NYSE

Elizabeth K. King

Chief Regulatory Officer, ICE.
General Counsel & Corporate Secretary, NYSE
11 Wall Street
New York, NY 10005
T+202.661.8948
Elizabeth.King@theice.com

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Via Email

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Securities Exchange Act Release No. 87821 (December 20, 2019). SR-NYSE-2019-67

Dear Ms. Countryman:

In December 2019, the New York Stock Exchange LLC ("NYSE") filed with the Securities and Exchange Commission ("Commission") a proposed rule change to amend the Listed Company Manual's provisions relating to direct listings.[1] The Proposal is currently open for public comment and pending action by the Commission.[2]

Today, the NYSE rules set forth in the Listed Company Manual include initial listing requirements for a company whose common shares were not previously registered under the Securities Exchange Act of 1934 ("Exchange Act") that files a registration statement under the Securities Act of 1933 ("Securities Act"), without a traditional underwritten public offering (such a listing, a "Selling Shareholder Direct Floor Listing"). The Proposal would permit a company to sell shares on its own behalf and thereby raise capital ("Primary Direct Floor Listing"). A Primary Direct Floor Listing would be in addition to, or an alternative to, a Selling Shareholder Direct Floor Listing.

The Proposal to permit Primary Direct Floor Listings has been greeted with enthusiasm by emerging growth companies, other pre-IPO companies, investors and market participants generally who recognize that another method to access public markets than a traditional underwritten public offering would appeal to some companies. At the same

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1 Securities Exchange Act Release No. 87821 (December 20, 2019), 84 FR 72065 (December 30, 2019) (SR-NYSE-2019-67) (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) ("Proposal").

2 See Securities Exchange Act Release No. 88190 (February 13, 2020), 85 FR 9891 (February 20, 2020) (SR-NYSE-2019-67) (notice of designation of a longer period for Commission Action on proposed rule change, as modified by Amendment No. 1).

time, some commenters have raised concerns about Primary Direct Floor Listings and NYSE Direct Floor Listings in general, and have suggested to the Commission that facilitating Primary Direct Floor Listings could in some cases be harmful to investors.

The NYSE appreciates this opportunity to address the concerns that have been raised, which we have paraphrased in italics below.

The absence of underwriters, and underwriter liability, creates a loophole in the regulatory regime that governs the offerings of securities to the public.

This absence of liability in the absence of an underwriter is not a "loophole" that Congress overlooked when it created the Securities Act; it is a design feature of the regulatory regime that has served American investors well for nearly 90 years.

The key difference between a Primary Direct Floor Listing and an underwritten public offering centers on the participation of underwriters. Underwriter involvement is often necessary to the success of an IPO or other public offering because of the role an underwriter can fulfill in identifying potential investors, introducing them to the company, and mediating the bookbuilding and price discovery process. Other than select companies with appropriate financial markets expertise in-house, no other actor in the IPO process has the ability to perform these functions. For companies that require it, the underwriter's role is a valuable service, and one that is priced to reflect its value.

The Securities Act recognizes the important and often critical role of underwriters in the capital formation process. At the same time, it recognizes the conflict of interest facing the underwriter, as the party paid to intermediate between the objectives of the company and the interests of investors. For this reason, when an underwriter acts as a "gatekeeper" to the public markets, as with other gatekeepers, the Securities Act imposes liability to strengthen the gatekeeper's incentive for communications to investors during the offering process to include all material information required by the federal securities laws and not omit facts when omission would render the information provided materially misleading. This potential liability ensures that the underwriter's direct and substantial economic interest in achieving a higher valuation for the company and raising the amount of capital intended by the company and its shareholders is tempered by an incentive for the gatekeeper to take care with the information it uses to market the company's securities.

But the Securities Act does not, and has never, *required* the participation of underwriters in the public capital-raising process, even though it requires the participation of other gatekeepers, including the company's board of directors, its senior management and, crucially, its independent accountants. Involvement by these gatekeepers in the capital-raising process is in fact mandated by the Securities Act. These gatekeepers face the same liability as underwriters for material misstatements in a company's offering documents (in the case of the accountants, with respect to the company's audited financial statements) and have the same economic incentive as underwriters to participate in the diligence process in order to avoid securities law liability.

The Securities Act does not force companies that do not require the services of an underwriter to purchase underwriting services. Today, even without Primary Direct Floor Listings, companies regularly access the public markets for capital-raising and other purposes without using underwriters in, for example, offerings and corporate spin-offs registered on Form 10.

A primary direct listing would circumvent the diligence process, many of the most important investor protections set forth in the Securities Act, and the very reason the Commission was formed: to protect America's retail investors against fraud.

A Primary Direct Floor Listing does not circumvent the diligence process for a public offering; the diligence process is instead the responsibility of the gatekeepers who participate in the transaction. Nor does a Primary Direct Floor Listing deprive investors of any protections under the Securities Act or the Exchange Act; those protections continue to apply in Primary Direct Floor Listings and Selling Shareholder Direct Floor Listings (together, "NYSE Direct Floor Listings") in the same manner as in all public offerings. The key difference, of course, is the absence of an underwriter. But this absence does not indicate that key protections are missing; it simply means that without functions that are not needed in a particular offering, the party that would perform those functions in a traditional IPO is not a target for an investor lawsuit.

Primary direct listings would likely increase the number of companies that forego the traditional IPO process.

This observation is undoubtedly correct, as Primary Direct Floor Listings would, we believe, likely increase the overall number of companies that choose to go public in the United States. Direct listings are not, and will never be, appropriate for all companies. But for a company that has weighed the benefits and drawbacks of an NYSE Direct Floor Listing and concluded that such a listing best serves its interests and the interests of its shareholders, we believe there is no good reason to require that company and its shareholders to hire underwriters. Indeed, such a requirement could simply cause the company to abandon listing and public capital raising plans altogether.

The primary advocates of direct listings are private investors in highly valued "unicorns" that stand to benefit the most from selling their shares directly to the general public. But two high-profile direct listings haven't worked out particularly well for retail investors.

Private investors in highly valued "unicorns" may be advocating for Selling Shareholder Direct Floor Listings, which, as noted above, are already permitted under the NYSE rules. In any case we see no reason to believe that companies that enter the public markets through direct listings will, over time, perform any better or worse than companies that proceed through an underwritten public offering. As is well understood, IPOs carry a certain amount of risk for investors, and it is certainly not the case that an underwritten IPO insulates investors from that risk.

A robust underwriting process would uncover more of a company's vulnerabilities before its shares are offered to the public in the same way it did for a recent high-profile abandoned IPO.

This argument mischaracterizes the facts surrounding companies whose IPOs were abandoned due to adverse market reaction. To date, all such companies sought to access the market through traditional underwritten offerings. The vulnerabilities in these companies' business models became broadly known only after publicly filing a registration statement for an underwritten offering. A company pursuing a Primary Direct Floor Listing would go through the same process of publicly filing a registration statement, and if the company's business model exhibits weaknesses, they will be exposed to the public prior to listing, as with any of the recent high-profile abandoned IPOs.

Direct listings bypass some of the restrictions of standard IPOs, such as lockups that prevent insiders from immediately selling their shares.

IPO underwriter lock-up agreements typically restrict pre-IPO shareholders, and the company itself, from selling shares within the six-month period following pricing. The absence of these lockups in Direct Floor Listings does not create short-term price instability; at most it shifts the timing of such instability from six months after the offering to closer to the time of listing. First, we note that underwriter lockups in IPOs are not part of the federal securities regulatory scheme, and instead are private contracts negotiated between underwriters and pre-IPO shareholders. Second, underwriters require these restrictions for a variety of reasons, one of the more important being the voluntary role played by underwriters in "stabilizing" the price of the shares in the immediate aftermarket, ideally preventing pricing in the aftermarket from falling below the IPO price. Preventing pre-IPO shareholders from selling into the immediate aftermarket shields the underwriters from any need to purchase their shares in the course of stabilization activity. When the lock-up restrictions lapse and the pre-IPO shareholders are permitted to sell their shares, the influx of new supply to the market can cause short-term price instability at a time when the underwriters have long-since ceased any stabilization activities.

One company that went through a direct listing and was later sued by investors has argued in court that investors can't directly trace their shares to the registration statement, and therefore the suit should be dismissed. The company also said the plaintiffs can't seek damages because there was no offering price in its direct listing, which would determine how much money the plaintiffs had lost.

We believe the federal courts are fully capable of weighing the merits of the parties' arguments in pending litigation over direct listings. The outcome of the referenced litigation should have no bearing on the Commission's decision as to whether the Proposal is consistent with the Exchange Act. As discussed above, the Securities Act does not mandate the use of an underwritten offering by a company intent on accessing the capital markets. The methods used by a plaintiff to establish Securities Act liability for offering participants may well vary depending upon the facts of the specific transaction, and securities law liability has always distinguished between investors who purchase in the market and investors who purchase directly from underwriters.

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We appreciate the opportunity to help address the concerns that have been raised concerning our proposed rule change, and would be happy to address any further comments that the Commission, its staff or the public have about the Proposal.

Very truly yours,

Elizabeth K. King

cc: Hon. Jay Clayton, Chairman
Hon. Hester M. Peirce
Hon. Elad L. Roisman
Hon. Allison Herren Lee
Director William Hinman
Director Brett Redfearn