient.⁴⁶ Rather, it is self-evident from the Approval Order that the Division engaged in thorough, well-

⁴³ *Id.*

⁴⁴ *Id.* at 23-24.

⁴⁵ *Id.* at 26; *see* Pet. at 7-15.

⁴⁶ Petitioner asserts in cursory fashion (*see* Pet. at 7, 13-14) that the Approval Order is “arbitrary and capricious” and otherwise fails to meet requirements of the Administrative Procedure Act, but CII is mistaken. For example, while CII cites cases for the proposition that agencies must “respond to significant comments raised during the comment period,” CII acknowledges that the Division *did* address its concerns about potential difficulties that purchasers in direct listings may have satisfying Section 11’s requirements. (Pet. at 13-14.) While Petitioner seeks to minimize the Division’s analysis on this point, the fact remains that the Approval Order devotes a full page to responding to CII’s specific concerns as part of its overall, robust discussion and analysis of the effect of the Rule Changes on investor protection. *See* Approval Order at 26. Nor is this case akin to *Susquehanna International Group, LLC v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), cited by Petitioner, in which the Court of Appeals faulted the Commission for “effectively abdicat[ing] [its] responsibility” to make findings under Section 19 of the Exchange Act to the self-regulatory organization that had proposed the rule change at issue. *Id.* at 447. Here, by contrast, the Division only approved the Rule Changes after instituting proceedings and following a substantial amendment by NYSE to address the concerns the Division had expressed,

reasoned decision-making, and considered and responded to significant comments received during the period for public comment including the comments by CII concerning Section 11 protections in direct listings.

II. The Rule Changes Do Not Pose a “Heightened Risk” to Investors

The Division’s conclusion that the Rule Changes pose no “heightened risk” to investors is correct. CII’s specific concerns about the adequacy of investor protections under Section 11 are not a function of direct listings in general or the Rule Changes in particular. Rather, they flow from a completely extraneous factor—the potential lack of lockup agreements, which are neither prohibited nor required by the Rule Changes or any other law or regulation. Indeed, as the Division properly determined, Petitioner’s concerns are not unique to Primary Direct Floor Listings, but rather present a “recurring issue” that applies in a variety of contexts in which “a company conducts a registered offering for less than all of its shares.”⁴⁷

As an initial matter, and as the Division determined, Section 11 will apply to Primary Direct Floor Listings just as it applies to other types of offerings. The Division observed that because “the proposed rule change will require all Primary Direct Floor Listings to be registered under the Securities Act,” “the existing liability framework under the Securities Act for registered offerings will apply to all such Primary Direct Floor Listings.”⁴⁸ Petitioner does not dispute or otherwise take issue with this finding.

and—unlike in *Susquehanna*—explicitly stated that it “finds that the proposed rule change is consistent with investor protection.” See Approval Order at 18-19, 26; see also *Higgins v. S.E.C.*, 866 F.2d 47, 49 (2d Cir. 1989) (per curiam) (concluding approval of NYSE’s proposed rule changes “was not arbitrary, capricious, or an abuse of discretion” because the Commission “clearly considered and responded to the only comments it received on the proposed rule” and “adequately weighed the competing interests of all those involved”).

⁴⁷ Approval Order at 26.

⁴⁸ *Id.* at 24-25; see also Notice of Amended Proposed Rule Change, Ex. 4, Proposed Section 102.01B, Note (E).

Rather, relying on unsupported assumptions, Petitioner contends that purchasers in direct listings potentially could have difficulty satisfying Section 11's "tracing" requirement.⁴⁹

Section 11 provides a remedy for "any person acquiring *such security*" that is subject to a registration statement containing a materially false or misleading statement of fact or omitting a material fact required to be stated.⁵⁰ Courts have generally held that this language precludes standing to pursue a Section 11 claim unless a plaintiff can plead and prove that it either (i) directly purchased securities in the offering covered by the challenged registration statement or (ii) purchased securities in the aftermarket traceable to that registration statement.⁵¹

A Section 11 plaintiff may face difficulty tracing the shares he or she purchased back to the challenged registration statement when other shares of the same class of the issuer's stock, which are not subject to the registration statement, trade in the market at the same time as the newly issued shares that *are* covered by the registration statement.⁵² Because shares of the same class are fungible, a plaintiff may have difficulty establishing whether the shares he or she purchased were newly issued pursuant to the registration statement, or whether they were identical, pre-existing shares that were not covered by the registration statement.⁵³ In fact, after-market purchasers in secondary offerings of an issuer's common stock can and routinely do face

⁴⁹ Pet. at 8.

⁵⁰ 15 U.S.C. § 77k(a) (emphasis added).

⁵¹ See, e.g., *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495-96 (5th Cir. 2005); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 978 (8th Cir. 2002); *Barnes v. Osafsky*, 373 F.2d 269, 273 (2d Cir. 1967).

⁵² See, e.g., *In re Century Aluminum*, 729 F.3d at 1106-08 (holding that plaintiffs had not adequately pleaded traceability to issuer's secondary offering because newly issued shares were indistinguishable from issuer's existing publicly traded shares).

⁵³ *Id.*

this precise difficulty.⁵⁴ One—but by no means the only—scenario in which a Section 11 plaintiff may encounter this type of tracing difficulty in connection with an initial offering is when a company’s insider shareholders are not subject to a “lockup” agreement. In a lockup agreement, insider shareholders agree for a certain period of time not to sell their pre-existing, unregistered shares of the issuer’s stock pursuant to an exemption to the Securities Act’s registration provisions, such as SEC Rule 144.⁵⁵ Absent a lockup agreement or after the lockup period expires, and assuming that a valid exemption from registration under the Securities Act applies, those insider shareholders are free to (but need not) sell their shares—which may be indistinguishable from the issuer’s newly issued stock of the same class that has been registered pursuant to an allegedly false or misleading registration statement. Whether or not Section 11 tracing difficulties will materialize, however, is very fact-dependent and may turn on the existence and terms of any lockup agreement; who the insiders are and how long they have held their stock;⁵⁶ whether (and when, and how much) the insider shareholders sell existing shares under Rule 144 or another exemption; and what records are kept by the various broker-dealers who facilitate and execute the trades or by other parties.⁵⁷

⁵⁴ See *e.g.*, *id.*; *Barnes*, 373 F.2d at 270-71.

⁵⁵ See, *e.g.*, *In re Ubiquiti Networks, Inc. Sec. Litig.*, 33 F. Supp. 3d 1107, 1118-19 (N.D. Cal. 2014) (describing 180-day “lock-up” period following IPO during which insiders of issuer were barred from selling issuer’s securities), *rev’d in part on other grounds*, 669 F. App’x 878 (9th Cir. 2016).

⁵⁶ For example, SEC Rule 144 applies different standards to and limits on affiliates of the issuer and non-affiliates, and imposes different holding periods for restricted securities depending on whether the issuer is a reporting issuer or not. See 17 C.F.R. § 230.144(b)(1)-(2), (d)(1), (e).

⁵⁷ See *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 274 n.7 (3d Cir. 2006) (“The [traceability] question . . . is likewise a factual one, to be resolved through discovery, as to whether plaintiffs can demonstrate that the shares they allegedly purchased are in fact traceable to the registration statement alleged to be false and misleading.”).

Petitioner's opposition to the Rule Changes does not contend with any of these important factual considerations, which may play out differently in different cases. Rather, Petitioner advances a highly simplistic and speculative theory. CII appears to assume that because Primary Direct Floor Listings do not require underwriters, and because underwriters often request lockup agreements, there will never be lockup agreements in connection with Primary Direct Floor Listings; as a result, nothing will prevent an issuer's insider shareholders from selling their unregistered shares alongside the issuer's directly listed, registered shares; that a valid exemption will always apply to permit the insider shareholders to sell their stock; and that the insider shareholders will always choose to do so, potentially making it harder to trace any purchased shares back to the registration statement.⁵⁸ But, as discussed further below, Petitioner's theory is conjectural, has nothing to do with the Rule Changes for which NYSE sought approval, and has already been contradicted by the circumstances of at least one Selling Shareholder Direct Floor Listing that recently went forward under the Exchange's existing direct listing rules.

As the Division found, Section 11's traceability requirement is not unique to Primary Direct Floor Listings (or indeed, any form of direct listing). Rather, it applies to *every* registered securities offering (whether an initial or secondary offering), irrespective of form.⁵⁹ Depending on the specific circumstances, the traceability requirement may make it difficult or "impossible" for shareholders to establish standing under Section 11 in myriad situations *not* involving direct listings—including any time a company has issued securities under more than one registration

⁵⁸ Pet. at 8. CII asserts that one law firm that has represented issuers in connection with Selling Shareholder Direct Floor Listings has attempted to market its services based on the premise that direct listings can be used to mitigate the risk of liability under Section 11. *See* Pet. at 11. NYSE, however, has never contended that reduction of Securities Act liability is a feature of direct listings, and as set forth herein, NYSE disagrees with that premise.

⁵⁹ Approval Order at 26.

statement, even when those securities were distributed through traditional, firm commitment underwritings.⁶⁰

Petitioner suggests that the difficulties plaintiffs face in satisfying Section 11's traceability requirement may become particularly acute for investors in direct listings. But those difficulties do *not* result from anything inherent in direct listings themselves or NYSE rules permitting them. Rather, the difficulties arise when selling insider shareholders do not enter into any lockup agreements preventing them from immediately selling their remaining, unregistered shares pursuant to the exemption under SEC Rule 144.⁶¹ As the Division found in addressing CII's concerns, the potential lack of lockup agreements is "not exclusive to Primary Direct Floor Listings," and "even in the context of traditional firm commitment offerings, the ability of existing shareholders who meet the conditions of Rule 144 to sell shares on an unregistered basis may result in concurrent registered and unregistered sales of the same class of security . . . leading to difficulties tracing purchases back to the registered offering."⁶² The same difficulties

⁶⁰ See, e.g., *In re Century Aluminum*, 729 F.3d at 1107-08 (requiring "a greater level of factual specificity" in complaint to allege Section 11 standing "[w]hen a company has issued shares in multiple offerings under more than one registration statement" and noting impossibility of proving tracing where registered and unregistered shares are held together in "'undivided'" brokerage "'house'" accounts that do not distinguish between "'newly registered or old shares'" (quoting *Barnes*, 373 F.2d at 271-72)); see also *Krim*, 402 F.3d at 496-98 (where public offering shares and unregistered insider shares were intermingled in market and most shares were held in undifferentiated "street name" accounts, plaintiffs could not satisfy Section 11 tracing requirements despite statistical evidence that any given share was 90% likely to be a public offering share). Shares may also fail the "traceability" requirement for Section 11 claims by virtue of the presumption against extraterritoriality if the issuer concurrently offered shares for sale outside of the United States. See *In re Smart Techs., Inc. S'holder Litig.*, 295 F.R.D. 50, 61-62 (S.D.N.Y. 2013) (reserving decision on "compelling" argument that "any [of the issuer's] shares purchased after the IPO cannot be 'traced' back to a sale pursuant to the Registration Statement because: (1) all shares share the same CUSIP; and (2) some shares were sold in Canada pursuant to the Canadian prospectus") (internal citations omitted).

⁶¹ See *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 379 (N.D. Cal. 2020), *lv. app. granted*, No. 20-80095, ECF No. 3 (9th Cir. July 23, 2020).

⁶² Approval Order at 26.

with tracing will be present in *every* registered securities offering that lacks a lockup agreement, or where such agreements expire or have exceptions, or even in cases where there are multiple registration statements, but only some of which contain alleged false or misleading statements.⁶³ In fact, as the Division noted, it may be “potentially easier” in a Primary Direct Floor Listing than in other contexts to trace purchased shares back to the registration statement because “all company shares will be sold in the opening auction.”⁶⁴

The Rule Changes that NYSE is seeking to implement neither require nor prohibit lockup agreements in connection with Primary Direct Floor Listings. Indeed, even for traditional, firm-commitment underwritten IPOs, there is no legal or regulatory requirement to enter into lockup agreements with insiders. By the same token, nothing prevents issuers who are pursuing direct listings from entering into lockup agreements. In fact, in the Palantir Selling Shareholder Direct Floor Listing that took place just last month, insider shareholders *did* enter into lockup agreements with respect to certain shares.⁶⁵ That is not surprising, given the same price volatility concerns that cause underwriters to request lockup agreements in traditional IPOs may apply to direct listings as well.⁶⁶ Accordingly, Petitioner’s fundamental assumption that there will never

⁶³ For example, in *Krim*, 402 F.3d at 491-92, 496-97, aftermarket purchasers failed to trace their shares to allegedly false registration statements for both an IPO and a secondary offering, because prior to their purchases, insiders had sold non-publicly offered shares into the market that had intermingled with the publicly offered shares.

⁶⁴ Approval Order at 26 & n.81.

⁶⁵ See Palantir Techs. Inc., Am. 6 to Registration Statement (Form S-1/A) (Sept. 21, 2020) at 71 (describing lockup agreements with shareholders as to almost 1.9 billion shares that will remain in place until after public disclosure of Palantir’s 2020 year-end financial results).

⁶⁶ Compare Therese H. Maynard, *Spinning in A Hot IPO—Breach of Fiduciary Duty or Business As Usual?*, 43 Wm. & Mary L. Rev. 2023, 2039 n.45 (2002) (“Lockup agreements, made between Wall Street underwriters and company insiders, are designed to attract and protect IPO investors by stabilizing stock prices following the [IPO] offering through a more orderly sale of [insiders’] shares.”) with Danny Crichton, *Sources say Palantir will have a lockup period after its direct listing*, TechCrunch, Aug. 21, 2020, available at

(or rarely) be lockup agreements in connection with direct listings has already proved false. To the contrary, the Rule Changes give the participants in a Primary Direct Floor Listing at least as much flexibility as a firm-commitment underwritten IPO to address the possibility of sales by insider shareholders in such manner as they believe will best maximize value—including by entering into lockup agreements.⁶⁷

Moreover, while Primary Direct Floor Listings are no doubt an important new development, they do not present a material difference with respect to lockup agreements and traceability issues from Selling Shareholder Direct Floor Listings, which the Commission approved (and CII enthusiastically supported) in 2018 as “reasonably designed to protect investors and the public interest and promote just and equitable principles of trade.”⁶⁸ As both the Division and CII itself recognized,⁶⁹ the only courts to consider Section 11 standing in the context of a direct listing involved a Selling Shareholder Direct Floor Listing—the Slack listing. In companion cases, both a federal and a state court concluded—for different reasons—that Section 11 *did not*, under the circumstances, preclude plaintiffs from pursuing claims just because they could not definitively trace the securities they acquired to the challenged

<https://techcrunch.com/2020/08/21/sources-say-palantir-will-have-a-lockup-period-after-its-direct-listing/> (reporting Palantir’s planned “novel” combination of direct listing and lockup period, which would avoid the volatility that is one reason “some companies have been hesitant to go the direct listing route”).

⁶⁷ Moreover, even if Petitioner were correct that lockup agreements may prove to be less prevalent in the context of direct listings, and that the absence of those agreements may make Section 11 claims more difficult to pursue, there is a ready market-based solution to address CII’s concern. If shareholders face materially greater difficulties in pursuing Section 11 claims in connection with direct listings, then all else being equal, they will pay less for shares acquired through such offerings than through a traditional, firm underwritten offering. Thus, to maximize their ability to raise capital, issuers opting for a Primary Direct Floor Listing will have every incentive to structure their direct listing in such a way so as not to reduce the protections available under the federal securities laws.

⁶⁸ NYSE 2018 Order at 16.

⁶⁹ Approval Order at 26; CII Letter III at 3-4.

registration statement at the pleading stage.⁷⁰ For CII’s concerns to come to pass, other courts in circumstances where there is no lockup (whether in an underwritten offering or direct listing) must reach the *opposite* conclusion.⁷¹

Ultimately, the Division considered CII’s arguments with regard to Section 11, examined them critically, and correctly concluded that the Rule Changes do not pose heightened risks to investors.⁷² There is no basis for the Commission to disturb or second-guess this well-reasoned assessment.

III. The Commission Should Not Defer Its Decision in Favor of Implementing “Proxy Plumbing” Reforms

Though CII fails to identify any adequate basis for its position that the Rule Changes afford inadequate protection to investors, it nevertheless insists that the Commission delay implementation of the Rule Changes until it enacts certain “proxy plumbing” reform measures, which CII has for years pushed outside of the direct listing context.⁷³ These Rule Changes are not the proper vehicle for CII to advance this unrelated agenda.

⁷⁰ *Pirani*, 445 F. Supp. 3d at 380-81; Case Management Order #5, *In re Slack Techs. Inc. S’holder Litig.*, Master File No. 19CIV005370, 2020 WL 4919555 at *3-5 (Cal. Super. Ct. Aug. 12, 2020). While the federal court held that Section 11’s tracing requirement may apply differently to direct listings from other offerings, *Pirani*, 445 F. Supp. 3d at 380-81, the state court held that even if Section 11’s traditional tracing requirement applied to direct listings, it was a factual dispute for a later stage of the case whether they would, in fact, be able to prove tracing, *In re Slack Techs. Inc. S’holder Litig.*, 2020 WL 4919555, at *3-5.

⁷¹ CII speculates that the *Pirani* decision may not be adopted by other courts or may be reversed on appeal. Pet. at 10. But even if the Ninth Circuit were to reverse the district court in *Pirani*, that would not necessarily foreclose, in an appropriate case, the approach taken by the state court in *In re Slack Technologies Inc. Shareholder Litigation*—namely, determining that the plaintiff’s complaint had pled enough facts to infer that tracing is plausible and permitting the case to proceed to discovery to allow the plaintiff to attempt to prove tracing. See *In re Slack Techs. Inc. S’holder Litig.*, 2020 WL 4919555, at *3-5.

⁷² Approval Order at 22 n.72, 23-26.

⁷³ See Pet. at 11 (“The point of this petition is not to start a debate about the wisdom of direct listings at an abstract policy level. [CII] believes – and has long believed – that traceability

According to CII, “[t]echnological change now offers the opportunity to construct a better system of share ownership based on traceable shares.”⁷⁴ CII proposes that an unspecified blockchain-based ledger technology could definitively establish a share’s chain of custody and thereby enable investors to trace the provenance of their shares in the context of Section 11 claims.⁷⁵ For years, CII has been a zealous advocate for a menu of “proxy plumbing” reforms, which include among them the implementation of a hypothetical method for enhanced share traceability. In 2016, Delaware Vice-Chancellor J. Travis Laster gave the keynote address at CII’s annual conference and issued a call-to-arms for CII members “to take back the voting and stockholding infrastructure of the U.S. securities markets” by “becom[ing] [proxy] plumbers.”⁷⁶ And, as CII acknowledges in the Petition, CII has a well-established record of proxy plumbing advocacy before the Commission.⁷⁷ Indeed, CII has repeatedly “encouraged the SEC to take the lead on meaningfully modernizing the proxy voting infrastructure” through “the promising pathway of a blockchain solution enabling traceable shares” outside the context of its consideration of rules pertaining to direct listings.⁷⁸

problems of the sort raised here should impel the Commission to update its ‘proxy plumbing’ regulation *before* any liberalization of direct listing regulations.” (emphasis original)).

⁷⁴ Pet. at 12 (internal quotation marks omitted).

⁷⁵ *Id.*

⁷⁶ See Vice-Chancellor J. Travis Laster, Keynote Address at Council of Institutional Investors Conference, “The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote” (Sept. 29, 2016) at 2 (“Today I want to encourage you . . . the institutional stockholders of America, to take back the voting and stockholding infrastructure of the U.S. securities markets. Put a little differently. I want you to become plumbers. You need to fix the proxy plumbing.”); see also *id.* at 16 (“One possible external solution is to look to the SEC as [a] regulator” in connection with “[d]istributed ledger technolog[y]” solutions to proxy issues).

⁷⁷ Pet. at 11-12.

⁷⁸ *E.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Securities and Exchange Commission (Jan. 31, 2019) (“We believe the SEC should work directly with private sector innovators, alongside issuers willing to adopt these

But CII cannot show that any relevant proxy plumbing reform is forthcoming, and the current prospects of such reforms remain speculative at best. Indeed, there is no concrete proposal currently before the Commission to implement a system of blockchain share tracing, and discussions remain in the most nascent stages. Last year, the Investment Advisory Committee to the Commission (the “IAC”) released a recommendation to the Commission regarding various “proxy plumbing” proposals, including blockchain share tracing.⁷⁹ While the IAC recognized the potential benefit of a blockchain system, it acknowledged that to date, market participants have been slow to move in that direction given “incentives and private interests (as affected by existing regulation), coupled with the externalities of networks, which have prevented moving the U.S. proxy system onto a single, reformed technological platform.”⁸⁰ The IAC further expressed doubt with respect to whether the Commission or Congress was the appropriate body to mandate such reforms.⁸¹

In light of the status of these reform efforts, CII effectively asks the Commission to shelve the Rule Changes indefinitely, which the Commission should not do. The Exchange Act clearly contemplates that rule changes proposed by self-regulatory organizations should be

[blockchain] technologies, to develop case-by-case regulatory relief, which may include individual guidance, no-action letters, and/or exemptive orders. Accordingly, we recommend that the SEC initiate a formal comment process with respect to potential blockchain-related rulemaking.”); *see also* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Securities and Exchange Commission (Nov. 8, 2018), at 3-7; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Chairman, Senate Committee on Banking, Housing, and Urban Affairs (Feb. 27, 2019), at 10 (advocating for “a better system of share ownership based on traceable shares, with the potential to fix a panoply of problems associated with proxy voting”).

⁷⁹ Recommendation of the SEC Investor Advisory Committee (IAC) Proxy Plumbing (Sept. 5, 2019), *available at* <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf>

⁸⁰ *Id.* at 5.

⁸¹ *Id.* (“Technology-based solutions could be mandated by the SEC, although some would argue that would require Congressional authorization.”).

approved or disapproved in a timely matter, ordinarily within 45 days of the date of publication and, if proceedings are instituted, “not later than 180 days after the date of publication of notice of the filing of the proposed rule change” unless the Commission determines that an additional 60 days is required.⁸² The Commission’s consideration has already run well past this timeframe.⁸³ Moreover, the Exchange Act requires that “the Commission shall approve a proposed rule change” of a self-regulatory organization like NYSE “if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations issued [there]under . . . that are applicable to such organization.”⁸⁴ Inchoate rules and regulations that do not currently exist but may be adopted in the future—such as the proxy plumbing initiatives CII has championed—fall outside of the permissible considerations under Section 19 of the Exchange Act because, by definition, they are not applicable to NYSE or any other organization.

CII has sought unsuccessfully to derail other proposed rule changes under the Commission’s consideration based on the same rationale that the Commission should “put the horse before the cart” by prioritizing proxy plumbing reforms.⁸⁵ Earlier this year, in response to the Commission’s solicitation of comments on a proposed rule to “update the criteria, including the ownership requirements, that a shareholder must satisfy to be eligible to require a company to

⁸² 15 U.S.C. § 78s(b).

⁸³ *Cf. Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 111-12 (2d Cir. 2018) (“[The Agency] offers no authority—statutory or otherwise—for the proposition that an agency has authority to delay a rule because it is engaged in a separate process of reconsideration As the D.C. Circuit recently held, a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration.”).

⁸⁴ 15 U.S.C. § 78s(b)(2)(C)(1).

⁸⁵ Pet. at 14-15; *cf.* Press Release, CII, Leading Investor Group Blasts SEC’s Proposed Rules for Proxy Advice and Shareholder Proposals (Jan. 31, 2020), *available at* <https://www.cii.org/jan2020seclatters>.

include a proposal in its proxy statement,”⁸⁶ CII similarly argued that “[t]he SEC’s first priority should be to fix the creaky proxy plumbing—the nuts and bolts of the ways that proxy cards are solicited and votes are counted.”⁸⁷ The Commission’s final rule does not mention CII’s call for proxy plumbing reforms.⁸⁸

The Commission is required to approve a self-regulatory organization’s proposed rule changes when they meet the requirements of the Exchange Act and rules promulgated thereunder. That is the only relevant question before the Commission. As discussed above and in the Approval Order, the Rule Changes do just that. CII’s request that the Commission evaluate the Rule Changes in the context of CII’s own policy objectives that do not specifically concern direct listings is unsupported by any authority permitting the Commission to evaluate exchange listing rules in light of other, unrelated and ill-defined regulatory policies.

CONCLUSION

For the foregoing reasons, the Commission should affirm the Division’s Approval Order and allow the Rule Changes to take effect. The Division’s analysis amply fulfilled its responsibilities under the Exchange Act and the Rule Changes satisfy the statutory criteria for approval. None of the concerns or policy proposals raised by CII alter that conclusion.

⁸⁶ Press Release, SEC, SEC Proposes Amendments to Modernize Shareholder Proposal Rule (Nov. 5, 2019); *see also* Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Securities Exchange Act Release No. 34-87458, File No. S7-23-19 (Nov. 5, 2019), 84 FR 66458 (Dec. 4, 2019).

⁸⁷ Press Release, CII, Leading Investor Group Blasts SEC’s Proposed Rules for Proxy Advice and Shareholder Proposals (Jan. 31, 2020); *see also* Letter from Kenneth A. Bertsch, Executive Director, & Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Secretary, Securities and Exchange Commission (Jan. 30, 2020).

⁸⁸ *See* Final Rule: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Securities Exchange Act Release No. 34-89964, File No. S7-23-19 (Sept. 23, 2020). The Final Rule did address many of CII’s other comments from its six comment letters.

Dated: October 16, 2020
New York, New York

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CERTIFICATE OF SERVICE

I, Paul S. Mishkin, counsel to the New York Stock Exchange LLC (“NYSE”), hereby certify that on October 16, 2020, I caused to be served copies of the attached Statement in Support of Order Approving Proposed Rule Change by way of Federal Express Overnight Courier, hand courier, and email on the Council of Institutional Investors, and sent the original and three copies of the same by Federal Express Overnight Courier and email to the Secretary at the following addresses:

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