clearingbid™
A New Issue Market Solution

January 21, 2020

Via E-Mail (rule-comments@sec.gov)
Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE Washington, D.C. 25049

Re: Release No. 34-87821; File No. SR-NYSE-2019-67: Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings

Dear Ms. Countryman:

ClearingBid, Inc. (together with its affiliates, "ClearingBid") respectfully submits this comment letter in response to the New York Stock Exchange LLC (the "NYSE" or "Exchange") filing of a proposed rule change to amend Chapter One of the Listed Company Manual to modify the provisions relating to Direct Listings (the "Proposal"). We support the Proposal; however, we would like to offer certain observations related to the ongoing debates regarding Direct Listings versus traditional underwritten public offerings, or IPOs. Potential changes in regulations for Direct Listings will impact issuing companies, selling shareholders and new investors. We believe the Securities and Exchange Commission (or the "SEC") may benefit from hearing some of these observations given that Direct Listings are likely to become more prevalent, especially if combined with Primary Listings.

Our suggestions related to Direct Listings and IPOs can be summarized as follows:

1. 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;

2. Direct Listings offer certain benefits to multiple constituents but they expose new investors to the impact of unpredictable selling behavior by selling shareholders;

3. Managed Direct Listings, whereby a technology-enabled clearing process provides transparency to all participants and ensures fair market-clearing pricing, is superior to both traditional IPOs and the Direct Listing approaches that have been used to date; and

4. As the market ultimately moves to "combination offerings," whereby both primary and secondary shares are offered simultaneously, the need for transparent clearing processes will become even more important and evident.

Summary Observations

With traditional underwritten public offerings, in which the customary practice aims to underprice IPOs while making guesses about post-market demand, the underwriters' objective is to see the new issues trade upward in the secondary market. This desired "IPO pop" is one justification for the underwriters to oversell the offering and create an initial short position with which facilitate supporting

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bids in the aftermarket via the exercise of the "greenshoe." In contrast, a Selling Shareholder Direct Floor Listing (aka a Direct Listing) offers the benefit of determining an opening price at which supply matches demand (i.e., an equilibrium price at which to open the stock in a "fair and orderly" way) without conducting an IPO. Consequently, in the case of a Direct Listing, the breadth of buyer demand above the opening price is likely to be less than for a traditional IPO since both buyer and seller demand is presumed to be satisfied at this equilibrium price. Tepid buying at higher prices after the Direct Listing is perhaps one of the reasons why certain Direct Listings to date have experienced relatively poor aftermarket price performance. Price drops can come at the expense of new investors who buy shares on the opening or immediately thereafter in the aftermarket.

Combining (or substituting) a Selling Shareholder Direct Floor Listing with (or for) a Primary Direct Floor Listing (aka a Primary Direct Listing) could exacerbate some of the pricing dynamics above when compared to a traditional IPO underwriting, which can be further compounded by the overhang effect of having additional, unrestricted shares available for sale by existing shareholders, absent the use of investor lock-ups that are typical with an IPO.

Selling Shareholder Direct Floor Listings and Primary Direct Floor Listings may provide issuers and sellers with the option to avoid underwriting fees typically associated with IPOs; however, concerns have been expressed that such offerings can result in the loss of certain safeguards typical of conventional IPOs. These can include more extensive due diligence by underwriters, and investor oversight provided by the underwriters and brokers typically responsible for marketing an offering, including suitability testing and the adherence to know your customer, or KYC, rules.

The ability to gain visibility on true, public interest for a newly issued security (i.e., one that doesn't already have an existing secondary market) can be handicapped by relying principally on institutional demand in which most investors, including "Main Street" investors, have (i) limited visibility on the initial price indications (in the case of a Direct Listing) until time frames closer to the final pricing, along with some constraints in their ability to submit order requests ahead of the final offering price, and/or (ii) limitations placed on their available information outside of the company's guidance and the registration statement when compared to a typical IPO. In the latter case, the underwriters and selling group are typically incentivized and available to counsel their clients on the merits of the investment and investor suitability.

Background

The SEC is currently reviewing the Proposal to afford companies with the opportunity to conduct a Selling Shareholder Direct Floor Listing and/or a Primary Direct Floor Listing without the need for an underwritten public offering, subject to meeting certain initial offering size criteria (e.g., minimum recommended liquidity thresholds) and meeting ongoing listing parameters. Except in limited circumstances, to date, companies that have chosen to conduct a Direct Listing have been unable to also sell primary shares to the public in order to raise capital for the company. Absent a traditional underwritten public offering, under the current Exchange Proposal, listing a company's securities using either a Selling Shareholder Direct Floor Listing and/or a Primary Direct Floor Listing is expected to achieve sufficient market liquidity and breadth in ownership in the secondary market based upon the NYSE's proposed market capitalization parameters.

The two most visible companies that have chosen to use Direct Listings to date have been Spotify Technology SA and Slack Technologies. Both companies commanded relatively high valuations in the private market before listing to trade publicly, each benefitted from relatively high public awareness and neither was dependent upon raising new proceeds in their offerings. Investors were attracted to the opportunity to be able to buy the shares of these two companies, once publicly listed, and each company achieved successful trade results on behalf of their existing private owners/sponsors who desired liquidity from the outset. To this end, these Direct Listings allowed the companies to save on underwriting fees (but not advisory fees), conduct their own management presentations while providing the market with earnings guidance once the registration statements were effective, and avoid the traditional lock-ups that would otherwise prevent insiders from selling at the offering.

Notwithstanding that both Spotify and Slack resulted in successful Direct Listings at the time that each company's shares were priced to trade publicly, and their secondary market liquidity has remained robust, both companies subsequently saw their shares trade below their respective opening prices, where they essentially remain today. As a result, and in the case of Slack, the SEC enforcement staff is seeking information on Slack's opening, and shareholder lawsuits have been filed against the company alleging that it failed to fully disclose certain risks when it sold securities.

Opening Price Limitations and the Impact on the Secondary Market

In contrast to traditional underwritten public offerings, Selling Shareholder Direct Floor Listings rely upon a Designated Market Maker, or DMM, and the financial advisors to ascertain who may be sellers and who may be buyers of the company's securities on the offering in order to determine a preliminary opening price and, subsequently, the final opening price with an offering. While registered selling shareholders may or may not elect to sell their shares covered by the registration statement, increasing bids at higher prices will attract a larger number of potential sellers, with the potential for increased volume and public float. This, in turn, can prompt buyers who are interested in accumulating larger positions from the outset to bid for the shares, up to a price point, after which buyer demand begins to taper off. Once the DMM and the advisors determine the price at which to cross the opening trade, following auction principals that give priority to the time of entry and the price of each order, the first print, or opening trade, takes place.

Direct Listings employ some of the benefits of price discovery, with the assistance of the DMM and the advisors, to determine where supply meets demand with any given offering, and where the first print should occur. Given that most sellers are unrestricted, the potential exists to see a substantial overhang in securities still available for sale (i.e., shares held by existing investors who are not subject to a lock-up provision), which can result in greater selling pressure in the aftermarket. Consequently, the upside potential for investors who purchase shares at the opening or in the secondary market may be impacted, thereby transferring the pricing risk from the sellers to the buyers.

The Merits of Providing a Primary Direct Floor Listing

While a Primary Direct Floor Listing would allow a company to raise additional proceeds through the sale of primary shares, the mix and size of combining a secondary and primary share offering can be unknown since the registered selling shareholders may or may not elect to sell their shares covered by the registration statement and there are no restrictions placed on their ability to sell their shares at the offering or in the secondary market. While ownership dilution only occurs from the sale of primary shares being sold by a company, which amount is typically fixed and disclosed in the company's registration statement, without having lock-ups in place for existing shareholders, it is possible to see more secondary shares become available for sale in the aftermarket. This overhang effect, and potential for additional aftermarket market volatility, could come at the expense of the investors and, potentially, the issuing company, when combined with a Primary Direct Floor Listing. Given the relatively larger positions and market values held by the institutional investors in private companies that have achieved substantially high valuations prior to going public (e.g., "unicorns"), the effects may be exacerbated under these circumstances. This is a fundamental reason why underwriters typically require certain shareholders to agree to lock-ups when underwriting public offerings, which is not the case with Direct Listings.

Primary Direct Floor Listing May Not Be a Panacea for Traditional IPOs

Until recently, many sponsors of private companies, including venture investors, who chose to go public were less concerned about the dilution resulting from underpricing an IPO, or seeing the IPO "pop," because they were unable to sell their shares until their lock-ups came off, typically 180 days later. It was at that point, when the existing holders were able to sell their shares, that these investors wanted to see the stock prices higher. Hence, the IPO pop in price was less controversial. Today, however, given the relatively high valuations of many of the companies looking to go public, particularly unicorns, existing shareholders want to be able to realize liquidity from their ownership positions sooner, if not immediately. From an underwriting and buyers' prospective, allowing existing shareholders to exit upon the offering can be in conflict with asking new investors to buy a company's stock; the inference being that insiders are deemed to know more about a company's prospects than new investors – and why would they be selling when expecting others to buy? While a Primary Direct Floor Listing may mitigate the obligation to pay underwriting fees, with potentially less rigorous due diligence than with an underwritten public offering, limited incentives for financial advisors (whether broker-dealers or registered investment advisors) to counsel their clients on the new issue, and the relative limitations of only having a registration statement with which to assess the merits of the investment, such offerings may create a "buyer beware" environment, especially when an offering consists of both primary shares and selling shareholder shares.

Public Offerings Can Be Exclusionary and, Therefore, Restrict Opportunities for Capital Formation

Whether a Direct Listing of secondary or primary shares, or a traditional underwritten public offering, the new issue market has historically been institutionally dominated. This has occurred at the expense of many companies unable to meet the customary underwriting demands afforded to larger companies, including institutional preferences, and "Main Street" investors who would welcome the opportunity to buy shares on an offering if provided with the opportunity but are typically precluded from doing so. Instead, many investors are relegated to having to buy shares in the secondary market after the public offering. Given that the pricing mechanics with underwritten public offerings can be opaque, and the traditional book-built method of syndication highly subjective and exclusionary, the prospect for seeing more Direct Listings is gaining attention.

Concluding Remarks

The Proposal presupposes that the amendments would not impose a burden on competition but rather would increase competition by providing new pathways for companies which desire to access the public markets. That is an important objective; however, equally important is the goal of broadening new investor participation in the primary offering process while providing pre-IPO shareholders with the option to sell on the offering to help create more market liquidity and establish a larger public float from the outset. It is ClearingBid's view that to achieve optimal outcomes, all investors should have the opportunity to participate in a seamless process that also provides transparency. To this end, under the JOBS Act, a broader range of information can now also be made available for such purposes. This, in turn, could supplement broker-dealer oversight responsibilities, including adhering to KYC rules and suitability testing to benefit the clients. 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 simply the largest institutions. These are the pathways with which to allow more companies to access the public markets, increase capital formation and drive prosperity for all investors.

We remain available to provide additional input on these matters, including insights into ClearingBid's approach with which to achieve some of these expressed objectives. We believe that the timing and opportunities to offer a more inclusive and transparent means for all investors and their financial advisors to participate in these efforts, across a wide range of asset classes, is timely and beneficial, and will only help to evolve and strengthen our capital markets overall.

Sincerely yours,

Matthew B. Venturi

Matthew B. Venturi
Founder & CEO