

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2020-027 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-CboeBZX-2020-027. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2020-027, and should be submitted on or before April 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88485; File No. SR-NYSE-2019-67]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Chapter One of the Listed Company Manual To Modify the Provisions Related to Direct Listings

March 26, 2020.

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 related to direct listings. 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, 2019.³ On February 13, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ 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.⁵ The Commission has received twelve comment letters on the proposed rule change, including a response from the

¹⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87821 (December 20, 2019), 84 FR 72065 (December 30, 2019) ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 88190 (February 13, 2020), 85 FR 9891 (February 20, 2020). The Commission designated March 29, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

Exchange.⁶ This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

Section 102.01B, Footnote (E) of the Manual states that the Exchange generally expects to list companies in connection with a firm commitment underwritten initial public offering ("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.⁸ 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 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 statement⁹ filed solely for the purpose of allowing existing shareholders to sell their shares.¹⁰ The Exchange has proposed to define this type of direct listing already contemplated by the Exchange's rules as a "Selling Shareholder Direct Floor Listing."¹¹ In addition, the Exchange has proposed to recognize an additional type of direct listing in which a company would sell shares itself in the opening auction on the first day of trading on the Exchange in addition to, or instead of, facilitating sales by selling shareholders (a "Primary Direct Floor

⁶ Comments received on the Notice are available on the Commission's website at: <https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Section 102.01B, Footnote (E) of the Manual.

⁹ The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 ("Securities Act").

¹⁰ See Section 102.01B, Footnote (E) of the Manual. See also Securities Exchange Act Release No. 82627 (February 2, 2018), 3 FR 5650 (February 8, 2018) (SR-NYSE-2017-30) (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).

¹¹ See proposed Section 102.01B, Footnote (E) of the Manual. Under the proposal, the Exchange would remove a description of this type of direct listing as involving a company "whose stock is not previously registered under the Exchange Act, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registered only the resale of shares sold by the company in earlier private placements." See *id.*

Listing”).¹² Under the proposal, the Exchange would, on a case by case basis, exercise discretion to list companies that are listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.¹³

With respect to a Selling Shareholder Direct Floor Listing, the Exchange has proposed to retain 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”).¹⁴ 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.¹⁵ Alternatively, in the absence of any recent trading in a Private Placement Market, the Exchange will determine that such company has met its market value of publicly-held shares requirement if the company provides a Valuation evidencing a market value of publicly-held shares of at least \$250 million.¹⁶

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 sells 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.¹⁷ Alternatively, where a company is conducting a Primary Direct Floor Listing and sells 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 company provides a Valuation evidencing a market value of publicly-held shares of at least \$250 million.¹⁸ According to the Exchange, 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.¹⁹

In addition, the Exchange has proposed to amend Section 102.01A of the Manual to provide certain exceptions to the requirement that a company listing in connection with a Primary Direct Floor Listing or a Selling Shareholder Direct Floor Listing comply with the applicable initial listing distribution requirements, which require at least 400 round lot holders and 1.1 million publicly-held shares, at the time of initial listing.²⁰ In each of the following cases, the Exchange has proposed to grant the company a grace period of up to 90 trading days from the date of initial listing (“Distribution Standard Compliance Period”) to comply with the applicable initial listing distribution requirements: (i) A company listing in connection with a Primary Direct Floor Listing in which it sells at least \$250 million in market value of shares in the Exchange’s opening auction on the first day of trading on the Exchange; (ii) a company listing in connection with a Primary Direct Floor Listing in which the aggregate amount of the market value of shares sold by the company in the opening auction and the market value of publicly-held shares demonstrated by the company immediately prior to the time of initial listing (in the manner set forth in Section 102.01B, Footnote (E) of the Manual) is at least \$350 million; and (iii) a company listing in connection with a Selling Shareholder Direct Floor

Listing in which it demonstrates at the time of initial listing (in the manner set forth in Section 102.01B, Footnote (E) of the Manual) that it has at least \$350 million in aggregate market value of publicly held shares.²¹

Under the proposal, any such company that fails to demonstrate its compliance with the applicable requirements of Section 102.01A within the Distribution Standard Compliance Period will be deemed to be below compliance with listing requirements.²² Any such company will have the right to submit a plan pursuant to the provisions of Sections 802.02 or 802.03 of the Manual, as applicable, demonstrating its ability to gain compliance with the applicable requirements of Section 102.01A of the Manual within a period not to exceed six months from the end of the Distribution Standard Compliance Period.²³

According to the Exchange, private companies generally do not have as many as 400 round lot holders, but that this typically is not a barrier to listing for a company undertaking an IPO because the underwriters are able to ensure that the shares sold in the IPO are distributed to sufficient accounts to meet the Exchange’s distribution standards.²⁴ However, the Exchange asserts that, in the absence of an underwritten transaction at the time of listing, the initial listing distribution standards may represent more of a challenge for a private company contemplating listing in connection with a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.²⁵ The Exchange believes that a Primary Direct Floor Listing in which the company sells at least \$250 million of its stock in the opening auction on the day of listing would provide an appropriately liquid trading market and make it highly likely that the company would meet the initial listing distribution standards quickly after initial listing.²⁶ The Exchange notes that the market value of publicly-held shares requirement for initial listings other than direct listings and IPOs is \$100 million, and that the proposed \$350 million requirement to use the Distribution Compliance Period is far higher than what a newly-listed company would have to demonstrate

¹² See proposed Section 102.01B, Footnote (E) of the Manual.

¹³ See proposed Section 102.01B, Footnote (E) of the Manual.

¹⁴ See proposed 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.

¹⁵ See Section 102.01B, Footnote (E) of the Manual.

¹⁶ See Section 102.01B, Footnote (E) of the Manual.

¹⁷ See proposed Section 102.01B, Footnote (E) of the Manual.

¹⁸ See proposed Section 102.01B, Footnote (E) of the Manual.

¹⁹ See Notice, *supra* note 3, 84 FR at 72067.

²⁰ See proposed Section 102.01A of the Manual. Section 102.01A requires a company to have 400 holders of 100 shares or more (or of a unit of trading if less than 100 shares) and 1,100,000 publicly-held shares. 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 of the Manual.

²¹ See proposed Section 102.01A of the Manual.

²² See proposed Section 102.01A of the Manual; Notice, *supra* note 3, 84 FR at 72066.

²³ See proposed Section 102.01A of the Manual.

²⁴ See Notice, *supra* note 3, 84 FR at 72066.

²⁵ See Notice, *supra* note 3, 84 FR at 72066.

²⁶ See Notice, *supra* note 3, 84 FR at 72066.

under other circumstances.²⁷ The Exchange believes that this heightened standard significantly increases the likelihood that a liquid trading market will develop after a Selling Shareholder Direct Floor Listing or Primary Direct Floor Listing, and therefore makes it likely that these companies will meet the initial distribution standards within the Distribution Standard Compliance Period.²⁸

III. Summary of Comment Letters Received

The Commission has received twelve comment letters on the proposed rule change, including two letters from one commenter and a letter responding to the comments from the Exchange.²⁹

Four commenters generally supported the proposal.³⁰ One commenter 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 they protect the integrity of the markets and are fair and clear to investors, using transparent processes.³¹ 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.³² A third commenter stated that it strongly supports proposals designed to facilitate companies accessing the public equity markets, and expressed the view that the proposal appropriately updated the

publicly-held shares and distribution requirements associated with direct listings in order to ensure the development of a liquid trading market.³³ Finally, one commenter expressed general support for the proposal, but offered a variety of observations and concerns, including that the historical approach to IPO pricing is not sufficiently transparent, creates the opportunity for dramatic price swings, and is not fair to all qualified investors.³⁴ In its view, all investors should have the opportunity to participate in a seamless process that also provides transparency.³⁵

Other commenters opposed the proposal. One commenter expressed the view 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.”³⁶ This commenter believed that approval of the proposal would likely increase the number of companies that forego the traditional IPO process, and significantly increase the risks for retail investors, including by circumventing the due diligence process.³⁷ The commenter expressed concern that direct listings could weaken certain shareholder 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 be required to hold the regulatory capital necessary to act as a de facto underwriter.³⁸

Another commenter noted that it had generally supported permitting direct listings, based on a belief that a direct listing should be a choice for companies considering a public listing that could be more cost-effective than an IPO while still providing necessary investor protections.³⁹ However, this commenter 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 listing companies may have fewer legal protections than investors in IPOs.⁴⁰ The commenter stated that it could not support 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.⁴¹ Finally, this commenter specifically opposed the Distribution Standard Compliance Period proposed by the Exchange. The commenter noted that the Exchange had provided no data to support its argument that issuers with at least \$350 million in public float would quickly develop a liquid trading market and comply with the initial listing distribution requirements within the 90-day grace period and stated that, without evidence, the \$350 million threshold “appears arbitrary.”⁴²

The Exchange responded to several of the concerns raised by commenters. The Exchange disagrees that the absence of

²⁷ See Notice, *supra* note 3, 84 FR at 72066.

²⁸ See Notice, *supra* note 3, 84 FR at 72066.

²⁹ See *supra* note 6.

³⁰ See Letter from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel Securities (February 18, 2020) (“Citadel Letter”), at 1; Letter from Paul Abrahamzadeh and Russell Chong, Co-Heads, U.S. Equity Capital Markets, Citigroup Global Markets Inc. (February 26, 2020) (“Citigroup Letter”); Letter from Matthew B. Venturi, Founder & CEO, ClearingBid, Inc. (January 21, 2020) (“ClearingBid Letter”), at 5; Letter from David Ludwig, Head of Americas Equity Capital Markets, Goldman Sachs Group, Inc. (February 7, 2020) (“Goldman Sachs Letter”).

³¹ See Citigroup Letter, *supra* note 30. This commenter also believed 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.*

³² See Goldman Sachs Letter, *supra* note 30. 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.*

³³ See Citadel Letter, *supra* note 30, at 1. This commenter also referenced its role as the NYSE Designated Market Maker for both Spotify Technology S.A. and Slack Technologies, Inc., and stated that its experience has demonstrated that a direct listing can be an attractive alternative to the traditional IPO process. *See id.*

³⁴ See ClearingBid Letter, *supra* note 30, at 1.

³⁵ See ClearingBid Letter, *supra* note 30, at 5. This commenter also believed that, coupled with greater transparency for a truer indication of market demand via real-time price discovery, fair and equal market access can be provided to all investors, not just the largest institutions. *See id.*

³⁶ Letter from Christopher A. Iacovella, Chief Executive Officer, ASA (December 12, 2019) (“ASA Letter I”), at 1.

³⁷ See ASA Letter I, *supra* note 36, at 2. 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.*

³⁸ See ASA Letter I, *supra* note 36, at 2; Letter from Christopher A. Iacovella, Chief Executive Officer, American Securities Association (March 5, 2020) (“ASA Letter II”), at 2–3.

³⁹ See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 16, 2020) (“CII Letter”), at 1–2.

⁴⁰ See CII Letter, *supra* note 39, at 2.

⁴¹ See CII Letter, *supra* note 39, at 2–3. 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.” *Id.* at 2. Among other things, the commenter urged the Commission to explore establishing a system of traceable shares before approving a direct listing regime. *See id.* at 2–3.

⁴² See CII Letter, *supra* note 39, at 4. Several additional commenters raised a variety of concerns with the proposal. 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 (December 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 (December 4, 2019). Yet 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.” *See* Letter from Anonymous (January 3, 2020).

underwriters creates a loophole in the regulatory regime that governs offerings of securities to the public.⁴³ According to the Exchange, while underwriter involvement 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 that do not require the services of an underwriter are not required to purchase them.⁴⁴ In the Exchange's view, the due diligence process in primary direct 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.⁴⁵ 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.⁴⁶

IV. Proceedings To Determine Whether To Approve or Disapprove SR-NYSE-2019-67 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the proposal should be approved or disapproved.⁴⁷ Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act, the Commission is providing notice of the grounds for

disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency with the Exchange Act⁴⁸ and, in particular, with Section 6(b)(5) of the Exchange Act, 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.⁴⁹

The Commission has consistently recognized the importance of 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.⁵⁰

The Exchange is proposing to provide new exceptions to its initial listing standards for companies listing in connection with a Primary Direct Floor Listing or a Selling Shareholder Direct Floor Listing. Specifically, such companies would be granted a grace period of up to 90 trading days to comply with the requirements to have at least 400 round lot holders and 1.1 million publicly-held shares (*i.e.*, the Distribution Standard Compliance Period), so long as they meet one of three \$250 million or \$350 million market value of shares tests. In support of its proposal, the Exchange simply expresses the belief that these heightened market value standards

significantly increase the likelihood that a liquid trading market will develop after the listing, which the Exchange believes makes it likely that these companies will meet the initial distribution standards within the 90-trading day period. The Exchange, however, does not offer any further explanation as to why a higher market value of shares would lead to a potentially substantial increase in the number of shareholders in a relatively short time frame. In addition, the Exchange does not provide any data or other evidence to support its belief that companies with the specified market values are likely to have at least 400 round lot holders within 90 trading days of listing, regardless of the number of holders upon listing or other characteristics of the company. Further, the Exchange effectively is proposing not to enforce any minimum number of holders requirements for such companies for 90 trading days, and has not explained why potentially listing an issuer with a very small number of holders, and allowing it to trade for many months, would not risk undermining fair and orderly markets or the protection of investors, or otherwise would be consistent with Section 6(b)(5) and other relevant provisions of the Exchange Act. Finally, by first listing companies and only later enforcing compliance with the specified distribution standards, the Exchange would appear to be increasing the risk of delisting companies relatively soon after their listing, and the Exchange has not offered any assessment of this risk or the impact such delistings may have on investors in those securities or on fair and orderly markets.

The Exchange also has proposed that, with respect to a Primary Direct Floor Listing, a company will be deemed to have met the applicable \$100 million aggregate market value of publicly-held shares requirement if the company sells at least \$100 million in market value of shares in the Exchange's opening auction on the first day of trading. The Exchange has not explained, however, how it would be assured that a company listing under this provision will actually sell shares valued at \$100 million or more at the time the company is approved for listing, which necessarily will be in advance of the Exchange's opening auction. If the company is unable to sell shares with the requisite valuation in the opening auction, then it may not in fact have met the initial listing standards prior to listing and trading. This immediate compliance issue, and the potential for delisting, would appear to raise fair and orderly

⁴⁸ 15 U.S.C. 78f(b)(5).

⁴⁹ *Id.*

⁵⁰ The Commission has stated in approving 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.*, Securities Exchange Act Release Nos. 81856 (October 11, 2017), 82 FR 48296, 48298 (October 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission notes that, in general, 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.

⁴³ See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel & Corporate Secretary, NYSE (March 16, 2020) ("NYSE Response Letter"), at 2.

⁴⁴ See NYSE Response Letter, *supra* note 43, at 2-3.

⁴⁵ See NYSE Response Letter, *supra* note 43, 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.

⁴⁶ See NYSE Response Letter, *supra* note 43, at 4. The Exchange also took the position that the absence of lock-up agreements with pre-IPO shareholders in Primary Direct Floor Listings does not create short-term price instability, and at most it shifts the timing of such instability from six months after the offering to closer to the time of listing. *See id.*

⁴⁷ 15 U.S.C. 78s(b)(2)(B).

markets, investor protection, and other issues similar to those discussed above with respect to the Distribution Standard Compliance Period. The Exchange has not explained how this would be consistent with Section 6(b)(5) and other relevant provisions of the Exchange Act.

Finally, the proposal, for the first time, would permit the Exchange to conduct a Primary Direct Floor Listing, either alone or in combination with a Selling Shareholder Direct Floor Listing, where the company being listed would sell shares in the opening auction on the first day of trading. In such a case, 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. The Exchange, however, has not explained how its opening auction rules would apply in a Primary Direct Floor Listing, or how the Exchange would assure that the opening auction and subsequent trading promote fair and orderly markets, prevent manipulative acts and practices, protect investors, and otherwise would be consistent with Section 6(b)(5) and other relevant provisions of the Exchange Act.

The Commission notes that, under 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 ['SRO'] that proposed the rule change."⁵¹ 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,⁵² and any failure of an SRO to provide this information 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 applicable rules and regulations.⁵³

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act⁵⁴ to determine whether the proposal should be approved or disapproved.

⁵¹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁵² See *id.*

⁵³ See *id.*

⁵⁴ 15 U.S.C. 78s(b)(2)(B).

V. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁵

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by April 22, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by May 6, 2020.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSE-2019-67 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-NYSE-2019-67. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

⁵⁵ Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2019-67 and should be submitted on or before April 22, 2020. Rebuttal comments should be submitted by May 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission Investor Advisory Committee will hold a public meeting on Thursday April 2, 2020, by remote means and/or at the Commission's headquarters, 100 F St. NE, Washington, DC 20549.

PLACE: The meeting will begin at 4:00 p.m. (ET) and will be open to the public. The meeting will be conducted by remote means and/or at the Commission's headquarters, 100 F St. NE, Washington, DC 20549. Members of the public may watch the webcast of the meeting on the Commission's website at www.sec.gov.

⁵⁶ 17 CFR 200.30-3(a)(57).