**SECURITIES AND EXCHANGE COMMISSION**

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| **In the Matter of the Petition of:** | ) | |
| | ) | File No. SR-NYSE-2019-67 |
| **The Council of Institutional Investors.** | ) | |

**BRIEF IN SUPPORT OF MOTION TO LIFT STAY**

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The New York Stock Exchange LLC ("NYSE" or the "Exchange") respectfully submits this brief in support of its motion to lift the automatic stay imposed under 17 C.F.R. § 201.431(e).

## PRELIMINARY STATEMENT

This matter relates to proposed changes to NYSE's direct listing rules (the "Rule Changes"), recently approved by the Division of Trading and Markets (the "Division") pursuant to delegated authority after a thorough, deliberative process informed by repeated rounds of comments from interested market participants.[1] The subject of significant market interest and commentary, the Rule Changes expand access to U.S. equity markets, increase efficiency, and enhance investor choice by affording issuers the new option of raising capital through a direct stock listing, reducing intermediation and potentially their cost of capital. Numerous potential issuers, including those who may have no other viable public offering alternative now or perhaps at any point in the foreseeable future, are poised to rely on the Rule Changes immediately to take advantage of the fall 2020 window for raising capital.

This opportunity is now being threatened by the Council of Institutional Investors ("CII"), a petitioner seeking a re-do of the rule vetting process in which it participated fully, and in which its purported concerns were addressed in detail by the Division. By letter dated August 31, CII announced its intention to petition the Commission for review of the approval Order, the result of which, under Rule 431(e), is an automatic stay of the rule pending further action by the Commission. Unless the stay is lifted, potential issuers who otherwise could and would access the capital markets through the direct primary floor listing process approved by the Commission's Order must now sit on the sidelines, waiting while the Commission decides

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[1] Order Approving Proposed Rule Change as Modified, Securities Exchange Act Release No. 89684, File No. SR-NYSE-2019-67 (Aug. 26, 2020), 85 FR 54454 (Sept. 1, 2020) (the "Order").

whether any of CII's arguments—which the Division, pursuant to its delegated authority, already addressed and rejected—warrant further review of the Order.

The direct, destructive impact of CII's petition is vastly disproportionate to its merit. There is nothing new for the Commission to consider that the Division did not already review in detail, and the concerns that CII previously expressed (repeatedly and repetitively in its comment letters), and that the Division rejected, are speculative and unrelated to the Rule Changes. On the other hand, the harm imposed by the stay CII's petition triggered is certain and imminent. The automatic stay has no place under these circumstances, and all of the factors that the Commission typically considers when determining whether to lift a stay strongly favor doing so here.

*First*, CII cannot demonstrate a substantial—or even *any*—likelihood of success on the merits. The Order comes almost nine months after NYSE initially filed the proposal to revise its listing rules. During that time, CII and others fully aired their concerns in comment letters filed with the Commission, the Commission issued an order instituting proceedings to determine whether to approve or disapprove the rule change, and thereafter, NYSE addressed the concerns raised by the Commission in an amended proposed rule. The 26-page Order approving the Rule Changes reflects the Division's careful deliberation, including its specific consideration of the various issues CII raised in three separate comment letters. Because the Division has already adequately addressed CII's concerns, and there has been no meaningful change in circumstances since the Order issued, there is simply no basis for the Commission to revisit the Order now.

*Second*, lifting the stay will not preclude the Commission's consideration of CII's petition, or otherwise render the petition moot.

*Third*, if the Commission lifts the stay, CII and its members will not suffer imminent, irreparable injury. Indeed, CII has never identified *any* actual, concrete harm that either it or its

members will suffer if the Rule Changes take effect. CII has not represented that any of its members currently intend to participate in any direct listings, if and when such listings occur. Instead, CII has focused on speculative harm to investors generally that it does not and cannot even say will actually occur if direct primary floor listings move forward. For example, CII expressed the concern that investors "may"—not *will*—have difficulty establishing standing to sue under Section 11 of the Securities Act of 1933 ("Section 11") due to the statute's "tracing" requirement depending on how the law in that area develops in the future. But this purported harm is completely speculative and does not, in any event, result from NYSE's direct listing rules—precisely as the Division determined in the Order when it rejected CII's contention as a basis for disapproving the Rule Changes.

*Fourth,* while CII and its members will suffer no irreparable injury, there is a meaningful risk of harm to companies that will be unable to use the new listing rule to access the capital markets while the stay remains in place. The interest in direct listings as an efficient alternative to traditional IPOs has grown in recent years, with several companies having already taken advantage of NYSE rules that permit direct listing of shares held by the company's existing shareholders. The new direct listing rule now provides companies an additional way to *raise* public capital, which is all the more important in the current economic climate. Even if the automatic stay remains in place for only a brief period, companies will lose the opportunity to raise capital using this new, more efficient alternative to a traditional IPO. And if the current window for primary issuance closes, the stay will inflict disproportionate injury on potential issuers, given the deep economic uncertainties resulting from the global pandemic.

*Finally,* the public interest strongly favors lifting the stay because implementation of the rule will serve to further democratize the public markets. Indeed, the Division and several

market participants that filed comment letters recognized that primary direct listings will afford a broader array of companies access to public capital, expand the pool of investors who can participate in primary issuances, and potentially make such offerings more efficient and transparent.

For these reasons, and the additional reasons addressed herein, NYSE respectfully requests that the Commission lift the automatic stay.

## BACKGROUND

Direct listing is an alternative to the traditional process of listing companies via a firm commitment underwritten initial public offering ("IPO"). Since 2018, NYSE's Listing Company Manual (the "Manual") has allowed companies that have not previously had their common equity securities registered under the Exchange Act or traded in a trading system for unregistered securities to list on the Exchange securities already held by existing shareholders at the time a registration statement becomes effective ("Selling Shareholder Direct Floor Listings").[2]

On December 11, 2019, NYSE filed a proposal to broaden the scope of its direct listing rule to allow companies to directly list newly issued shares as well (a "Primary Direct Floor Listing"). The proposal would, for the first time, provide a company the option of selling shares to raise capital in the opening auction upon initial listing on the Exchange without a firm commitment underwritten offering. The proposed rule, as modified by Amendment No. 1, was published for comment in the Federal Register on December 30, 2019.[3]

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[2] Order Granting Accelerated Approval of Proposed Rule Change, Securities Exchange Act Release No. 82627, File No. SR-NYSE-2017-30 (Feb. 2, 2018), 83 FR 5650 (Feb. 8, 2018) at 3-10, 19-20.

[3] Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 87821, File No. SR-NYSE-2019-67 (Dec. 20, 2019), 84 FR 72065 (Dec. 30, 2019). The Commission extended the period within which to approve, disapprove, or institute proceedings with respect to whether to approve or disapprove the proposed rule change on February 13, 2020.

After reviewing comments submitted in response to the proposal (including those received from CII and NYSE), the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change on March 26, 2020.[4]

In response, NYSE filed Amendment No. 2 to the proposed rule change, which was published for comment in the Federal Register on June 30, 2020.[5] The amendment addressed the issues raised by the Commission by, among other things, clarifying how market value would be determined for qualifying the company's securities for listing and eliminating the grace period for meeting other listing requirements. The Commission extended the time to approve or disapprove the proposed rule change until August 26, 2020.[6]

On August 26, 2020, the Commission issued the Order, which concluded the proposed rule change, as modified by Amendment No. 2, was consistent with the requirements of the Exchange Act and the rules and regulations thereunder, and approved the Rule Changes pursuant to the authority delegated to the Division. CII provided written notice to the Commission on August 31, 2020 that it intended to petition for review of the Order (the "Notice") pursuant to Rule 430(b)(1) of the Commission's Rules of Practice. Upon the filing of the Notice, the Order was automatically stayed under Rule of Practice 431(e). NYSE now moves to lift the automatic stay.

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*See* Notice of Designation of Longer Period for Commission Action, Securities Exchange Act Release No. 88190, File No. SR-NYSE-2019-67 (Feb. 13, 2020), 85 FR 9891 (Feb. 20, 2020).

[4] Order Instituting Proceedings, Securities Exchange Act Release No. 88485, File No. SR-NYSE-2019-67 (Mar. 26, 2020), 85 FR 18292 (Apr. 1, 2020).

[5] Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 89148, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39246 (June 30, 2020).

[6] Notice of Designation of Longer Period for Commission Action, Securities Exchange Act Release No. 89147, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39226 (June 30, 2020).

## ARGUMENT

Under Rule 431(e), "an action made pursuant to delegated authority shall be stayed" upon the filing of a notice of intention to petition for review "until the Commission orders otherwise."[7] When determining whether to lift a stay, the Commission may consider factors including (1) whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether lifting the stay would preclude meaningful review of the challenged order; (3) whether without a stay a party will suffer imminent irreparable injury; (4) whether there will be substantial harm to a person if the stay is continued; and (5) whether the stay would likely serve the public interest.[8] Each of these factors calls for lifting the automatic stay here.

### I. Petitioner Does Not Have a Strong Likelihood of Success in Obtaining Review and Reversal of the Order

The Division correctly concluded that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed

[7] 17 C.F.R. § 201.431(e).

[8] *See* Options Clearing Corp., Securities Exchange Act Release No. 75886, File No. SR-OCC-2015-02, 2015 WL 5305989 (Sept. 10, 2015) (order discontinuing automatic stay); Institutional Networks Corp., Securities Exchange Act Release No. 25039, File No. 3-6926, 1987 WL 756909 (Oct. 15, 1987) (same); *cf.* Order Establishing Guidelines for Seeking Stay Applications, Securities Exchange Act Release No. 33870, File No. SR-MSRB-94-2, 1994 WL 117920, at *1 (Apr. 7, 1994) (listing factors Commission considers "[w]hen evaluating the appropriateness of a stay").

to permit unfair discrimination between customers, issuers, brokers, or dealers.[9] In reaching that conclusion, the Division considered how NYSE addressed concerns previously cited in the notice instituting proceedings in Amendment No. 2, as well as the arguments against the rule's approval raised in comment letters. None of the concerns raised by CII warrant reversing or modifying the Order, because the Division already took into account those concerns when approving the Rule Changes in the first place. To the extent CII rehashes those concerns in its petition for review of the Order, it cannot demonstrate a "strong," "substantial" or indeed *any* likelihood of success on the merits—as it must—to maintain the automatic stay.

A. CII's Concerns Regarding Investor Legal Protections

CII's principal objection to the Rule Changes, that investors in Primary Direct Floor Listings "may have fewer legal protections" under Section 11,[10] furnishes no grounds for the Commission to review the Order. In three separate comment letters filed over a seven-month period, CII repeatedly opposed the Rule Changes on precisely the same insubstantial grounds: investors in Primary Direct Floor Listings "may not be able to" (1) directly trace their shares to an allegedly defective registration statement so as to establish Section 11 standing, or (2) establish damages for lack of any definitive offering price.[11] The only support CII marshalled for these claims was its own prior comment letters, a Wall Street Journal article, a Yahoo! Finance report, a legal blog post and a single judicial decision from the Northern District of

[9] Order at 12-13.

[10] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (July 16, 2020) ("CII Letter III"), at 3; *see also* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Jan. 16, 2020) ("CII Letter I"), at 2; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (Apr. 16, 2020) ("CII Letter II"), at 2.

[11] CII Letter II at 2; *see also* CII Letter I at 2; CII Letter III at 3.

California.[12] And, as CII recognized, that lone court decision *undercuts* its arguments because it held that Section 11's traceability requirements did not preclude claims by investors in direct listings.[13]

The Division carefully considered—and properly rejected—CII's arguments as a basis for denying approval of the Rule Changes.[14] As discussed in greater detail below,[15] the Division determined that the Rule Changes did not "pose[] a heightened risk to investors" because the Section 11 concerns CII had raised were equally applicable to other types of securities offerings, including "traditional firm commitment offerings."[16] That determination was manifestly correct.[17] If CII had any additional or more compelling arguments to demonstrate that Primary Direct Floor Listings posed an unreasonable risk to the investing public, it had every opportunity and incentive to make them. CII's failure to do so is telling; it confirms that CII lacks any

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[12] *See* CII Letter I at 2 & n.7; CII Letter II at 2 & nn. 8-9; CII Letter III at 3-4 & nn. 12-14, 17-18.

[13] CII Letter III at 3-4 (citing *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 380 (N.D. Cal. 2020), *lv. app. granted*, No. 20-80095, ECF No. 3 (9th Cir. July 23, 2020)). Although not addressed by CII, the *Pirani* court also held that the lack of a definitive offering price did not eliminate Section 11 damages in connection with a direct listing. *Pirani*, 445 F. Supp. 3d at 381-83. Although *Pirani*'s traceability ruling was appealed, its damages holding was not.

[14] Order at 22, 26.

[15] *See infra* Point III.

[16] Order at 26.

[17] That some investors in some direct listings may not be able "to support a meritorious claim" under Section 11 does not mean, as CII suggests, that direct listings afford fewer legal protections to investors. *See* CII Letter III at 3. Investors in Primary Direct Floor Listings will be able to invoke the full protections of the federal securities laws—under both the Securities Act of 1933 and the Securities Exchange Act of 1934—to the same extent as investors in any other types of securities offerings. If they can plead and prove the statutory elements of cognizable claims, they will be able to pursue them just as do investors in firm commitment underwritten offerings.

meaningful basis now to argue that the Division erred in finding the Rule Changes "consistent with investor protection."[18]

B. CII's Concerns Regarding Size and Liquidity

CII likewise does not have a strong likelihood of success in obtaining review and reversal of the Order based on its concern that investors may be subject to greater risk because of the potential for insufficient size and liquidity. The Division appropriately determined that NYSE's Rule Changes concerning the aggregate market value of publicly held shares provides a "reasonable level of assurance that the company's market value supports listing on the Exchange and the maintenance of fair and orderly markets."[19] As the Division found, NYSE's Rule Changes impose a substantially *higher* capitalization requirement for primary direct listings than Exchange rules require for traditional IPOs. Indeed, NYSE generally requires companies listing on the Exchange in connection with an IPO to have publicly held shares with a market value of at least $40 million.[20] By contrast, the Rule Changes require direct listing companies to either (1) sell at least $100 million of its listed securities in the opening auction, or (2) have an aggregate market value of publicly held shares immediately prior to listing, together with the market value of shares the company sells in the opening auction, of at least $250 million.[21] These requirements effectively ensure that only companies with a substantial market capitalization of freely tradable shares can utilize the Primary Direct Floor Listing process, resolving any potential concerns about company size and liquidity.

[18] *See* Order at 25.

[19] *Id.* at 15-17.

[20] *Id.* at 16-17; *see also* Manual § 102.01B.

[21] Order at 16-17.

CII's only objection to these requirements was that NYSE relied on its "experience" and did not provide specific data to support them.[22] But as the Division specifically found in rejecting CII's argument, the proposed minimum value requirements for Primary Direct Floor Listings are "comparable to or higher than those applied by the Exchange in other contexts"; because those requirements have proved "suitable for listing [companies] over many years," and the Commission has previously approved those lower market capitalization requirements as consistent with investor protection and the "public interest," there was no need for NYSE to provide the data CII demands.[23] CII thus is not likely to succeed in obtaining review, reversal or modification of the Order based on its preference for specific data supporting NYSE's market capitalization requirements.

* * *

Because the Division thoroughly addressed each of CII's concerns before it entered the Order, and circumstances have not changed since the Order was issued, CII cannot demonstrate that those concerns warrant review—much less reversal or modification—of the Order. Accordingly, CII cannot demonstrate a strong likelihood of success on its Petition.

## II. Lifting the Stay Will Not Preclude Consideration of the Petition

Although, for the reasons discussed above, NYSE believes CII's to-be-filed petition will in all likelihood be meritless, lifting the stay would not preclude the Commission from meaningfully reviewing the Order should it determine to do so.

## III. Petitioner Does Not Face Imminent Irreparable Injury Absent an Automatic Stay

CII has failed to identify any specific harm to anyone that will occur once the Rule Changes take effect. CII has not identified any harm to itself from the Rule Changes, nor has it

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[22] CII Letter III at 5.

[23] Order at 17 n.62.

indicated that any of its members even intend to purchase shares in a Primary Direct Floor Listing if the stay is lifted and such listings proceed—let alone that they will suffer any actual harm if they do so. Instead, CII has focused on purported generic potential harms to investors. But even here, CII cannot and does not say that such harms will or even are likely to occur in the absence of a stay. Rather, CII merely speculates—without any support whatsoever—that investors "may have fewer legal protections" and "may be subject to greater risk" in connection with Primary Direct Floor Listings.[24] But speculative, amorphous harm that only "may" occur cannot give rise to an irreparable injury supporting a stay.[25]

CII's concern that investors might be subject to greater risk because of the *potential* for direct listings to have insufficient size and liquidity is entirely speculative and, as discussed above, after careful consideration, the Division concluded that the market value requirements imposed by NYSE on Primary Direct Floor Listings should effectively mitigate such risk.

The remaining purported harm advanced by CII, which is the primary focus of its letters, has nothing to do with inherent dangers of the Primary Direct Floor Listing process, but rather reflects CII's belief that Primary Direct Floor Listing investors will be inadequately protected under the existing securities laws. Not only is this purported harm entirely speculative, it does not flow from the Order approving the Rule Changes. CII asserts that Primary Direct Floor Listings "may lessen investor protections" under Section 11 to the extent that investors in such offerings "may not be able to directly trace their shares" back to the registration statement.[26] But the potential difficulties that some investors may face, in some securities offerings, in

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[24] *See* CII Letter III at 3, 5; CII Letter II at 2-3; CII Letter I at 2.

[25] *See Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 672, 676 (D.C. Cir. 1985) (holding that "speculative, unsubstantiated" claims of harm do "not demonstrate[] that [Petitioners] will suffer irreparable injury in the absence of a stay").

[26] CII Letter III at 3; CII Letter II at 2; *see also* CII Letter I at 2.

establishing standing under Section 11 is not a result of Primary Direct Floor Listings or the Rule Changes approved by the Order. Maintaining the stay preventing the Rule Changes from taking effect would not diminish CII's asserted harm, even if it were more than just conjectural.

As an initial matter, and as the Division determined, Section 11 will apply to Primary Direct Floor Listings just as it applies to other types of registered securities offerings.[27]

Section 11 provides a remedy for "any person acquiring *such security*" subject to a registration statement that contains a materially false or misleading statement of fact or omits a material fact required to be stated.[28] Courts have generally held that this language precludes standing to pursue a Section 11 claim unless a plaintiff can plead and prove that it either (i) directly purchased securities in the offering covered by the challenged registration statement or (ii) purchased securities in the aftermarket traceable to that registration statement.[29] As the Division acknowledged, this traceability requirement is not unique to Primary Direct Floor Listings; it applies to *every* registered securities offering, irrespective of form.[30] Depending on the specific circumstances, the traceability requirement may make it difficult or "impossible" for shareholders to establish standing under Section 11 in myriad situations *not* involving direct listings—including any time a company has issued securities under more than one registration

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[27] Order at 26. The Rule Changes specify that to qualify for a Primary Direct Floor Listing, an issuer must have in place an effective registration statement covering the shares to be sold, which is a prerequisite for potential Section 11 liability. *See* Notice of Filing of Proposed Rule Change to Amend Manual, Securities Exchange Act Release No. 89148, File No. SR-NYSE-2019-67 (June 24, 2020), 85 FR 39246 (June 30, 2020), Ex. 4, Proposed Section 102.01B, Note (E).

[28] 15 U.S.C. § 77k(a) (emphasis added).

[29] *See, e.g.*, *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495-96 (5th Cir. 2005); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 978 (8th Cir. 2002); *Barnes v. Osafsky*, 373 F.2d 269, 273 (2d Cir. 1967).

[30] Order at 26.

statement, even when those securities were distributed through traditional, firm commitment underwritings.[31]

CII suggests that the difficulties plaintiffs face in satisfying Section 11's traceability requirement may become particularly acute for investors in direct listings. But those difficulties do *not* result from anything inherent in direct listings themselves or NYSE rules permitting them. Rather, the difficulties arise when selling insider shareholders do not enter into any "lockup" agreements preventing them from immediately selling their remaining, unregistered shares pursuant to the exemption under SEC Rule 144.[32] As the Division recognized in the Order approving the Rule Changes, however, "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 . . . leading to difficulties tracing purchases back to the registered offering."[33] The Rule Changes that NYSE is seeking to implement neither require nor prohibit lockup agreements in connection with Primary Direct Floor Listings. Lifting the stay to allow those changes to take effect will have no impact on the ability of investors to satisfy Section 11's traceability requirement. Even if some increase in proving the traceability of shares in

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[31] *See, e.g.*, *In re Century Aluminum*, 729 F.3d at 1107-08 (requiring "a greater level of factual specificity" in complaint to allege Section 11 standing "[w]hen a company has issued shares in multiple offerings under more than one registration statement" and noting impossibility of proving tracing where registered and unregistered shares are held together in "'undivided'" brokerage "'house'" accounts that do not distinguish between "'newly registered or old shares'" (quoting *Barnes*, 373 F.2d at 271-72)); *see also Krim*, 402 F.3d at 496-98 (where public offering shares and unregistered insider shares were intermingled in market and most shares were held in undifferentiated "street name" accounts, plaintiffs could not satisfy Section 11 tracing requirements despite statistical evidence that any given share was 90% likely to be a public offering share).

[32] *See Pirani*, 445 F. Supp. 3d at 379.

[33] Order at 26.

connection with a given offering could constitute irreparable harm (and it cannot), lifting the stay would not cause that harm.[34]

In fact, as both the Division and CII itself recognized,[35] the sole court to consider Section 11 standing in the context of a direct listing held that the statute *did not*, under the circumstances of that case, preclude a plaintiff from pursuing claims just because he could not definitively trace the securities he acquired to the challenged registration statement.[36] While CII speculates that this decision "may not be adopted by other courts,"[37] predictions about how this area of the law may ultimately develop are no basis to claim *any* harm—let alone the concrete, immediate and irreparable harm required to justify maintaining the stay of NYSE's Rule Changes.

## IV. Companies Planning a Direct Listing Under the Rule Will Suffer Substantial Harm If the Stay Is Continued

Meanwhile, companies planning to take advantage of Primary Direct Floor Listings will suffer substantial harm if the stay remains in replace, as will potential investors who are denied the opportunity to invest in such companies. As discussed in more detail below, the Division determined that Primary Direct Floor Listings can offer substantial benefits to companies and the investing public relative to firm commitment underwritten offerings.[38] These benefits, however, cannot be realized while the automatic stay remains in place.

It is clear that both potential issuers and investors could and would eagerly utilize the Primary Direct Floor Listing process if the automatic stay were lifted. In recent years, there has

[34] The Division further noted that because all company shares will be sold in the opening auction as part of a Primary Direct Floor Listing, it may potentially be easier to trace such shares back to the applicable registration statement. Order at 26 n.81.

[35] *Id.* at 26; CII Letter III at 3-4.

[36] *Pirani*, 445 F. Supp. 3d at 380-81.

[37] CII Letter III at 4.

[38] *See infra* Point V.

been strong, mounting enthusiasm for direct listings as an alternative means for raising capital.[39] Two Selling Shareholder Direct Floor Listings on the Exchange have already been successfully completed to great fanfare from investors,[40] and additional companies have lined up to utilize that process.[41] In each case, these listings were supported by numerous prominent financial institutions, which served as financial advisors to the listing issuers.[42] Primary direct listing efforts likewise have the full support of leading financial firms. Indeed, two major investment banks that collectively served as bookrunners for over 15% of the IPOs and over 23% of the secondary offerings this year submitted comment letters supporting NYSE's Rule Changes to permit Primary Direct Floor Listings.[43] Unsurprisingly, there is already considerable interest among potential issuers in Primary Direct Floor Listings, which provide the additional benefit of

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[39] *E.g.*, Miles Kruppa, *NYSE renews push for direct listings that raise capital*, Financial Times Dec. 11, 2019, *available at* https://www.ft.com/content/94d5ee4a-1c4f-11ea-9186-7348c2f183af (noting "enthusiasm for direct listings on the rise").

[40] *See, e.g.*, Maureen Farrell & Corrie Driebusch, *Slack Shares Jump in Trading Debut, Wall Street Journal*, June 20, 2019, *available at* https://www.wsj.com/articles/slack-set-for-its-trading-debut-11561040327 ("The banner day for Slack is a win for its existing shareholders—like employees and large early investors, including venture-capital firms Accel and Andreessen Horowitz—as their shares are now worth much more than they were before they could be traded on a public market."); Theodore Schleifer, *Spotify tried to reinvent the IPO. But two quarters later, things look . . . normal?*, Vox, July 26, 2018, *available at* https://www.vox.com/2018/7/26/17615094/spotify-ipo-earnings-direct-listing ("Naysayers—and there were many—were predicting Spotify shares would spike and nosedive out of the gate. That hasn't happened.").

[41] *See* Palantir Techs. Inc., Registration Statement (Form S-1) (Aug. 25, 2020); Asana, Inc., Registration Statement (Form S-1) (Aug. 24, 2020).

[42] *See* Palantir S-1 at 229 (listing financial advisors); Asana S-1 at 41 (same); Slack Techs., Inc., Registration Statement (Form S-1/A) (May 31, 2019) at 46 (same); Spotify Tech. S.A., Registration Statement (Form F-1/A) (Mar. 23, 2018) at 45 (same).

[43] *See* Refinitiv, Global Equity Capital Markets Review, First Half 2020 Managing Underwriters, U.S. Rankings (listing Goldman Sachs & Co. and Citi as having 8.9% and 7.5% market shares, respectively, in U.S. IPOs and 14.1% and 8.9% market shares, respectively, in U.S. Secondary Offerings).

affording companies access to new capital.[44] Since NYSE initially proposed its Rule Changes in December 2019, moreover, it has engaged in discussions with potential issuers with aggregate private valuations of over one hundred billion dollars.

Access to this alternate form of offering is particularly important in the current climate. Without the Primary Direct Floor Listing option, companies in need of public capital but for whom a traditional IPO listing is not financially sensible might be boxed out of the public markets altogether. Meanwhile, the traditional IPO market has become even more challenging given recent market volatility.[45] Even a short-lived stay could have lasting impacts on companies planning to raise capital in the next several weeks while the current window for primary issuance remains open.[46]

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[44] *See, e.g.*, Kruppa, *supra* note 39 ("The NYSE push comes with enthusiasm for direct listings on the rise"); Ivan Levingston, *NYSE Phone Rings as Interest in Direct Listings Spreads Abroad*, Bloomberg, Nov. 4, 2019, *available at* https://www.bloomberg.com/news/articles/2019-11-04/nyse-phone-rings-as-interest-in-direct-listings-spreads-abroad ("Foreign companies are showing greater interest in direct listings in New York as an alternative to initial public offerings, according to the stock exchange."); Alexander Osipovich, *NYSE's Plan for New IPO Alternative Wins Green Light From SEC*, Wall Street Journal, Aug. 26, 2020, *available at* https://www.wsj.com/articles/nyses-plan-for-new-ipo-alternative-wins-green-light-from-sec-11598479804 (observing that "Wednesday's decision by the SEC could make direct listings a more popular alternative to the traditional IPO" and that "[t]he new type of direct listing could appeal to Silicon Valley venture capitalists who have long complained about underwriting fees and other costs associated with IPOs").

[45] *See* Letter from Burke Dempsey, Executive Vice President Head of Investment Banking, Wedbush Securities (Apr. 20, 2020) ("Wedbush Letter") ("The current massive correction that has effectively shuttered the capital markets, is actually a good time to explore Direct Listings more aggressively."); *see also* Yun Li, *NYSE gets approval for cheaper IPO alternative for companies amid SPAC boom*, CNBC, Aug. 27, 2020, *available at* https://www.cnbc.com/2020/08/27/nyse-gets-approval-for-cheaper-ipo-alternative-for-companies-amid-spac-boom.html ("Companies have shied away from the traditional IPO market roiled by the coronavirus pandemic and wild volatility. Nikola and DraftKings both went the SPAC route to be listed on exchanges, and Bill Ackman last month launched the biggest SPAC in history, worth $4 billion.").

[46] *See* Luisa Beltran, *Airbnb May Finally File to Go Public This Month. Here's Why*, Barron's, Aug. 11, 2020, *available at* https://www.barrons.com/articles/airbnb-may-finally-file-for-an-ipo-this-month-51597175262 ("Companies are also rushing to get their deals done before the

## V. Continuation of the Stay Would Not Serve the Public Interest

Finally, continuing the stay would harm—not serve—the public interest. As discussed above, it is not in the public interest to limit access to the capital markets, particularly at this juncture, given the state of the national economy. Primary Direct Floor Listings will "enable and encourage more companies to participate in public equity markets in the United States," and provide "public investors a broader array of attractive investment opportunities."[47] As has been widely recognized, direct listings may make securities offerings less expensive for some potential issuers by, among other things, reducing fees to certain financial intermediaries such as underwriters.[48]

Moreover, as the Division determined when it issued the Order, Primary Direct Floor Listings may provide benefits to existing and potential investors relative to firm commitment underwritten offerings. For example, "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," thereby broadening the scope of investors able to

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November presidential election. That's because the IPO window typically closes before U.S. voters decide who will lead the country.").

[47] Letter from David Ludwig, Head of Americas Equity Capital Markets, Goldman Sachs Group, Inc. (Feb. 7, 2020) ("Goldman Sachs Letter"); *see also* Letter from Paul Abrahimzadeh and Russell Chong, Co-Heads, U.S. Equity Capital Markets, Citigroup Capital Markets Inc. (Feb. 26, 2020) ("Citigroup Letter") ("[A] direct listing – with the ability for a concurrent capital raise – offers an important additional avenue for companies to go public.").

[48] *See* Li, *supra* note 45 (explaining that direct listings are "a cheaper alternative to the traditional initial public offering"); Farrell & Driebusch, *supra* note 40 ("By structuring its IPO as a direct listing, it saved tens of millions of dollars that bankers typically charge companies to run a traditional IPO.").

participate in initial public offerings.[49] In addition, as the Division found, this auction process may also be a more accurate and transparent way to price securities offerings.[50] As a result, Primary Direct Floor Listings may effectively lower the cost of capital for issuers should the public opening auction execute at a clearing price higher than what might have been achieved in the allocation process of a firm commitment underwritten offering.[51]

As the Order determined, NYSE's Rule Changes are consistent with Section 6(b)(5) of the Exchange Act, which requires Exchange rules, among other things, "to protect . . . the public interest."[52] Maintaining the automatic stay runs directly contrary to that finding.

## **CONCLUSION**

The automatic stay was not designed for the present circumstances. Applied here, it serves no useful purpose and will likely cause significant harm. Meanwhile, Petitioner faces, at best, remote chances of reversing the Division's considered decision. NYSE therefore respectfully requests that the Commission promptly lift the automatic stay.

[49] Order at 25; *see also* Citigroup Letter ("This 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.").

[50] Order at 25 (citing Matt Levine, *Soon Direct Listings Will Raise Money*, Bloomberg, Nov. 27, 2019, *available at* https://www.bloomberg.com/opinion/articles/2019-11-27/soon-direct-listings-will-raise-money).

[51] *Cf., e.g.*, Ari Levy, *Inside Bill Gurley's mission to upend the tech IPO market in favor of direct listings*, CNBC, Oct. 6, 2019, *available at* https://www.cnbc.com/2019/10/06/bill-gurleys-plan-to-move-from-tech-ipos-to-direct-listings.html (discussing one market participant's views based on historic IPO data that "the most dominant banks" have "underpriced" IPO deals in recent years).

[52] Order at 12-13; *see also* 15 U.S.C. § 78f(b)(5).

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**CERTIFICATE OF COMPLIANCE**

I, Paul Mishkin, counsel to the New York Stock Exchange LLC ("NYSE"), hereby certify that the foregoing brief and contemporaneously-filed motion comply with the word count limitation provided in 17 C.F.R. § 201.154(c). Excluding tables of contents and authorities, as provided by 17 C.F.R. § 201.154(c), but including cover pages, case captions, and signature blocks, the brief and motion together include 6,522 words. The undersigned relied upon the word count of this word-processing system in preparing this certificate.

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**CERTIFICATE OF SERVICE**

I, Paul S. Mishkin, counsel to the New York Stock Exchange LLC ("NYSE"), hereby certify that on September 4, 2020, I caused to be served copies of the attached Brief in Support of Motion to Lift Stay and Certificate of Compliance by way of Federal Express Overnight Courier, hand courier, and email on the Council of Institutional Investors, and sent the original and three copies of the same by Federal Express Overnight Courier and email to the Secretary at the following addresses:

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