

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:)
)
)
) File No. SR-NYSE-2019-67
The Council of Institutional Investors.)
)
)

REPLY BRIEF IN SUPPORT OF MOTION TO LIFT STAY

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NYSE respectfully submits this reply brief in support of its motion to lift the automatic stay (the “Motion”) imposed under 17 C.F.R. § 201.431(e).¹

PRELIMINARY STATEMENT

The automatic stay of the Commission’s Order imposes significant harms on potential issuers and investors by precluding Primary Direct Floor Listings from proceeding during the quickly closing fall 2020 capital raising window. Meanwhile, CII and its members have not shown that they will suffer any harm—let alone *irreparable* harm—if the stay is lifted, nor that they have any likelihood of success—much less a *strong* likelihood—in reversing or modifying the Order, which carefully considered and thoroughly addressed the same purported concerns that CII raised during the comment period and has now rehashed in its petition for review (the “Petition” or “Pet.”). CII’s opposition brief (the “Opposition” or “Opp.”) concedes or entirely fails to respond to NYSE’s arguments. Instead, CII advances two primary contentions, neither of which has merit.

First, CII erroneously asserts that the only factor relevant to lifting an automatic stay pursuant to Rule 431(e) is the “public interest,” and that NYSE’s brief set forth the wrong standard. But the factors NYSE articulated are precisely the factors considered in prior Commission orders lifting automatic stays—including the very same orders upon which CII relies in its Opposition. Moreover, CII concedes that the factors NYSE discussed are relevant to assessing the public interest. At best, CII has advanced a distinction with no difference.

Second, CII contends that the public interest supports maintaining the stay, but does so based *solely* on a rationale that it concedes has nothing to do with NYSE’s Rule Changes.

¹ All capitalized terms and abbreviations used herein and not otherwise defined shall have the meanings ascribed to them in NYSE’s September 4, 2020 Brief in Support of Motion to Lift Stay (“NYSE Br.”).

Specifically, CII now admits that the only supposed “problem” with the Order is that potential issuers *may* not require their insider shareholders to enter into lockup agreements in connection with direct listings, which *may* make it more difficult for investors in such offerings to satisfy Section 11’s statutory tracing requirement. But, as the Order determined and NYSE demonstrated, this issue is not unique to direct listings. Nor does it flow from the Rule Changes, which neither require nor prohibit lockup agreements—a point CII fails even to mention in its Opposition. Moreover, as CII concedes, the *only* Section 11 case to address a direct listing held that the absence of a lockup agreement did not preclude the plaintiff’s claim. In short, CII bases its entire position on a purported harm that is not tied in any way to the Rule Changes and depends on speculative predictions about how potential issuers, insiders, and investors *may* act and how the law on direct listings *may* evolve. Such conjecture does not and cannot warrant maintaining the automatic stay.

CII’s remaining contentions are even more readily dispatched. CII contends that the harms flowing from the stay that NYSE established are overblown. CII, however, puts forward no meaningful basis to dispute that there is substantial interest in Primary Direct Floor Listings, or that it is particularly important for the Rule Changes to take effect so that all companies that wish to and are in a position to do so can access the capital markets before the end of the year, particularly in light of current economic uncertainty and market volatility.

Whether the factors are considered individually or as part of an assessment of “the public interest,” the conclusion is the same: the automatic stay is detrimental and unwarranted, and the Commission should lift it and permit the Rule Changes to take effect.

ARGUMENT

With very limited exceptions, CII fails to contest—and thus concedes—its inability to satisfy any of the factors that could support keeping the automatic stay in place. CII does not,

because it cannot, dispute that it has failed to establish a strong likelihood of success on the merits. As NYSE pointed out, CII already had multiple opportunities to present its views during the comment period, the Division thoroughly considered those views, and it addressed them in the Order.² Nor does CII dispute that it has failed to demonstrate any concrete, specific, and irreparable harm that either it or its members will suffer if the stay is lifted.³ CII likewise does not contend that lifting the stay will preclude the Commission from reviewing the Order, should it believe such review is warranted.⁴ Standing alone, CII's failure to make any showing on these factors should result in a lifting of the stay. Moreover, the only arguments CII does present in favor of maintaining the stay are legally erroneous, unsupported and speculative.

I. NYSE Correctly Identified the Relevant Factors for Lifting the Automatic Stay

NYSE's brief identified five factors that the Commission considers in deciding whether to lift an automatic stay pursuant to Rule 431(e).⁵ CII argues that NYSE misstates the standard, and that the only relevant consideration is whether the stay is "in the public interest."⁶ CII is wrong.

The Commission's orders lifting automatic stays in prior proceedings have addressed precisely the factors that NYSE's brief analyzed. For example, in *Options Clearing Corporation*, the Commission lifted an automatic stay not only based on the public interest, but also—and more specifically—because it determined that the petitioners' concerns of "potential monetary and competitive harm do not currently justify maintaining the stay," and that lifting the

² See NYSE Br. at 6-10.

³ See *id.* at 10-11.

⁴ See *id.* at 10.

⁵ *Id.* at 6.

⁶ Opp. at 2-6.

stay would not preclude Commission review of the order approving the relevant rule changes.⁷ Likewise, in *Institutional Networks Corporation*, the Commission lifted the stay once it determined that the petitioner—like CII here—had multiple opportunities to raise its concerns regarding the relevant rule changes during the comment period, which the Division had already considered and addressed through extended proceedings.⁸ Moreover, the Commission found that the stay in *Institutional Networks* had “the potential to harm investors and disrupt the orderly operation of that segment of the international equities securities market affected by” the rule changes, and that the petitioner “will not suffer irreparable harm” from lifting the stay.⁹ These orders thus make clear that the Commission can and routinely does consider factors such as likelihood of success, irreparable harm to the petitioner, substantial harm to others, and the effect on the Commission’s ability to review the order—in addition to the public interest more generally. CII’s Opposition relies on these *same* orders, and concedes their relevance for defining the applicable standard.¹⁰ While CII tries to distinguish these orders based on supposedly “significant” “factual differences” from the present circumstances,¹¹ CII does not and cannot explain how such purported factual differences alter the relevant legal standard.

CII also claims that the Commission should not consider factors beyond the public interest in deciding whether to lift stays of orders made on delegated authority, because such orders supposedly are “interlocutory” and present different considerations from stays of final

⁷ Options Clearing Corp., Securities Exchange Act Release No. 75886, File No. SR-OCC-2015-02, 2015 WL 5305989, at *1 (Sept. 10, 2015).

⁸ Institutional Networks Corp., Securities Exchange Act Release No. 25039, File No. 3-6926, 1987 WL 756909, at *1 (Oct. 15, 1987).

⁹ *Id.*

¹⁰ Opp. at 5-6.

¹¹ *Id.* at 5.

agency actions that are subject to judicial review.¹² But setting aside the fact that the Commission *does* consider the same factors in both contexts, the Commission’s Rules—which provide that “[a]n action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission”¹³—do not support CII’s view. And while filing a notice of intent to petition the Commission for review automatically triggers a stay of such actions, the stay remains in place only “until the Commission orders otherwise.”¹⁴ Accordingly, ample authority supports consideration of the factors NYSE identified in its brief. In any event, CII concedes that “a variety of considerations come into play” in assessing whether an automatic stay is in the public interest, and that many of the specific points that NYSE advanced “are relevant to a ‘public interest’ determination.”¹⁵ Thus, even if CII were correct about the standard—and it is not—the Commission still could and should consider each of the factors NYSE addressed in its brief, all of which support lifting the automatic stay here.

II. CII’s Speculative Concerns About the Viability of Section 11 Claims in the Absence of Lockup Agreements Do Not Warrant Maintaining the Automatic Stay

CII’s comment letters objected to the Rule Changes based on purported concerns about investor protections under Section 11 and a demand for specific data supporting the capitalization and public shareholding requirements of NYSE’s direct listing rules.¹⁶ CII has now abandoned the latter claim; its Petition and Opposition focus solely on Section 11 issues.¹⁷ But, as NYSE demonstrated in its brief, the supposed Section 11-related harms on which CII

¹² *Id.* at 3-5.

¹³ 17 C.F.R. § 201.431(e).

¹⁴ *Id.*

¹⁵ *Opp.* at 6, 11.

¹⁶ *See* NYSE Br. at 7-10.

¹⁷ *Pet.* at 8-15; *Opp.* at 8-11.

grounds its position do not flow from the Rule Changes or even direct listings, and they are unsupported and speculative.¹⁸ CII's Opposition largely concedes or fails to respond to these points.

First, CII expressly admits that “the problem” with which it is concerned is a lack of lockup agreements to prohibit insider shareholders from selling their unregistered shares simultaneously with primary direct listings, potentially complicating investors' ability to trace their shares to a materially false or misleading registration statement as required by Section 11.¹⁹ This, however, is not a “problem” with NYSE's Rule Changes at all; as NYSE established, its rules neither require nor prohibit lockup agreements in connection with Primary Direct Floor Listings²⁰—a point CII fails even to mention.

Moreover, as the Division found in addressing CII's concerns and approving the Order, the potential lack of lockup agreements is a “recurring issue” that is “not exclusive to Primary Direct Floor Listings.”²¹ CII itself implicitly recognizes this when it asserts that the Order could “*exacerbate*” existing traceability “concerns.”²² The same difficulties 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 where there are multiple registration statements, only some of which allegedly contain false or misleading statements or omissions of material

¹⁸ NYSE Br. at 10-14.

¹⁹ Opp. at 7-9.

²⁰ NYSE Br. at 13.

²¹ Order at 26.

²² Opp. at 9 (emphasis added). The Opposition, in fact, acknowledges that while a “traditional IPO *usually* has a ‘lockup’ period” (*id.* at 7 (emphasis added)), lockup periods are not necessarily or invariably part of such offerings.

fact.²³ Contrary to CII’s vague and unsupported suggestion,²⁴ even for traditional firm 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. Indeed, in one already-announced Selling Shareholder Direct Listing, the issuer and its insider shareholders *have* entered into lockup agreements with respect to certain shares.²⁵ The Rule Changes simply give issuers and their insider shareholders the ability to pursue Primary Direct Floor Listings without predetermining anything about the use of lockup agreements. That is no reason to stay the Rule Changes from taking effect.

Unable to demonstrate any concrete basis for maintaining the stay of the Rule Changes themselves, CII tries, unsuccessfully, to tie its position into bigger and unrelated policy considerations that either have already been addressed or should have no place in the approval of NYSE’s listing rule changes. CII asserts, for example, that because Primary Direct Floor Listings represent a “huge change,” are “potentially a significant ‘game changer’” and a “brave new world,” the Commission should “assess the adequacy of investor protections” before the Rule Changes take effect.²⁶ But, while Primary Direct Floor Listings are no doubt a very important new development, they do not present a material difference with respect to lockup

²³ For example, one of the cases CII cites, *Krim v. pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005), involved aftermarket purchasers who 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. *Id.* at 491-92, 496-97.

²⁴ *See* Opp. at 9 (asserting, without citation, that Rule Changes “will make it possible for many more shares to be directly listed and sold *without the protections offered by [unspecified] IPO regulations*” (emphasis added)).

²⁵ *See* Palantir Techs. Inc., Am. 2 to Registration Statement (Form S-1/A) (Sept. 9, 2020) at 72 (describing lockup agreements with shareholders as to over 1.3 billion shares that will remain in place until after public disclosure of Palantir’s 2020 year-end financial results).

²⁶ Opp. at 7, 11.

agreements and traceability issues from Selling Shareholder Direct Floor Listings, which the Commission already approved in 2018.²⁷ Indeed, the case that, according to CII, brings the Section 11 traceability issue “into sharp focus” involved just such a direct listing of selling shareholders’ stock.²⁸ Moreover, the Order already assessed all of CII’s arguments concerning investor protection,²⁹ and neither CII’s Opposition nor its Petition identify any new arguments that require further assessment. And while CII asks the Commission to evaluate the Rule Changes against vague “policy decisions” that do not specifically concern direct listings,³⁰ CII does not identify any authority for the notion that the Commission should evaluate exchange listing rules in light of other, unrelated and ill-defined regulatory policies.³¹

In any event, CII still does nothing to show that any perceived harm resulting from possible difficulties in bringing Section 11 claims is more than hypothetical. While the Opposition asserts, in conclusory fashion, that the “risks” under the Order are “significant,”³² CII’s sole “authority” for this proposition is an article in a legal newsletter, which recognized that the law in this area is developing and that litigants will “increasingly spar over how Section

²⁷ 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).

²⁸ Opp. at 9 (citing *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 373, 378 (N.D. Cal. 2020), *lv. app. granted*, No. 20-80095, ECF No. 3 (9th Cir. July 23, 2020)).

²⁹ Order at 26.

³⁰ Opp. at 4. For example, CII asserts in its Petition that approval of the Rule Changes should be tied to unrelated proxy issues. *See* Pet. at 11 (stating that CII believes “that traceability problems of the sort raised here should impel the Commission to update its ‘proxy plumbing’ regulations *before* any liberalization of direct listing regulations”).

³¹ To the contrary, Section 19 of the Securities Exchange Act of 1934 provides that the Commission “shall approve” a proposed rule change if the “rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.” 15 U.S.C. § 78s(b)(2)(C)(i). Section 19 thus requires evaluating proposed exchange rule changes against the applicable laws, rules and regulations as they exist; the statute says nothing about unrelated or future “rules and regulations.”

³² Opp. at 6.

11 . . . applies to direct listings” as they become more common.³³ As discussed above, however, CII concedes that the real issue is how courts will grapple with registered securities becoming available for sale when there is no lockup period for unregistered securities, not the direct listing mechanism itself, which, like traditional underwritten offerings, can occur with or without a lockup. Moreover, as NYSE pointed out in its brief and as the Division found, the only court to *actually* consider Section 11 standing in the context of a direct listing without a lockup “allowed the plaintiff’s Section 11 claims to proceed,” notwithstanding his inability to definitively trace the securities he acquired to the challenged registration statement.³⁴ 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.³⁵ Put another way, the purported difficulties in proving up a Section 11 claim on which CII has focused depend on a highly uncertain chain of events not even triggered by the Rule Changes themselves. But uncertain, speculative, and contingent risks that do not even flow from the Rule Changes cannot justify keeping the automatic stay in place.

³³ *Id.* at 10 (citing Latham & Watkins, *Complex and Novel Section 11 Liability Issues of Direct Listings*, Corporate Counsel (Dec. 20, 2019), available at <https://www.lw.com/thoughtLeadership/section-eleven-liability-direct-listings>). CII’s assertion that “[n]either the Order nor the NYSE motion disputes th[e] interpretation” proffered by the law firm article (*id.* at 10) is irrelevant. Neither the Division nor NYSE had any obligation or reason to respond to the views of a law firm that did not submit any comment letter. Nor does this article deserve any special consideration merely because it was written by a law firm that has represented issuers in direct listings. *See id.*

³⁴ Opp. at 9 n.4; *see also* NYSE Br. at 14 (citing Order at 26).

³⁵ NYSE Br. at 14.

III. CII's Remaining Arguments Lack Merit

Under the heading of “public interest,” CII makes a smattering of arguments concerning the benefits that Primary Direct Floor Listings have to offer and the harms caused by the automatic stay. These contentions lack substance and can be quickly rejected.

CII acknowledges the substantial benefits that Primary Direct Floor Listings are poised to provide to the public markets.³⁶ As set forth in NYSE’s prior submissions, the Rule Changes have the potential to benefit issuers and investors by expanding opportunities to participate in public offerings, and potentially by making the pricing of newly issued shares more transparent and efficient.³⁷ CII does not contest these benefits; indeed, it calls them “obvious.”³⁸ It is therefore also “obvious” that the public will be deprived of significant benefits while the stay remains in effect.

Maintaining the automatic stay would impose substantial harm on companies and investors that would otherwise participate in Primary Direct Floor Listings. CII dismisses these concerns, but its arguments are not well-founded.

Notwithstanding its assertions about the impact of the Rule Changes, CII apparently still questions whether companies will qualify and choose to engage in Primary Direct Floor Listings.³⁹ To support its speculation, CII cites only a law firm’s opinion unsupported by other

³⁶ See Opp. at 11-12.

³⁷ NYSE Br. at 14-18.

³⁸ Opp. at 11.

³⁹ *Id.* at 12-13. Curiously, after pages of assertions concerning the substantial impact of the Rules Changes, CII goes on to question whether issuers outside of a “select group” of companies would even be eligible for Primary Direct Floor Listing and asserts that “demand by private companies for immediate direct listing may be lower than was perceived earlier this year.” *Id.* at 12.

evidence to back up its assertion that eligible companies will be a “fairly select group.”⁴⁰ In any event, the article’s straightforward observation that not all companies may qualify for Primary Direct Floor Listings does not speak to the level of interest among eligible companies which CII has no valid basis to claim is insubstantial, and as to which NYSE has unique insight.

CII dismisses as “sloganeering” NYSE’s concerns that potential issuers have a limited window within which to raise capital during fall 2020 due to the current market climate and upcoming election.⁴¹ But there is no question that the current climate will continue to impact options for raising capital and how companies evaluate those options. In addition, the blog post CII cites for the proposition that there is no “window” for raising capital before an election itself acknowledges reduced IPO activity in the weeks around an election.⁴² That post, moreover, was published on March 4, 2020, before the market experienced the full impact of the COVID-19 pandemic. Indeed, a more recent source upon which CII relies acknowledges that companies currently planning to go public “*seem to be eager to strike while the iron is hot . . . and before the uncertainty of the November election sets in.*”⁴³

CII also questions whether companies can avail themselves of the Rule Changes before the November election, noting the challenge of filing a registration statement, having it declared effective, and getting it listed in a matter of weeks.⁴⁴ This observation overlooks the substantial

⁴⁰ *Id.* at 12 (citing Morrison & Foerster, *PE & VC Exits: U.S. Direct Listing Rules in Flux* (Sept. 4, 2020), available at <https://www.mofo.com/resources/insights/200904-investor-exits.html>).

⁴¹ *Id.*

⁴² *Id.* at 14 (citing David Ethridge & Alison Kutler, *Myth-busting – Going public during election years*, PwC’s Deals Blog (Mar. 4, 2020), available at <http://usblogs.pwc.com/deals/election-year-ipos/>).

⁴³ Michael Johnston, *Chasing Unicorns: IPOs to Watch in 2020*, Evergreen Gavekal (Sept. 4, 2020), available at <https://blog.evergreengavekal.com/chasing-unicorns-ipos-to-watch-in-2020/> (emphasis added).

⁴⁴ *Opp.* at 13-14.

efforts that companies have already undertaken to be prepared to utilize the Rule Changes, and in any event only further demonstrates why lifting the automatic stay as soon as possible is critical.

CONCLUSION

For the reasons set forth above and in NYSE's Brief in Support of its Motion to Lift the Stay, NYSE respectfully requests that the Commission lift the automatic stay.

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CERTIFICATE OF COMPLIANCE

I, Paul Mishkin, counsel to the New York Stock Exchange LLC (“NYSE”), hereby certify that the foregoing reply brief complies with the word count limitation provided in 17 C.F.R. § 201.154(c). Excluding tables of contents and authorities, as provided by 17 C.F.R. § 201.154(c), but including the cover page and signature block, the brief includes 3,604 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

Dated: September 11, 2020
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CERTIFICATE OF SERVICE

I, Paul S. Mishkin, counsel to the New York Stock Exchange LLC (“NYSE”), hereby certify that on September 11, 2020, I caused to be served copies of the attached Reply Brief in Support of Motion to Lift Stay and Certificate of Compliance 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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