the Commission believes that, by improving LCH SA's ability to assess and validate the CDS Margin Framework, the changes described in Section II.B above should help to ensure the continued performance of the CDS Margin Framework and, therefore, LCH SA's ability to calculate margin using the CDS Margin Framework. For similar reasons, the Commission believes the changes described in Section II.C above should improve the CDS Margin Framework, and LCH SA's ability to calculate margin using the CDS Margin Framework, by correcting drafting errors.

Because they should improve LCH SA's ability to calculate margin using the CDS Margin Framework, the Commission believes that the changes described in Section II.B and Section II.C above should enhance LCH SA's ability to use margin to avoid losses that could result from miscalculating the risks associated with clearing transactions. The Commission further believes that these losses could negatively affect LCH SA's ability to clear and settle transactions and safeguard funds. Therefore, the Commission believes that by improving LCH SA's ability to avoid losses that could result from mismanaging the risks associated with clearing transactions, these aspects of the proposed rule change should promote the prompt and accurate clearance and settlement of CDS contracts and transactions and assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible.

For these reasons, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.[12]

B. Consistency With Rule 17Ad–22(e)(6)(i)

Rule 17Ad–22(e)(6)(i) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[13] As discussed above, the Commission believes the changes to the CDS Margin Framework described in Section II.A above should facilitate LCH SA's clearing of CDS contracts on the ESG Index by modifying LCH SA's margin calculations to take into account the risks of clearing such contracts. The Commission therefore believes these changes should help to ensure that LCH SA's margin system considers, and produces margin levels commensurate with, the risks and particular attributes of CDS contracts on the ESG Index.

Moreover, as discussed above, the Commission believes the changes described in Section II.B above should improve LCH SA's ability to assess and validate the CDS Margin Framework. The Commission further believes this aspect of the proposed rule change should help LCH SA to identify any possible errors in, and make improvements to, the CDS Margin Framework. Similarly, as discussed above, the Commission believes the changes described in Section II.C above should improve the CDS Margin Framework by correcting drafting errors. The Commission further believes this aspect of the proposed rule change should help resolve possible errors in applying the CDS Margin Framework and reduce the possibility for confusion or mistakes in using the CDS Margin Framework. Finally, by helping to improve the CDS Margin Framework, resolve possible errors, and reduce the possibility for confusion or mistakes, the Commission believes that the changes described in Section II.B and Section II.C above should help to ensure that LCH SA's margin system considers, and produces margin levels commensurate with, the risks and particular attributes of the transactions cleared by LCH SA.

For these reasons, the Commission finds that the proposed rule change is consistent with Rule 17Ad-22(e)(6)(i).[14]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act[15] and Rule 17Ad–22(e)(6)(i) thereunder.[16]

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Act[17] that the proposed rule change, as modified by Amendment No. 1 (SR–LCH–SA–2020–002), be, and hereby is, approved.[18]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–19191 Filed 8–31–20; 8:45 am]

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[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] 17 CFR 240.17Ad–22(e)(6)(i).

[14] 17 CFR 240.17Ad–22(e)(6)(i).

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] 17 CFR 240.17Ad–22(e)(6)(i).

[17] 15 U.S.C. 78s(b)(2).

[18] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89684; File No. SR–NYSE–2019–67]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order 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

August 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 relating 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] On March 26, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the

[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) (''Original Notice''). Comments received on the proposal are available on the Commission's website at: *https://www.sec.gov/comments/sr-nyse-2019-67/srnyse2019-67.htm.*

[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.

proposed rule change, as modified by Amendment No. 1.[6] 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.[7] On June 24, 2020, the Commission extended the time period for approving or disapproving the proposal to August 26, 2020.[8] The proposed rule change, as modified by Amendment No. 2, was published for comment in the **Federal Register** on June 30, 2020.[9] The Commission is approving the proposed rule change, as modified by Amendment No. 2.

II. Description of the Proposal, as Modified by Amendment No. 2

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.[10] 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 statement [11] filed solely for the purpose of allowing existing shareholders to sell their shares.[12] 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.'' [13] In addition, 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 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 Listing'').[14] 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.[15]

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'').[16] 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.[17]

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.[18] 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.[19]

[6] *See* Securities Exchange Act Release No. 88485 (March 26, 2020), 85 FR 18292 (April 1, 2020) (''OIP'').

[7] Amendment No. 2 to the proposed rule change revised the proposal to, among other things, (1) delete the proposed changes to Section 102.01A of the Manual that would have provided additional time under certain circumstances for companies listing in connection with a direct listing to meet the initial listing distribution standards; (2) add provisions specifying how companies listing in connection with a direct listing would qualify for listing if it includes both sales of securities by the company and possible sales by selling shareholders; (3) add a new order type for companies to use when selling securities in a direct listing and describe how such companies would participate in a direct listing auction; and (4) remove references to direct listing auctions from Rule 7.35C, Exchange-Facilitated Auctions. Amendment No. 2 to the proposed rule change is available on the Commission's website at *https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967-7332320-218590.pdf.*

[8] *See* Securities Exchange Act Release No. 89147 (June 24, 2020), 85 FR 39226 (June 30, 2020). The Commission designated August 26, 2020, as the date by which it should either approve or disapprove the proposed rule change.

[9] See Securities Exchange Act Release No. 89148 (June 24, 2020), 85 FR 39246 (June 30, 2020) (''Notice'').

[10] *See* Section 102.01B, Footnote (E) of the Manual.

[11] The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (''Securities Act'').

[12] *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) (''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).

[13] *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.*

[14] *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.*

[15] *See* proposed Section 102.01B, Footnote (E) of the Manual.

[16] *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.

[17] *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.

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

[19] *See* proposed Section 102.01B, Footnote (E) of the Manual. The Exchange states that, for example,

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According to the Exchange, a company may list on the Exchange 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 under the proposed market value of publicly-held shares requirements.[20] 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.[21] 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.[22] 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.[23] 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.[24]

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 shareholders of round lots 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.[25]

The Exchange has proposed a new order type to be used by the issuer in a Primary Direct Floor Listing and has proposed rules regarding how that new order type would participate in a Direct Listing Auction.[26] 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.[27] 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 registration statement; (4) an IDO Order may not be cancelled or modified; and (5) an IDO Order must be executed in full in the Direct Listing Auction.[28] 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.[29] 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.[30] 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.[31] 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 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.[32]

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.[33] The Exchange has proposed that an IDO Order would be guaranteed to participate in the Direct Listing Auction at the Auction Price.[34] If the limit price of the IDO Order is equal to the Auction Price, the IDO Order would have priority at that price.[35] 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.[36]

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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, *supra* note 9, 85 FR at 39247.

[20] *See* Notice, *supra* note 9, 85 FR at 39250.

[21] *See* Notice, *supra* note 9, 85 FR at 39250.

[22] *See* Notice, *supra* note 9, 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.*

[23] *See* Notice, *supra* note 9, 85 FR at 39247.

[24] *See* Notice, *supra* note 9, 85 FR at 39247.

[25] *See* Notice, *supra* note 9, 85 FR at 39247.

[26] 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.''

[27] *See* proposed Rule 7.31(c)(1)(D). *See also* Rule 7.31(a)(2) for the definition of ''Limit Order.''

[28] *See* proposed Rule 7.31(c)(1)(D)(i)–(v).

[29] ''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, *supra* note 9, 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.''

[30] *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).

[31] *See* Notice, *supra* note 9, 85 FR at 39249.

[32] *See* Notice, *supra* note 9, 85 FR at 39249.

[33] *See* Rule 7.35A(h)(1) and (2).

[34] *See* proposed Rule 7.35A(h)(4).

[35] *See* proposed Rule 7.35A(h)(4).

[36] *See* Notice, *supra* note 9, 85 FR at 39249.

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 before a security opens if the Auction Price is anticipated to be a change of more than the Applicable Price Range [37] from a specified Indication Reference Price.[38] Under the proposal, 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.[39] 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.[40] 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.[41]

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.[42]

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 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.[43] 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.[44] 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.[45] 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 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.[46]

Finally, the Exchange has proposed to remove references to Direct Listing Auctions from Rule 7.35C, which concerns Exchange-facilitated auctions.[47] 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.[48]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[49] In particular, 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,[50] 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.

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.[51]

[37] 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).

[38] *See* Rule 7.35A(d)(1)(A).

[39] *See* proposed Rule 7.35A(d)(2)(A)(iv).

[40] *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.*

[41] *See* Notice, *supra* note 9, 85 FR at 39249.

[42] *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, *supra* note 9, 85 FR at 39248, n.22.

[43] *See* Notice, *supra* note 9, 85 FR at 39249.

[44] *See* Notice, *supra* note 9, 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'').

[45] *See* Notice, *supra* note 9, 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.

[46] *See* proposed Rule 7.35A, Commentary .10.

[47] *See* proposed Rule 7.35C(a), (a)(3), (b)(1), and (b)(3).

[48] *See* Notice, *supra* note 9, 85 FR at 39249.

[49] 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).

[50] 15 U.S.C. 78f(b)(5).

[51] 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.,* NYSE 2018 Order, *supra* note 12, 83 FR at 5653, n.53; 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 has stated that adequate listing standards, by promoting fair and orderly markets,

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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.[52] 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.[53]

Several commenters expressed support for the proposed expansion of direct listings to permit a primary offering.[54] 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 they protect the integrity of the markets and are fair and clear to investors, using transparent processes.[55] 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.[56]

The Commission believes that a number of the changes set forth in Amendment No. 2 support a finding that the proposal is consistent with the Act. More specifically, the Commission believes that the following aspects result in a proposal for a Primary Direct Floor Listing that 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 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 of 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.

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.'' [57] 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, as set forth by the issuer in its registration statement.[58] 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.[59]

The Exchange's 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. The proposed requirements are comparable to or higher than the aggregate market value of publicly-held shares required by the Exchange for initial listing in other contexts.[60] 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 higher than the $40 million minimum market value requirement for IPOs [61] and comparable to the $100 million and $250 million minimum market value requirements for Selling Shareholder

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, *supra* note 12, 83 FR at 5653, n.53; Securities Exchange Act Release Nos. 87648 (December 3, 2019), 84 FR 67308, 67314, n.42 (December 9, 2019) (SR–NASDAQ–2019–059); 88716 (April 21, 2020), 85 FR 23393, 23395, n.22 (April 27, 2020) (SR–NASDAQ–2020–001).

[52] *See* Section 102.01B, Footnote (E) of the Manual. *See also* NYSE 2018 Order, *supra* note 12, 83 FR at 5654.

[53] *See* NYSE Listed Company Manual Section 102.01B, Footnote (E) of the Manual which states in part 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.

[54] *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 Abrahimzadeh and Russell Chong, Co-Heads, U.S. Equity Capital Markets, Citigroup Capital 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''); Letter from Burke Dempsey, Executive Vice President Head of Investment Banking, Wedbush Securities (April 20, 2020) (''Wedbush Letter'').

[55] *See* Citigroup Letter, *supra* note 54. 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.*

[56] *See* Goldman Sachs Letter, *supra* note 54. 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, *supra* note 54, at 1; Wedbush Letter, *supra* note 54.

[57] Notice, *supra* note 9, 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 asserts 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, *supra* note 9, 85 FR at 39247.

[58] *See* Notice, *supra* note 9, 85 FR at 39247 and note 19, *supra,* and accompanying text.

[59] *See* Citadel Letter, *supra* note 54, at 1.

[60] *See* Section 102.01B of the Manual.

[61] In addition to the $40 Million standard, the Exchange's current listing standards require an aggregate market value of publicly held shares of $100 million for companies that list other than at the time of an IPO, spin-off, or initial firm commitment underwritten public offering. *See* Section 102.01B of the Manual.

Direct Floor Listings.[62] The Commission further believes that 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 given that, as described below, the Primary Direct Floor Listing will not proceed at a lower price.

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 stated that the Exchange had not explained how its opening auction rules would apply in a Primary Direct Floor Listing.[63]

In Amendment No. 2, the Exchange proposed 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, 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.[64] The Commission believes that the IDO Order and related clarifications proposed by the Exchange assure that the method by which the issuer participates in the opening auction is clearly defined, that the issuer is not in a position to improperly influence the price discovery process, and that the auction is otherwise consistent with the disclosures in the registration statement. The Commission further believes 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, and this would assure that both the issuer and better priced sell orders are able to sell securities in the auction.[65] The Commission believes that the IDO Order requirements described above help to mitigate concerns about the price discovery process in the opening auction and would provide some reasonable assurance that the opening auction and subsequent trading promote fair and orderly markets and that the proposed rules are designed to prevent manipulative acts and practices, and protect investors and the public interest 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 adviser to an issuer and the DMM that any consultations with the financial adviser must be conducted in a manner consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements.[66] The Exchange also represents that it has retained FINRA to monitor such compliance and that it plans to issue regulatory guidance in this area. The Commission believes that these are reasonable steps to help assure 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.

Finally, 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.[67] One commenter believed that approval of the proposal would likely increase the number of companies that forego the traditional IPO process,[68] and significantly increase the risks for retail investors, including by circumventing the due diligence process.[69] This commenter expressed

[62] One commenter raised a concern that the Exchange does not provide any data to support its conclusion that there would be adequate liquidity for a security listing in connection with a Primary Direct Floor Listing. *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (July 16, 2020) (''CII Letter III''), at 5. While the Exchange did not provide the data specifically referenced by the commenter, as noted above, the proposed minimum market value requirements are comparable to or higher than those applied by the Exchange in other contexts. *See supra* notes 16–17 and accompanying text. The existing $40 million and $100 million market value requirements in Section 102.01B of the Manual are longstanding requirements that have supported the listing of companies on the Exchange that are suitable for listing over many years. The Commission also 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, *supra* note 12, 83 FR at 5654).

[63] 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, *supra* note 54, at 1.

[64] 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.

[65] In addition, the Commission believes that the proposed changes to Rule 7.35C to remove the references to Direct Listing Auction would assure 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 described above to conduct the auction have been met. The Commission also believes that 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 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.

[66] *See* Notice, *supra* note 9, 85 FR at 39249, and proposed Rule 7.35A, Commentary .10. *See also supra* note 45 and accompanying text noting that the Exchange will be issuing 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 not inconsistent with Regulation M and other anti-manipulation provisions of the federal securities laws and NYSE Rule 2020.

[67] *See, e.g.,* Letter from Christopher A. Iacovella, Chief Executive Officer, ASA (December 12, 2019) (''ASA Letter I''), at 1.

[68] The Commission acknowledges the possibility that some companies may pursue a Primary Direct Floor Listing instead of a traditional IPO. The Commission also believes that some companies may pursue a Primary Direct Floor Listing that would not otherwise go public, or that would wait to pursue a traditional IPO until a later stage of development, both of which would potentially reduce opportunities for public shareholders to share in growth opportunities. Thus, the Commission believes that the proposed rule change may result in additional investment opportunities while providing companies more flexible options for becoming publicly traded.

[69] *See* ASA Letter I, *supra* note 67, 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

Continued

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 are required to hold the regulatory capital necessary to act as a de facto underwriter.[70]

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 listing companies may have fewer legal protections than investors in IPOs.[71] 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.[72]

On the other hand, one commenter supported direct listings as a suitable option for certain issuers, and took the position that ''[d]ue diligence is already ably done by the legions of experienced accountants, lawyers, consultants, rating agencies, etc.'' [73]

In response, the Exchange stated that it disagrees that the absence of underwriters creates a loophole in the regulatory regime that governs offerings of securities to the public.[74] 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.[75] 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.[76] 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.[77]

As to the comments concerning underwriter liability and due diligence, the Commission agrees, as noted by the Exchange, that the Securities Act does not require the involvement of an underwriter in registered offerings. Moreover, given the broad definition of ''underwriter'' [78] in the Securities Act, a financial advisor to an issuer engaged in a Primary Direct Floor Listing may, depending on the nature and extent of the financial advisor's activities and on the facts and circumstances, be deemed a statutory ''underwriter'' with respect to the securities offering, with attendant underwriter liabilities.[79] In addition, given the broad definition of underwriter, required involvement of financial advisors, and the financial advisors' reputational interests and potential liability, including as statutory underwriters, the Commission believes that the financial advisors to issuers in Primary Direct Floor Listings will be incentivized to engage in robust due diligence, notwithstanding the lack of a firm commitment underwriting agreement. 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 and other gatekeepers, with their attendant liability, play important roles in assuring that disclosures provided to investors are materially accurate and 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. Given that

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).

[70] *See* ASA Letter I, *supra* note 67, at 2; Letter from Christopher A. Iacovella, Chief Executive Officer, American Securities Association (March 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 (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.'' Letter from Anonymous (January 3, 2020). And 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). The Commission acknowledges these concerns, but believes the proposed rule change is consistent with investor protection in light of the fact that Primary Direct Floor Listings will be registered under the Securities Act, and that such registration statements will require both bona fide price ranges and audited financial statements prepared in accordance with either U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board.

[71] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 16, 2020) (''CII Letter I''), at 2; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (April 16, 2020) (''CII Letter II''), at 2; CII Letter III, *supra* note 60, at 3–4, 6.

[72] *See* CII Letter I, *supra* note 71, at 2–3; CII Letter II, *supra* note 71, at 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.'' CII Letter I, *supra* note 71, 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; CII Letter III, *supra* note 62, at 4.

[73] Wedbush Letter, *supra* note 54.

[74] *See* Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel & Corporate Secretary, NYSE (March 16, 2020) (''NYSE Response Letter''), at 2.

[75] *See* NYSE Response Letter, *supra* note 74, at 2–3.

[76] *See* NYSE Response Letter, *supra* note 74, 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.

[77] *See* NYSE Response Letter, *supra* note 74, 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 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.*

[78] 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.''

[79] The Commission does not agree, as asserted by one commenter, that financial advisors, exchanges, control shareholders, and directors involved in a direct listing will automatically incur statutory underwriter liability under the Securities Act. *See* ASA Letter I, *supra* note 67, at 2; ASA Letter II, *supra* note 70, 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).

the proposed rule change will require all Primary Direct Floor Listings to be registered under the Securities Act, and in light of the fact that the existing liability framework under the Securities Act for registered offerings will apply to all such Primary Direct Floor Listings, the Commission concludes the proposed rule change is consistent with investor protection.

The Commission further believes that Primary Direct Floor Listings may 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. 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, some believe that Primary Direct Floor Listings may be a more accurate way to price securities offerings.[80] In a firm commitment underwritten offering, the offering price is decided through negotiations between the issuer and the underwriters for the offering. The opening auction in a Primary Direct Floor Listing provides for a different price discovery method for initial public offerings which some believe may result in more appropriate pricing for the offered shares, a potential benefit to existing and potential investors. The Commission believes that the proposed rule change, by providing an opening process in which buy and sell orders are matched, in accordance with the proposed rules, to determine the offering price, may allow for efficiencies in the way IPOs are priced and allocated without sacrificing investor protection.

Commenters also raised concerns about shareholder claims pursuant to Section 11 of the Securities Act. The Commission notes that this issue is not exclusive to Primary Direct Floor Listings but rather is a recurring issue, particularly in the context of aftermarket securities purchases. Purchasers in a registered offering may face difficulty tracing their shares back to the registration statement whenever a company conducts a registered offering for less than all of its shares. Thus, even in the context of traditional firm commitment offerings, the ability of existing shareholders who meet the conditions of Rule 144 to sell shares on an unregistered basis may result in concurrent registered and unregistered sales of the same class of security at the time of an exchange listing, leading to difficulties tracing purchases back to the registered offering.[81] Although judicial precedent on this topic may continue to evolve, the Commission is aware of only one court that has considered this issue in the direct listing context to date, and that court ruled in favor of allowing the plaintiffs to pursue Section 11 claims.[82] The Commission does not believe that the proposed rule change to permit Primary Direct Floor Listings poses a heightened risk to investors, and finds that the proposed rule change is consistent with investor protection.

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Exchange Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[83] that the proposed rule change (SR–NYSE–2019–67), as modified by Amendment No. 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[84]

Jill M. Peterson,

Assistant Secretary.

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[80] *See* Matt Levine, *Soon Direct Listings Will Raise Money,* Bloomberg, *available at https://www.bloomberg.com/opinion/articles/2019-11-27/soon-direct-listings-will-raise-money.*

[81] In a Primary Direct Floor Listing, all company shares will be sold in the opening auction, making it potentially easier to trace those shares back to the registration statement than in other contexts.

[82] *See Pirani* v. *Slack Techs., Inc.,* 2020 U.S. Dist. LEXIS 70177 (N.D. Cal., April 21, 2020).

[83] 15 U.S.C. 78s(b)(2).

[84] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89679; File No. SR–FINRA–2020–024]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Delete the FINRA Order Audit Trail System (OATS) Rules

August 26, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 14, 2020, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing to eliminate the Order Audit Trail System (''OATS'') rules in the FINRA Rule 7400 Series and FINRA Rule 4554 (Alternative Trading Systems—Recording and Reporting Requirements of Order and Execution Information for NMS Stocks) once members are effectively reporting to the consolidated audit trail (''CAT'') and the CAT's accuracy and reliability meet certain standards, as described below. The Rule 7400 Series and Rule 4554 are collectively referred to herein as the ''OATS Rules.''

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

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

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.