Council of Institutional Investors®
The voice of corporate governance

Via Email

October 21, 2021

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number SR-NASDAQ-2021-045

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with more than $40 trillion in assets under management.[1]

The Order

The purpose of this letter is to respond to the Securities and Exchange Commission (SEC or Commission) solicitation of comments with respect to the *Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Certain Pricing Limitations for Companies Listing in Connection With a Direct Listing Primary Offering* (Order).[2] Under the proposed rule change, the Nasdaq Stock Market LLC (Exchange) would:

> [M]odify the rules concerning the opening transaction on the first day of trading for a Direct Listing with a Capital Raise so that the opening transaction is not constrained by the Pricing Range Limitation, which limits the price of the opening transaction to the price range disclosed in the issuer's effective registration statement. Instead, the proposal would allow the opening transaction to proceed at

[1] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.

[2] Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Modify Certain Pricing Limitations for Companies Listing in Connection With a Direct Listing Primary Offering, Exchange Act Release No. 93, 119, 86 Fed. Reg. 54,262, 54,267 (Sept. 24, 2021), https://www.federalregister.gov/documents/2021/09/30/2021-21208/self-regulatory-organizations-the-nasdaq-stock-market-llc-order-instituting-proceedings-to-determine.

> a price up to 20% above or below the disclosed price range or at a price higher than 20% above the disclosed price range if the issuer certifies that the offering price would not materially change the issuer's disclosures in its effective registration statement.[3]

As the leading voice for effective corporate governance and strong shareholder rights, CII believes the SEC should disapprove the Exchange proposal.

The SEC Does Not Have A Sufficient Basis to Make an Affirmative Finding

The Commission has indicated that a proposal must be disapproved if the SEC does not have a sufficient basis to make an affirmative finding that a proposed rule change is consistent with Section 6(b)(5) of the Securities and Exchange Act of 1934 (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.[4]

CII notes that the SEC staff has included five references in the Order indicating that the Exchange's proposed rule change may not be consistent with the protection of investors under Section 6(b)(5) of the Act.[5] We are particularly concerned about the following SEC staff observations that the Exchange proposal lacks required company disclosure of material information about the final offering price prior to the time of the sale of shares in a direct listing with a capital raise:

> [U]nder the proposal, the Exchange would release a security for trading in a Direct Listing with a Capital Raise if the price calculated by the Nasdaq Halt Cross is within 20% of the disclosed price range (or more than 20% above the disclosed price range if the company provides the required certification). Under the Exchange's proposal, it is unclear how companies would be able to disclose *any* additional material information related to the final offering price prior to the time of sale. . . . The Exchange has not explained how an issuer would be able, under the proposed rule, to provide *any disclosure* necessary to avoid *any material misstatements or omissions*, including what methods an issuer may use to provide such disclosures to potential purchasers. . . . The Exchange has not explained how

[3] 86 Fed. Reg. at 54,262, 54,267.
[4] See National Securities Exchanges § 6(b)(5), 15 U.S.C. §78(f)(b)(5) (1934), available at https://www.law.cornell.edu/uscode/text/15/78f ("The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange").
[5] 86 Fed. Reg at 54,265-66.

> the potential inability of an issuer to convey important material pricing information to investors in a timely manner under its proposal would be consistent with the investor protection requirements under Section 6(b)(5) of the Exchange Act.[6]

Our sensitivity to this lack of disclosure in the Exchange proposal is heighted by our broader concerns about the loss of investor protections relating to direct listings generally,[7] including the difficulties of investors in bringing claims under Section 11 of the Securities Act of 1933 for material misstatements or omissions in direct listing registration statements.[8] We note our concerns about the potential lack of Section 11 liability in direct listings was recently echoed by the U.S. Court of Appeals for the Ninth Circuit in *Pirani v. Slack*.[9] Writing for the majority, Judge Jane A. Restani opined:

> While there may be business-related reasons for why a company would choose to list using a traditional IPO (including having the IPO-related services of an investment bank), from a liability standpoint it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing. Moreover, companies would be incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements.[10]

The panel's ruling in favor of investors found "that, even though [an investor] . . . could not determine if he had purchased registered or unregistered shares in a direct listing, he had standing to bring a claim under [Section 11] . . ."[11] However, we note that following the decision, prominent corporate law firms, including those that have promoted direct listings as a going public vehicle that "deter[s] private plaintiffs from bringing claims under Section 11."[12] have informed clients that the panel's ruling may be overturned on appeal,[13] may only be binding

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[6] *Id.* at 54,265-66 (footnote omitted & emphasis added).
[7] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission 2-6 (Oct. 8, 2021), https://www.sec.gov/comments/sr-nasdaq-2020-057/srnasdaq2020057-7888884-224228.pdf (describing CII concerns about liability, investor protection, and corporate governance arising from proposed direct listings with a capital raise)..
[8] *See, e.g.*, Petition of Council of Institutional Investors for Review of an Order, Issued by Delegated Authority, Granting Approval of a Proposed Rule 8-13 (Sept. 8, 2020) (footnotes omitted), https://www.sec.gov/rules/sro/nyse/2020/34-89684-petition.pdf (describing in detail how direct listings with a capital raise "compounds the problems shareholders face in tracing their share purchases to a registration statement.").
[9] Pirani v. Slack (9th Cir. Sept. 20, 2021), https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/20/20-16419.pdf.
[10] *Id.* at 16 (footnotes omitted).
[11] *Id.* at 3.
[12] *See, e.g.*, Andrew Clubock, Latham & Watkins et al., Complex and Novel Section 11 Liability Issues of Direct Listings, Corp. Couns. 1 (Dec. 20, 2019), https://www.lw.com/thoughtLeadership/section-eleven-liability-direct-listings ("In this article, we discuss another important advantage of the direct listing: the potential to deter private plaintiffs from bringing claims under Section 11 of the Securities Act of 1933, which imposes strict liability for material misstatements or omissions in registration statements").
[13] *See, e.g.*, Alert Memorandum, Divided Ninth Circuit Finds Securities Act Standing for Purchasers in Slack's Direct Listing, Cleary Gottlieb 5 (Sept. 30, 2021), https://www.clearygottlieb.com/news-and-insights/publication-listing/divided-ninth-circuit-finds-securities-act-standing-for-purchasers-in-slacks-direct-

upon district courts in the Ninth Circuit,[14] or may be distinguishable in future cases.[15] Thus, investors in direct listings, including direct listings with a capital raise, are likely to continue to have fewer legal rights than investors in a traditional initial public offering.

For all these reasons, we believe the SEC does not have a sufficient basis to make an affirmative finding that the Exchange proposal is consistent with Section 6(b)(5) of the Act. We, therefore, respectively request that the Exchange proposal be disapproved.

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We appreciate your consideration of our comments. Please let me know if you have any questions.

Sincerely,

Jeff Mahoney

Jeffrey P. Mahoney
General Counsel

listing#:~:text=On%20September%2020%2C%202021%2C%20a,purchases%20to%20the%20registration%20statement ("Because of this fundamental misunderstanding, fueled by the policy-driven nature of the majority's ruling, it is possible the decision could be reversed on review or rejected by other courts.").

[14] *See, e.g.,* Client Alert, Commentary, Ninth Circuit's *Slack* Decision Forges New Ground for Securities Act Liability Related to Direct Listings, Latham & Watkins 3 (Sept. 22, 2021) (on file with CII) ("the panel's decision will be binding upon district courts in the Ninth Circuit in cases involving direct listings that are materially similar to Slack's direct listing ").

[15] *Id.* ("As the specifics of any given listing may be distinguishable from Slack's listing, practitioners should be attuned to ways in which the panel's decision can be distinguished.").