

December 22, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings

I. Introduction

On December 11, 2019, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Chapter One of the Listed Company Manual (“Manual”) to modify the provisions relating to direct listings.³ Pursuant to the proposal, NYSE would allow

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On December 13, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on December 30, 2019. See Exchange Act Release No. 87821 (Dec. 20, 2019), 84 FR 72065. On February 13, 2020, pursuant to Section 19(b)(2) of the Exchange Act, the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. See Exchange Act Release No. 88190, 85 FR 9891 (Feb. 20, 2020). On March 26, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1. See Exchange Act Release No. 88485, 85 FR 18292 (Apr. 1, 2020) (“OIP”). On June 22, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as modified by Amendment No. 1 (“Amendment No. 2”). On June 24, 2020, the Commission extended the time period for approving or disapproving the proposal to August 26, 2020. See Exchange Act Release No. 89147, 85 FR 39226 (June 30, 2020). The proposed rule change, as modified by Amendment No. 2, was published for

an issuer, at the time of an initial listing on the Exchange, to conduct a primary offering as part of a direct listing without conducting a firm commitment underwritten offering.

On August 26, 2020, the Commission, acting through authority delegated to the Division of Trading and Markets (“Division”),⁴ approved the proposed rule change, as modified by Amendment No. 2 (“Approval Order”).⁵ On September 8, 2020, the Council of Institutional Investors (“CII” or “Petitioner”) filed a petition for review of the Approval Order (“Petition for Review”). Pursuant to Commission Rule of Practice 431(e), the Approval Order was stayed by the filing with the Commission of a notice of intention to petition for review.⁶ On September 25, 2020, the Commission issued a scheduling order, pursuant to Commission Rule of Practice 431, granting the Petition for Review of the Approval Order and providing until October 16, 2020, for any party or other person to file a written statement in support of, or in opposition to, the

comment in the Federal Register on June 30, 2020. See Exchange Act Release No. 89148 (June 24, 2020), 85 FR 39246 (“Notice”).

⁴ 17 CFR 200.30-3(a)(12).

⁵ See Exchange Act Release No. 89684, 85 FR 54454 (Sept. 1, 2020).

⁶ 17 CFR 201.431(e). See Letter to John Carey, Senior Director, NYSE Group Inc. (Aug. 31, 2020) (providing notice of receipt of notice of intention for review of delegated action and stay of order), available at <https://www.sec.gov/rules/sro/nyse/2020/34-89684-carey-letter.pdf>. On September 4, 2020, NYSE filed a motion for the Commission to lift the automatic stay of the Approval Order and a brief in support of its motion to lift the stay. On September 8, 2020, CII filed a brief in opposition to NYSE’s motion to lift the automatic stay. On September 11, 2020, NYSE filed a reply brief in support of its motion to lift the stay.

Approval Order.⁷ On October 16, 2020, NYSE submitted a written statement in support of the Approval Order.⁸

The Commission has conducted a de novo review of NYSE’s proposal, giving careful consideration to the entire record—including NYSE’s amended proposal, the Petition for Review, and all comments and statements submitted—to determine whether the proposal is consistent with the Exchange Act and the rules and regulations issued thereunder. Under Section 19b(2)(C) of the Exchange Act, the Commission must approve the proposed rule change of a self-regulatory organization (“SRO”) if the Commission finds that the proposed rule change is consistent with the Exchange Act and the applicable rules and regulations thereunder; if it does not make such a finding, the Commission must disapprove the proposed rule change.⁹ Additionally, under Rule 700(b)(3) of the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”¹⁰ Further, “the description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.”¹¹ Finally,

⁷ See Exchange Act Release No. 90001, 85 FR 61793 (Sept. 30, 2020). In the scheduling order, the Commission also denied NYSE’s motion to lift the automatic stay of the Approval Order and ordered that the proposed rule change, as modified by Amendment No. 2, remain stayed.

⁸ See The New York Stock Exchange LLC’s Statement in Support of Order Approving Proposed Rule Change (Oct. 16, 2020) (“NYSE Statement”).

⁹ 15 U.S.C. 78s(b)(2)(C).

¹⁰ 17 CFR 201.700(b)(3).

¹¹ Id.

“[a]ny failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.”¹²

For the reasons discussed herein, the Commission has determined that NYSE has met its burden to show that the proposed rule change is consistent with the Exchange Act. We thus set aside the Approval Order and approve NYSE’s proposed rule change, as amended. Section 6(b)(5) of the Exchange Act requires that the rules of a national securities 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 the Exchange Act matters not related to the purposes of the Exchange Act or the administration of an exchange.¹³

The record supports a finding that NYSE’s proposal is consistent with these requirements. In particular, based on that record, the Commission concludes that, consistent with Section 6(b)(5) of the Exchange Act, NYSE’s proposal will prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market

¹² Id.

¹³ 15 U.S.C. 78f(b)(5).

system, and, in general, will protect investors and the public interest; and will not permit unfair discrimination between customers, issuers, brokers, or dealers, and is not designed to regulate by virtue of the Exchange Act matters not related to the purposes of the Exchange Act or the administration of an exchange.

II. Description of the Proposal

In an initial public offering (“IPO”) underwritten on a firm commitment basis, an underwriter or group of underwriters enter into an underwriting agreement with the issuer in which they commit to take and pay for a specified amount of shares at a set price. The underwriters’ purchase price reflects a discount, or spread, to the public offering price, which is negotiated between the issuer and the underwriters. The underwriters purchase the securities at the agreed upon discount and then resell the securities to the initial investors at the public offering price prior to the opening of trading. The underwriters and the issuer generally determine the public offering price and the discount based on indications for interest from prospective initial purchasers, which typically are, in large part, institutional investors with ongoing relationships with the underwriters. When the securities begin trading on an exchange, the opening price is determined based on orders to buy and sell the securities and may vary significantly from the initial public offering price. In a direct listing, in contrast, there is no initial sale to an underwriter or pre-opening sale by the underwriter to the initial purchasers. Instead, initial sales are conducted through the exchange, with the prices determined based on matching buy and sell orders and in accordance with applicable listing rules.

Section 102.01B, Footnote (E) of the Manual states that the Exchange generally expects to list companies in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spin-off, but also allows for the possibility of using a direct

listing, as described below.¹⁴ Currently, Footnote (E) states that the Exchange recognizes that companies that have not previously had their common equity securities registered under the Exchange Act, but that have sold common equity securities in a private placement, may wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement¹⁵ filed solely for the purpose of allowing existing shareholders to sell their shares.¹⁶

The Exchange has proposed to define this type of direct listing already permitted by the Exchange's rules as a "Selling Shareholder Direct Floor Listing."¹⁷ The Exchange has proposed to recognize an additional type of direct listing in which a company that has not previously had its common equity securities registered under the Exchange Act would list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company itself would sell shares in the opening auction on the first day of trading on the Exchange in addition to, or instead of, facilitating sales by selling shareholders (a "Primary

¹⁴ See Section 102.01B, Footnote (E) of the Manual.

¹⁵ The reference to a registration statement refers to an effective registration statement filed pursuant to the Securities Act of 1933 ("Securities Act").

¹⁶ See Section 102.01B, Footnote (E) of the Manual. See also Exchange Act Release No. 82627 (Feb. 2, 2018), 83 FR 5650 (Feb. 8, 2018) (SR-NYSE-2017-30) ("NYSE 2018 Order") (approving proposed rule change to amend Section 102.01B of the Manual to modify the provisions relating to the qualifications of companies listing without a prior Exchange Act registration in connection with an underwritten IPO and amend the Exchange's rules to address the opening procedures on the first day of trading for such securities).

¹⁷ See proposed Section 102.01B, Footnote (E) of the Manual. Under the proposal, the Exchange would specify that such company may have previously sold common equity securities in "one or more" private placements. The Exchange also has proposed to move the description of this type of direct listing as involving a company "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" so that this description appears in conjunction with the definition of "Selling Shareholder Direct Floor Listing." See *id.*

Direct Floor Listing”).¹⁸ Under the proposal, the Exchange would, on a case-by-case basis, exercise discretion to list companies through a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.¹⁹

With respect to a Selling Shareholder Direct Floor Listing, the Exchange proposal retains the existing standards regarding how the Exchange will determine whether a company has met its market value of publicly-held shares listing requirement. The Exchange will continue to determine that such company has met the \$100 million aggregate market value of publicly-held shares requirement based on a combination of both (i) an independent third-party valuation (“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 (“Private Placement Market”).²⁰ Alternatively, in the absence of any recent trading in a Private Placement Market, the Exchange will determine that such company

¹⁸ See proposed Section 102.01B, Footnote (E) of the Manual. A Primary Direct Floor Listing would include 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. See id.

¹⁹ See proposed Section 102.01B, Footnote (E) of the Manual.

²⁰ See proposed Section 102.01B, Footnote (E) of the Manual. 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. See Section 102.01B, Footnote (E) of the Manual. For specific requirements regarding the Valuation and the independence of the valuation agent conducting such Valuation, see Section 102.01B, Footnote (E) of the Manual. Section 102.01B, Footnote (E) of the Manual also sets forth specific factors for relying on a Private Placement Market price. Generally, the Exchange will only rely on a Private Placement Market price if it is consistent with a sustained history over a several month period prior to listing evidencing a market value in excess of the Exchange’s market value requirement.

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 million.²¹

With respect to a Primary Direct Floor Listing, the Exchange has proposed that it 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 million in market value of the shares in the Exchange's opening auction on the first day of trading on the Exchange.²² Alternatively, 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 million, 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 million, 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.²³

According to the Exchange, a company may list on the Exchange in connection with a traditional IPO with a market value of publicly-held shares of \$40 million and, in the Exchange's experience in listing IPOs, a liquid trading market develops after listing for issuers with a much

²¹ See Section 102.01B, Footnote (E) of the Manual. Shares held by directors, officers, or their immediate families and other concentrated holdings of 10 percent or more are excluded in calculating the number of publicly-held shares. See Section 102.01A, Footnote (B) of the Manual.

²² See proposed Section 102.01B, Footnote (E) of the Manual.

²³ See proposed Section 102.01B, Footnote (E) of the Manual. The Exchange states that, for example, if the company is selling five million shares in the opening auction, there are 45 million publicly-held shares issued and outstanding immediately prior to listing, and the lowest price of the price range disclosed in the company's registration statement is \$10 per share, then the Exchange will attribute to the company a market value of publicly-held shares of \$500 million. See Notice, 85 FR at 39247.

smaller value of publicly-held shares than the Exchange anticipates would exist after the opening auction in a Primary Direct Floor Listing under the proposed market value of publicly-held shares requirements.²⁴ Consequently, the Exchange believes that these requirements would provide that any company conducting a Primary Direct Floor Listing would be of a suitable size for Exchange listing and that there would be sufficient liquidity for the security to be suitable for auction market trading.²⁵ The Exchange also states that, with the exception of the proposed requirement for Primary Direct Floor Listings, shares held by officers, directors, or owners of more than 10% of the company stock are not included in calculations of publicly-held shares for purposes of Exchange listing rules.²⁶ The Exchange states that such investors may acquire in secondary market trades shares sold by the issuer in a Primary Direct Floor Listing that were included when calculating whether the issuer meets the market value of publicly-held shares initial listing requirement.²⁷ The Exchange further states that it believes that because of the enhanced publicly-held shares requirement for listing in connection with a Primary Direct Floor Listing, which is much higher than the Exchange's \$40 million requirement for a traditional underwritten IPO, and the neutral nature of the opening auction process, companies using a Primary Direct Floor Listing would have an adequate public float and liquid trading market after completion of the opening auction.²⁸

²⁴ See Notice, 85 FR at 39250.

²⁵ See Notice, 85 FR at 39250.

²⁶ See Notice, 85 FR at 39247. The Exchange states that these types of inside investors may purchase shares sold by the company in the opening auction, and purchase shares sold by other shareholders or sell their own shares in the opening auction and in trading after the opening auction, to the extent not inconsistent with general anti-manipulation provisions, Regulation M, and other applicable securities laws. See id.

²⁷ See Notice, 85 FR at 39247.

²⁸ See Notice, 85 FR at 39247.

The Exchange states that any company listing in connection with a Primary Direct Floor Listing or a Selling Shareholder Direct Floor Listing would continue to be subject to and need to meet all other applicable initial listing requirements. According to the Exchange, this would include the requirements of Section 102.01A of the Manual to have 400 round lot shareholders and 1.1 million publicly-held shares outstanding at the time of initial listing, and the requirement of Section 102.01B of the Manual to have a price per share of at least \$4.00 at the time of initial listing.²⁹

The Exchange has proposed a new order type to be used by the issuer in a Primary Direct Floor Listing and rules regarding how that new order type would participate in a Direct Listing Auction.³⁰ Specifically, the Exchange has proposed to introduce an Issuer Direct Offering Order (“IDO Order”), which would be a Limit Order to sell that is to be traded only in a Direct Listing Auction for a Primary Direct Floor Listing.³¹ The IDO Order would have the following requirements: (1) only one IDO Order may be entered on behalf of the issuer and only by one member organization; (2) the limit price of the IDO Order must be equal to the lowest price of the price range established by the issuer in its effective registration statement (the price range is defined as the “Primary Direct Floor Listing Auction Price Range”); (3) the IDO Order must be for the quantity of shares offered by the issuer, as disclosed in the prospectus in the effective

²⁹ See Notice, 85 FR at 39247.

³⁰ Under current Rule 1.1(f), the term “Direct Listing” means “a security that is listed under Footnote (E) to Section 102.01B of the Listed Company Manual.” The Exchange has proposed to modify this definition to specify that the term “Direct Listing” may refer to either a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing. See proposed Rule 1.1(f). See also Rule 7.35(a)(1) for the definition of “Auction” and Rule 7.35(a)(1)(E) for the definition of “Direct Listing Auction.”

³¹ See proposed Rule 7.31(c)(1)(D). See also Rule 7.31(a)(2) for the definition of “Limit Order.”

registration statement; (4) the IDO Order may not be cancelled or modified; and (5) the IDO Order must be executed in full in the Direct Listing Auction.³² Consistent with current rules, a Designated Market Maker (“DMM”) would effectuate a Direct Listing Auction manually, and the DMM would be responsible for determining the Auction Price.³³ Under the proposal, the DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing if (1) the Auction Price would be below the lowest price or above the highest price of the Primary Direct Floor Listing Auction Price Range; or (2) there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full.³⁴ The Exchange states that if there is insufficient buy interest and the DMM cannot price the Auction and satisfy the IDO Order as required, the Direct Auction would not proceed and such security would not begin trading.³⁵ The Exchange represents that, if a Direct Listing Auction cannot be conducted, the Exchange would notify market participants via a Trader Update that the Primary Direct Floor Listing has been cancelled

³² See proposed Rule 7.31(c)(1)(D)(i)–(v).

³³ “Auction Price” is defined as the price at which an Auction is conducted. See Rule 7.35(a)(5). The Exchange states that because an IDO Order would not be entered by the DMM, the Exchange has proposed to include IDO Orders among the types of Auction-Only Orders that are not available to DMMs. See Notice, 85 FR at 39248, n.21. See also proposed Rule 7.31(c). An “Auction-Only Order” is 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). See Rule 7.31(c). See also Rule 7.31(a)(1) for the definition of “Market Order.”

³⁴ See proposed Rule 7.35A(g)(2). A buy (sell) order is “better-priced” if it is priced higher (lower) than the Auction Price, and this includes all sell Market Orders and Market-on-Open Orders. See Rule 7.35(a)(5)(A). See also Rule 7.31(c)(1)(B) for the definition of “Market-on-Open Order.” A buy (sell) order is “at-priced” if it is priced equal to the Auction Price. See Rule 7.35(a)(5)(B).

³⁵ See Notice, 85 FR at 39249.

and any orders for that security that had been entered on the Exchange, including the IDO Order, would be cancelled back to the entering firms.³⁶

Currently, Rule 7.35A(h) generally provides that, once an Auction Price has been determined, better-priced orders are guaranteed to participate in the Auction at the Auction Price, whereas at-priced orders are not guaranteed to participate and will be allocated according to specified priority rules.³⁷ The Exchange has proposed that an IDO Order would be guaranteed to participate in the Direct Listing Auction at the Auction Price.³⁸ If the limit price of the IDO Order is equal to the Auction Price, the IDO Order would have priority at that price.³⁹ The Exchange states that providing priority to an at-priced IDO Order would increase the potential for the IDO Order to be executed in full, and therefore for the Primary Direct Floor Listing to proceed.⁴⁰

In addition, the Exchange has proposed to specify that two existing provisions would apply in the case of a Selling Shareholder Direct Floor Listing only. Currently, a DMM will publish a pre-opening indication if the Auction Price is anticipated to be a change of more than the Applicable Price Range⁴¹ from a specified Indication Reference Price.⁴² Under the proposal,

³⁶ See Notice, 85 FR at 39249.

³⁷ See Rule 7.35A(h)(1) and (2).

³⁸ See proposed Rule 7.35A(h)(4).

³⁹ See proposed Rule 7.35A(h)(4).

⁴⁰ See Notice, 85 FR at 39249.

⁴¹ The “Applicable Price Range” for determining whether to publish a pre-opening indication, with limited exception, is 5% for securities with an Indication Reference Price over \$3.00 and \$0.15 for securities with an Indication Reference Price equal to or lower than \$3.00. See Rule 7.35A(d)(3)(A).

⁴² See Rule 7.35A(d)(1)(A).

the Indication Reference Price for a security that is a Selling Shareholder Direct Floor Listing that has had recent sustained trading in a Private Placement Market prior to listing would be the most recent transaction price in that market or, if none, would be a price determined by the Exchange in consultation with a financial advisor to the issuer of such security.⁴³ Further, when facilitating the opening on the first day of trading of a Selling Shareholder Direct Floor Listing that has not had a recent sustained history of trading in a Private Placement Market prior to listing, the DMM would consult with a financial advisor to the issuer of such security in order to effect a fair and orderly opening of such security.⁴⁴ The Exchange states that these provisions are not applicable to a Primary Direct Floor Listing because, unlike for a Selling Shareholder Direct Floor Listing, the registration statement for a Primary Direct Floor Listing would include a price range within which the company anticipates selling the shares it is offering.⁴⁵

In the case of a Primary Direct Floor Listing, the Exchange has proposed a new measure of the Indication Reference Price. Specifically, for a security that is offered in a Primary Direct Floor Listing, the Indication Reference Price would be the lowest price of the Primary Direct Floor Listing Auction Price Range.⁴⁶

The Exchange states that any services provided by a financial advisor to the issuer of a security listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct

⁴³ See proposed Rule 7.35A(d)(2)(A)(iv).

⁴⁴ See proposed Rule 7.35A(g)(1). The Exchange has proposed a non-substantive change to this provision to modify a reference to “Private Placement” to utilize the defined term “Private Placement Market.” See *id.*

⁴⁵ See Notice, 85 FR at 39249.

⁴⁶ See proposed Rule 7.35A(d)(2)(A)(v). The Exchange states that, for example, if the Primary Direct Floor Listing Auction Price Range is \$10.00 to \$20.00, then the Indication Reference Price would be \$10.00. See Notice, 85 FR at 39248, n.22.

Floor Listing (the “financial advisor”) and the DMM assigned to that security must provide such services in a manner that is consistent with all federal securities laws, including Regulation M and other anti-manipulation requirements.⁴⁷ The Exchange states that, for example, when a financial advisor provides a consultation to the Exchange as required by Rule 7.35A(d)(2)(a)(iv), when the DMM consults with a financial advisor in connection with Rule 7.35A(g)(1), or when a financial advisor otherwise assists or consults with the DMM as to pricing or opening of trading in a Selling Shareholder Direct Floor Listing or Primary Direct Floor Listing, the financial advisor and DMM will not act inconsistent with Regulation M and other anti-manipulation provisions of the federal securities laws, or Exchange Rule 2020.⁴⁸ The Exchange represents that it has retained the Financial Industry Regulatory Authority (“FINRA”) pursuant to a regulatory services agreement to monitor such compliance with Regulation M and other anti-manipulation provisions of the federal securities laws, and Rule 2020.⁴⁹ The Exchange has proposed a new commentary that states that, in connection with a Selling Shareholder Direct Floor Listing, the financial advisor to the issuer of the security being listed and the DMM assigned to such security are reminded that any consultation that the financial advisor provides to the Exchange as required by Rule 7.35A(d)(2)(A)(iv) and any consultation between the DMM

⁴⁷ See Notice, 85 FR at 39249.

⁴⁸ See Notice, 85 FR at 39249 (citing Rule 2020, which provides that “No member or member organization shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent contrivance”).

⁴⁹ See Notice, 85 FR at 39249. The Exchange further represents that it expects to issue regulatory guidance in connection with a company conducting a Primary Direct Floor Listing, and that such regulatory guidance would include a reminder to member organizations that activities in connection with a Primary Direct Floor Listing, like activities in connection with other listings, must be conducted in a manner not inconsistent with Regulation M and other anti-manipulation provisions of the federal securities laws and Rule 2020. See id. at 39249, n.28.

and financial advisor as required by Rule 7.35A(g)(1) is to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.⁵⁰

Finally, the Exchange has proposed to remove references to Direct Listing Auctions from Rule 7.35C, which concerns Exchange-facilitated auctions.⁵¹ The Exchange states that, because of the importance of the DMM to the Direct Listing Auction, if a DMM is unable to manually facilitate a Direct Listing Auction, the Exchange would not proceed with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.⁵²

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act,⁵³ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.⁵⁴

⁵⁰ See proposed Rule 7.35A, Commentary .10.

⁵¹ See proposed Rule 7.35C(a), (a)(3), (b)(1), and (b)(3).

⁵² See Notice, 85 FR at 39249.

⁵³ 15 U.S.C. 78f(b)(5).

⁵⁴ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

The Commission has consistently recognized the importance and significance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.⁵⁵ The standards, collectively, also provide investors and market participants with some level of assurance that the listed company has the resources, policies, and procedures to comply with the requirements of the Exchange Act and Exchange rules.⁵⁶

⁵⁵ The Commission has stated in approving national securities exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., NYSE 2018 Order, 83 FR at 5653, n.53; Exchange Act Release Nos. 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., NYSE 2018 Order, 83 FR at 5653, n.53; Exchange Act Release Nos. 87648 (Dec. 3, 2019), 84 FR 67308, 67314, n.42 (Dec. 9, 2019) (SR-NASDAQ-2019-059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395, n.22 (Apr. 27, 2020) (SR-NASDAQ-2020-001).

⁵⁶ “Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved a national securities exchange listing, and the role of a national securities exchange in overseeing its market and assuring compliance with its listing standards.” Exchange Act Release No. 65708 (Nov. 8, 2011), 76 FR 70799, 70802 (Nov. 15, 2011) (SR-NASDAQ-2011-073). See also Exchange Act Release Nos. 65709 (Nov. 8, 2011), 76 FR 70795 (Nov. 15, 2011) (SR-NYSE-2011-38); 88389 (Mar. 16, 2020), 85 FR 16163 (Mar. 20, 2020) (SR-NASDAQ-2019-089). The Exchange, in addition to requiring companies seeking to list to meet the quantitative listing standards and once listed the quantitative continued listing standards, also requires listed companies to meet other qualitative requirements. See, e.g., Section 3, Corporate Responsibility, of the Manual.

The Exchange’s listing standards currently provide the Exchange with discretion to list a company whose stock has not been previously registered under the Exchange Act, where such company is listing in connection with a Selling Shareholder Direct Floor Listing.⁵⁷ The Exchange has proposed to allow companies to list in connection with a Primary Direct Floor Listing, which would for the first time provide a company the option, without a firm commitment underwritten offering, of selling shares to raise capital in the opening auction upon initial listing on the Exchange.⁵⁸

Several commenters expressed support for the proposed expansion of direct listings to permit a primary offering.⁵⁹ One commenter, for example, stated that it supports alternative formats for IPOs, including direct listing proposals like the one proposed by the Exchange, and expressed the view that issuers should be offered choices that match their objectives so long as

⁵⁷ See Section 102.01B, Footnote (E) of the Manual. See also NYSE 2018 Order, 83 FR at 5654.

⁵⁸ See NYSE Listed Company Manual Section 102.01B, Footnote (E) of the Manual which states generally that 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. Section 102.01B, Footnote (E) also states, however, that “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 a private placement, 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.”

⁵⁹ See Letter from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel Securities (Feb. 18, 2020) (“Citadel Letter”), at 1; Letter from Paul Abrahamzadeh and Russell Chong, Co-Heads, U.S. Equity Capital Markets, Citigroup Capital Markets Inc. (Feb. 26, 2020) (“Citigroup Letter”); Letter from Matthew B. Venturi, Founder & CEO, ClearingBid, Inc. (Jan. 21, 2020) (“ClearingBid Letter”), at 5; Letter from David Ludwig, Head of Americas Equity Capital Markets, Goldman Sachs Group, Inc. (Feb. 7, 2020) (“Goldman Sachs Letter”); Letter from Burke Dempsey, Executive Vice President Head of Investment Banking, Wedbush Securities (Apr. 20, 2020) (“Wedbush Letter”).

they protect the integrity of the markets and are fair and clear to investors, using transparent processes.⁶⁰ Another commenter believed that allowing for multiple pathways for private 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.⁶¹

In Amendment No. 2, the Exchange made several modifications to its proposal that were designed to clarify the role of the issuer and financial advisor in a direct listing to explain how compliance with various rules and regulations will be addressed. As discussed in more detail below, these changes: (i) help to ensure that the issuer cannot unduly influence the opening price through a new order type that cannot be modified or canceled; (ii) highlight that financial advisors involved with direct listings cannot violate the anti-manipulation provisions of the Exchange Act, including Regulation M; and (iii) highlight that the Exchange has retained FINRA pursuant to a regulatory services agreement to monitor compliance with Regulation M and other anti-manipulation provisions of the federal securities laws. We conclude that the proposal, as amended by Amendment No. 2, supports a finding that the proposal is consistent with the Exchange Act. More specifically, the following aspects of the proposal demonstrate that it is 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: (i) addition of the IDO Order

⁶⁰ See Citigroup Letter. This commenter also stated its belief that 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. See id.

⁶¹ See Goldman Sachs Letter. This commenter also referenced the recent direct listings by Spotify Technology S.A. and Slack Technologies, Inc., and expressed the view that the development of a direct listing approach to becoming a public company has been a significant step forward in providing companies greater choice in their path to going public, and that the ability to include a primary capital raise in a direct listing will further enhance this flexibility. See id. See also Citadel Letter, at 1; Wedbush Letter.

type and other requirements which address how the issuer will participate in the opening auction; (ii) discussion of the role of financial advisors; (iii) addition of the Commentary that provides that specified activities are to be conducted in a manner that is consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements; (iv) retaining FINRA to monitor compliance with Regulation M and other anti-manipulation provisions of the federal securities laws and NYSE Rule 2020; (v) clarification of how market value will be determined for qualifying the company's securities for listing; and (vi) elimination of the grace period for meeting certain listing requirements.

The Commission addresses below the relevant concerns, identified by either commenters or the Commission in the OIP, relating to NYSE's proposal to allow direct listings with a primary offering. First, the Commission addresses issues identified in the OIP related to the aggregate market value of publicly-held shares requirement and whether the proposed standards will help facilitate adequate liquidity for companies listing in a Primary Direct Floor Listing. Second, the Commission addresses issues identified in the OIP about the initial listing opening auction process for Primary Direct Floor Listings and discusses financial advisors. Finally, the Commission addresses commenters' concerns about whether the proposal is consistent with investor protection and the public interest given the lack of traditional underwriter involvement in a Primary Direct Floor Listing, as well as concerns about Securities Act Section 11(a) liability. As discussed in greater detail below, the Commission concludes that the record addresses these concerns and that the Exchange has met its burden to demonstrate that its proposal is consistent with the Exchange Act, and therefore finds the proposed rule change to be consistent with the Exchange Act.

A. Aggregate Market Value of Publicly-held Shares Requirement

With respect to the aggregate market value of publicly-held shares requirement, the Exchange proposes to require that it will deem a company to have met such requirement if the company will sell at least \$100 million in market value of shares in the Exchange's opening auction on the first day of trading. Alternatively, where a company will sell shares in the opening auction with a market value of less than \$100 million, the Exchange will deem the company to have met such 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 listing is at least \$250 million. According to the Exchange, a company may list in connection with an IPO with a market value of publicly-held shares of \$40 million and, "in the Exchange's experience in listing IPOs, a liquid trading market develops after listing for issuers with a much smaller value of publicly-held shares than the Exchange anticipates would exist after the opening auction in a Primary Direct Floor Listing."⁶² In Amendment No. 2, the Exchange clarified that market value would be calculated using a price per share equal to the lowest price of the price range multiplied by the number of shares being offered by the issuer.⁶³

⁶² Notice, 85 FR at 39250. As described above, in determining that a company has met the market value of publicly-held shares standards the Exchange will consider the market value of all shares sold by the company in the opening auction, rather than excluding shares that may be purchased by officers, directors, or owners of more than 10% of the company's common stock, notwithstanding that generally the Exchange's listing standards exclude shares held by such insiders from its calculations of publicly-held shares. The Exchange believes that the Primary Direct Floor Listing will have an adequate public float and liquid trading market after completion of the opening auction given the higher market value requirement than that required for listing an underwritten IPO. See Notice, 85 FR at 39247.

⁶³ See Notice, 85 FR at 39247 and note 23, supra, and accompanying text.

One commenter expressed the view that the proposal, as originally noticed for comment, appropriately updated the publicly-held shares and distribution requirements associated with direct listings in order to ensure the development of a liquid trading market.⁶⁴ Another commenter believed that the Exchange should provide data to support its conclusion that there would be adequate liquidity for a security listing in connection with a Primary Direct Floor Listing.⁶⁵ In its statement in support of its proposal, the Exchange stated that its proposal would impose a substantially higher capitalization requirement for Primary Direct Floor Listings than its rules require for traditional IPOs.⁶⁶

The Commission has determined that the Exchange has met its burden to show that the proposed aggregate market value of publicly-held shares requirement provides the Exchange with a reasonable level of assurance that the company's market value supports listing on the Exchange and the maintenance of fair and orderly markets.⁶⁷ The Commission reaches this

⁶⁴ See Citadel Letter, at 1.

⁶⁵ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (July 16, 2020) ("CII Letter III"), at 5.

⁶⁶ See NYSE Statement, at 12 (citing Section 102.01B of the Manual; Approval Order at 16–17). According to the Exchange, it generally requires companies listing on the Exchange in connection with an IPO to have a market value of publicly-held shares of at least \$40 million, whereas the proposal would require a company listing in conjunction with a Primary Direct Floor Listing 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.

⁶⁷ Almost half of exchange-listed IPOs in the recent year had proceeds that fell below the \$100 million threshold. Using information from Thomson Reuters SDC Platinum New Issues database, the Commission staff concluded that, among 146 exchange-listed IPOs conducted during the 2019 calendar year, the median offer size was \$106.7 million. Further, staff concluded that approximately 47.9 percent of the companies that went public via IPO (12.8 percent for NYSE IPOs and 60.7 percent for NASDAQ IPOs) had an offer size that fell below \$100 million. Similarly, an Ernst & Young report states that during 2019, the median proceeds raised in exchange-listed IPOs in the United States

conclusion because the proposed market value standard for listing a Primary Direct Floor Listing is at least two and a half times greater than the market value standard that currently exists under Exchange rules for an Exchange listing of an IPO. The Commission also finds that the proposed requirements are also comparable to or higher than the aggregate market value of publicly-held shares required by the Exchange for initial listing in other contexts.⁶⁸ Specifically, the Exchange's proposed minimum market value requirements, which are designed in part to ensure sufficient liquidity, of \$100 million and \$250 million for Primary Direct Floor Listings are, in addition to being higher than the \$40 million minimum market value requirement for IPOs,⁶⁹ comparable to (i) the \$100 million and \$250 million minimum market value requirements for listing a Selling Shareholder Direct Floor Listing;⁷⁰ and (ii) the \$100 million requirement for

were approximately \$110 million. See Global IPO trends: Q4 2019, Ernst & Young, available at https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/growth/ey-global-ipo-trends-q4-2019.pdf.

⁶⁸ The Exchange did not provide the data specifically referenced by a commenter. See supra note 65 and accompanying text. However, the proposed minimum market value requirements are comparable to or higher than those listing standards applied by the Exchange in other contexts. See supra notes 20-21 and 66 and accompanying text.

⁶⁹ The existing \$40 million market value requirement in Exchange Rules (Section 102.01B of the Manual) is a longstanding requirement that has supported the listing of companies on the Exchange that are suitable for listing and have existed since at least 2009. See Section 102.01B of the Manual. See Exchange Act Release No. 60501 (Aug. 13, 2009), 74 FR 42348 (Aug. 21, 2009) (SR-NYSE-2009-80) (lowering the aggregate market value of publicly-held shares for the listing of IPOs and spin-offs from \$60 million to \$40 million).

⁷⁰ The Commission previously approved the standards for Selling Shareholder Direct Floor Listings as supporting listing on the Exchange and the maintenance of fair and orderly markets thereby protecting investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act. See NYSE 2018 Order, 83 FR at 5654.

aggregate market value of publicly-held shares for companies that list other than at the time of an IPO, spin-off, or initial firm commitment underwritten public offering.⁷¹

And as described below, using the lowest price in the price range established by the issuer in its registration statement to determine the minimum market value is a reasonable and conservative approach because the Primary Direct Floor Listing will not proceed at a lower price.

B. Opening Auction Process for Primary Direct Floor Listings and Role of Financial Advisors

In the Order Instituting Proceedings, the Commission expressed concern that, with a Primary Direct Floor Listing, the company could be the only seller (or a dominant seller) participating in the opening auction and thus could be in a position to uniquely influence the price discovery process, and requested the Exchange to explain how its opening auction rules would apply in a Primary Direct Floor Listing.⁷² In Amendment No. 2, the Exchange proposed

⁷¹ See Section 102.01B of the Manual. The Commission previously has found that this longstanding requirement is suitable for initial listing of companies on the Exchange and that the standard has supported listings of companies on the Exchange over many years. For example, in 1999 the Commission approved the existing \$100 million aggregate market value standard of publicly-held shares standard that currently applies to listings other than IPOs and spin-offs. In approving this proposal, the Commission stated its belief that this threshold requirement, among others, should “ensure that only companies of a certain minimum size are included among those listing on the Exchange, thereby protecting investors by raising the minimum standard for listed companies.” Exchange Act Release No. 41502 (June 9, 1999), 64 FR 32588 (June 17, 1999) (SR-NYSE-99-13). The 1999 rule change also increased to \$60 million the \$40 million requirement that applied to IPOs and spin-offs, which is still significantly below the requirements being proposed for a Primary Direct Floor Listing. *Id.* As noted *supra* at note 69, the \$60 million requirement was lowered back to \$40 million in 2009. See Exchange Act Release No. 60501 (Aug. 13, 2009), 74 FR 42348 (Aug. 21, 2009) (SR-NYSE-2009-80).

⁷² One commenter expressed general support for the proposal and offered a variety of observations beyond the scope of the proposal, including with respect to the importance of opening auction information. See ClearingBid Letter, at 1.

to add the IDO Order as a new order type to be used by the issuer in a Primary Direct Floor Listing, and to clarify in its rules how the DMM would conduct the opening auction for such listings. As discussed above, the issuer would be required to submit an IDO Order in the opening auction with a limit price equal to the low end of the Primary Direct Floor Listing Auction Price Range, and for the full quantity of offered shares, as reflected in the registration statement. The IDO Order cannot be modified or canceled by the issuer once entered. Further, the DMM would conduct the opening auction only if the auction price is within the Primary Direct Floor Listing Auction Price Range disclosed in the registration statement, and the IDO Order and all better-priced sell orders can be satisfied in full. If the auction price is equal to the limit price of the IDO Order (i.e., the low end of the Primary Direct Floor Listing Auction Price Range), the IDO Order would have priority over other sell orders at that price.⁷³

The Commission finds that the IDO Order and related clarifications proposed by the Exchange help to clearly define the method by which the issuer participates in the opening auction, to prevent the issuer from being in a position to improperly influence the price discovery process,⁷⁴ and to design an auction that is otherwise consistent with the disclosures in the registration statement. Specifically, the issuer would be required to submit an IDO Order in the opening auction with a limit price equal to the low end of the Primary Direct Floor Listing

⁷³ In addition, as discussed above, the Exchange proposes that the DMM will publish a pre-opening indication in a Primary Direct Floor Listing if the auction price is expected to be outside a price range around an “Indication Reference Price” equal to the low end of the price range reflected in the registration statement. The Commission believes this is a reasonable and conservative reference price because the auction cannot occur at a lower price, and if the auction occurs at a higher price the proposal errs on the side of requiring opening indication information to be disseminated to market participants.

⁷⁴ See supra notes 72–73 and accompanying text. See also proposed Rule 7.31(c)(1)(D)(i)-(v) which sets forth the requirements the issuer must follow in entering the IDO Order and proposed Rule 7.35A(g)(2) which sets forth the requirements in order for the DMM to conduct the direct listing auction for a Primary Direct Floor Listing.

Auction Price Range, and for the full quantity of offered shares, as reflected in the registration statement. Further, the IDO Order cannot be modified or canceled by the issuer once entered. The Commission further finds that it is appropriate for the IDO Order to have priority over other sell orders at the same price if the auction price is at the limit price of the IDO Order because the auction will not occur at all unless the IDO Order is satisfied in full. This provision therefore would allow for both the issuer's IDO Order and better-priced sell orders to be executed in the opening auction.⁷⁵ The IDO Order requirements described above mitigate concerns about the price discovery process in the opening auction and provide 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 in accordance with Section 6(b)(5) of the Exchange Act.

In Amendment No. 2, the Exchange added language to its proposal, discussed above, reminding a financial advisor to an issuer and the DMM that any consultations with the financial advisor must be conducted in a manner consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.⁷⁶ The Exchange also represents that it

⁷⁵ In addition, the proposed changes to Rule 7.35C to remove the references to Direct Listing Auction would help ensure that all direct listings occur with a DMM that will facilitate the opening auction manually, and should help promote fair and orderly markets in connection with direct listings, because of the role of the DMM in ensuring that the conditions to conduct the auction, described above, have been met. The proposed changes to (i) Section 102.01B of the Manual, Footnote (E) to clarify the description of a Selling Shareholder Direct Floor Listing, (ii) Rule 1.1(f) to amend the definition of "Direct Listing," and (iii) Rule 7.35A(g)(1) to use the defined term "Private Placement Market" will also provide clarity to the Exchange's rules, consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act.

⁷⁶ See Notice, 85 FR at 39249, and proposed Rule 7.35A, Commentary .10. See also *supra* note 36 and accompanying text noting that the Exchange will issue a regulatory circular to remind member organizations that activities in connection with a Primary Direct Floor Listing, like activities in connection with other listings, must be conducted in a manner

has retained FINRA to monitor such compliance and that it plans to issue regulatory guidance in this area. These steps will also help to ensure compliance by participants in the direct listing process with these important provisions of the federal securities laws and that the proposed changes are consistent with preventing manipulative acts and practices, and protecting investors and the public interest in accordance with Section 6(b)(5) of the Exchange Act.

C. Lack of Traditional Underwriter Involvement in a Primary Direct Floor Listing and Securities Act Section 11(a) Standing

1. *Comments on the Proposal*

Several commenters expressed concerns that the lack of traditional underwriter involvement in direct listings generally would increase risks for investors, suggesting that direct listings circumvent the traditional due diligence process and traditional underwriter liability.⁷⁷ One commenter stated that approval of the proposal would likely increase the number of companies that forgo the traditional IPO process, and significantly increase the risks for retail investors, including by circumventing the due diligence process.⁷⁸ This commenter expressed

not inconsistent with Regulation M and other anti-manipulation provisions of the federal securities laws and NYSE Rule 2020.

⁷⁷ See, e.g., Letter from Christopher A. Iacovella, Chief Executive Officer, ASA (December 12, 2019) (“ASA Letter I”), at 1.

⁷⁸ See ASA Letter I, at 1–2. This commenter believed that allowing companies to raise primary capital through a direct listing “would be a complete end run around the traditional underwriting process and . . . create a massive loophole in the regulatory regime that governs the offerings of securities to the public.” Id. at 1. In this commenter’s view, two recent high-profile direct listings—Spotify and Slack—did not work out particularly well for retail investors, and a robust underwriting process would have uncovered more of these companies’ vulnerabilities before these securities were offered to the public. See id. at 2. Another commenter stated that these direct listings may have been successes for private investors, but the retail and public investors that purchased stock in Spotify and Slack were under water for years, and one company is facing a lawsuit because of how direct listings are modeled. See Letter from Anonymous (June 30, 2020).

concern that direct listings could weaken certain investor protections, and recommended that the Commission make clear that financial advisors, exchanges, control shareholders, and directors involved in a direct listing automatically incur statutory underwriter liability under the Securities Act and are required to hold the regulatory capital necessary to act as a de facto underwriter.⁷⁹ On the other hand, one commenter supported direct listings as a suitable option for certain issuers, and stated that “[d]ue diligence is already ably done by the legions of experienced accountants, lawyers, consultants, rating agencies, etc.”⁸⁰

Another commenter recommended that the Commission disapprove the proposal and expressed concern that shareholder legal rights under Section 11 of the Securities Act may be particularly vulnerable in the case of direct listings, and that investors in direct listings may have fewer legal protections than investors in IPOs.⁸¹ The commenter stated that it could not support

⁷⁹ See ASA Letter I, at 2; Letter from Christopher A. Iacovella, Chief Executive Officer, American Securities Association (Mar. 5, 2020) (“ASA Letter II”), at 2–3. Several additional commenters raised a variety of concerns with the use of a direct listing to conduct a primary offering. For example, one commenter expressed the view that “bailing out” private market investors with reduced offering requirements would incent companies to remain private longer, reduce transparency, and impair price discovery. See Letter from Anonymous (Dec. 4, 2019). Another commenter took the position that direct listings are a method for insiders to “rip-off” IPO investors. See Letter from Allan Rosenbalm (Dec. 4, 2019). Another commenter was critical of direct listings for a variety of reasons, and expressed the view, among other things, that they are “an attempt to bypass the independent skilled investment banking and investment management professionals when establishing the initial market value of the company.” Letter from Anonymous (Jan. 3, 2020). Another commenter stated that a primary capital raise would have many red flags, questioned how to trust a private company’s accounting methods that are not consistent with the public markets, and stated that a direct listing is “fraudulent with no liability.” See Letter from Anonymous (July 1, 2020).

⁸⁰ Wedbush Letter.

⁸¹ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Jan. 16, 2020) (“CII Letter I”), at 2; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Apr. 16, 2020) (“CII Letter II”), at 2; CII Letter III, at 3–4, 6.

direct listings as an alternative to IPOs if public companies could limit their liability for damages caused by untrue statements of fact or material omissions of fact within registration statements associated with direct listings.⁸²

The Petitioner’s Petition for Review stated that the delegated order raises important policy issues that should be decided after plenary consideration by the Commission. In particular, the Petitioner expanded on its prior comments relating to claims under Section 11 of the Securities Act, stating that the proposal compounds the problems shareholders face in tracing their share purchases to a registration statement. As discussed in greater detail below, Section 11(a) of the Securities Act allows purchasers to bring claims for damages based on materially false or misleading registration statements. Courts have held that plaintiffs lack standing to pursue such claims if they cannot trace their purchased shares back to the offering covered by the false or misleading registration statement. The Petitioner stated that the proposal exacerbates concerns regarding the availability of Section 11 protections because it would “make it possible for many more shares to be directly listed and sold without the protections offered by IPO regulations.”⁸³ The Petitioner acknowledged that traceability problems may occur because of successive offerings – where first there is an offering under a registration statement and then there are unregistered offerings by company insiders after the expiration of any applicable

⁸² See CII Letter I, at 2–3; CII Letter II, at 3; Petition for Review, at 9-10. This commenter was particularly concerned about positions taken by the issuer in a recent lawsuit relating to the direct listing of Slack, and expressed the view that the issuer “relies on (1) attacking the right of secondary market purchasers to bring a Section 11 claim; and (2) the inability to determine what shares were ‘covered’ by Slack’s registration statement.” CII Letter I, at 2. See also Pirani v. Slack Technologies, Inc., 445 F. Supp. 3d 367 (N.D. Cal. 2020).

⁸³ See Petition for Review, at 9.

lockup or Rule 144 holding periods.⁸⁴ The Petitioner also stated that traceability challenges may also arise in the context of simultaneous registered and unregistered sales.⁸⁵ The Petitioner also argued that the very purpose of the proposal is “to facilitate, if not encourage, a significant increase in the number of securities that can be sold to the public without Section 11 protections” and that it is hard to understand how that result poses no heightened risk to investors.⁸⁶ The

⁸⁴ Although not required by federal securities laws or existing national securities exchange listing rules, a lockup period is an oft-included contractual agreement or provision negotiated with the underwriters of an initial public offering that restricts insiders and certain other pre-IPO security holders from selling, transferring, or otherwise disposing of their securities for a specified period – typically 90 to 180 days – following the initial public offering. As these provisions are not required by federal securities laws or existing national securities exchange listing rules, the specific terms of lockup agreements can and do vary between offerings. Rule 144 creates a safe harbor for the sale of restricted or control securities under the exemption in Section 4(a)(1) of the Securities Act if the seller complies with the conditions of the safe harbor, which includes a minimum holding period. See 17 CFR 230.144.

⁸⁵ The Petitioner stated that tracing shares to a registration statement immediately after an IPO may not be a significant concern but the situation becomes murkier when insiders are able to sell their shares in the company after the end of the lockup period. See Petition for Review, at 8. In discussing traceability issues, the Petitioner also stated that NYSE’s proposal on Selling Shareholder Direct Floor Listings “permitted not only the sale of shares covered by the registration statement, but also the simultaneous sale of unregistered shares held by insiders, assuming that the owner of those shares could satisfy the requirements of the Rule 144 exemption from registration.” See Petition for Review, at 9.

⁸⁶ See id. at 14. The Petitioner stated with respect to the Slack case (see note 82, supra) that while the district court denied a motion to dismiss a Section 11 claim on the grounds that the plaintiff could not trace their purchase to Slack’s registration statement, the court of appeals has agreed to hear the matter on an interlocutory basis so it is unclear whether the district court case will be upheld. See Pirani v. Slack Technologies, Inc., No. 20-16419 (9th Cir. July 23, 2020), Docket No. 1. The Petitioner further argued that the Approval Order did not cite any cases where the sale of registered and unregistered shares shortly after an IPO and prior to the end of a lockup period was used as a basis to dismiss a claim of a Section 11 violation. See Petition for Review, at 14.

Petitioner urged the Commission to explore a system of traceable shares before approving a direct listing regime.⁸⁷

2. *NYSE Response to Comments*

In response, the Exchange stated that it does not believe that the absence of underwriters creates a gap in the regulatory regime that governs offerings of securities to the public.⁸⁸

According to the Exchange, while involvement of a traditional underwriter is often necessary to the success of an IPO or other public offering, underwriter participation in the public capital-raising process is not required by the Securities Act, and companies regularly access the public markets for capital raising and other purposes without using traditional underwriters.⁸⁹ In the Exchange's view, the due diligence process in Primary Direct Floor Listings is the responsibility of the gatekeepers who participate in the transaction, such as the company's board of directors, its senior management, and its independent accountants.⁹⁰ The Exchange further stated that a company pursuing a Primary Direct Floor Listing would go through the same process of publicly filing a registration statement as an underwritten offering, and if a company's business model exhibits weaknesses, they will be exposed to the public prior to listing.⁹¹

⁸⁷ See Petition for Review, at 12; CII Letter I, at 2–3; CII Letter III, at 4.

⁸⁸ See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel & Corporate Secretary, NYSE (Mar. 16, 2020) (“NYSE Response Letter”), at 2.

⁸⁹ See NYSE Response Letter, at 2–3.

⁹⁰ See NYSE Response Letter, at 2–3. The Exchange took the position that IPOs carry a certain amount of risk for investors, that an underwritten IPO does not insulate investors from that risk, and that there is no reason to believe that companies with direct listings will perform any better or worse than companies with underwritten IPOs. See id. at 3.

⁹¹ See NYSE Response Letter, at 4. The Exchange also took the position that the absence of lockup agreements with pre-IPO shareholders in Primary Direct Floor Listings does not create short-term price instability, and that at most it shifts the timing of such instability from six months after the offering to closer to the time of listing. See id. See also NYSE Statement, at 20, stating that the same price volatility concerns that cause

In response to the Petitioner’s concern about the adequacy of investor protections under Section 11 of the Securities Act, the Exchange stated that these concerns flow from an extraneous factor – namely, lockup agreements. In particular, the Exchange contends that the Section 11 and traceability concerns are due to the potential lack of lockup agreements, which are neither prohibited nor required by the proposal or any other law or regulation, rather than to anything inherent in direct listings themselves or the Exchange rules permitting them to be listed.⁹² The Exchange argued that the Petitioner assumes that because Primary Direct Floor Listings do not require underwriters, they will never involve lockup agreements, and therefore insider shareholders will sell their unregistered shares alongside the issuer’s registered shares, potentially making it harder to trace purchased shares back to the registration statement.⁹³ Further, according to the Exchange, the traceability requirement may make it difficult for shareholders to establish standing under Section 11 in many situations that do not involve direct listings, including when a company has issued securities under more than one registration statement and distributed those securities through traditional, firm commitment underwritings.⁹⁴ The Exchange stated that in traditional, firm commitment underwritten IPOs there is no legal or regulatory requirement for the issuer to enter into lockup agreements with insiders, and

underwriters to request lockup agreements in a traditional IPO may apply to direct listings as well.

⁹² See NYSE Statement, at 15.

⁹³ See NYSE Statement, at 18. The Exchange stated that tracing issues are very fact-dependent and turn on many factors so it is unclear whether Section 11 tracing difficulties will in fact occur. See NYSE Statement, at 17.

⁹⁴ See NYSE Statement, at 18–19 (citing In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1107–08 (9th Cir 2013); Krim v. pcOrder.com, Inc., 402 F.3d 489, 496–98 (5th Cir. 2005)).

conversely, there is nothing preventing an issuer in a direct listing from entering into a lockup agreement.⁹⁵

According to the Exchange, the only courts to consider Section 11 standing in the context of a direct listing involved the Selling Shareholder Direct Floor Listing by Slack Technologies, Inc., where both a federal and a state court concluded that Section 11 did not preclude plaintiffs, at the pleading stage, from pursuing claims just because they could not definitively trace the securities they acquired to the registration statement.⁹⁶ The Exchange stated that for Petitioner's concerns to materialize, other courts in circumstances where there is no lockup agreement would need to reach the opposite conclusion.⁹⁷ Moreover, in response to the Petitioner's arguments that the Commission should delay implementation of the proposal until it addresses the traceability issue by enacting certain "proxy plumbing" reform measures, the Exchange stated that the Petitioner has pursued this goal for many years and the current proposal is not the proper vehicle to advance this agenda.⁹⁸

⁹⁵ See NYSE Statement, at 20 (stating that in the recent Selling Shareholder Direct Floor Listing by Palantir, insider shareholders entered into lockup agreements with respect to certain shares). Further, the Exchange stated that even if lockup agreements did prove to be less common in direct listings, there is a market-based solution to this issue because shareholders will pay less for shares acquired with direct listings if they would face materially greater difficulty in pursuing Section 11 claims in connection with direct listings, and that in turn would incentivize issuers to structure their direct listings in a way that does not reduce the protections available under the federal securities laws. See id. at 21, n.67.

⁹⁶ See NYSE Statement, at 21–22 (citing 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)).

⁹⁷ See NYSE Statement, at 22.

⁹⁸ See NYSE Statement, at 22–24.

3. *Commission Discussion and Analysis*

The Commission agrees with the Exchange that the Securities Act does not require the involvement of an underwriter in registered offerings.⁹⁹ Moreover, given the broad definition of “underwriter”¹⁰⁰ in the Securities Act, a financial advisor to an issuer engaged in a Primary Direct Floor Listing may, depending on the facts and circumstances including the nature and extent of the financial advisor’s activities, be deemed a statutory “underwriter” with respect to the securities offering, with attendant underwriter liabilities.¹⁰¹ Thus, the financial advisors to issuers in Primary Direct Floor Listings have incentives to engage in robust due diligence, given their reputational interests and potential liability, including as statutory underwriters under the broad definition of that term. Moreover, even absent the involvement of a statutory underwriter, investors would not be precluded from pursuing any claims they may have under the Securities Act for false or misleading offering documents, nor would the absence of a statutory underwriter affect the amount of damages investors may be entitled to recover.

In addition, issuers, officers, directors, and accountants, with their attendant liability, play important roles in assuring that disclosures provided to investors are materially accurate and

⁹⁹ See, e.g., Item 508(c) of Regulation S-K (“Outline briefly the plan of distribution of any securities to be registered that are to be offered otherwise than through underwriters.”).

¹⁰⁰ Section 2(a)(11) of the Securities Act defines “underwriter” to mean “any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking.”

¹⁰¹ The Commission does not agree, as argued by one commenter, that financial advisors, exchanges, control shareholders, and directors involved in a direct listing will necessarily incur statutory underwriter liability under the Securities Act. See ASA Letter I, at 2; ASA Letter II, at 2–3. Whether or not any person would be considered a statutory underwriter would be evaluated based on the particular facts and circumstances, in light of the definition of underwriter contained in Section 2(a)(11).

complete. The Commission therefore does not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of a registered offering. Indeed, exchange-listed companies often engage in offerings that do not involve a firm commitment underwriting.

The Commission finds that the proposed rule change is consistent with the protection of investors. First, the Commission disagrees with the concerns raised by commenters that direct listings would “rip off” investors, reduce transparency, or involve reduced offering requirements or accounting methods that are not “up to code with the public markets.”¹⁰² The proposed rule change will require all Primary Direct Floor Listings to be registered under the Securities Act, and thus subject to the existing liability and disclosure framework under the Securities Act for registered offerings. Among other disclosures, these registration statements will require both bona fide price ranges¹⁰³ and audited financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.¹⁰⁴

Second, Petitioner’s 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. Rather, this issue is potentially implicated anytime securities that are not the subject of a recently effective registration statement trade in the same market as 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

¹⁰² See note 79, supra.

¹⁰³ See, e.g., Instruction 1 to Item 501(b)(3) of Regulation S-K.

¹⁰⁴ See Rule 4-01(a) of Regulation S-X.

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 that at the time of the acquisition the person “knew of such untruth or omission.”¹⁰⁵ Courts have interpreted this statutory provision to permit aftermarket purchasers (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.¹⁰⁶ Tracing is not set forth in Section 11 and is a 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.¹⁰⁷

Aftermarket purchasers following either firm commitment underwritten IPOs or direct listings may face similar difficulties in tracing their shares back to a misleading registration statement. In a number of litigated cases outside of the direct listing context, courts have denied plaintiffs standing to sue under Section 11 following registered public offerings on the basis that plaintiffs purchased their securities in secondary market transactions and could not directly trace their purchases to the allegedly defective registered offering because some portion¹⁰⁸ of the

¹⁰⁵ Section 11(a) of the Securities Act.

¹⁰⁶ See, e.g., In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104 (9th Cir. 2013).

¹⁰⁷ See, e.g., Pirani v. Slack Techs., Inc., 2020 U.S. Dist. LEXIS 70177 (N.D. Cal., April 21, 2020) (addressing Securities Act Section 11 standing and stating that “[i]f the text is ambiguous, the Court ‘may [also] use canons of construction, legislative history, and the statute’s overall purpose to illuminate Congress’s intent.’” (quoting Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser, 945 F.3d 1076 (9th Cir. 2019))).

¹⁰⁸ See, e.g., Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967); Krim v. PCOrder.com, 402 F.3d 489 (5th Cir. 2005) (IPO stock represented 91% of shares trading in market); In re

outstanding securities available for trading – sometimes a very small portion – were not issued pursuant to the allegedly defective registration statement. These situations arise where shares may have been issued pursuant to more than one registration statement, not all of which include material misstatements or omissions. Shares may have also entered the market prior to a potential claimant’s purchase other than through the registered offering, such as through sales pursuant to Rule 144.¹⁰⁹ For example, the shares might have been sold by insiders or significant shareholders following the expiration of lockup agreements or applicable restricted periods, or could have also been sold by other shareholders who were never subject to any such agreement.¹¹⁰ Furthermore, traceability concerns can arise when shares are held in fungible bulk – as they usually are – such that an investor is not able to establish that the particular shares it

Century Aluminum Co. Sec. Litig., 729 F.3d 1104 (9th Cir. 2013) (49 million shares were already trading in market prior to the issuance of 24.5 million shares pursuant to allegedly misleading registration statement).

¹⁰⁹ Rule 144 is a non-exclusive safe harbor that permits the resale of restricted securities, without Securities Act registration, if a number of conditions are met, including a holding period of either six months or one year, depending on the reporting status of the issuer. Non-affiliates of a newly-listed issuer may rely on Rule 144 to sell their securities provided they have held the securities for at least one year.

¹¹⁰ While lockup agreements are customary in firm commitment initial public offerings, in the Commission’s experience they often do not cover all of the outstanding shares. There is thus a risk that, even in the context of IPOs underwritten on a firm commitment basis, securities other than those issued pursuant to the related registration statement may enter the trading market prior to the expiration of any applicable lockup period and thus could raise questions regarding traceability of shares purchased on a national securities exchange. Additionally, as the Exchange noted, companies that pursue a direct listing may also enter into lockup agreements. Required disclosure in registration statements, for both direct listings and IPOs, may help investors assess the risk that shares other than those offered pursuant to the registration statement will be available for sale. For example, in registration statements for IPOs and direct listings, issuers are required to provide disclosure of the amount of shares that may be sold pursuant to Rule 144. See Item 201(a)(2) of Regulation S-K. Issuers also typically provide disclosure of the material terms of lockup agreements governing pre-IPO shares.

purchased were acquired pursuant to, or are traceable to, a particular misleading registration statement.¹¹¹

Although it is possible that aftermarket purchases following a Primary Direct Floor Listing may present tracing challenges, this investor protection concern is not unique to Primary Direct Floor Listings, nor (based on the approaches taken by courts as described above) do we expect any such tracing challenges in this context to be of such magnitude as to render the proposal inconsistent with the Act. We expect judicial precedent on traceability in the direct listing context to continue to evolve,¹¹² but the Commission is not aware of, nor have commenters pointed to, any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims.

The Commission further believes that Primary Direct Floor Listings will provide benefits to existing and potential investors relative to firm commitment underwritten offerings. First, because the securities to be issued by the company in connection with a Primary Direct Floor Listing would be allocated based on matching buy and sell orders, in accordance with the proposed rules, some investors may be able to purchase securities in a Primary Direct Floor Listing who might not otherwise receive an initial allocation in a firm commitment underwritten offering. The proposed rule change therefore has the potential to broaden the scope of investors that are able to purchase securities in an initial public offering, at the initial public offering price, rather than in aftermarket trading.

¹¹¹ See, e.g., Krim v. PCOrder.com, 402 F.3d 489 (5th Cir. 2005).

¹¹² For example, the Ninth Circuit Court of Appeals has agreed to consider the issue of Section 11 standing at issue in Pirani v. Slack Techs., Inc., 2020 U.S. Dist. LEXIS 70177 (N.D. Cal., April 21, 2020) on an interlocutory basis. See Pirani v. Slack Technologies, Inc., No. 20-16419 (9th Cir., July 23, 2020), Docket No. 1.

Second, because the price of securities issued by the 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.¹¹³ In a firm commitment underwritten offering, 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 underwriters then sell the securities to the initial purchasers at the public offering price. When the securities begin trading on the listing exchange, however, the price often varies from the IPO price. The opening auction in a Primary Direct Floor Listing provides for a different price discovery method for IPOs which may reduce the spread between the IPO price and subsequent market trades, a potential benefit to existing and potential investors. In this way, the proposed rule change may result in additional investment opportunities while providing companies more options for becoming publicly traded.¹¹⁴

¹¹³ A frequent academic observation of traditional firm commitment underwritten offerings is that the IPO price, 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. See, e.g., Patrick M. Corrigan, Article: The Seller’s Curse and the Underwriter’s Pricing Pivot: A Behavioral Theory of IPO Pricing, 13 Va. L. & Bus. Rev 335; Jay R. Ritter, Initial Public Offerings: Underpricing tbl.1a (June 17, 2020), https://site.warrington.ufl.edu/ritter/files/IPOs2019_Underpricing.pdf.

¹¹⁴ While the Commission acknowledges the possibility that some companies may pursue a Primary Direct Floor Listing instead of a traditional IPO, these two listing methods may not be substitutable in a wide variety of instances. For example, some issuers may require the assistance of underwriters to develop a broad investor base sufficient to support a liquid trading market; others may believe a traditional firm commitment IPO is preferable given the benefits to brand recognition that can result from roadshows and other marketing efforts that often accompany such offerings. Thus, we do not anticipate that all companies that are eligible to go public through a Primary Direct Floor Listing

The Commission finds that the Exchange’s proposal will facilitate the orderly distribution and trading of shares, as well as foster competition, which is clearly consistent with the purposes of the Exchange Act. The orderly distribution of, and trading of shares, promotes fair and orderly markets, and is one of the important roles of a national securities exchange in ensuring that its rules prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade and protect investors and the public interest.¹¹⁵ The proposal also fosters competition by providing an alternate method for companies of sufficient size that decide they would rather not conduct a firm commitment underwritten offering to list on the Exchange, thereby removing potential impediments to free and open markets consistent with Section 6(b)(5) of the Exchange Act while also supporting capital formation. For the reasons discussed above, the Commission finds that, on balance, the proposed rule change to permit Primary Direct Floor Listings is designed to, among other things, prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

IV. Conclusion

For foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Rule 431 of the Commission’s Rules of Practice, that the earlier action taken by delegated authority, Exchange Act Release No. 89684 (August 26, 2020), 85 FR 54454 (September 1, 2020), is set aside and, pursuant to Section

will choose to do so; the method chosen will depend on each issuer’s unique characteristics.

¹¹⁵ See 15 U.S.C. 78f(b)(5). See also 15 U.S.C. 78k-1(a)(1)(C)(i).

19(b)(2) of the Exchange Act, the proposed rule change (SR-NYSE-2019-67), as modified by Amendment No. 2, hereby is approved.

By the Commission.

Vanessa A. Countryman
Secretary